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Categories of Employment Class Actions

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Class actions can be a powerful tool for access to justice in the employment law context. Employees are often systemically denied benefits or proper pay.

In his paper "Fairness at work" Harry Authurs[1] quotes studies that show 25% of federally regulated workplaces were not in compliance with most statutory obligations and 75% were not in compliance with at least one statutory provision. Provincial numbers are likely similar. Frequently, however, the amounts at stake for an individual employee may not be worth pursuing given the costs of retaining counsel. Class actions overcome the economic barriers individual litigants face by aggregating multiple claims into one lawsuit.

Before a class action can proceed to trial it must be certified by court order. The matter must be one which is amenable to a class proceeding.

Most often, the central issue on certification is whether there are common issues that can be resolved on a class-wide basis. Success often follows in a class action when the determination of a legal issue for one class member answers the same legal question for every other class member. If the answer is yes, then a class action will often be an appropriate mechanism for the resolution of each class members claims. Class actions often, but not always, focus on statutory rights that have been denied to a group of employees.

In the employment law context, there are several common types of class actions. This paper provides an overview of the types of employment law class actions that have been litigated in Canada and attempts to categorize them into a taxonomy so that practitioners can potential identify class issues, or class liabilities, for their clients.

Misclassification Cases: Employee vs. Contractor

Misclassification cases deal with workers who have been labelled and treated as contractors, not employees and by extension denied the complement of benefits that employment standards legislation provide to employees. Misclassification cases have become more prevalent in Canada in recent years. Depending on the size of the class, employers can be exposed to significant liability for unpaid statutory benefits such as overtime pay, vacation pay and public holiday pay, etc.

[1] Arthurs, Harry W., Fairness at Work: Federal Labour Standards for the 21st Century. Federal Labour Standards Review, 2006. https://ssrn.com/abstract=953049 at pg 192.

Sondhi v Deloitte[2] is an example of a misclassification case. In *Sondhi* hundreds of lawyers who worked for Deloitte as document reviewers were treated as independent contractors and were not provided with overtime pay, vacation pay or statutory holiday pay. Many document reviewers worked very long hours meaning Deloitte's potential liability for overtime pay is significant. The action was certified but the central issue in the case – whether the document reviewers are in fact employees and not contractors- has not yet been litigated on the merits.

Similarly, *Omarali v Just Energy*[3] is a class action which involves roughly 7,000 sales representatives. The sales representatives were classified as independent contractors by Just Energy despite the fact that they were subject to Just Energy's control and were required to wear company uniforms in the course of their duties. The class claims for, among other things, losses stemming from unpaid wages, including minimum wage, employment insurance benefits, CPP contributions, and EI premiums.

Although, *Berg v CHL*[4] does not involve a dispute regarding whether CHL hockey players are contractors, it is another example of a class action where the central dispute is whether the class are misclassified employees. The class in this matter contends that CHL players are employees rather than "amateur athletes". The court certified the action allowing the class to continue the action claiming for unpaid minimum wage, vacation, etc.

Sondhi and *Omarali* are evidence of an increasing trend amongst employers towards misclassifying employees as contractors in order to cut costs. As Justice Belobaba commented in the *Sondhi* case:

> . . .class actions alleging the misclassification of employees as independent contractors are increasing. Because of increasing pressure to reduce labour costs and increase productivity, "many Canadian employers are substituting self-employed labour for employees … transforming the workers into self-employed casuals who report for duty only when required[5]

Sondhi and *Omarali* highlight the importance of properly classifying workers. If an employer is in doubt as to whether their workers are employees or contractors, it is best to err on the side of employee so as to avoid a class action lawsuit. For individual workers, it is important to ensure their employment status is properly classified so they enjoy the associated rights and benefits owed to employees.

Overtime Class Actions: "Off the Clock Cases" and Manager Misclassification Cases

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[2] *Sondhi v Deloitte*, 2017 ONSC 2122 (CanLII), http://canlii.ca/t/h36jr [*Sondhi]*
[3] *Omarali v Just Energy*, 2016 ONSC 4094 (CanLII), http://canlii.ca/t/gsp36
[4] *Berg v Canadian Hockey League*, 2016 ONSC 4466 (CanLII), http://canlii.ca/t/gsdqm
[5] *Sondhi, supra* note 2 at para 24

In recent years, there have been a host of unpaid overtime class actions. These cases do not involve the misclassification of employees as contractors but rather involve the systemic denial of statutory benefits (often overtime pay) to those already counted as employees. These cases fall into two categories: 1) "off the clock" cases and 2) manager misclassification cases.

"Off the Clock" Cases

The so-called "off the clock" cases do not turn on whether an employee is *eligible* for overtime pay but rather if they were denied overtime pay or other employee benefits on a systemic basis.

In both *Fulawka v Scotiabank*[6] and *Fresco v CIBC*[7], for example, the class alleged that the banks implemented overtime policies that created systemic barriers to overtime pay, which were more onerous than the restrictions contained in the *Canada Labour Code*.[8] In particular, in *Fulawka*, the allegation was that overtime pay was only available to the class if they were pre-approved to work extra hours. In practice, however, the class members could not predict when overtime hours would be required and they rarely sought or received pre-approval for overtime hours. As a result, many bank employees worked significant overtime hours but never received compensation for same. *Fulawka* was certified as the court found that the Bank's overtime policies were systemically applied to all of the members of the class in the same manner.[9] *Fulawka* eventually settled after certification.[10] The settlement allowed class members to claim compensation for unpaid overtime from a fund that was created by the Bank.

Similarly, in *Baroch v Canada Cartage*,[11] the proposed common issues focused on whether the Defendant-employer engaged in a systemic pattern of behaviour designed to deny overtime pay to its employees. In that case Justice Belobaba noted that the plaintiffs case did not revolve around the question of whether each individual class member was eligible for overtime pay, but rather, if the Defendant's systemic behaviour resulted in unpaid overtime to the class in general. Justice Belobaba certified the action noting that while individualized assessments of each class members eligibility for overtime pay and corresponding losses might be required, the class action, as framed by the plaintiff, would significantly advance the litigation.[12]

Eklund v Goodlife Fitness[13] is a recent class action that fits into the so-called "off-the clock" category of employment class actions. *Eklund* was certified on consent and settled for $7.5 million dollars. The class action involved claims for unpaid wages, including overtime, for all non-managerial employees of Goodlife before they became unionized. Specifically, the allegations were that Goodlife's policies required that class members work a number of hours without pay

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[6] *Fulawka v Bank of Nova Scotia,* 2012 ONCA 443 (CanLII), http://canlii.ca/t/frtzp [*Fulawka*]
[7] *Fresco v Canadian Imperial Bank of Commerce*, 2012 ONCA 444 (CanLII), http://canlii.ca/t/frtz
[8] *Canada Labour Code*, RSC 1985, c L-2, http://canlii.ca/t/532qw
[9] *Fulawka, supra* note 6 at para 103
[10] *Fulawka Bank of Nova Scotia*, 2014 ONSC 4743 (CanLII), http://canlii.ca/t/g8rnc
[11] *Baroch v Canada Cartage,* 2015 ONSC 40 (CanLII), http://canlii.ca/t/gg4ff
[12] *Ibid* at para 8-10
[13] *Eklund v Goodlife Fitness Centres Inc.,* 2018 ONSC 4146 (CanLII), http://canlii.ca/t/hssgh

which then also resulted in a significant amount of unpaid overtime. After settlement, Goodlife made significant changes to its payment policies, including paying trainers for preparation and administrative time, along with paying overtime pay when required.

Manager Misclassification Cases

By contrast, manager misclassification cases, unlike the "off the clock" cases, revolve around the question of whether a class of employees are caught by the managerial exception to overtime pay. In *Brown v CIBC*[14] , for example, the class was comprised of employees who were classified as managers by CIBC and as a result were not paid overtime. The court found that each class members' job duties varied such that whether any given class member would be caught by the managerial exception to overtime required individual analyses. In other words, the court reasoned that whether or not one class member was caught by the managerial exception to overtime pay, would not answer the same question for every other class member. Accordingly, the proposed class action was not certified.

Similarly, the Court of Appeal refused to certify a class action for overtime in *McCraken v Canadian National Railway Co*.[15] In *McCracken*, the class was comprised of a thousand first line supervisors employed by CN. As was the case in *Brown,*[16] the court determined that although the class members shared the same job title, their job duties varied so greatly that whether a class member was caught by the managerial exception to overtime required individual analyses. Accordingly, as was the case in *Brown*, McCracken was not certified.[17]

By contrast, in *Rosen v BMO*,[18] Justice Belobaba certified a manager misclassification case distinguishing it from both *Brown* and *McCracken*. On the facts, Justice Belobaba found that unlike *Brown* and *McCracken*, the Plaintiff was able to show that proposed class members' job functions were sufficiently similar "that eligibility [for overtime pay] could be decided on class-wide basis."[19] Accordingly, the court certified the action,[20] and it eventually settled for 12 million dollars.[21]

The decision in *Rosen*[22] is important as it demonstrates that manager misclassification cases can be viable provided the class member's job duties are sufficiently similar and uniform to allow a court to make findings on a class-wide basis.

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[14] *Brown v Canadian Imperial Bank of Commerce*, 2014 ONCA 677 (CanLII), http://canlii.ca/t/gdszz [*Brown*]
[15] *McCracken v Canadian National Railway Company*, 2012 ONCA 445 (CanLII), http://canlii.ca/t/frv0b [*McCracken*]
[16] *Brown, supra* note 14
[17] *McCracken, supra* note 15 at para 210
[18] *Rosen v BMO Nesbitt Burns Inc*., 2013 ONSC 2144 (CanLII), http://canlii.ca/t/g04z9 [*Rosen*]
[19] *Ibid* at para 23
[20] *ibid* at para 25
[21] *Rosen v BMO Nesbitt Burns Inc*., 2016 ONSC 4752 (CanLII), http://canlii.ca/t/gsn79
[22] *Rosen, supra* note 18

Constructive Dismissal and Mass Termination

Although not as prevalent as class actions relating to overtime or statutory benefits, employment class actions sometime involve claims for wrongful dismissal damages. These can be difficult because generally reasonable notice becomes quickly an individualized investigation.

In *Brigaitis v IQT Ltd*.,[23] a group of dismissed employees brought a class action against IQT for, among other things, wrongful dismissal damages, oppression, and breach of contract. Several other claims were advanced due to the fact that IQT was insolvent.[24]

IQT defended the certification motion on the basis that the majority of the class had already obtained relief under the Ontario Labour Relationship Board and were therefore barred from advancing further wrongful dismissal claims.[25] The court certified the class.[26] It found that although the majority of the class could not advance a claim for wrongful dismissal damages, it could advance claims on account of IQT's insolvency, such as negligence and oppression.

Wood v CTS[27] involved a mass termination of roughly 70 employees who then commenced a class action for wrongful dismissal damages. CTS provided its employees 12 months' working notice, as opposed to pay in lieu of notice.

Although the Court of Appeal's decision in *Wood v CTS* is somewhat complicated given the various common issues,[28] it is evidence that in a case of a mass layoff, wrongful dismissal litigation can be advanced by way of a class action. Interestingly, the Court of Appeal upheld the motion judge's finding that for some members of the class, CTS failed to provide reasonable working notice because some employees were forced to work overtime hours which prevented those class members from seeking new employment.[29] Accordingly, the court found that the working notice provided to those class members did not properly count as notice of termination given the lack of opportunity to search for new employment.

Finally, *Kafka v Allstate*[30] involved a class of employees who claimed reasonable common law notice damages on account of the class' constructive dismissal. Allstate gave notice to its sales employees that it would implement a change to their pay structure. The class members did not accept the unilateral change and brought forward the class action claiming constructive dismissal. The court denied certification on the basis that the central issues in the case could not

[23] *Brigaitis v IQT, Ltd. c.o.b. as IQT Solutions*, 2014 ONSC 7 (CanLII), http://canlii.ca/t/g2nhk
[24] *Ibid* at para 24
[25] *Ibid* at para 6
[26] *Ibid* at para 179
[27] *Wood v CTS of Canada Co.*, 2017 ONSC 5695 (CanLII), http://canlii.ca/t/h6b3j
[28] *Ibid* at para 5
[29] *Ibid* at para 113
[30] *Kafka v Allstate Insurance Company of Canada,* 2011 ONSC 2305 (CanLII), http://canlii.ca/t/fl0z6 [*Kafka*]

be determined in common.[31] Specifically, the court held that the impact of the changes to compensation varied by employee, given their location, books of business, expenses, etc.[32] Further the employees were subject to different employment contracts. Essentially, the court held that individual inquiries were needed to determine the liability of Allstate, and as a result that a class proceeding was impractical.[33]

Sexual Harassment and Systemic Discrimination

Employment class actions involving claims of sexual harassment and discrimination are on the rise in Ontario and throughout Canada. The heightened social consciousness of these issues, along with the elimination of limitation periods for civil claims relating to sexual assault has undoubtedly had a positive influence in galvanizing individuals to commence related class actions. As such recent class actions have focused on an employer's failure to prevent systemic sexual harassment.

The prevalence of sexual harassment must be systemic for a successful certification of a class action, not merely individualized incidents and/or the experiences of a single person.

Davidson & Merlo v Canada (Attorney General),[34] which recently settled, involved systemic claims of sexual harassment and discrimination. The classes were formed of female employees of the Royal Canadian Mounted Police who were subjected to sexual discrimination and harassment by male colleagues. The class claimed, among other things, that the RCMP systemically failed to provide a workplace free of gender and sexual orientation based discrimination, bullying and harassment. The terms of the settlement include: payment of damages by the RCMP; the RCMP issued an apology; the RCMP admitted to the discrimination and sexual harassment claims, the class members are able to submit confidential claims to the RCMP; and the RCMP is to undertake positive action in order prevent discriminatory actions and harassment in the future.[35]

Similarly, the Canadian Armed Forces is involved in two class actions brought by several plaintiffs on behalf of female and LGBT employees. Heyder, Graham and Schultz-Neilsen are the plaintiffs in the class action on behalf of female CAF members who allege that the CAF systemically failed to, among other things 1) prevent sexual assault and harassment, 1) implement proper policies, and 3) investigate complaints. Ross, Roy and Satalic are the representative plaintiffs who bring the class action on behalf of the LGBT members of the CAF, claiming discrimination and harassment due to sexual orientation.

There are other class actions throughout Canada that involve claims of sexual harassment. *Lewis v WestJet Airlines*[36] is a class action out of British Columbia. The class is comprised of female flight

[31] *Kafka, supra* note 30 at para 7
[32] *Ibid* at para 6
[33] *Ibid* at para 165
[34] *Merlo v Canada (Attorney General*), 2013 BCSC 1136 (CanLII), http://canlii.ca/t/fzffb
[35] See here for copy of the settlement agreement
[36] *Lewis v WestJet Airlines Ltd.*, 2017 BCSC 2327 (CanLII), http://canlii.ca/t/hpcqt

attendants who claim breach of contract for systemic sexual harassment and assault. The class claims that WestJet failed to address and prevent the incidents of sexual harassment and assault, and also allege that WestJet attempted silence the employees from reporting the allegations.

These cases demonstrate a heightened awareness of systemic sexual harassment and discrimination in the workplace. Given the financial and reputational risk, it is important for employers to maintain a safe work environment, free of discrimination and harassment both from a legal and ethical standpoint.

Takeaway

There are many different causes of action within employment law that can give raise to a class action law suit. The takeaway from the various class actions commenced in Ontario and Canada is that, in order to be successful, the issues raised in the class action must be capable of being resolved in common. Generally, the disputes involve systemic issues in the workplace, being either harassment or denial of a statutory right.

For employers, it is important to understand who comprises your workforce, their duties, your obligations relating to payment, and recognizing that you must foster a safe work environment, free of harassment. Classes come in all shapes and sizes, and it is important to comply with all of your statutory obligations towards your workforce.