CITATION: Omarali v. Just Energy, 2019 ONSC 3734
COURT FILE NO.: CV-15-527493-CP
DATE: 20190621

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Haidar Omarali / Plaintiff

AND:

Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario LP / Defendants

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David Rosenfeld and Garth Myers* for the Plaintiff / Moving Party

Paul J. Martin and Anastasia Reklitis for the Defendants / Responding Parties

HEARD: June 11 and 12, 2019

Proceeding under the *Class Proceedings Act, 1992*

Summary Judgment Decision

[1] A motion for summary judgment on certified common issues that ask in essence whether the defendants' sales agents were independent contractors or employees will not always work.

[2] If there are serious credibility issues, or the court finds that the evidence needs substantial clarification, and recourse to a "mini-trial" is precluded by a provision in the *Class Proceedings Act*,[1] the motion for summary judgment may well be dismissed.

[3] That's what happened here.

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[1] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

Background

[4] In this class action, the plaintiff alleged that the defendants' 8000 sales agents were misclassified - that they were not independent contractors but employees and were therefore entitled to the benefits and protections of the *Employment Standards Act*[2] such as minimum wage, overtime pay, and vacation and public holiday pay. The defendants argued that the determination whether the defendants' sales agents were independent contractors or employees could only be made on an individualized basis. Because commonality could not be established on the evidence before the court, argued the defendants, the matter could not proceed as a class action and the motion for certification should be dismissed.

[5] In 2016, I certified this action as a class proceeding.[3] I found there was some evidence of commonality for each of the 13 certified common issues that are attached in the Appendix.

The motion for summary judgment

[6] The plaintiffs now move for summary judgment on the 13 common issues. The key issues are Common Issue Nos. 1 and 4:

- CI No. 1: Are the Class Members "employees" of the Defendants pursuant to the *Employment Standards Act, 2000* ("*ESA*")?
- CI No. 4: If the answer to (1) is "yes", are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?

[7] The outside sales agent exemption and the route sales person exception are set out in s. 2(1)(h) of O. Reg. 285/01:

> *Exemptions from Parts VII to XI of Act*
>
> 2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed....

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[2] *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA").

[3] *Omarali v. Just Energy*, 2016 ONSC 4094.

> (h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,
>
> (i) relate to goods or services, and
>
> (ii) are normally made away from the employer's place of business.

[8] In other words, if a worker is found to be an employee, he is entitled to the range of benefits and protections set out in Parts VII to XI of the Act, such as minimum wage, overtime pay, and vacation and public holiday pay. However, if the employee is an outside door to door sales agent who works on commission, he falls within the exemption and the ESA benefits and protections are not available, *unless* the outside sales agent is a "route salesperson." In other words, on the facts of this case, the ESA provisions in question only apply if the defendants' door to door sales agents are both employees *and* route salespersons.

[9] At the certification stage, I found there was some basis in fact for each of the 13 certified common issues, including the all-important employee and route salesperson determinations. But that was at the certification stage. We are now at the merits stage where the overall evidence may well point to a very different determination.

[10] The plaintiff says the evidence on this summary judgment motion requires a finding that the defendants' sales agents were employees and route salespersons.[4] The defendants refer to their evidence and argue that the sales agents were not employees but independent contractors and if they were employees, they cannot reasonably be characterized as route salespersons – and instead fall within the outdoor sales agent exemption.

The "control" factor

[11] Neither "employee" nor "route salesperson" is defined in the ESA – hence the need to rely on judicial interpretation. The case law is clear that one of the factors in the

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[4] I say "were" because the defendants' residential door to door sales practices ended five years into the class period. As of January 1, 2017, Just Energy no longer engages individuals for door-to-door energy solicitation as a result of legislative amendments to the *Energy Consumer Protection Act*, 2009, S.O. 2010, c. 8, which came into force on that date. These amendments provide, in part, that the sale or offer of sale of electricity or natural gas to a consumer in person at the consumer's home is prohibited, and that such sales or offers of sale cannot be based on a commission or value of volume sales basis.

analysis that decides both the "employee" and "route sales person" determinations is the defendants' degree of control over the how, where and when of what is being sold.[5]

[12] The courts have identified five or six factors that are relevant to the "employee" determination.[6] The central question is "whether the person who has been engaged to perform the services is performing them as a person in business on his own account"[7] – in other words, "whose business is it?"[8] The various factors may be weighed differently depending on the evidence before the court, but as the Supreme Court noted in *Sagaz*, "the level of control the employer has over the worker's activities will always be a factor."[9]

[13] The focus on the level of control over the how, when and where of what is being sold – important as it is for deciding the threshold "employee" question - is even more important in deciding whether the employee/outside sales agent is a "route sales person." The evidence that is relevant to the "route salesperson" determination is evidence about the degree of control exercised by the employer over the selection of the marketing locations, whether the employees are driven to and from the pre-assigned locations, are given sales scripts or direction or coaching on how to perform sales calls, wear uniforms provided by the employer and are generally subject to employer monitoring or supervision.[10]

[14] In short, evidence about the level of control that is exercised by the employer is always relevant (to some degree) when deciding the "employee" question and pretty much determinative when deciding whether the employee/outside sales agent is a "route salesperson."

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[5] *Omarali, supra,* note 3, at para. 32.

[6] *671122 Ontario Ltd. v. Sagaz Industries Canada,* 2001 SCC 59, at para. 47. The Supreme Court set out a list of non-exhaustive factors that should be considered: (1) the level of control the employer has over the worker's activities; (2) whether the worker provides his or her own equipment; (3) whether the worker hires his or her own helpers; (4) the degree of financial risk taken by the worker; (5) the degree of responsibility for investment and management held by the worker; and (6) the worker's opportunity for profit in the performance of his or her risks. Also see *Belton v. Liberty Insurance Co. of Canada,* [2004] O.J. No. 3358 (C.A.) at para. 11 and *Braiden v. La-Z-Boy Canada Limited,* 2008 ONCA 464 at paras. 33-35

[7] *Sagaz, supra,* note 6, at para. 47.

[8] *Braiden, supra,* note 6, at para. 34.

[9] *Sagaz, supra,* note 6, at para. 47.

[10] *Omarali, supra,* note 3, at para. 31 and case law cited therein.

[15] Both sides, not surprisingly, provided compelling affidavit evidence about the level of control over the how, when and where Just Energy products were sold by the class member sales agents – the plaintiffs saying the level of control was extensive; the defendants the exact opposite.

[16] In the certification decision, I noted that "control" is conventionally defined as "the power to influence or direct people's behaviour."[11] On this motion, counsel on both sides focused more on the "power to direct" the sales agents' behaviour than on "the power to influence" the sales agents' behaviour. (This may change as the case proceeds.)

Mini-trial or trial?

[17] The difficulty that I face on this motion for summary judgment is that there is diametrically conflicting evidence about the level of control over the how, when and where question. The plaintiff says I can decide the common issues more directly by simply considering the "organizational structure" evidence and finding that Just Energy's organizational structure is "inconsistent" with the sales agents being independent contractors. Not surprisingly, the defendants refer to the same organizational structure to make the opposite point.

[18] In any event, even if I were to focus on the defendants' organizational structure, I would still have to consider the relevant factors that are set out in the case law. Given that "the level of control the employer has over the worker's activities will always be a factor"[12] I would be obliged to consider the extent to which Just Energy exercised control over the how, where and when of what was being sold.

[19] The plaintiffs filed six affidavits (all quite similar in format and content) that describe a high level of control. The affidavits say, in essence, that the morning sales meetings were mandatory, the sales agents were driven to and from pre-selected sales locations, were required to wear the defendants' uniform, used a pre-approved sales script, and worked a mandatory number of hours, all under the defendants' supervision. In other words, the defendants' level of control over the how, when and where was extensive.

[20] The defendants filed three affidavits from equally knowledgeable witnesses swearing the exact opposite - that the outside sales agents were independent contractors that were "free to market anywhere they wanted." The defendants' affiants swore that the

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[11] *Ibid.* at para. 26.

[12] *Sagaz, supra,* note 6, at para. 47.

morning sales meetings were completely optional, the sales locations or hours of work were not imposed on the sales agents, they weren't required to wear a Just Energy uniform or accept van rides from the crew co-ordinators and they didn't only sell Just Energy products. There were sales scripts but they were imposed primarily because of regulatory requirements. The sales agents were neither monitored nor supervised. According to the defendants' affiants, the sales agents were free to come and go as independent contractors and work wherever and whenever they pleased.

[21] Cross-examinations were conducted by counsel on both sides but the conflicting evidence about the level of control remained intact.

[22] Following the roadmap in *Hryniak v. Mauldin,*[13] I readily concluded, without using the enhanced fact-finding powers set out in Rule 20.04 (2.1), that there were genuine issues (about the level of control) that required trial.

[23] I then asked the next question - whether the need for a trial could be avoided by using the enhanced fact-finding powers. I was concerned about using the enhanced powers for two reasons: (i) the significance of the credibility issues; and (ii) the insufficiency of the evidence before me. I realized that *viva voce* evidence would be needed. I then had to decide whether resort to a "mini-trial" under Rule 20.01 (2.2) was precluded by an over-arching statutory provision. I will explain each of these points in turn.

[24] ***Credibility.*** As already noted, the evidence about the level of control exercised by the defendants over its door to door sales agents is conflicting. One side swears that the sales agents could come and go and work whenever and wherever they pleased. The other side, the exact opposite.

[25] The Court of Appeal noted in *Gordashevskiy v. Aharon,*[14] that "it is not open to a motion judge to simply prefer one affidavit over another in the absence of explanatory reasons for the preference that permit appellate review."[15] Without hearing *viva voce* evidence, I would not be able to provide explanatory reasons why I prefer, say, the plaintiffs' affidavit evidence over that of the defendants. All the more so where, as here, the plaintiffs failed on cross-examination to challenge the defendants' affiants on their "no control" evidence. Given the evidentiary conflict in the sworn evidence before me, *viva voce* evidence would be essential, whether via a mini-trial or a trial.

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[13] *Hryniak v Mauldin,* [2014] 1 S.C.R. 87.

[14] *Gordashevskiy v. Aharon,* 2019 ONCA 297.

[15] *Ibid.* at para. 6.

[26] ***Insufficient evidence.*** During the class period, Just Energy had about a dozen offices in Ontario, each run by a regional distributor who was also said to be an independent contractor. The plaintiffs' affiants spoke about their experiences in only three of these offices and only for a portion of the class period. They also limited their evidence to residential door to door sales agents and made no mention of the other two sales agent categories: customer renewal agents and commercial (business) agents.

[27] In order to fairly determine the key Common Issues (Nos. 1 and 4) – that is, whether the class members were "employees" and if so, whether they fell within the "route salesperson" exception - I would need more evidence about the customer renewal agents and the commercial agents. In particular, I would need evidence about the number of sales agents that did renewal and commercial work on a regular basis; the level of control that the defendants exercised in these circumstances; and the number of residential agents that from time to time opted to do this kind of work and how often this happened.

[28] I would also need evidence that would allow this court to draw reasonable inferences that could support a determination of the Common Issues on a class-wide basis for all 8000 class members. To clarify these questions[16] at this stage of the proceeding, I would need to conduct either a mini-trial or a trial.

[29] ***Can't be a mini-trial.*** I say this for three reasons, the first two raising concerns and the third one being determinative. First, I would have to hear from numerous witnesses. Given the number of required witnesses, the mini-trial might arguably be no more efficient or cost-effective than a conventional "hybrid" trial.

[30] Second, I am mindful of the Court of Appeal's admonition in *Baywood Homes*,[17] that "the motion judge's task of assessing credibility and reliability [is] especially difficult in a summary judgment and mini-trial context." [18] I recognize that the Supreme Court in *Hryniak* was less timid, noting that "concerns about credibility or clarification of the evidence" on the summary judgment motion can be addressed by calling oral evidence by way of a mini-trial.[19] However, I also recognize that the Supreme Court added a proviso to this statement that in my view could well apply here:

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[16] *Hryniak, supra,* note 13, at para. 51: "Often, concerns about credibility or *clarification* of the evidence can be addressed by calling oral evidence on the motion itself." (Emphasis added.)

[17] *Baywood Homes Partnership v. Haditaghi,* 2014 ONCA 450.

[18] *Ibid.* at para. 44.

[19] *Hryniak, supra,* note 13, at para. 51.

> A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner.[24]

[36] Common Issues Nos. 10 and 11 are not easily detached from the other 11 issues. And even if they could be detached, there is no good reason to do so on the facts herein. It makes more sense if all 13 issues are heard together.

Disposition

[37] The plaintiffs' motion for summary judgment is dismissed. All 13 common issues shall proceed to trial.

[38] If both sides agree, I would be prepared to preside over the trial of the common issues. I would issue directions under Rule 20.05 to ensure that the trial proceeds in a timely, focused and expeditious fashion.

[39] Given that much of the material that was filed on this summary judgment motion can be used at the upcoming trial (whoever hears it) I am inclined to defer the question of costs until after the trial and the court's decision on the common issues. I say this because but for s. 34(1) of the CPA I would seriously have considered the super-sized mini-trial (using s. 12 of the CPA if necessary.) Had this happened, the costs question would not have materialized until the mini-trial was concluded and a decision had been rendered. In fairness, the same reasoning should apply here. In other words, the costs award on this motion should be deferred until the conclusion of the trial and a decision on the common issues. If either side disagrees, they should advise forthwith.

[40] I am obliged to counsel on both sides for their co-operation and assistance.

Justice Edward P. Belobaba

Date: June 21, 2019

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[24] *Ibid.* at para. 34.

Appendix

Certified Common Issues

Statutory Claim

1. Are the Class Members "employees" of the Defendants pursuant to the *Employment Standards Act, 2000* ("*ESA*")?

2. If the answer to (1) is "yes", are the Class Members in "pensionable employment" of the Defendants pursuant to the *Canada Pension Plan* ("CPP")?

3. If the answer to (1) is "yes", are the Class Members in "insurable employment" of the Defendants pursuant to the *Employment Insurance Act* ("EI")?

4. If the answer to (1) is "yes", are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?

5. If the answers to (1) and (4) are "yes", do the minimum requirements of the *ESA* with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with the Class Members?

Breach of Contract

6. If the answers to questions (1) and (4) are "yes", do the Defendants owe contractual duties and/or a duty of good faith to:

    a. Ensure that the Class Members were compensated with the minimum wage?

    b. Ensure that the Class Members' hours of work were monitored and accurately recorded?

    c. Properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?

    d. Ensure that the Class Members were compensated with vacation pay?

    e. Ensure that the Class Members were compensated with and public holiday and premium pay?

7. Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?

8. If the answers to (1) and (4) are "yes", did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the *ESA*?

9. If the answers to (2) and/or (3) are "yes", did the Defendants fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Negligence

10. Alternatively, did the Defendant owe a duty of care to the Class Members to:

    a. ensure that Class Members are properly classified as employees;

    b. advise Class Members of their entitlement to the minimum wage, overtime pay, vacation pay and public holiday and premium pay;

    c. ensure that the Class Members hours of work are monitored and accurately recorded; and

    d. ensure that Class Members are appropriately compensated with minimum wage, overtime pay, vacation pay and public holiday and premium pay.

11. Did the Defendants breach any of the duties of care found to exist above? If so, how?

Unjust Enrichment

12. Were the Defendants unjustly enriched by failing to compensate Class Members with minimum wages, overtime pay, vacation pay and public holiday and premium pay owed to them, in accordance with the *ESA*, and/or failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Limitation Period

13. Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

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