CITATION: Davidson v. T.E.S. Contract Services Inc., 2024 ONSC 1044
COURT FILE NO.: CV-20-00645736-00CP
DATE: 20240220

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN: ANN DAVIDSON, Plaintiff

AND:

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

BEFORE: Justice Glustein

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

Stephanie M. Ramsay, for the defendant

HEARD: February 15, 2024

REASONS FOR DECISION

Nature of motion and overview

[1] The proposed representative plaintiff, Ann Davidson ("Davidson") brings this motion under s. 12 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 for production of an application submitted by the defendant, T.E.S. Contract Services Inc. ("TES") to the Ontario government for a licence to operate as a temporary help agency ("THA"), as well as the accompanying documents and representations (the "Application").

[2] For the reasons that follow, I order that the Application be produced, subject to redactions by TES for any parts not related to (i) whether TES operated or seeks to operate as a THA or (ii) the nature, characterization, and other statements about TES' relationship with its workers.

Positions of the parties on the certification motion

[3] Davidson is bringing a certification motion to certify a class action on behalf of "all persons working on contracts with [TES] since November 6, 2009, who were classified as independent contractors, until the date when the notice of class action is sent out to class members with the opt-out forms".

[4] Davidson submits that the class members were misclassified as independent contractors rather than employees and as such are entitled to minimum standards under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*") such as overtime pay, vacation pay and public holiday pay, and for the reimbursement of any CPP or EI contributions which are owed.

[5] On the certification motion, proposed common issue ("PCI") 1 is whether the class members are in an employment relationship with TES despite being classified by TES as independent contractors.

[6] To establish such a common employment relationship for all class members, under PCI 1(a), Davidson relies on s. 74.3 of the *ESA*, which provides, under the heading "employment relationship", that "[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", (i) "the temporary help agency is that person's employer" and (ii) "the person is an employee of the temporary help agency".

[7] Davidson submits that under that definition, all workers that TES assigns or attempts to assign to its clients or potential clients are deemed to be employees, regardless of how they are classified by TES.

[8] Davidson further submits in the alternative that a common employment relationship for all class members with TES can also be established under s. 1(1) of the *ESA* (PCI 1(b)) and in the further alternative, under common law (PCI 1(c)).

[9] TES submits that s. 74.3 applies only to class members who are employees under the *ESA* or at common law, and, as such, each class member is required to establish an employment relationship before s. 74.3 operates. TES submits that Davidson's position that s. 74.3 deems any "worker" assigned by TES to its clients as an "employee" is contrary to principles of statutory interpretation and the legislative history of s. 74.3. TES submits that the role of s. 74.3 is to clarify the employer in a tripartite employment relationship, but not to create a deemed employment relationship when a worker is not an employee under the *ESA*.

[10] Consequently, TES submits that PCI 1(a) discloses no cause of action and that as such there is no basis in fact to decide that issue in common.

[11] TES further submits that even if it is found to be a THA for some of the proposed class members, there is no basis in fact to certify PCI (1)(a) as a common issue since TES' role with respect to each class member depends on the particular worker. TES relies on evidence that in many cases it acts only as a "contract administrator" or "payroll processor". Consequently, TES submits that individualized inquiries are necessary for each proposed class member to determine TES' role.

[12] TES further submits that there is no basis in fact that it is a THA. TES relies on the evidence of Davidson and the evidence of TES' affiant on the certification motion. TES submits that the only evidence before the court is consistent with its alleged limited role as contract administrator and payroll processor.

Positions of TES in its factums

[13] Throughout its three factums filed in respect of the certification motion (Davidson has filed four factums), TES submits that there is no basis in fact that it is a THA. I set out some of these submissions below:

(i) In its Responding Party Factum dated October 1, 2021, under the heading "TES Was a Payment Processor or Contract Administrator", TES submits that while Davidson "baldly asserts that TES is a 'temporary help services firm' that 'assigned' class members pursuant to section 74.3 of the ESA", "the pleadings do not disclose any facts that indicate TES' relationship to any potential class members was anything other than a pure payrolling situation, which does not constitute 'assignment' and thus does not give rise to an employment relationship under s. 74.3".

(ii) At para. 127 of its Responding Party Factum dated October 1, 2021, TES submits in a heading that the is "No Basis in Fact for Ms. Davidson's Claim that TES was the Employer of Putative Class Members or that their Employment Status Could be Determined in Common".

(iii) At para. 9 of its sur-reply factum dated November 1, 2021, TES submits that there is an "absence of any actual evidence on the point" of whether "TES is a temporary placement agency within the meaning of s. 74.3 of the ESA".

(iv) At para. 26 of its Supplementary Factum dated February 27, 2023, TES submits that the "only evidence about the relationship between TES and the putative class members comes from Davidson's own experience".

[14] TES further submits that even if it is found to be a THA, it "is not sufficient to establish employment under s. 74.3" (see para. 10 of its sur-reply factum dated November 1, 2021), since there is no basis in fact to establish that (i) "putative class members had an agreement to be assigned on a temporary basis by TES to clients or potential clients" or (ii) "putative class members were employees of TES".

The Application

[15] The Application was filed in response to the licensing requirements under O. Reg. 99/23, which require THAs providing services in Ontario to obtain a licence in order to operate. The deadline for that licence is July 1, 2024.

[16] On November 3, 2023, Davidson's counsel learned that TES applied for a THA licence.

[17] Under the licensing requirements, an entity that seeks to operate as a THA is required to complete an application which includes information about compliance with the *ESA*. Other requirements relate to administrative information such as business contacts, locations of business, names of corporate officers and directors or partners (if the applicant is a corporation or partnership), information about criminal convictions, and information about similar applications and licences in other Canadian jurisdictions.

[18] Davidson requested production of the Application, which TES refused.

Analysis

[19] I first review the relevant law and then apply that law to the facts of the present case.

The relevant law

[20] The law on production of documents prior to a certification motion is as follows:

(i) The test for pre-certification production is limited to the issues relevant on certification: *Kaplan v. Casino Rama Services Inc.*, 2018 ONSC 3545 at para. 34, citing *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 87, 274 ACWS (3d) 485, at para. 41.

(ii) The onus is on the plaintiff to explain why the documents are relevant to an issue on certification: *Kaplan*, at para. 34, citing *Mancinelli*, at para. 41.

(iii) The plaintiff must show that the documents will "inform the certification process": *Mancinelli*, at para. 41.

(iv) Otherwise, discovery follows certification of the action: *Mancinelli*, at para. 42.

Application of the law to the present case

[21] Given the positions of TES and its submissions in its factums, as summarized at paras. 9-14 above, I find that those parts of the Application which address (i) whether TES operated or seeks to operate as a THA or (ii) the nature, characterization, and other statements about TES' relationship with its workers, are relevant to the issues before the court on the certification motion and shall be produced. Any other information related to the licensing requirements is irrelevant and may be redacted by TES.

[22] While Davidson proposed that the court review the Application and make the redactions, it is appropriate that TES counsel provide a redacted version of the Application consistent with these reasons. The court should only intervene if there is any dispute as to the scope of the redactions. Counsel have been involved with this matter for many years and have detailed knowledge about the issues before the court, and as such are in a better position to make the necessary redactions (by TES counsel) and consider whether the proposed redactions are appropriate (by Davidson's counsel).

[23] TES has repeatedly submitted that there is no basis in fact (or even a proper pleading) that it is a THA. Davidson will have the burden on certification to establish some basis in fact for PCI 1(a) – i.e., whether an employment relationship exists under s. 74.3. Consequently, whether there is some basis in fact for the preliminary issue of whether TES is a THA must be determined by the court on a certification motion.

[24] TES seeks to operate as a licensed THA under the applicable regulations. By seeking such licensing, and taking such a position before the Ontario government that it is a THA, such evidence is relevant to whether there is some basis in fact that TES operated (or seeks to operate) as a THA.

[25] TES seeks to rely on an alleged "concession" by Davidson that s. 74.3 does not apply to independent contractors. In her Supplementary Reply Factum dated March 17, 2023, Davidson submits, at para. 4(f):

> Bill 139 [s. 74.3] deals with independent contractors the same way that the ESA deals with independent contractors: they [sic] don't. A true independent contractor is not subject to the ESA. Where an employee is misclassified as an independent contractor, then they ought to have been subject to the ESA.

[26] TES submits that the effect of Davidson's submission is that (i) "the act of temporarily assigning a person to a client pursuant to section 74.3 does not assist in determining whether they are an 'employee' or an 'independent contractor'" and (ii) as such, it is irrelevant to certification whether TES is a THA.

[27] TES submits that Davidson's alleged concession is consistent with TES' position that s. 74.3 applies only to workers who are employees, so that individualized inquiries are required to determine (i) whether a proposed class member is an employee or independent contractor and, (ii) if a class member is subject to s. 74.3, whether such person was assigned by TES to one of its clients.

[28] Davidson does not accept TES' characterization of her submission as a "critical concession". Davidson submits that she has not "conceded that section 74.3 of the ESA does not deal with independent contractors". Rather, Davidson submits that she has consistently submitted that all class members, who were classified as independent contractors, were mischaracterized since, as set out in PCI 1(a), "the actual circumstances of the relationship between the Defendant and the class members constitute an employer/employee relationship such that the class members were in fact employees of the Defendant and not 'independent contractors' based on (a) Part XVIII.1 'Temporary Help Agencies' of the Employment Standards Act".

[29] Davidson further submits that section 74.3 is "clear" that "the workers who are assigned by temporary placement agencies with their clients are employees under the ESA".

[30] It is not the role of the court to determine certification issues on a pre-certification production motion. The issue of whether Davidson has made a "critical concession" on the merits of the certification motion should not be considered at this time.

[31] In brief, the issue of whether there is some basis in fact that TES operates as a THA remains open to be decided at certification. The parts of the Application that address (i) whether TES operated or seeks to operate as a THA or (ii) the nature, characterization, and other statements about TES' relationship with its workers are relevant to that issue.

Order and costs

[32] For the above reasons, I order production of the Application, subject to the restrictions and redactions discussed above.

[33] On consent of the parties, I reserve costs of this motion to the return of the certification motion.

GLUSTEIN J.

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Glustein J.

Released: February 20, 2024