WORST TRIP EVER! ANOTHER MISCLASSIFICATION CLASS ACTION GETS CERTIFIED

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Yet another employment misclassification case has been certified as a class action in Ontario in Montaque v Handa Travel Student Trip Ltd. [1] ("***Montaque***") … but this time with a twist!

Background

The corporate defendants operated a travel company under a number of different brand names, including S-Trip, Breakaway Tours and Campus Vacations, that marketed vacation packages to student-age travelers.

The proposed class of approximately 1,000 individuals worked as "Trip Leaders" on guided trips offered by the corporate defendants. Trip Leaders were alleged to play an important role in the operations of these trips, as set out in the standard form Trip Leader Agreements that they were required to sign. The responsibilities of Trip Leaders included:

- customer service and passenger assistance;
- communication with trip organizers, passengers and all full-time staff and volunteers;
- assisting with all activities, events, excursions, info desks and check-in and check-out procedures;
- collecting code of conduct letters and damage deposits/damage insurance from travelers;
- performing room checks and passenger sign-ins;
- completing detailed incident reports;
- escorting passengers on excursions and/or to the hospital or clinics;
- promoting trip program calendars;
- attending morning and evening staff meetings;
- ensuring passengers are having a great and safe trip; and
- following S-Trip's handbook and procedures.

Despite these responsibilities, Trip Leaders were paid only a small honorarium well under Ontario's minimum wage, and they did not receive other minimum entitlements guaranteed by the Employment Standards Act, 2000 (the "**ESA**") such as vacation pay. Their allegations include breach of contract, unjust enrichment, denial of employment benefits and breach of good faith. The Trip Leaders also seek to impose personal liability on the

directors of the corporate defendants for unpaid wages under sections 80 and 81 of the ESA.

Class Proceedings Found to Be Appropriate

Under Ontario's *Class Proceedings Act*, 1992, the Court is obligated to certify a proceeding as a class action where: (i) the pleadings disclose a cause of action; (ii) there is an identifiable class; (iii) the claims of the class members raise common issues of fact or law; (iv) a class proceeding would be the preferable procedure; and (v) there is a plaintiff who adequately represents the interests of the class.

The Court found the Trip Leaders' claim to meet each of these requirements, noting that similar causes of action have been permitted to go forward in other cases, including where workers were misclassified as independent contractors (as opposed to employees). The Court also found that the similar job functions of the class members, including their compensation structure and the degree of control exercised by the corporate defendants, were sufficient to establish common issues.

Regarding the fourth part of the test, whether a class proceeding would be the preferable procedure, the Court noted:

> "The individual claims of these 1,000 [workers] will be very small and would not warrant individual litigation despite the importance of that income to these low-income workers. Common determinations on their employment status will significantly contribute to these claimants' access to justice."

According to the Court, a class action was "undoubtedly" the preferable procedure in this case. In the result, the action was certified as a class proceeding.

Takeaways for Employers

It is important to remember that the certification of a class action is a procedural ruling rather than a substantive finding on the merits of the claim, meaning that the Trip Leaders in Montaque could very well be unsuccessful. Nevertheless, the ruling is significant because it is the first time that a misclassification claim brought by a class of "volunteers" has been certified, and it could pave the way for other similar claims in the future.

The *Guide to the Employment Standards Act* published by Ontario's Ministry of Labour states that the main factors that determine whether a worker is a volunteer or an employee are: (i) how much the business benefits from the worker's service, and (ii) whether the worker views the arrangement as being in pursuit of a living. Other relevant factors include how the arrangement was initiated and the degree of economic imbalance between the parties. [2]

It is important that employers keep these factors top of mind when classifying their relationships with workers,

including volunteers. As cases like Montaque show, it is better to be proactive than reactive, and relying upon the terms and conditions of written agreements with workers is often not enough to avoid misclassification claims.

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[1] [ps2id id='1' target='']2020 ONSC 6459

[2] [ps2id id='2' target='']Consumer Liability Discharge Corporation v Molica (July 24, 1981), ESC 1032.

A Cautionary Note