CITATION: Davidson v. T.E.S. Contract Services Inc., 2024 ONSC 3066
COURT FILE NO.: CV-20-00645736-00CP
DATE: 20240603

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: ANN DAVIDSON, Plaintiff

AND:

T.E.S. CONTRACT SERVICES INC., Defendant

BEFORE: Justice Glustein

COUNSEL: *Andrew Monkhouse, Alexandra Monkhouse and Emily Kim*, for the plaintiff

Jeffrey E. Goodman, Stephanie M. Ramsay and Prateek Awasthi, for the defendant

HEARD: May 14, 15, and 16, 2024

REASONS FOR DECISION

NATURE OF MOTION AND OVERVIEW

[1] The proposed representative plaintiff, Ann Davidson ("Davidson") brings this motion under s. 5 of the *Class Proceedings Act,* 1992, S.O. 1992, c. 6 ("*CPA*") for certification of the proposed class action. The defendant, T.E.S. Contract Services Inc. ("TES"), opposes the motion.

[2] TES is a company which provides recruitment services, as well as payroll and contract administration services. It has applied for registration in Ontario as a temporary help agency ("THA").

[3] Davidson worked at Texas Instruments Canada Ltd. ("TI") providing information technology ("IT") services between March 4, 2019 and February 7, 2020. Her job title was a "User Experience (or "UX") Designer". TI is a technology company that designs and manufactures electronic parts and communications equipment.

[4] Davidson applied directly to TI. TI contacted Davidson for an interview and decided to extend her an offer. TES played no role in recruiting Davidson for TI.

[5] Davidson formed a corporation, Colleen Davidson Design Inc. (“CDD”), to sign an agreement in which CDD was described as the “Independent Contractor”, for the services she was to provide as a UX Designer (the “IC Agreement”). Davidson signed the IC Agreement on behalf of CDD with TES. The IC Agreement was a template agreement.

[6] TES signed the IC Agreement pursuant to its obligations under a “Master Professional Services Agreement” (“MPSA”) between TES and TI. The MPSA was created by TI, pursuant to which TES was to provide a basket of services, depending on each temporary worker, including contract administration and providing personnel.

[7] There is no evidence that the MPSA was a template agreement for any other clients of TES.

[8] Davidson submits that she was misclassified as an independent contractor and instead should have been classified as an employee. The proposed class consists of all persons working on contracts with TES and classified as independent contractors, from November 6, 2009 until the date that the notice of the class action is sent to class members.

[9] The putative class members seek benefits under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“*ESA*”),[1] including overtime pay, vacation pay, as well as public holiday pay. The class also seeks reimbursement of any CPP or EI contributions which are owed resulting from the alleged misclassification.

[10] TES makes 18 objections to the certification of the action. However, there are three core objections (the “Core Objections”), which are based on the decision of Justice Belobaba in *Sondhi v. Deloitte Management Services LP*, 2017 ONSC 2122.

[11] In *Sondhi*, the court dismissed the certification motion against the placement agency, Procom Consultants Group Limited (“Procom”). The court rejected the plaintiff’s submission that certification was available against Procom under s. 74.3, which deems a THA to be the employer “[w]here a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency.”

[12] Justice Belobaba held, at para. 17, that “[s]ection 74.3 of the ESA does not apply” because “Procom had nothing to do with the placement of document reviewers – it did not ‘assign or attempt to assign [the document reviewers] to perform work on a temporary basis for [a] client.’”

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[1] Unless otherwise stated, all references to statutory provisions forthwith in these reasons are to the *ESA*.

[13] Justice Belobaba also held that there was no basis in fact for a finding that Procom was an employer at common law or under s. 1(1): at paras. 15-16.

[14] The three Core Objections raised by TES in the present case are based on those raised by Procom in *Sondhi*, i.e., that the plaintiff has not established a basis in fact under s. 5(1)(c) of the *CPA* for:

(i) the commonality of the proposed common issue ("PCI") that TES was an employer under s. 74.3 ("PCI 1"),

(ii) the commonality of the PCI that TES was an employer under s. 1(1) ("PCI 2"), or

(iii) the commonality of the PCI that TES was an employer at common law ("PCI 3").

[15] For the reasons that follow, I agree with the three Core Objections and deny certification on that basis. I find:

(i) There is no basis in fact that PCI 1 can be determined in common. The issue of whether TES and each putative class member had an agreement under s. 74.3 "whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency" (a "s. 74.3 agreement") must be determined on an individual basis.

(ii) There is no basis in fact that PCI 2 or PCI 3 can be determined in common. There is no evidence of systemic commonality to determine the employment status of all putative class members on a common basis. Davidson seeks to rely on certain documents and emails related to her work at TI. However, that evidence does not provide a basis in fact for a common finding of employment under s. 1(1) or at common law.

[16] At PCI 4, Davidson seeks to certify a common issue of whether TES owed a fiduciary duty to class members. However, the commonality of that fiduciary obligation is based on a common finding of employment under PCIs 1, 2, or 3. Consequently, PCI 4 cannot be certified as a stand-alone common issue.

THE ADDITIONAL OBJECTIONS

[17] TES makes 15 other objections to certification, which are relevant only if the court does not accept the Core Objections. TES raises the following additional objections:

Objections under s. 5(1)(a) of the *CPA*

(i) The claim does not disclose a cause of action under s. 74.3 since Davidson does not allege that TES and Davidson entered into an agreement that TES would assign or attempt to assign her to its clients. Davidson only alleges that she

entered into the IC Agreement with TES and delivered invoices to TES for payment.

(ii) The claim does not disclose a cause of action under s. 1(1) since there are no allegations that TES "has control or direction of, or is directly or indirectly responsible for, the employment of a person" in the employer's business, as required under the definition of employer in the *ESA*.

(iii) The claim does not disclose a cause of action at common law since there are no allegations that Davidson was working as an employee for TES. Under the settled law of the "whose business is it?" test (*Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464, 294 D.L.R. (4th) 172, at para. 34), there are no allegations which could establish factors such as (a) Davidson performed any work for TES or (b) TES in any way controlled putative class members' work for clients (as those factors are discussed in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] S.C.R. 983 ("*Sagaz*"), at para. 47).

(iv) The claim does not disclose a cause of action for breach of fiduciary duty. While such a claim would require an employment relationship (and as such falls if the Core Objections are accepted), even if the Core Objections were rejected, there are no allegations to establish either (a) an undertaking by TES to act in the best interests of class members or (b) any vulnerability by class members to TES' conduct.

(v) In any event, the claim does not disclose a cause of action to support the relief of disgorgement sought by the class, since restitutionary relief is not available if the claimant possesses a right to contractual relief.

(vi) The claim of the class for "a declaration that [TES] is liable for any adverse tax liability sustained by class members" resulting from their alleged misclassification is not tenable since the Tax Court of Canada has "exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Canada Pension Plan* [and] the *Employment Insurance Act* […]" based on s. 12 of the *Tax Court of Canada Act*, RSC 1985, c. T-2.

Objection under s. 5(1)(b) of the *CPA*

(vii) There is not an identifiable class in the statement of claim. The class consists of all workers placed on assignments or assigned to work on contracts by TES since November 6, 2009 who were classified as independent contractors. TES submits that "the plaintiffs have failed to discharge their burden of establishing that every member of the proposed class has at least a plausible claim against TES" since "a large number of the proposed class are without even a 'colourable' claim against TES because they are in a pure payrolling arrangement."

Additional objections under s. 5(1)(c) of the *CPA*

(viii) TES submits that s. 74.3 applies only to employees. Consequently, TES submits that even if there could be a common determination that TES and every putative class member were parties to an agreement to assign the person (or attempt to assign the person) to temporary work (which it denies as a Core Objection), individual enquiries would still be required under s. 74.3 to determine whether the class member was an employee or an independent contractor.

Davidson submits that s. 74.3 applies to independent contractors. Consequently, Davidson submits that individual enquiries to determine employment status would not be necessary under s. 74.3 if there could be a common determination that TES and every putative class member were parties to an agreement to assign the person (or attempt to assign the person) to temporary work.

This issue is a novel question of law with both parties raising issues of statutory interpretation, review of Hansard, policy considerations underlying Bill 139 which introduced the THA provisions in the *ESA*, and even purported expert[2] and fact evidence which the parties alleged was relevant to statutory interpretation.

This issue led to the adjournment of the certification motion initially scheduled to be heard by Justice Belobaba, resulting in the filing of additional evidence and cross-examinations, and three lengthy factums by the parties on this issue alone.

(ix) Even if proposed class members could be considered as "employees", individual assessments would still be required to determine whether (a) exemptions applied for each class member, such as an exemption for (1) "information technology professionals" under *Exemptions, Special Rules and Establishment of Minimum Wage*, O. Reg. 285/01 (the "*Exemption Regulation*"), or (2) workers whose work is "supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis" under ss. 4(1)(b) and 8(b) of the *Exemption Regulation*, or (b) limitation periods applied.

(x) Individual inquiries would be necessary to determine whether the claim for breach of fiduciary duty could succeed, since "an individual assessment would be

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[2] TES brought a motion to strike the expert evidence relied upon by Davidson, if the statutory interpretation issue was to be addressed by the court. At the hearing, however, TES advised the court that it was not pursuing the motion to strike but instead raised the alleged frailties of the impugned evidence as part of its argument on the statutory interpretation issue.

required to determine what each individual class member reasonably expected of TES in the circumstances."

Objections under s. 5(1)(d) of the *CPA*

(xi) A class proceeding would not be the preferable procedure since the class members can seek recourse before the Small Claims Court or the Ministry of Labour.

(xii) A class proceeding would not be the preferable procedure since a class action would not be manageable "due to the plethora of individual issues trials that would be required."

Objections under s. 5(1)(e) of the *CPA*

(xiii) Davidson cannot be a representative plaintiff because "there is no basis in fact for a finding that TES assigned Ms. Davidson within the meaning of section 74.3 of the ESA" as "[t]he evidence discloses a pure payrolling situation, akin to Procom's relationship with the document reviewers in [*Sondhi*]."

(xiv) Davidson cannot be a representative plaintiff because Davidson "lacks motivation to prosecute the claim" since she brought it without using her full legal name.

(xv) Davidson cannot be a representative plaintiff because Davidson has not produced a workable litigation plan.

[18] Given my conclusion that the proposed class action cannot be certified because of the Core Objections, I do not address the 15 additional objections raised by TES.

[19] In particular, additional objection (viii) above raises an important question of statutory interpretation (i.e., whether independent contractors are subject to a s. 74.3 agreement). I find that it is not appropriate to make a decision on that cause of action when that issue raises significant consequences to workers and THAs and a decision on that issue is not required for the purpose of determining certification. Any conclusion I would reach on additional objection (viii) would be *obiter* and should await determination in a case where it is necessary to address the statutory interpretation issue.

FACTS

The parties

[20] Davidson is a resident of Ontario. Her legal name is Colleen Ann Davidson. She brought the action under the name of Ann Davidson but is prepared to amend the claim to use her legal name if required.

[21] Davidson worked for TI, one of TES' clients, from March 4, 2019 until February 7, 2020.

[22] TES is a company based in Toronto, Ontario.

The proposed class

[23] The putative class members worked in various roles with 935 different organizations that were clients of TES (generally in the IT sector) under independent contractor agreements. TES provided different services to those client organizations pursuant to 21,252 individual contracts with the client organizations relating to those putative class members, from 2009 over a 12-year period (when TES provided answers to undertakings).[3]

The business of TES

[24] TES focuses on the IT field. It provides a variety of staffing and business services to its clients, which largely fall under three buckets: payrolling, recruitment, and permanent placements.

[25] Depending on a client's needs and preferences at the time of a particular engagement, TES may provide one or a combination of any of the following services: locating candidates, interviewing candidates, evaluating skills of candidates, confirming references, submitting candidates to clients for consideration, setting up interviews with the client, facilitating negotiations between the client and candidate, coordinating background checks, onboarding workers for the purpose of recruitment or payrolling, and facilitating payroll arrangements on behalf of the client for workers.

[26] Craig Sisson ("Sisson"), the Director of Strategic Accounts at TES, described the role of TES as falling into two broad categories: "recruitment" and "payroll". The "recruitment" individuals are those who TES actively recruits for a client organization. The "payroll" individuals are those who are hired by TES' clients and for whom TES performs onboarding and payroll functions.

[27] On cross-examination, Sisson distinguished between the recruitment and payroll services/contract administration roles played by TES with respect to its clients. He stated that "I assist our clients in getting good folks to work and assist them in payroll situations as well" and "[w]e recruit when necessary for the skills that [TES' clients] are looking for."

[28] Sisson also stated that "in servicing [TES' clients], oftentimes they find their own resources and we help bring [those workers] onboard, and occasionally they ask me to find [workers] because they don't know those skill sets or have access to them."

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[3] Since time has passed from TES providing answers to undertakings, the actual numbers of client organizations and individual contracts with client organizations likely would have increased.

[29] The extent to which these services are provided by TES varies by client and by contract. However, most clients find their own resources, and only use TES to help onboard those workers for payrolling and contract administration.

[30] TES has developed and used a variety of template independent contractor agreements over the years. The terms of these contracts are not consistent and have evolved over time. Where TES provides a client with payrolling services, the specific onboarding processes TES engages in with the worker varies.

[31] TI is a client of TES. TES provides both recruiting and payroll and contract administration services to TI. Since 2009, TES has provided such services with respect to 104 persons at TI.

Davidson contacts TI and applies for a position as UX Designer

[32] Davidson applied directly to TI for a position as UX Designer, without any involvement of TES to obtain the position. Her evidence is:

(i) In or around early January 2019, Davidson applied for the UX Designer contract role with TI based out of the Toronto office.

(ii) On January 16, 2009, Ms. Kelly Lynn ("Lynn") at TI responded by email to Davidson's application. Lynn thanked Davidson "for applying for the UX contract role in our Toronto office" and invited Davidson to participate in a 15-minute pre-screening interview.

(iii) On or about January 22, 2019, Davidson received a follow-up email from Lynn inviting Davidson for a telephone and WebEx based interview with Senior UX Designers at TI working out of Dallas, Texas. The WebEx platform allowed Davidson to present her portfolio to the Senior UX Designers.

(iv) As part of the interview process with TI, Davidson was required to do a "sample project". Following this sample project, Davidson had an in-person interview with TI.

TI decides to hire Davidson and then contacts TES for onboarding

[33] TI decided to make an offer to Davidson. At that point, TI contacted TES to conduct contract administration and payroll services.

The onboarding process for Davidson at TI

[34] By email dated February 6, 2019, Jason Strimus ("Strimus") at TI contacted Amy Hoddinott ("Hoddinott") and Sisson at TES, to advise them that "[TI] would like to extend an offer to Colleen Davidson for the role of UX Designer". Strimus advised Hoddinott that "[t]his

role would require [Davidson] to come into the office Monday to Friday working during core business hours for a maximum of 40 hours per week" and "[w]e offer flexibility regarding work hours and occasionally working from home if necessary." Strimus attached Davidson's resumé to his email.

[35] Strimus noted that Davidson "is not incorporated but is used to working on contract and hopefully will consider incorporating."

[36] By email dated February 7, 2019, Hoddinott contacted Davidson (following an earlier telephone conversation) to offer her "[c]ongratulations on being selected for hire and accepting Texas Instrument's [*sic*] offer to employ you as their newest contractor for UX Designer." Hoddinott set out the terms of the TI offer, including the position, working hours, pay rate, the start date (March 4, 2019), and the one-year contract length.

[37] In her email, Hoddinott asked for various documents from Davidson to "complete some paperwork," including two pieces of identification, the first page of articles of incorporation, an HST number and a void cheque from Davidson's corporation.

[38] Davidson was not required to incorporate as a term of the TI offer. Hoddinott advised Davidson that if she chose not to incorporate, she would be paid $50 per hour rather than the $56 per hour offered as a corporation. By email dated February 7, 2019, Hoddinott advised that "[t]he preference from TI is that you incorporate" but that "[i]f you choose to use your sole [proprietorship] instead it changes the pay rate to $50 per [*sic*] instead." Hoddinott forwarded the name of an accounting firm which specialized in IT work if Davidson had further questions.

[39] When asked by Davidson as to "why TI hires contractors instead of hiring people as employees", Hoddinott responded that "TI is not able to hire permanent staff as of now as per guidelines from the US head office," which Hoddinott noted was similar to policies in place at large Canadian banks.

[40] Shortly after that correspondence, Davidson incorporated CDD and at all material times was the sole director. The corporation operates exclusively for her benefit.

[41] By email dated February 25, 2019, Hoddinott (i) confirmed that Davidson would start work at TI on March 4, 2019, (ii) provided a location and time, (iii) confirmed that TI would have a computer for Davidson, and (iv) advised that Davidson would use TI's system to log her hours. Hoddinott also attached a highlighted calendar to assist Davidson in providing her invoices to TES.

The IC Agreement

[42] On or about February 8, 2019, TES provided Davidson with the IC Agreement, in which TES described itself as a corporation which "carries on the business of providing staffing services to, among others, Texas Instruments Canada Ltd." TES set out the terms of Davidson's work with TI, including:

(i) a "Statement of Work" which set out that her duties would be "as assigned by the client", her fees, and the one-year term starting on March 4, 2019,

(ii) a "compensation", "invoicing", and "payment of invoicing" structure by which Davidson would invoice TES for her work and be paid by TES,[4]

(iii) an agreement by Davidson that TI could conduct a criminal background investigation if it so required, and that Davidson would comply with such a request if made by TI,

(iv) an "intellectual property" provision by which Davidson agreed that all of her "work product" "shall belong exclusively to [TI]",

(v) a "non-solicitation and non-competition" provision which prevented Davidson from becoming employed by TI or entering into a separate agreement with TI to provide consulting services, or to enter any agreement with a business that competes with TES, all for a twelve-month period after the end of the contract,

(vi) a "termination" provision which allowed TES to terminate the IC Agreement on 10 days' notice,

(vii) an "indemnification" provision requiring Davidson to indemnify TES for any loss it suffers as a result of "a breach of this Agreement by the Independent Contractor or from the Services performed or to have been performed by Independent Contractor pursuant to the Statement of Work",

(viii) a "guarantee of principal" provision that the principal "guarantees the performance of the obligations of the Independent Contractor", and

(ix) an "assignment" provision that prohibits assignment by the independent contractor and deems any change of control of the independent contractor to be an assignment.

[43] Davidson's evidence was that she "was confused as to why TES was providing my contract, when all of the discussions regarding my employment and the interview process was with Texas Instruments" but that "[a]t that point, I didn't think too much into why my contract was presented to me by TES."

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[4] The evidence is uncontested that TES would then send those invoices to TI for payment and receive a fee for its contract administration and payroll services.

[44] The IC Agreement was a template agreement although there were different versions during the class period.

[45] Davidson signed the IC Agreement on behalf of CDD and started work for TI on March 4, 2019.

TES provides Davidson with TES's Worker Health & Safety Booklet

[46] TES provided Davidson with a form letter to its "valued employee, contractor/consultant" enclosing its "Worker Health & Safety Booklet" (the "Booklet") that was "designed to protect you while you are on assignment", and which was provided pursuant to TES being "committed to the safety of its employees, contractors/consultants" while "on assignment."

[47] Davidson was advised that she was required to (i) comply with the policies in the Booklet and (ii) sign the letter acknowledging that she "read and understood what is expected of [her], while on assignment."

[48] The policies in the Booklet set out matters such as health and safety rules, return of injured workers to work, workplace injury reporting procedure, and a worker's right to refuse unsafe work.

[49] The Booklet was also a template document which referred to a "company" in generic terms and was not restricted to TI.

TES provides Davidson with payroll instructions

[50] TES provided Davidson with a document titled "TES IT Candidate Payroll Instructions" dated April 2011 (the "Payroll Instructions"). It sets out the process for reporting hours and provides a sample invoice. It further sets out the process for receiving payment. Payment was on a bi-weekly cycle with invoices to be delivered pursuant to a fixed timetable.

[51] The Payroll Instructions further set out answers to frequently asked questions such as "Why is there CPP and EI deduction, if I am self-employed", to which TES provided excerpts from a Canada Revenue Agency ruling for "Placement and employment agency workers" (i) setting out guidelines that "apply to workers engaged by placement or employment agencies" and (ii) stating that "[a]n agency that places workers in an employment under the direction and control of a client of the agency and where the agency pays the worker … is required to deduct CPP contributions and EI premiums, but not income tax."

[52] The Payroll Instructions further state that "[y]ou are treated as an employee for EI and CPP purposes but as self-employed for individual tax purposes."

[53] The Payroll Instructions document is a template which does not refer to a particular company or worker.

The MPSA

[54] TES and TI entered into the MPSA which was effective as of July 1, 2013. The MPSA was extended by agreement signed by TES on January 16, 2016.

[55] The MPSA covers a broad range of "certain services" TI sought to obtain from TES. Those services included "furnish[ing] [TES'] Personnel to perform Services for TI as requested." TES was "responsible to recruit, train, supervise, discipline and/or discharge any of Provider's Personnel as necessary to perform satisfactorily the Services under this Agreement."

[56] Under the MPSA, TES (i) "assume[s] full responsibility for the work of Provider's Personnel used in the performance of Services" and (ii) "guarantees the performance of all Provider's Personnel, as if all were direct employees of Provider."

[57] TES was also to be compensated for "time-based services", which included "coordinating vacations and sick time issues for Provider's Personnel", "performing all disciplinary actions with respect to Provider's Personnel, including hiring and termination", and "[c]onducting regular evaluations of Provider's Personnel assigned to TI."

[58] Under the MPSA, TES was to provide day-to-day administration of the contracts of workers who entered into an agreement with TES to work at TI, regardless of whether that worker was placed by TES or independently selected by TI through a direct hiring process (as was Davidson).

[59] Davidson recognized the limited role of TES with respect to her work when she stated on her cross-examination that "primarily my communications with Amy were payroll", and that she also had discussions with Hoddinott and Sisson about why Davidson was "working beside people … that were full-time and had health plan and annual bonus and benefits" when she did not receive such benefits even though "I was working in the same position as them."

Davidson's work at TI

[60] While at TI, Davidson worked exclusively on projects and tasks for TI. Davidson typically worked between 35 and 40 hours a week, depending on her workload.

[61] Davidson was responsible for the UX design on projects for the enterprise global TI.com website. Her job involved incorporating competitive analysis and research to create hi-fidelity interactive prototypes and user flows and contributing to the visual design for the global website standards and pattern library. Davidson was also responsible for presenting quarterly Competitive Analysis Reports and Best in Class findings and providing recommendations for web accessibility compliance (WCAG 2.0).

[62] TI provided Davidson with a flexible start time, but she was required to work for 8 hours per day and arrive at the office no later than 10:00 am for her shift. She was permitted to work from home two days per week.

[63] Davidson was asked by TES to use TI's system to log her hours. TI's headquarters had an open office environment where the UX Designers worked. Davidson was provided with desk space, a laptop, and all of the software required to perform her job by TI. Davidson "felt that I had been fully integrated into Texas Instruments' business and had not been contracted to perform work that was outside of the scope of what one of their regular full-time employees would perform."

Termination of Davidson's contract

[64] On February 7, 2020, Hoddinott advised Davidson by email (following an earlier discussion) that "your contract assignment has ended effective immediately with 10 days pay being provided by the next payment date – Friday February 14th."

[65] In her email, Hoddinott advised Davidson that "[w]e would like to be able to assist in finding a new contract or permanent job for you so when you have a moment we would be happy to receive your updated resume and can work together to find something new. It will be pendant [*sic*] upon what our clients have available, your interest level, and your timeline etc."

ANALYSIS

[66] As I discuss above, the Core Objections address whether the "some basis in fact" test has been met to establish the commonality of PCIs 1, 2, and 3.

[67] Consequently, I review the law on the general principles of certification and the test to establish a common issue. I then consider each of the Core Objections.

General principles of certification

[68] In *Price v. H. Lundbeck A/S*, 2022 ONSC 7160, affirmed 2024 ONSC 845 (Div. Ct.), I adopted the review of the law set out by Perell J. in his earlier certification decision in that matter (*Price v. H. Lundbeck A/*S, 2018 ONSC 4333).[5]

[69] I adopt the principles I set out in *Price* (2022), at paras. 74 to 78. I note that (i) "the test for certification is to be applied in a purposive and generous manner" and (ii) the "'some basis in fact' test is a low evidentiary threshold for plaintiffs" where "a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case": *Price* (2022), at paras. 74-75.

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[5] Justice Perell's decision was set aside by the Divisional Court at 2020 ONSC 913, but not on the legal tests he applied to the general certification test or the commonality requirement under s. 5 of the *CPA*. I refer to Justice Perell's decision as *Price* (1998) and the Divisional Court decision in that matter as *Price* (2020). I refer to my decision in *Price* as *Price* (2022).

[70] However, as I set out in *Price* (2022), at para. 76-78, the gatekeeping role of the court is critical to ensuring that the suit is appropriately prosecuted as a class action. I summarize those principles as follows (also as set out in *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, 56 O.R. (3d) 214, at para. 16 and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, 364 D.L.R. (4th) 573, at para. 103):

(i) The test for certification is not a mere formality, but a meaningful screening device used to eliminate claims that are not appropriately resolved by class proceedings. While a certification motion is procedural in nature, it serves as an important screening function. The certification motion judge is tasked with playing a gatekeeper role, eliminating claims that are not appropriately prosecuted as class actions.

(ii) The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.

General principles on the test to establish commonality

[71] In *Frohlinger v. Nortel Networks Corp.* (2007), 40 C.P.C. (6th) 62 (Ont. S.C.J.), at para. 25, Winkler J. (as he then was) set out the governing principle that "the core of a class proceeding is the element of commonality."

[72] Similarly, in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276, Strathy J. (as he then was) held, at para. 138:

> **Common issues are at the heart of the class action process** because it is the resolution of the common issues that makes a class action an efficient way of providing access to justice, resulting in economic use of judicial resources and behaviour modification. [Emphasis added.]

[73] In *Price* (2022), at para. 82, I adopted the thorough analysis of Perell J. in *Price* (2018),[6] in which he addressed the general principles to establish the tests of commonality. In *Price* (2018), Perell J. held, at paras. 104-11:

> The third criterion for certification is the common issues criterion. **For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim. The underlying foundation of a common issue is whether its**

[6] Justice Perell's analysis of the test for commonality was expressly adopted by the Divisional Court in *Price* (2020), at para. 22.

resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.

An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.

Commonality is a substantive fact that exists on the evidentiary record or it does not, and commonality is not to be semantically manufactured by overgeneralizing; i.e., by framing the issue in general terms that will ultimately break down into issues to be resolved by individual inquiries for each class member. In *Rumley v. British Columbia*, Chief Justice McLachlin stated that an issue would not satisfy the common issues test if it was framed in overly broad terms; she stated:

> [...] **It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings.** That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.

The common issue criterion presents a low bar. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. Even a significant level of individuality

> does not preclude a finding of commonality. A common issue need not dispose of the litigation; **it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation**.
>
> As already noted above, **in the context of the common issues criterion, the some basis in fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.**
>
> **Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis.** [Citations omitted; ellipsis in original; emphasis added.]

[74] I now apply the above principles to each of the Core Objections.

Core Objection 1: There is no basis in fact for the commonality of PCI 1

[75] I first review the scope of my analysis of PCI 1. I then consider the applicable statutory provisions relevant to the requirement for a s. 74.3 agreement. Lastly, I apply that law to the facts of the present case.

Scope of the PCI 1 analysis

[76] TES submits that as in *Sondhi*, the class action cannot be certified because there is no basis in fact that PCI 1 can be determined in common. As I discuss below, I find that there is no basis in fact to determine in common whether all putative class members were subject to a s. 74.3 agreement. This is a core objection which on its own, defeats certification of PCI 1.

[77] TES also submits that s. 74.3 applies only to "employees" and does not apply to independent contractors. TES submits that s. 74.3 does not "convert" an independent contractor to an employee. Consequently, TES submits that individual trials would still be required to determine whether the putative class member was an employee or independent contractor.

[78] Davidson submits that s. 74.3 applies to independent contractors since s. 74.3 applies to any person subject to an agreement "that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency." Consequently, Davidson submits that no individual trials would be required to determine whether a putative class member was an employee or independent contractor.

[79] The statutory issue is complex. Prior to the initial scheduled certification motion before Justice Belobaba, he asked for additional research and submissions to address this important issue of statutory interpretation. The parties prepared lengthy new factums on the issue, conducted a review of Hansard, considered evidence from the *Employment Standards Act* Policy and Interpretation Manual (the "Manual"), delivered new affidavit evidence from both a worker

advocate and an academic (on behalf of Davidson) and from an industry representative (on behalf of TES), and engaged in extensive research on case law both from the Ontario Labour Relations Board and from all levels of court.

[80] The adjournment ordered by Justice Belobaba resulted in the parties filing three full new factums (a full supplementary factum and reply factum from the plaintiff and a supplementary responding factum from the defendant) with voluminous authorities.

[81] In effect, the interpretation of s. 74.3 was treated by the parties as a motion within a motion, to be addressed if required at the certification hearing.

[82] However, given the hearing before me, I accept the Core Objection that there is no basis in fact for the commonality of PCI 1 since the issue of whether there is a s. 74.3 agreement cannot be resolved on a common basis. Having decided this issue in TES' favour, I find that it is not appropriate to conduct an *obiter* analysis of the statutory interpretation issue.

[83] There may be other cases subsequently before the court where the Core Objection on the s. 74.3 agreement issue does not arise or may not be successful. At that point, the statutory interpretation of s. 74.3 (i.e., whether it applies to independent contractors) would become relevant.[7]

[84] Consequently, I limit my analysis of PCI 1 to the Core Objection.

The applicable law on determining what constitutes a s. 74.3 agreement

[85] Section 74.3 requires an agreement (whether or not in writing) between a person and a THA, that the THA will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the THA:

> **Where a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency**,
>
> (a) the temporary help agency is the person's employer;
>
> (b) the person is an employee of the temporary help agency. [Emphasis added.]

[7] In such a situation, other additional objections such as those set out at para. 17 above might also become relevant.

[86] Section 74.4(1) defines a work assignment as one where the THA "arranges" for the "assignment employee" to perform work for a client on a temporary basis:

> An assignment employee of a temporary help agency is assigned to perform work for a client **if the agency arranges for the employee to perform work for a client on a temporary basis** and the employee performs such work for the client. [Emphasis added.]

[87] Section 74.4(4) provides that an assignment does not occur solely based on certain activities without further evidence that the THA "arranged" for the person to work for the client of the THA. Section 74.4(4) provides:

> An assignment employee of a temporary help agency is not assigned to perform work for a client because the agency has,
>
> (a) provided the client with the employee's resume;
>
> (b) arranged for the client to interview the employee; or
>
> (c) otherwise introduced the employee to the client.

[88] Under the review of s. 74.3 in the Manual, it is a question of fact as to whether a s. 74.3 agreement exists. The Manual provides the following example of how such an agreement could be demonstrated, through an attempt by the agency to "match" the individual with a client:

> For example, **agreement would be demonstrated by an attempt by the agency to match the individual** who had submitted a resume [to the THA] with a client. [Emphasis added.]

[89] The Manual also reviews a "work assignment" under s. 74.4(1) and refers to both "arranged" and "placement" as a basis on which an assignment under s. 74.3 could occur:

(i) A work assignment arises "if the agency **arranged** for the employee to perform work for the client on a temporary basis and the employee is performing the work". [Emphasis added.]

(ii) "The work is considered to be temporary because there is no permanent **placement** with the client; the assignment employee continues to be the employee of the agency and not the client throughout the period of the assignment." [Emphasis added.]

[90] In *Sondhi*, the court considered the assignment requirement under s. 74.3. As I discuss above, the court dismissed the certification motion against the THA, Procom.

[91] Under the heading, “No claim relating to Procom”, Justice Belobaba held that there was no basis in fact for a common finding of assignment. He held, at paras. 15 and 17, that there was no evidence that Procom was involved in the “placement” of the document reviewers:

> The evidence is uncontroverted, from both the plaintiff and Procom, that even though Procom often provided services as a placement agency, in this case it was only acting as a payment processer and contract administrator and not as a placement agency. **Procom played no role** in Deloitte's acquisition of ATD or **in the placement of the document reviewers. It was Deloitte that recruited, interviewed and hired the document reviewers and assigned them to the various projects.** Procom only kept track of the hours worked and provided the payroll services.
>
> […]
>
> There is also no basis for the application of s. 74.3 of the ESA which provides that a temporary help agency will be deemed to be an employer if the agency assigns or attempts to assign temporary workers for its client. It is true that Procom has been found to be a “placement agency” by the Customs and Revenue Agency for certain CRA purposes and it has also been described as such in a backdrop umbrella agreement involving the two defendants. But **on the uncontroverted evidence herein, Procom only provided payroll services. Procom had nothing to do with the placement of document reviewers -- it did not "assign or attempt to assign [the document reviewers] to perform work on a temporary basis for [a] client." As already noted, this was Deloitte's responsibility. Section 74.3 of the ESA does not apply.** [Emphasis added.]

[92] Davidson relies on a decision of the Ontario Labour Relations Board in *Jose Evello Carranza operating as Carlos Farm Services v. Anna Woelke*, 2022 CanLII 12309 (Ont. L.R.B.) (“*Carlos Farms*”). Davidson submits that *Carlos Farms* stands for the proposition that an independent contractor who is assigned by a THA to a client is deemed to be an assignment employee under s. 74.3.

[93] TES strongly opposes the statutory interpretation relied upon by Davidson, as discussed above. In any event, TES submits that *Carlos Farms* does not support Davidson’s statutory interpretation position. TES submits that to the contrary, the process applied by the Board in *Carlos Farms* supports TES’ position on the statutory interpretation issue.

[94] However, regardless of the statutory interpretation issue, the decision in *Carlos Farms* does not assist Davidson on the Core Objection related to the definition of a s. 74.3 agreement. The Board found that all farm workers in that case had entered into a s. 74.3 agreement. The Board held, at para. 37:

> The stipulated facts confirm that CFS entered into written agreements with clients to supply workers to perform manual labour at their farms on a temporary basis. CFS' contract with at least one of its clients expressly refers to the provision of "temporary employees". CFS was paid a fixed hourly rate for each hour of work performed by the workers it assigned to the farms. **CFS in turn entered into oral agreements with workers in which it agreed to assign them to perform work on a temporary basis in exchange for an hourly rate of pay that it administered.** These facts lead to the inescapable conclusion that CFS is a THA under the Act. [Emphasis added.]

[95] Based on the above case law, the applicable statutory provisions, and the interpretation from the Manual, I find that a s. 74.3 agreement requires an agreement to (i) "place", "arrange", or "match" temporary workers with clients of the THA, or (ii) attempt to do so.

Application of the law to the present case

[96] In the present case, there is no basis in fact for the commonality of PCI 1 since there is no evidence to permit the common issues judge to determine, on a common basis, whether the putative class members were parties to a s. 74.3 agreement.

[97] The uncontroverted evidence is that (i) Davidson applied directly to TI, (ii) TI conducted several interviews with Davidson, (iii) TI decided to offer temporary work to Davidson and (iv) TI advised TES that TI wanted to hire Davidson only after TI decided to offer her a temporary contract as a UX Designer. TES did not place Davidson with TI.

[98] Sisson's uncontested evidence is that TES performed various roles for TI and other clients, including a "recruitment" or "payroll" role which could include contract administration. TES' role would depend on the client and on the particular person. In both "recruitment" and "contract administration" cases, the individuals sign contracts with TES to have them perform work for a client of TES, regardless of whether (i) there was a s. 74.3 agreement pursuant to which TES placed the person with the client or (ii) the client directly offered temporary work to the person without a s. 74.3 agreement under which TES agreed to "match", "arrange", or "place" the client (or attempt to do so so).

[99] Davidson provided no direct evidence as to the commonality of s. 74.3 agreements of putative class members. She did not lead evidence that all persons who signed an IC Agreement with TES were subject to a s. 74.3 agreement (and Davidson's own experience is to the contrary).

[100] Instead, Davidson sought to rely on the following to establish some basis in fact for the commonality that all class members were subject to a s. 74.3 agreement: (i) the IC Agreement, (ii) the MPSA, (iii) the Booklet, (iv) the Payroll Instructions, and (v) email correspondence. I address each below.

The IC Agreement

[101] There is no reference in the IC Agreement as to whether the putative class member was subject to a s. 74.3 agreement to be placed by TES with a client.

[102] In the preamble to the IC Agreement, TES describes itself as an entity that "carries on the business of providing staffing services to, among others, Texas Instruments Canada Ltd.". However, "staffing services" is a broad term that includes a spectrum of services from payroll processing to contract administration to placement services. Davidson's evidence is that she signed the IC Agreement even though TES did not place her with TI. Thus, the preamble cannot be read as evidence that all putative class members were subject to a s. 74.3 agreement.

The MPSA

[103] Davidson then seeks to rely on the MPSA as some basis in fact that TES and all putative class members were parties to a s. 74.3 agreement.

[104] For the reasons that follow, I find that the MPSA does not provide a basis in fact for the commonality of a s. 74.3 agreement with every putative class member.[8]

[105] Under the MPSA, TES provided a broad range of services to TI, which included "furnish[ing] [TES'] Personnel to perform Services for TI as requested." TES also agreed to be "responsible to recruit, train, supervise, discipline and/or discharge any of Provider's Personnel as necessary to perform satisfactorily the Services under this Agreement."

[106] However, the uncontested evidence is that while TES provided some "recruiting" services for TI and other clients, it also provided payroll and contract administration services for persons (such as Davidson) with whom it had no s. 74.3 agreement.

[107] TES was required under the MPSA to "assume full responsibility for the work of Provider's Personnel used in the performance of Services" and was required to "[guarantee] the performance of all Provider's Personnel, as if all were direct employees of Provider." However, that requirement existed regardless of whether (i) TES and the putative class member were parties to a s. 74.3 agreement or (ii) TES was contacted for contract administration by the client after a person directly obtained the temporary work from the client (such as Davidson).

---

[8] There is no evidence that the MPSA existed with any client other than TI, nor that other clients had any similar documents. Consequently, even if the MPSA was to serve as a basis of fact for a finding of commonality of a s. 74.3 agreement, the class would need to be limited to the 104 clients for which TES provided both recruiting and payroll and contract administration services to TI since 2009.

[108] TES was also to be compensated for "time-based services", which included "coordinating vacations and sick time issues for Provider's Personnel", "performing all disciplinary actions with respect to Provider's Personnel, including hiring and termination", and "[c]onducting regular evaluations of Provider's Personnel assigned to TI." These services are consistent with a contract administration role for which TES is paid a "bill rate" which provides a profit margin over the rate paid to the worker.

[109] Under the MPSA, TES was to provide day-to-day administration of the contracts of workers who entered into an agreement with TES to work at TI, regardless of whether that worker was placed by TES pursuant to a s. 74.3 agreement or independently selected by TI through a direct hiring process (as was Davidson).

[110] Consequently, under the MPSA, TES' role with respect to each class member depends on the particular worker. The MPSA covers a broad range of "certain services" TI sought to obtain from TES. None of TES' obligations under the MPSA required TES to be a party to a s. 74.3 agreement with every putative class member.

[111] For the above reasons, the MPSA does not provide a basis in fact for a common finding of a s. 74.3 agreement.

<u>The Booklet</u>

[112] Davidson relies on the reference in the template cover letter (addressed to Davidson as "Dear Valued Employee, Contractor/Consultant") enclosing the Booklet that TES described as being "designed to protect you while you are on assignment", and which was provided (as stated in the cover letter) pursuant to TES being "committed to the safety of its employees, contractors/consultants" while "on assignment."

[113] Davidson submits that on that basis, and on the policies set out in the Booklet, a court could make a common finding that all putative class members were parties to a s. 74.3 agreement.

[114] I do not agree. Neither the letter nor the Booklet assist in determining whether every class member was a party to a s. 74.3 agreement with TES.

[115] Davidson relies on the references in the Booklet to "assignment". TES states in the cover letter that the Booklet "is designed to protect you while you are on assignment" and that the recipient of the letter was required to (i) comply with the policies in the Booklet and (ii) sign the letter acknowledging that she "read and understood what is expected of [her], while on assignment."

[116] However, the use of the term "assignment" in the context of the Booklet cannot be considered a basis in fact that every putative class member was subject to a s. 74.3 agreement.

[117] The letter was addressed to any "Employee, Contractor/Consultant" who was working "on assignment" with a client. The health and safety policy applied regardless of whether TES had a s. 74.3 agreement with the recipient of the letter or whether TES conducted contract administration for those who directly dealt with the client when obtaining temporary work (such as Davidson).

The Payroll Instructions

[118] Davidson submits that the Payroll Instructions provided by TES support that all class members were subject to a s. 74.3 agreement. I do not agree.

[119] The Payroll Instructions set out the payment process. In that regard, it is akin to the payment processor role of Procom in *Sondhi* and does not assist in establishing that Davidson or any other class member was subject to a s. 74.3 agreement. Providing a sample invoice (as did TES) has no bearing on whether the worker directly obtained work with the client (like Davidson) or was placed by TES with a client subject to a s. 74.3 agreement.

[120] Davidson also relies on (i) the references in the Payroll Instructions to frequently asked questions relating to "Placement and employment agency workers" setting out guidelines that "apply to workers engaged by placement or employment agencies" and (ii) the comment in the Payroll Instructions that "[a]n agency that places workers in an employment under the direction and control of a client of the agency and where the agency pays the worker … is required to deduct CPP contributions and EI premiums, but not income tax."

[121] However, the evidence is that TES provides a spectrum of services which depend on the client, including (i) placement services for some temporary workers (as shown by the fact that TES applied for a licence to operate as a THA in Ontario) and (ii) payroll processing and/or contract administration without any s. 74.3 agreement.

[122] In each case, the evidence is that TES' role depends on the facts of each individual client and each individual worker.

[123] Consequently, the existence of a "frequently asked question" about workers in a set of Payroll Instructions which would be relevant to some workers who were placed by TES pursuant to a s. 74.3 agreement does not serve as a basis in fact that every putative class member was assigned pursuant to such an agreement. The s. 74.3 agreement issue cannot be determined in common based on the Payroll Instructions.

Email correspondence

[124] Davidson also relies on a series of emails from Hoddinott to Davidson as set out at paras. 34 to 41 above.

[125] I first note that the emails cannot be used as evidence of a source of commonality. They relate only to Davidson's work with TI and there is no evidence that the same emails (or types of emails) were common to every putative class member.

[126] In any event, the emails do not support the commonality of a s. 74.3 agreement.

[127] The emails (i) advise Davidson that TI had selected her "for hire" based on its "offer to employ you as their newest contractor for UX Designer" and requested documents so that Hoddinott could "complete some paperwork," (ii) respond to Davidson's questions as to why TI could not hire her as an employee, (iii) set out the work arrangements TI would make available to Davidson, and (iv) advise Davidson that her temporary work was terminated and that TES offered to attempt to place her with another client if available.

[128] The above emails do not establish whether TES was a party to a s. 74.3 agreement with every putative class member. The same emails could have been sent regardless of whether Davidson was placed by TES pursuant to a s. 74.3 agreement, or as in the present case, Davidson obtained her contract directly with TI without any involvement by TES.

[129] Similarly, an offer to assist a temporary worker after termination does not establish whether the initial temporary work was obtained through a s. 74.3 agreement or by direct contact between the worker and the client.

[130] Consequently, even if the emails could be considered as a "common" factor applicable to all putative class members (which I do not find), they provide no basis in fact for a common finding of a s. 74.3 agreement for every putative class member.

Conclusion

[131] For the above reasons, I find that Davidson has not established a basis in fact that the issue of whether a putative class member was subject to a s. 74.3 agreement can be determined in common.

[132] Consequently, I conclude that this Core Objection is well-founded. I do not certify PCI 1.

Core Objections 2 and 3: There is no basis in fact for the commonality of PCI 2 or PCI 3

[133] I address the two commonality issues under PCIs 2 and 3 collectively. Davidson relies on the same evidence to support her submission that even if the s. 74.3 agreement issue cannot be determined in common, there is some basis in fact that the issue of whether each putative class member is an employee of TES under either s. 1(1) (PCI 2), or at common law (PCI 3) can be determined on a common basis.

[134] For the reasons that follow, I find no basis in fact that the issues of whether the putative class members are employees of TES under s. 1(1) or at common law can be determined in common.

[135] I first review the applicable law on the establishment of an employment relationship at common law and under s. 1(1). I then consider the law as to the requirements to establish a common issue in employment status misclassification cases. Finally, I apply the law to the evidence before the court.

The applicable law on the establishment of an employment relationship under s. 1(1) or at common law

[136] The parties did not provide any authority to submit that the test of "control or direction" under the definition of "employer" in s. 1(1) is in any way broader than the common law definition such that the commonality approach would be any different under s. 1(1) than under the common law test.

[137] To the contrary, both parties agreed that the courts have moved from a strict analysis of control or direction and taken a more holistic approach under the common law. Such an approach is consistent with the comments of the court in *Sagaz* that "the level of control the employer has over the worker's activities will always be a factor", but that 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": at para. 47.

[138] Consequently, I review the applicable law on the establishment of an employment relationship at common law.

[139] There is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor: *Sagaz*, at para. 47.

[140] In *Sagaz*, the court held that the central question to be considered is whether a person is engaged in business on his or her own account. The court set out a non-exhaustive list of factors to be considered on a case-by-case basis, at para. 47:

> 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. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[141] In effect, the court in *Sagaz* applied a "whose business is it?" test to determine whether an employment or contractor relationship exists. The importance of that test was set out by the court in *Braiden*, at para. 34:

> In many ways, the question posed at the end of the fifth principle — whose business is it? — lies at the heart of the matter. Was the individual carrying on

> business for him or herself or was the individual carrying on the business of the organization from which he or she was receiving compensation?"

[142] The above test was affirmed by the Court of Appeal in *McKee v. Reid's Heritage Homes Ltd.*, 2009 ONCA 916, 315 D.L.R. (4th) 129, at para. 45.

[143] Consequently, in proposed misclassification class actions, the key issue before the court on a certification motion is often whether the alleged misclassification of workers as independent contractors (when the workers allegedly should have been classified as employees and entitled to certain benefits under the *ESA* and other applicable legislation) can be determined as a common issue. I now address those cases below.

The applicable law as to the requirements to establish a common issue in employment status misclassification cases

[144] Both parties relied on cases in which the courts considered a proposed class action for alleged misclassification based on employment status. Those cases establish the requirement that there be some basis in fact to support the commonality of the issue being capable of resolution for the class, rather than individual trials being necessary to determine the issue.

[145] The plaintiffs rely primarily on the decisions in *Omarali v. Just Energy*, 2016 ONSC 4094, leave to appeal refused, 2016 ONSC 7096 (Div. Ct.) and *Navartnarajah v. FSB Group Ltd.*, 2021 ONSC 5418, leave to appeal refused, 2021 ONSC 7414 (Div. Ct.), both of which certified proposed misclassification class actions.

[146] In *Omarali*, Justice Belobaba certified a proposed class action for sales agents hired by the defendants as independent contractors. The plaintiff submitted that the sales agents ought to have been classified as employees.

[147] Justice Belobaba summarized the law on certification of proposed misclassification class actions at para. 3 (references omitted):

> Misclassification cases have been certified in two situations: one, where the issue was job function but the class was carefully defined to ensure class-wide job function similarity; and two, where the common issues were focused on the systemic nature of the defendant company's policies and practices rather than on class member entitlements. Otherwise, **most misclassification cases that ask whether the class member is an employee (rather than say a manager) collapse under the weight of an "it depends" reality. I am not saying that an "archetypal**

> **misclassification case" can never be certified, only that the challenge in doing so should not be underestimated.** [Emphasis added.]

[148] Justice Belobaba relied on the following evidence to find "systemic commonality"[9] of the misclassification issue:

(i) The "IC agreement" signed by each of the sales agents required them to "follow all instructions or directions" provided by Just Energy: at para. 16.

(ii) The plaintiff provided evidence as to how Just Energy controlled, for all sales agents, "the how, where and when of the door-to-door sales": at para. 37, including, at para. 38:

> I refer specifically to the evidence presented by sales agents Omarali, Awal, Nazerally and Filipovic. They make the following points. They work twelve-hour days, the morning portion dedicated to meetings and role-playing, and the balance of the day, 12 noon to 9 p.m., to door-to-door selling. They are required to wear Just Energy clothing. They are given sales scripts. They are driven in vans to pre-assigned locations, picked up at day's end and returned to the regional sales office. They cannot change their pre-assigned work areas without explicit permission. They are reprimanded if they take time off work and sanctioned if they breach internal or external codes of concduct [sic]. In short, say the affiants, they are told how, when and where to sell the defendants' products.

(iii) There was evidence of systemic commonality arising from (a) training manuals and references in the company's documentation to the mandatory completion of training, (b) detailed sales scripts, (c) morning meetings, (d) physical dropping off of sales agents by the company to designated locations, (e) compliance with the company's Code of Business Conduct, and (f) the requirement in the IC agreement to "follow all instructions or directions provided by JEC from time to time": at paras. 40-46.

[149] It was on the above factual evidence of systemic commonality that Justice Belobaba held, at para. 47:

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[9] Justice Belobaba discussed this term at paras. 3 and 5 of his reasons.

> In sum, I have no difficulty concluding that the plaintiff has presented some evidence that the defendants control (that is, influence or direct) the "how, when and where" behavior of the sales agents and do so on a class-wide basis.

[150] In *Navartnarajah*, Justice Morgan certified a misclassification class action brought on behalf of sales agents. The court found that "the essence of their job is similar enough that the classification question can be addressed in common", even if some minor differences "generally exist at the margins": at para. 18.

[151] Justice Morgan relied, at paras. 4 and 5, on evidence of systemic commonality including that:

(i) "Each producer's license must be registered under, or 'sponsored' by, one brokerage."

(ii) "[N]o producer can be sponsored by multiple brokerages at the same time."

(iii) "A producer who is unregistered with a brokerage is prohibited from selling insurance products or services."

(iv) "The Defendants provide administrative support to producers in the form of underwriting and quoting support."

(v) "[The defendants] also provide personnel called Customer Service Representatives to assist in servicing producers' books of business."

[152] Similarly, in *Sondhi*, while the court did not certify the class action against Procom as a payroll processor, the court certified the misclassification claim against Deloitte for the document reviewers. Justice Belobaba stated, at para. 28:

> Focusing then on the central question as just stated, has the plaintiff provided some evidence (some basis in fact) for PCI No. 1 - that Deloitte document reviewers are not carrying on a document review business for themselves but are being compensated to carry on Deloitte's document review business? The answer, in my view, is yes. By adducing some evidence about each of the following, the plaintiff has provided in combination some basis in fact for the central question, "Whose business is it?"
>
> ➢ There is at least some level of control over the worker's activity – the document reviewers must do their work at a designated Deloitte work site that is open for use at designated hours; they are briefed on the project and must use Deloitte's technology; training is provided if needed; there is always some level of supervision; and they must comply with all applicable codes and policies while working on a project.

> - The document reviewers are required to use Deloitte's tools and equipment;
>
> - They must do their own work and cannot outsource their work or hire helpers;
>
> - There is no evidence that any financial risk is assumed by the document reviewers – they are simply paid an hourly rate for time worked;
>
> - There is no evidence of any degree of responsibility for investment and management; and
>
> - There is no evidence of any opportunity for profit in the performance of the tasks in question.

[153] TES relies on cases where the proposed misclassification class actions were not certified because of the failure of the plaintiff to establish some basis in fact for commonality of employment status.

[154] In *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, 24 C.P.C. (7th) 251, aff'd 2014 ONCA 677, 326 O.A.C. 159, Justice Strathy refused to certify a proposed class action which alleged that the defendant bank had misclassified proposed class members as managerial employees, resulting in unpaid overtime. Justice Strathy found that the job duties performed by class members differed significantly, making it impossible to assess on a common basis whether the defendant bank had properly classified them: at para. 6, 55, and 164.

[155] Similarly, in *McCracken v. CNR*, 2012 ONCA 445, 111 O.R. (3d) 745, the court considered whether first line supervisors ("FLS") working for CN Railway were improperly classified as managers, resulting in unpaid overtime. The court noted that the plaintiff's litigation strategy seized upon "the superficial commonality that all class members work for CN and share the common label of being a FLS," but that this common label "conveys a false impression of commonality given the evidence on the motion of different job responsibilities and functions of class members, who hold many different job titles and work in a variety of different workplaces with different reporting structures and different sizes of workplaces": at paras. 2 and 128.

[156] The court in *McCracken* found that the absence of commonality among class members was fatal to the certification of the action: at para. 147. There was no basis in fact to support a finding that misclassification could be determined without resorting to individual inquiries: at para. 128.

[157] Consequently, the core of the above case law is that a proposed representative plaintiff must lead evidence to provide a basis in fact to establish "systemic commonality", in order to avoid the concerns of "it depends" as set out by the court in *Omarali*.

[158] As the court held in *McCracken*, at para. 104, in the absence of evidence establishing commonality on a class-wide basis, there is no basis in fact to find that resolving the proposed common issue would avoid duplication of fact finding or legal analysis. Further, there is no basis in fact to find that success for one class member would mean success for all, nor that individual findings of fact would not be required with respect to each individual claimant.

[159] I now apply the above law to the facts of the present case.

Application of the law to the present case

[160] In the present case, Davidson led no evidence that the putative class members hired for temporary work on IC Agreements held the same job title or had the same responsibilities. Davidson only led evidence as to her experience working at TI, when TI (i) was only one of TES' clients and (ii) had 104 recruitment and payroll workers who TES either assigned or only conducted payroll services and contract administration over the class period.

[161] On a "job function" basis, the scope of variability in the present case is more pronounced than in either *McCracken* or *Brown*. In *McCracken*, though proposed class members all held the same job title and worked for the same entity, certification was denied because their job responsibilities varied. In *Brown*, the proposed class members also worked for the same employer.

[162] In the present case, proposed class members do not work for the same entity, and the proposed class action is not based on a similar job function.

[163] Instead, Davidson submits that there is some basis in fact of systemic commonality, through the same evidence relied upon to establish some basis in fact for the commonality of PCI 1, i.e. (i) the IC Agreement, (ii) the MPSA, (iii) the Booklet, (iv) the Payroll Instructions, and (v) email correspondence. I address this evidence below.

<u>The IC Agreement</u>

[164] As I discuss at para. 42 above, the IC Agreement sets out several provisions applicable to the temporary work. Davidson submits that the provisions are some basis in fact for systemic commonality of employee status for putative class members. I do not agree.

[165] All of the provisions can apply equally (or only) to an independent contractor. They do not establish the systemic commonality of an employment relationship, unlike that which existed under the *Omarali* contract. In brief:

(i) The "Statement of Work" sets out the terms of the temporary work regardless of whether the person is an independent contractor or employee.

(ii) The "compensation", "invoicing", and "payment of invoicing" structure applies more to an independent contractor and not an employee who would be paid without such requirements.

(iii) A criminal background investigation is equally necessary for an independent contractor or employee offered a position for temporary IT work at an IT company.

(iv) The "intellectual property" provision applies more to an independent contractor as an employee would have no claim to intellectual property generated as an employee.

(v) Given the confidential IT information that would be obtained on temporary work at a client such as TI, a "non-solicitation and non-competition" provision could apply equally to both independent contractors and employees.

(vi) The "termination" provision would allow TES to terminate either an employee or an independent contractor.

(vii) The "indemnification" provision is more consistent with an independent contractor who could be required to indemnify for any loss suffered as a result of a breach of an independent contractor agreement. An employee would not be expected to provide such an indemnification.

(viii) The "guarantee of principal" provision is consistent with an independent contractor. An employee would not have to "guarantee" their own performance.

(ix) The "assignment" provision that prohibits assignment by the independent contractor would not apply to an employee. It can only apply to an independent contractor.

[166] The description of TES in the IC Agreement as an entity that "carries on the business of providing staffing services to, among others, Texas Instruments Canada Ltd.", does not assist in determining the status of any particular temporary worker. "Staffing services" is a broad term that would apply equally to independent contractors and employees.

[167] For the above reasons, I do not find that the IC Agreement assists Davidson in establishing systemic commonality of employment status under PCIs 2 or 3.

<u>The MPSA</u>

[168] Davidson seeks to rely on the MPSA as evidence of some basis in fact that TES assigned putative class members to clients.

[169] TES' obligation to provide a broad range of "certain services", including "furnish[ing] [TES'] Personnel to perform Services for TI as requested" applies equally to both independent contractors and employees. There is no prohibition against TI working with independent contractors who seek temporary contracts in the IT sector.

[170] Further, TES' role of being "responsible to recruit, train, supervise, discipline and/or discharge any of Provider's Personnel as necessary to perform satisfactorily the Services under this Agreement" again refers to a contract management responsibility which could apply equally to an employee or an independent contractor. If TI or other IT clients of TES choose to have TES conduct contract administration of the client's temporary workers, then TES would conduct such work for a fee, regardless of the employment status of the temporary workers.

[171] Similarly, when TES was to be compensated for "time-based services", which included "coordinating vacations and sick time issues for Provider's Personnel", "performing all disciplinary actions with respect to Provider's Personnel, including hiring and termination", and "[c]onducting regular evaluations of Provider's Personnel assigned to TI," it was part of its contract administration role that applies equally to employees and independent contractors.

[172] Finally, the requirement under the MPSA that TES would "assume full responsibility for the work of Provider's Personnel used in the performance of Services" and "guarantees the performance of all Provider's Personnel, as if all were direct employees of Provider" applies equally to employees and independent contractors under TES' contract administration functions. Regardless of whether the worker was an employee or independent contractor, it was TES who assumed responsibility for the work of the personnel used in the performance of its services.

[173] In brief, under the MPSA, TES was to provide day-to-day administration of the contracts of temporary workers regardless of whether that worker was an employee or independent contractor.

[174] For the above reasons, I do not find that the MPSA assists Davidson in establishing systemic commonality of employment status under PCIs 2 or 3.

<u>The Booklet</u>

[175] Davidson relies on the form letter and the Booklet to submit that there is evidence of systemic commonality of employment status at common law or under s. 1(1). I do not agree.

[176] Under s. 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("*OHSA*"), the duty to take reasonable precautions in the workplace arises for an "employer", who is defined under s. 1(1) of the *OHSA* as "a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services."

[177] Consequently, the role of TES in providing a health and safety policy for workers "on assignment" applies to any employee or independent contractor. The letter and Booklet do not establish whether any particular person is an employee or independent contractor.

[178] Further, the letter was addressed to any "Employee, Contractor/Consultant" who was working "on assignment" with a client, confirming that the requirement that a temporary worker complies with the policies in the Booklet is unrelated to whether the person is an employee, contractor, or consultant.

[179] For the above reasons, I do not find that the letter or Booklet assists Davidson in establishing systemic commonality of employment status under PCIs 2 or 3.

The Payroll Instructions

[180] Davidson submits that the Payroll Instructions provided by TES support that the class members were employees at common law or under s. 1(1). I do not agree.

[181] The Payroll Instructions set out the payment process. In that regard, it is akin to the payment processor role of Procom in *Sondhi* and does not assist in establishing that Davidson or any other class member was an employee.

[182] To the contrary, an invoice payment process is more consistent with an independent contractor relationship. Employees would not be asked to submit invoices for the hours they worked and send them for payment.

[183] Further, the references to a sample invoice are also more consistent with an independent contractor relationship as employees would not be asked to deliver an invoice for payment.

[184] Finally, the existence of a "frequently asked question" about workers in a set of Payroll Instructions which would be relevant to some workers who were assigned by TES does not serve as a basis to determine whether all putative class members were employees.

[185] For the above reasons, I do not find that the Payroll Instructions assist Davidson in establishing systemic commonality of employment status under PCIs 2 or 3.

Email correspondence

[186] Davidson also relies on a series of emails from Hoddinott to Davidson as set out at paras. 34 to 41 above.

[187] I again note that the emails cannot be used as evidence of a source of commonality. They relate only to Davidson's work with TI and there is no evidence that the same emails (or types of emails) were common to every putative class member.

[188] In any event, however, the emails do not support a common determination of employment status.

[189] In those emails, TES (i) advises Davidson that TI had selected her "for hire" based on its "offer to employ you as their newest contractor for UX Designer", (ii) requests documents so that Hoddinott could "complete some paperwork," (iii) responds to Davidson's questions as to why TI could not hire her as an employee, (iv) sets out the work arrangements TI would make available to Davidson, and (v) advises Davidson that the temporary work contract was terminated.

[190] The emails refer to a contractor relationship. Hoddinott confirmed that TI was not able to hire new permanent employees.

[191] The courts do not consider the description of an arrangement as a basis to determine employment status: *Sagaz,* at para. 49. However, the emails do not assist in establishing status as an employee.

[192] Hoddinott was engaged in her role as a contract administrator and would have had the same discussions with Davidson regardless of whether Davidson was an employee or independent contractor, including the offer to assist Davidson in finding work after termination.

[193] Finally, under the IC Agreement, TES had the right to terminate the contract with 10 days' notice, a right which could arise regardless of Davidson's employment status.

[194] For the above reasons, I do not find that the email correspondence assists Davidson in establishing systemic commonality of employment status under PCIs 2 or 3 (even if the emails could be considered part of the systemic commonality analysis, which I do not find).

Conclusion on commonality of PCIs 2 and 3

[195] For the above reasons, I find that there is no evidence of systemic commonality to provide a basis in fact for a common determination of whether every putative class member was an employee. Individual trials would be required for such a determination.

[196] Further, even if any one of the above pieces of evidence (or parts thereof) could be found to support a claim for employment status (which I do not find), the determination of the commonality of employment status would not be significantly advanced by such a finding. Unlike the "follow all instructions or directions" requirement in the IC agreement in *Sondhi* (and the additional evidence in that case), none of the documents in the present case advance the common determination of employment status in a material way. Individual trials would still be required to make the determination.

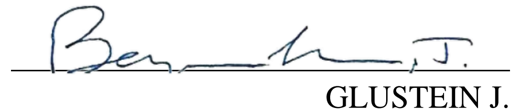
[197] Consequently, I conclude that these Core Objections are well-founded. I do not certify PCIs 2 and 3.

[198] Because PCI 4 requires a common finding of an employment relationship in order to establish a fiduciary duty, I do not certify PCI 4.

ORDER AND COSTS

[199] For the reasons discussed above, I dismiss the certification motion.

[200] If the parties cannot agree on costs, TES shall deliver written costs submissions of no more than five pages (not including a costs outline) by June 24, 2024. Davidson shall deliver responding costs submissions of no more than five pages (not including a costs outline) by July 8, 2024. TES may deliver reply costs submissions of no more than three pages by July 15, 2024.



GLUSTEIN J.

Date: 20240603

CITATION: Davidson v. T.E.S. Contract Services Inc., 2024 ONSC 3066
COURT FILE NO.: CV-20-00645736-00CP
DATE: 20240603

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANN DAVIDSON

Plaintiff

AND:

T.E.S. CONTRACT SERVICES INC.

Defendant

REASONS FOR DECISION

Glustein J.

Released: June 3, 2024