Cassels

Class Action for Unpaid Vacation Pay Beyond Two-Year Limitation Period May Proceed

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During the past decade, there has been a steady rise in class actions against employers for failing to provide vacation pay on top of bonuses and commissions. Vacation pay class actions can be very costly to employers, with five of the most recent class actions resulting in a combined $1.2 billion in damages.

Class actions can be appealing to potential plaintiffs because they allow for a pooling of resources. However, not every claim by a group of plaintiffs is suitable for a class proceeding. The *Curtis* v. *Medcan Health Management Inc*, litigation is an excellent example of the process that may be followed when a group of employees attempts to initiate a class action against their employer.

Medcan Health Management Inc. (Medcan) is a company that provides medical, therapeutic, and personal health services to consumers. The majority of Medcan's employees earned variable compensation consisting of a base salary plus commissions and bonuses. In 2019, a Medcan employee who received a base salary plus commissions and bonuses complained that Medcan had failed to pay him the vacation and public holiday pay required under the *Employment Standards Act*, *2000* (ESA). Medcan investigated and found that, for over 15 years, it had been calculating vacation and public holiday pay on base salary only, and not on employees' variable compensation.

Medcan sought to remedy the situation and paid its current and former employees the unpaid vacation and public holiday pay for the period of December 25, 2017, to December 25, 2019. Medcan did not make any payments for the period before December 25, 2017, relying on the two-year limitation period set out in the *Limitations Act*. Certain Medcan employees then initiated a class proceeding against Medcan for failure to pay vacation pay and public holiday that would have been payable prior to December 25, 2017.

Class actions are different than most litigation in Ontario as there is no inherent right to proceed with a class action. The person or persons seeking to initiate a class action must first satisfy the court that a class action is appropriate. This process is known as "certification" and, in Ontario, takes place in accordance with the provisions of the *Class Proceedings Act, 1992* (the CPA).

For a proposed class action to be certified, the representative plaintiff must show that all five criteria in the CPA are satisfied. In this case, the certification motion was argued in May of 2021 in front of Justice Perell of the Superior Court of Ontario and his decision was rendered later that year (*Curtis* v. *Medcan Health Management Inc*. 2021 ONSC 4584 (CanLii)). In his decision, Justice Perell held that four of the five criteria

in the CPA had been satisfied by the former Medcan employees. However, he determined that they had failed to show that a class proceeding was the preferred way for the dispute in question to be resolved and, as a result, he declined to certify the proposed class action.

The employees and former employees of Medcan appealed the decision and the matter proceeded to the Divisional Court.

The Divisional Court found in favour of the appellants and that Justice Perell had failed to properly apply the criteria for certification under the CPA. In particular, he had failed to consider the psychological and economic barriers to access to justice for the individuals in the proposed class and, further, had not recognized that a class action would be preferable over individual civil actions given that current employees were unlikely to sue their employer directly due to the low value of the individual claims and/or fear of reprisal from their employer.

In addition, the Divisional Court found that Justice Perell had failed to consider the behaviour modification aspects of the application. Without the possibility of a class action, there would be little incentive for employers to comply with the ESA, especially where the non-compliance could continue for years, and their liability could be curbed by a statutory limitation period. By holding employers responsible for actual damages incurred by the class, such a proceeding had the potential to serve as a warning to other non-compliant employers that they cannot just ignore the ESA and rely on the limitation period.

Based on the above reasoning, the action of the employees and former employees of Medcan was certified as a class proceeding.

Takeaway

It is important to remember that the certification decision discussed here was a procedural one; nothing was actually decided in terms of the potential entitlements of any of the proposed class members. However, these two decisions provide an excellent example of the potentially expensive and protracted litigation that can result from a failure to comply with employment standards legislation, especially when that non-compliance extends over a number of years and impacts both current and former employees.

Moreover, this decision is a useful reminder for employers to review their holiday and vacation pay compliance. Issues with compliance frequently arise due to the irregular payment of bonuses and commissions and the administrative burden in keeping track of vacation pay on these amounts.
