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July 26, 2022

Same Titles, Different Jobs: The Challenges of Misclassification Class Actions

Employment law misclassification class actions are becoming increasingly common. In those cases, the plaintiff says that employees have been misclassified by their employer in such a way as to render them ineligible for certain benefits under applicable provincial employment standards legislation which the employee claims that they should have been eligible for. The two most common categories of alleged misclassification are employees being allegedly misclassified as independent contractors, and ordinary employees being misclassified as managers. While some misclassification cases have been certified, courts have refused to certify many others due to a lack of sufficient commonality. The recent decision of the Ontario Superior Court of Justice in *Le Feuvre v Enterprise Rent-A-Car Canada Company* is an example of a case that falls into the latter category and was not certified.

By way of background, *Le Feuvre v Enterprise Rent-A-Car Canada Company* was a proposed class action brought on behalf of certain employees of Enterprise Rent-A-Car Canada. The proposed class consisted of an estimated 2,500 people across Canada who held the job title of Branch Rental Manager, Assistant Branch Rental Manager, or Station Manager at any of Enterprise Rent-A-Car's 500 rental car branches across the country. Those individuals had been classified as managers and therefore did not receive overtime pay under various provincial employment standards statutes. The plaintiff claimed that those individuals performed job duties that were indistinguishable from the non-managerial employees and had therefore been misclassified in order to deny them overtime pay.

The defendant resisted certification, and the matter proceeded to a three-day hearing in June 2022. Reasons were released in mid-July 2022 with Justice Morgan dismissing the plaintiffs' certification motion.

The crux of Justice Morgan's reasons for dismissing the certification motion was his finding that there were no appropriate common issues under s 5(1)(c) of the *Class Proceedings Act*. In particular, he found that the core issue of whether class members were misclassified could not be

determined in common across all members of the class. He held that on the record before him, there were substantial differences as to the relative breakdown of managerial versus non-managerial duties among different members of the class, particularly at different locations:

> The evidence in the record before me demonstrates that the variability and mix of the work actually performed by BRMs, ABRMs and SMs across hundreds of branches makes the alleged misclassification impossible to resolve on a basis that is common to all employees in the proposed class. A class that includes personnel in small branches where the management is expected to be a jack of all job functions, and personnel in high-volume airport branches where the division of job functions between management and non-management is clear and hierarchical, is not a class that raises issues in the way envisioned by the CPA. Some of the putative class members may well be misclassified while others are not; but the factual basis for that determination is so varied that each member would have to bring their own claim and pursue their own findings of fact.

Having declined to certify the common issues pertaining to the classification, Justice Morgan then held that the other proposed common issues fell away because misclassification was the heart of the proposed class action.

While dismissing the certification motion due to a lack of common issues, Justice Morgan also commented on the evidentiary record pertaining to aggregate damages. The plaintiff led two experts to provide methodologies for quantifying aggregate damages. The first expert was a statistician who explained he could use information produced by employees' computer log-ins and extrapolate the number of hours worked to determine the number of hours worked on average. The second expert was a sociologist who explained how he could use crowd-sourced data produced on the website glassdoor.com in order to gain insight about the defendants' employment practices, including the number of overtime hours worked by employees on average.

Justice Morgan held that neither of these experts presented a methodology that would be acceptable in the class action. He noted that both experts' approaches were impermissible statistical sampling, which he noted that the Ontario Court of Appeal had previously rejected. He was further critical of the expert sociologist's evidence in light of the lack of reliability of internet data. He noted as follows:

> In making these observations, I do understand and, in a sense, admire the efforts to which Dr. Lowe has gone to find a substitute source for individualized interviews with BRMs, ABRMs, and SMs. But it is important in the age of the internet that legal process limit itself to cogent and reliable standards of evidence. Students at University of Toronto are instructed not to use similarly anonymous internet sources as a basis for research because the information posted there "may be inadequate or incorrect": Why can't I use Wikipedia for my assignments?, University of Toronto Libraries, https://onesearch.library.utoronto.ca/faq/can-i-use-wikipedia-my-assignments. If such data is too unreliable for an undergraduate essay, it is certainly too unreliable for juridical purposes.

Consequently, Justice Morgan held there was no reliable methodology in the record by which aggregate damage assessments could be made, and aggregate damages was therefore not certified as a common issue.

This decision is a good reminder of the difficulties that may be presented in misclassification cases. While employment class actions are often viable, they must be appropriately tailored. The mere fact that some individuals with a particular job role might be misclassified as managerial employees when they are in fact not does not mean a class can automatically be certified. Rather, it must be the case that there is sufficient commonality in the core job duties of all of the class members. If not—and some individuals do predominantly management tasks while some individuals do predominately non-management tasks—the action will not be amenable to certification.