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Class Action Litigation – A New Tool for Union Organizing?

On March 5, 2012, the BC Supreme Court certified a class action, brought on behalf of temporary foreign workers recruited to work in a Denny's Restaurant franchise in Vancouver: *Dominguez v. Northland Properties Corp (COB Denny's Restaurants)*[1]. The lawsuit alleged that recruiting companies engaged by the Denny's franchisee charged agency fees contrary to the *Employment Standards Act,* and claimed damages, aggravated damages and punitive damages against the franchisee for breach of contract in failing to pay overtime and provide 40 hours of work per week as promised, as well as breach of fiduciary duty, a duty of good faith and fair dealing, and unjust enrichment.

The decision is significant, in that it is one of very few class actions certified in British Columbia arising in an employment context. Moreover, it may signal the beginning of a new organizing strategy by unions in difficult-to-organize sectors.

This case involved approximately 75 temporary foreign workers who were recruited from the Philippines to work at the franchisee's restaurant. A Labour Market Opinion had been obtained from Human Resources and Skills Development Canada (HRSDC) for each of the workers, in essentially the same terms. Although the employment contracts differed somewhat, they were in a form similar to the HRSDC sample contract that provided for 40 hours of work per week, with overtime at time and one-half. Prior to the litigation being commenced, complaints had been made to the Director of Employment Standards who had determined an overtime violation in the case of one of the workers, and also a violation of Section 10 of the *Employment Standards Act*, when the recruiting firms utilized by the franchisee charged a recruitment fee.

The Court certified the action as a class action, under the *Class Proceedings Act,* because the causes of action alleged in the claim were common to the group. The Court reaffirmed that the *Class Proceedings Act* is to be given broad interpretation and application to fulfill the benefits intended by the legislation.

Even though there were some differences in the employment contracts, the Court found there was sufficient commonality, in both the facts and the causes of action, to make certification as a class action appropriate. The Court further held that common issues of alleged systemic effects (failure to record hours worked), and a claim for an aggregate assessment of damages and punitive damages, were appropriate for certification.

The UFCW and National Union of Public and General Employees have thrown their support behind this action. That support is described on the website of the National Union of Public and General Employees as follows:

[1] 2012 BCSC 328

> The National Union of Public and General Employees (NUPGE) has signed a protocol with UFCW Canada to assist in organizing exploited groups of workers, such as migrates and employees of Walmart.

The *Denny`s* case may be the first instance of unions utilizing class action litigation as an organising strategy. In doing so, they have taken a page out of the play book of US unions which have, for years, used wage and hour claims, both in collective actions and class actions, to gain the support of non-union workers.

In the US, unions in the service industry, building maintenance, and more recently the private healthcare sector have brought collective actions under the *Fair Labour Standards Act*, or class actions under Rule 23 of the Federal Rules of Civil Procedure, for "off the clock" claims (overtime), employee misclassification (challenging managerial exclusion or independent contractor status), or overtime calculation claims (to determine "regular rate of pay"). Working with class action plaintiffs' attorneys, unions in the US have obtained multi-million dollar settlements from employers anxious to avoid the significant cost of litigation and adverse publicity. By supporting the class action suit, unions are able to generate support within groups of employees who would have difficulty advancing their claims individually.

Ironically, while class action employment litigation has been more prevalent in the US, the test for class action certification is in fact broader in British Columbia. In the US, questions of law or fact common to class members must predominate over any questions affecting only individual members. In British Columbia common issues of fact or law may not necessarily be identical, and need not predominate over issues affecting only individual members.

While the *Denny's* case may mark the beginning of class action employment litigation in British Columbia, the US Supreme Court has recently pulled the reins in somewhat on employment class action litigation. In *Walmart v. Dukes*, a June 20, 2011 US Supreme Court decision, the Court set aside a certification of a class action alleging gender discrimination against current and former female Walmart employees, who were denied promotion opportunities. In a split 5-4 decision, the US Supreme Court reversed a lower Court certification of the class consisting of approximately 1.6 million employees working in 3,400 stores across the US, on the basis that the claim did not show sufficient "commonality". The most significant aspect of this ruling was the importance it placed on the Rule 23 requirement that all of those in the class must have a common legal claim such that, in a workplace bias case, claimants must show that the alleged bias was targeted at each of them. Mr. Justice Scalia, writing for the majority, held that the plaintiffs were suing "about literally millions of employment decisions at once." The Court held that plaintiffs were obliged to offer "significant proof that Walmart operated under a general policy of discrimination," and that the exercise of discretion by store management was influenced by a general discriminatory policy that pervaded the

entire company. The majority held that statistical evidence put forward by the plaintiffs to demonstrate that gender played a role in promotion decisions was not enough to show a common reason for adverse treatment. The evidence fell well short of demonstrating that all managers exercised their discretion in a common way, under common direction from the company:

> In a company of Walmart's size, and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way, without some common direction. Respondents attempt to make that showing by means of statistical and anecdotic evidence, but their evidence falls well short.

This decision has been seen as an attempt to constrain class action employment litigation targeting large companies based largely on statistical analysis. The Court has indicated that in future, it will be much more stringent in requiring plaintiffs to prove commonality.

> Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavoured?*

The US has had a long history with class action employment litigation, with the Courts now taking steps to tighten the requirements for certification. By contrast, the phenomenon of class action employment litigation is relatively new in Canada, and the *Denny's* demonstrates that our Courts will take a liberal approach to certification.

Plaintiffs' class action attorneys in the US stepped into the void left by unions unable to organize in the retail and service industries. Unions then saw the opportunity to utilize class action litigation to garner worker support from those who would benefit by being a member of the class. The *Denny's* case indicates that this strategy may be just beginning in British Columbia.

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