CITATION: Omarali v. Just Energy Group Inc., 2016 ONSC 7096
DIVISIONAL COURT FILE NO.: 392/16
DATE: 20161117

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: HAIDAR OMARALI, Plaintiff/Responding Party

- **and** -

JUST ENERGY GROUP INC. et al., Defendants/Moving Parties

BEFORE: Swinton J.

COUNSEL: David Rosenfeld and Jody Brown, for the Plaintiff/Responding Party

Paul J. Martin and Laura F. Cooper, for the Defendants/Moving Parties

HEARD at Toronto: in writing

ENDORSEMENT

[1] The defendants seek leave to appeal the order of Belobaba J. dated July 27, 2016 in which he certified the present action as a class proceeding under the *Class Proceedings Act, 1992*. The class members are sales agents hired by the defendants to sell their energy products. They are paid on a commission basis and receive no benefits under the *Employment Standards Act* ("*ESA*"), as their contracts identify them as "independent contractors." The essence of the plaintiff's claim is that the class members are "employees" within the meaning of the *ESA* and entitled to compensation and benefits in accordance with the *ESA*.

[2] The defendants argue that the motions judge erred in identifying the following common issue: whether individuals who provide sales and marketing services to Just Energy are employees or route salespersons. They argue that the determination whether each class member is an employee, rather than an independent contractor, requires individualized consideration and consequently cannot be a common issue. As well, they argue that the motions judge erred in failing to limit the class definition to those whose claim arose within the two years preceding the issuance of the Statement of Claim. They argue that any claims outside that period are barred by the *Limitations Act, 2002*.

[3] In my view, the defendants have failed to satisfy either branch of the test for leave in rule 62.02(4). First, they have not identified a conflicting decision within the meaning of rule 62.02(4)(a). The motions judge applied the well-established legal principles to be considered in a certification motion.

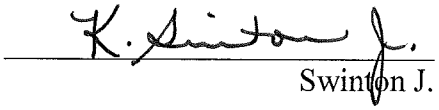
[4] The defendants argue that the motions judge's decision on the common issue respecting employee status conflicts with the Court of Appeal decisions in *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677 and *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, both misclassification cases where certification was denied. I disagree. The motions judge discussed in detail why the result in this case is different from that in *Brown* and *McCracken*. In particular, he explained that the evidentiary record before him led to the conclusion that the employee status issue was a common issue. See, for example, paras. 33 and 55 of his reasons. Thus, *Brown* and *McCracken* are not decisions based on conflicting legal principles; rather they are decisions that came to a different result respecting certification based on the evidence before the court.

[5] As to the other branch of the test for leave, the defendants have not demonstrated that there is good reason to doubt the correctness of the decision. The motions judge was satisfied on the evidence before him that there was some evidence that the defendants controlled the sales agents and did so on a class-wide basis (at para. 47). He concluded at para. 56, "I am satisfied that there is some basis in fact for both the existence and the commonality of the key common issues, 'employee' and 'route salesperson'." He also commented that the plaintiff's evidence of systemic commonality was "quite compelling" and the defendants' evidence of the need for individualized inquiries was "surprisingly weak" (at para. 33). The evidentiary record amply supports his conclusion, and the motions judge made no error when he distinguished *Brown* and *McCracken* on the facts.

[6] With respect to the class definition, the motions judge concluded that it was premature to exclude claims outside the two year period preceding the commencement of the action. Instead, he added the limitation period as a common issue. It was reasonable to leave the issues of time bars and discoverability to be determined later on the merits, rather than to determine these issues on a certification motion, which is procedural in nature.

[7] Finally, this is not a case that satisfies the second part of the test for leave under rule 62.02(4)(b). The proposed appeal does not raise issues of general importance that warrant the attention of the Divisional Court. I share the view of Lederman J. in *Baroch v. Canada Cartage Diversified GP Inc.*, 2015 ONSC 3227 at paras. 30-31: the principles applicable to certification motions are well-established, as is the approach to be taken in a misclassification case.

[8] Accordingly, the motion for leave to appeal is dismissed. Costs to the plaintiff are awarded in the amount of $17,000.00 all inclusive, an amount agreed upon by the parties.



Swinton J.

Date: November 17, 2016