

NOTHING CASUAL ABOUT IT: HOTEL FACES EMPLOYEES' CLASS ACTION OVER EMPLOYMENT BENEFIT CHANGES

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Class actions certifications in British Columbia have continued to surge for consumer claims arising from product liability, privacy breaches, misleading advertising, and price-fixing competition claims. However, employment-based class actions were thought to be unlikely to be brought or successfully certified. While the judicial landscape continues to evolve, for now employment-based class actions appear to be making headway.

In the ongoing litigation started by a group of hourly employees of Pan Pacific Hotel, a part of the Ocean Pacific Hotels Group ("**Ocean Pacific**") seeking certification, the tide appears to have turned.^[1] The employees initiated a putative class action in connection with alleged misrepresentation and a breach of the duty of honesty arising out of reduced work hours during the COVID-19 pandemic. While certification was granted, the court did not accept every claim initially advanced by the plaintiffs.

Background

In July 2020 during the COVID-19 pandemic, Ocean Pacific presented 156 regular hourly employees with employment agreements to transition them to casual employment status (the "**Casual Agreement**"). This shift meant relinquishing certain benefits, such as termination pay entitlements. However, the plaintiffs allege that Ocean Pacific assured them that extended health benefits, typically unavailable to casual employees, would be continued through Manulife's insurance plan, subject to the plan's terms and conditions and Manulife's approval. Of the 156 employees offered casual employment, 93 accepted.

Follow this, most of these employees had their extended health benefits terminated on January 2, 2021. The plaintiffs allege that Ocean Pacific breached the Casual Agreement (or an implied term), or alternatively, failed to fulfill its obligations under the agreement in good faith. Additionally, the plaintiffs assert that Ocean Pacific fraudulently misrepresented its commitment to maintaining extended health benefits for those who signed the Casual Agreement.

Procedural History

The certification application was initially heard on April 20 and 21, 2022 but the court rejected it for failing to sufficiently plead the material facts essential to support the elements of the causes of action, as required by s. 4(1)(a) of the *Class Proceeding Act* ("CPA"). In response, the plaintiffs' legal representatives attempted "verbal" amendments to the proposed notice of civil claim, but these were deemed vague, ambiguous, and insufficient to consider certifying the class action.

The plaintiffs subsequently amended their claim and sought permission to file an amended claim, taking the position that they had satisfied s. 4(1) of the CPA, and thus, a certification order should be granted. Ocean Pacific, conversely, maintained that the proposed amended claim still failed to adequately plead the necessary material facts to support the alleged causes of action and correctly articulate the causes of action. Ocean Pacific contended that the proposed amended claim was seriously flawed, the class was overly broad, and individual issues overshadowed common issues, rendering a class proceeding inappropriate and the certification application should be dismissed in its entirety.

Analysis

The plaintiffs argued that Ocean Pacific had a duty to take reasonable steps to seek continued approval from Manulife to continue extended health benefits for class members, or alternatively take reasonable steps pursuant to its obligation to act in good faith in performance of its obligations in the Casual Agreements. The plaintiffs also argued that, as a bare minimum, Ocean Pacific has a duty to ask Manulife to continue its approval of Class members' benefit coverage beyond January 2, 2021.

They further contended that Ocean Pacific breached the duty of honest performance by intentionally withholding vital information about the Casual Agreements and the continuation of extended health benefits, misleading class members about the true nature of their benefits and the temporary nature of the grace period and failing to take reasonable steps to extend this grace period for as long as it could. The plaintiffs also alleged fraudulent misrepresentation, citing an Ocean Pacific representative's statement that no changes to existing policies were anticipated, which, according to the plaintiffs, constituted a false representation. Finally, the plaintiffs sought punitive damages on the basis that Ocean Pacific's conduct was characterized as "high-handed, reckless, callous, willful, reprehensible, and entirely without care for Class members' precarious position in a sector hard-hit by COVID-19."

Breach of Contract

When interpreting a contract without ambiguity in its language, the parties' intention is determined objectively based on the plain and ordinary meaning of the contract's words. The court was satisfied that there was no express contractual term within the Casual Agreement that obligated Ocean Pacific to seek Manulife's approval for extended health coverage. Ocean Pacific argued that an implied term cannot contradict an

express term of the contract. The proposed amended NOCC provided material facts capable of establishing the implied term, which was not inconsistent with the Casual Agreement's express terms. Therefore, the court found that the plea that there was an implied term that Ocean Pacific had a duty to request that Manulife consider extending the coverage of the extended health benefits for employees covered by the Casual Agreement after January 2, 2021, was not bound to fail.

Breach of the Duty of Good Faith Contractual Performance

The duty to exercise contractual discretion in good faith arises when discretion exists for either party, and requires the parties to exercise their discretion consistently with the purpose that it was conferred. The plaintiffs did not plead any material facts necessary to establish that Ocean Pacific had the contractual discretion under the Casual Agreement to ask Manulife to continue its approval of the extended health benefit covered for employees covered by the Casual Agreements. Since the core of the plaintiffs' case was that Ocean Pacific was obligated to seek another extension of the grace period, which conflicted with a pleading of discretion regarding seeking an extension, the cause of action alleging Ocean Pacific's duty to exercise contractual discretion in good faith was deemed to be bound to fail.

Breach of the Duty of Honest Performance

The plaintiffs claimed that Ocean Pacific intentionally withheld information regarding the value of the Casual Agreements, leading class members to accept these agreements and give up their right to severance pay under false pretenses about the continuation of extended health benefits. To establish a breach of the duty of honest performance, the plaintiffs must plead material facts demonstrating that the defendant lied or knowingly misled the plaintiffs about a matter directly linked to contract performance. This can include omissions or other misleading behaviors, such as half-truths or even silence. Given the plaintiffs' assertion that the employment agreement and the Casual Agreement should be considered collectively, implying an existing employer-employee contractual relationship, within which Ocean Pacific intentionally and dishonestly concealed important information about the Casual Agreements to induce acceptance, this claim was considered novel but not bound to fail.

Fraudulent Misrepresentation

A representative of Ocean Pacific wrote in an email regarding the Casual Agreements that Ocean Pacific did not currently anticipate any changes to their existing policies. A claim for fraudulent misrepresentation requires the representation to be about a statement of fact, not a future event. This was a representation about a future event, and therefore not actionable, making the claim based on fraudulent misrepresentation bound to fail.

Punitive Damages

To establish a claim for punitive damages, the plaintiffs must allege misconduct so malicious, oppressive, and high-handed that it offends the court's sense of decency. The plaintiffs claimed that Ocean Pacific engaged in conduct fitting this description by intentionally misleading employees of a sector hard-hit by COVID-19 about the value of the Casual Agreements to encourage their acceptance. The plaintiffs also asserted that some employees relied heavily on the representations in that e-mail, and Ocean Pacific should have reasonably known that the possibility of continuing extended health benefit coverage was the key value of the Casual Agreements. Finally, they asserted that Ocean Pacific intentionally withheld the information that the coverage was temporary so that the class members would be more likely to accept the Casual Agreements. Because Ocean Pacific may have intentionally misled the employees to avoid paying them severance pay during a global pandemic and may have also failed to take reasonable steps to extend the Grace Period, the court decided that this claim was not bound to fail.

Certification of the Class Action

The court accepted the definition of the class as "all current and former employees of the defendant who agreed to convert from regular to casual status in July or August 2020 in exchange for terms that included continuation of benefits, and whose benefits were thereafter terminated despite maintaining their casual employee status at the time their benefits were terminated."

The fact that an Ocean Pacific representative did not engage in individual conversations with additional information about the Casual Agreement with individual employees was also material to the application for certification. All employees offered Casual Agreements received the same information, whether through group meetings, email, or individual communication.

Breach of Contract

The proposed representative plaintiffs presented sufficient evidence to meet the low test requiring them to provide some "Basis in fact" that they each suffered loss, particularly the loss of the right to claim severance if they had not signed the Casual Agreements. Breach of contract was certified, with common issues to address whether Ocean Pacific failed to take reasonable steps to seek continued approval from Manulife, whether this constitutes a breach of an implied term, and what remedies the class members are entitled to.

Breach of the Duty of Honest Performance

Evidence existed of an initial contract, identical communications sent to all class members, and nearly identical communications between Ocean Pacific's representative and individual class members regarding the Casual Agreements. Consequently, three common issues were certified: whether Ocean Pacific intentionally misled

class members about the limited continuation of their benefits, whether that would constitute a breach of the duty of honest performance, and what remedies the class members are entitled to.

Punitive Damages

Common issues were also certified for the plaintiffs regarding punitive damages, as there was some basis to conclude that the communications regarding the Casual Agreements constituted a common set of facts upon which punitive damages could be considered. In this case, proceeding as a class action provides significant advantages and is a fair, efficient, and manageable method to advance the claims of the plaintiffs.

Conclusion

The court granted the plaintiffs permission to file their proposed amended claim. The court also certified common issues related to breach of contract, breach of the duty of honest performance, and punitive damages. This means that the lawsuit will proceed as a class action, allowing the plaintiffs to represent a group of employees who share common issues in their claims against Ocean Pacific. The court's decision acknowledged the potential validity of the plaintiffs' claims, especially regarding the alleged breaches of contract and the duty of honest performance and deemed them suitable for further legal proceedings.

Takeaways for Employers

In conclusion, this case emphasizes the importance of clear and transparent employment agreements and acting in good faith when dealing with employees, particularly in challenging circumstances that put them in a vulnerable position. Employers should provide honest and accurate information, particularly regarding benefits, and avoid conduct that could be perceived as malicious or oppressive, as it may lead to punitive damages claims.

Further, the previously remote possibility of employment-based class action lawsuits should be considered when addressing disputes with groups of employees. This is a growing trend that can result in ongoing lengthy, expensive litigation. We recommend employers seek advice any time they are amending terms or conditions for a group of employees.

Case Citation

Lee v. Ocean Pacific Hotels Ltd., 2023 BCSC 1650

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[1] *Lee v. Ocean Pacific Hotels Ltd.*, 2023 BCSC 1650

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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