

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
NICOLE CURTIS, AMR GALAL and)
KATRINA BUHLMAN) *Andrew Monkhouse and Alexandra*
) *Monkhouse for the Plaintiffs*
)
Plaintiffs)
)
- and -)
)
)
MEDCAN HEALTH MANAGEMENT)
INC, ANDREW CARRAGHER, SHAUN) *Jeffrey E. Goodman, Stephanie M. Ramsay,*
C. FRANCIS, EDWIN F. HAWKEN,) *and Elisha C. Jamieson-Davies for the*
URBAN JOSEPH, BEAU LASKEY,) *Defendants*
)
THOMAS P. REEVES, OWEN)
ROGERS, CRAIG SHEPHERD)
Defendants)
)
)
Proceedings under the *Class Proceedings*) **HEARD:** December 19, 2023
Act, 1992)

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] At the weigh-in for this Superior Court Ultimate Interlocutory Fighting Championship for Settling a Discovery Plan, the Plaintiffs weighed in at 2,434 pages and the Defendants weighed in at 233 pages.

[2] In this class action under the *Class Proceedings Act, 1992*,¹ the Plaintiffs bring a motion to settle the Discovery Plan. The Defendants bring a cross-motion to amend the certified common issues. The Defendants submit an alternative Discovery Plan, that is

¹ S.O. 1992, c. 6.

based on their proposed revised common issues.

[3] For the reasons that follow, the Defendants' motion is granted. The Plaintiffs' motion is dismissed. The Plaintiffs' draft discovery plan for the common issues trial wants for common sense, commonality, efficiency, proportionality, and fairness. The Plaintiff's Discovery Plan is also unnecessary; to mix metaphors, it is time to take the common issues cake out of the oven and then find out how much of it can be eaten at individual issues trials.

B. Factual and Procedural Background

[4] The Plaintiffs Nicole Curtis, Amr Galal, and Katrina Buhlman sue the corporate Defendant Medcan Health Management Inc., and eight co-Defendants, Andrew Carragher, Shaun C. Francis, Edwin F. Hawken, Urban Joseph, Beau Laskey, Thomas P. Reeves, Owen Rogers, and Craig Shepherd. The Defendants Carragher, Francis, Hawken, Joseph, Laskey, Reeves, Rogers, and Shepherd are Medcan's directors.

[5] In 2019, a Medcan employee who received a base salary plus commissions and bonuses told Medcan that it had not paid him the vacation pay and public holiday pay that Medcan was required to pay under the *Employment Standards Act, 2000*.²

[6] Medcan investigated. It learned that for over fifteen years, it had been calculating vacation pay and public holiday pay based only on the base salary. In 2020, to remedy its error, Medcan paid its current and former employees the unpaid vacation pay and public holiday pay – for the years 2018 and 2019. Relying on the two-year limitation period of the *Limitations Act, 2002*,³ Medcan did not pay for the employment periods before 2018.

[7] In 2020, Ms. Curtis, Mr. Galal, and Ms. Buhlman, who are former employees of Medcan, brought this class action against Medcan and its directors. The Plaintiffs alleged that they and the proposed Class Members – who are comprised of Medcan's variable pay employees from April 2005 – are owed vacation pay and public holiday pay from April 2005.

[8] On **April 7, 2020**, Ms. Curtis and Mr. Galal commenced their proposed class action.

[9] The lawyers of record and proposed Class Counsel are Monkhouse Law.

[10] I pause to emphasize because it will become very important to the outcome of the motion and the cross-motion, that this class action is about: (a) unpaid vacation pay; and (b) unpaid public holiday pay for the period April 2003 to December 2017. Without conceding the point, the Plaintiffs are not pursuing claims for employment before April 2005 because these claims may be statute-barred by the absolute limitation period of the *Limitations Act, 2002*.

[11] The relevant portions of the Plaintiffs' Fresh as Amended Statement of Claim with respect to the alleged contraventions of the *Employment Standards Act, 2000* are paragraphs 13-17, and 20-30, which state:

² S.O. 2000, c. 41.

³ S.O. 2002, c. 24, Sched. B.

EMPLOYMENT STANDARDS ENTITLEMENTS

13. Under the *Employment Standards Act, 2000* (“*ESA*”) employees must be paid additional public holiday pay above and beyond their regular pay as per sections 24-32 (“Public Holiday Pay”). For the vast majority of the class period, Public Holiday Pay was calculated per s. 24(1) of the *ESA*, for employees with variable compensation this pay is to be an average of what they earned over the preceding 20 days.

14. Under the *ESA* employees must be paid additional vacation pay above and beyond their regular pay, as per s. 35.2 (“Vacation Pay”). This pay must be at least 4 per cent of the wages earned by the employee for those with less than five years seniority and 6 per cent for those with greater than five years seniority.

15. All Vacation Pay that has previously accrued remains owing to an employee, as per s. 38 of the *ESA*.

16. When an employee’s employment ends, “the employer shall pay any wages to which the employee is entitled,” as per s. 11(5) of the *ESA*.

17. In the *ESA*, wages are defined to include variable compensation (including commission) income.

[...]

20. As per s. 40(1) and (2) of the *ESA*, the Vacation Pay that ought to have been paid has a trust over it and creates a lien upon the assets of the employer in the amount of the monies that ought to have been paid.

COMPENSATION POLICY EXCLUDED VACATION AND PUBLIC HOLIDAY PAY ON VARIABLE COMPENSATION

21. Ms. Curtis, Mr. Galal, Ms. Buhlman, and other Variable Compensation Employees working for the Defendant received Vacation and Public Holiday Pay solely on their base salary, if at all, and not on their total compensation, as required by the *ESA*.

22. The pay stubs of Ms. Curtis and Mr. Galal reported no Vacation Pay at all. The paystubs of Ms. Buhlman report some Vacation Pay, but it is almost always calculated as a percentage of her base pay.

23. The Defendant failed in its obligations to correctly calculate pay. It failed in its obligations to be transparent and inform employees about the calculation of their pay.

24. The compensation policies applicable to Ms. Curtis, Mr. Galal, Ms. Buhlman, and other variable compensation employees violated the *ESA*. They did not provide for Vacation and Statutory Holiday Pay correctly calculated based on their total wages, inclusive of variable compensation. Ms. Curtis, Mr. Galal, and Ms. Buhlman seek to be Representative Plaintiffs for all persons denied such compensation while working for the Defendant.

PARTIAL PAYMENT OF RETROACTIVE PAY ALREADY ADMITTED AND DISCOVERABILITY

25. In December 2019, the Defendant paid out some variable commissioned persons for vacation and public holiday pay that had been due and owing for the previous two years.

26. In March 2020, Mr. Galal received a notification from the Defendant that some of his Public Holiday Pay entitlements had been miscalculated for 2018 and 2019 and that the Defendant will pay him \$4,903.84 as a result of the error.

27. In March 2020, Ms. Buhlman also received a notification from the Defendant that some of her Public Holiday Pay entitlements had been miscalculated for 2018 and 2019 and that the Defendant will pay her \$1,683.77 as a result of the error.

28. The Plaintiffs state by the 2019 and 2020 communications and payments, the Defendant admitted that its payroll system has not been adequately compensating the Variable Compensation Employees throughout their employment.

29. Vacation pay and Public Holiday Pay ought to be paid out for the full tenure of the Plaintiffs and of all Variable Compensation Employees with the Defendant for the following non-exclusive reasons:

a. The deprivation of these benefits was only discoverable to the Plaintiffs, and the other Variable Compensation Employees, once they were made aware of the pay discrepancy by the Defendant at the very earliest in December 2019;

b. The benefits under the *ESA* roll over and thus the two-year limitation period under the *Limitations Act, 2002*, SO 2002, c24, Sched B properly runs for all benefits owing from 7 days after employment ends as per s.11(5)(a) of the *ESA*.

30. The Plaintiffs further state that in so far as the calculations of what has been paid out to date appear in some circumstances to be incorrect that any Variable Compensation Employee whose payments are not correct ought to be compensated for the difference between the amount paid and the amount owed under the *ESA*.

[12] On **September 25, 2020**, the Defendants delivered their Statement of Defence. They plead that the Plaintiffs' claims are statute-barred under the *Limitations Act, 2002* and by full and final releases.

[13] The lawyers of record for the Defendants are Mathews, Dinsdale & Clark LLP and Hicks Morley Hamilton Stewart Storie LLP.

[14] On **October 21, 2020**, Ms. Curtis and Mr. Galal delivered their Reply.

[15] The Plaintiffs moved to have their action certified as a class action. Ms. Curtis and Mr. Galal proposed to add Ms. Buhlman as a Plaintiff and they prepared a Fresh as Amended Statement of Claim, which treated as the operative Statement of Claim for the purposes of this certification motion.

[16] The Defendants resisted certification, and the Defendants brought a cross-motion for summary judgment to have Ms. Curtis' and Mr. Galal's individual actions dismissed as statute-barred or because the individual Plaintiffs signed releases when they ended their employment with Medcan.⁴

[17] The evidentiary record for the certification motion and the summary judgment motion comprised approximately 650 pages and included affidavits from the three representative plaintiffs. It included affidavits from Andrew Rinzema, the former Chief Financial Officer of Medcan and the affidavit of Bronwen Evans, the Chief Growth and People Officer at Medcan. Ms. Evans was cross-examined. The evidentiary record included employment contracts, the employee handbook, payroll stubs, employee register reports, payroll records, correspondence about Medcan paying vacation pay and holiday pay. It

⁴ Medcan also brought a cross-motion pursuant to rule 21.01(1)(b) to strike the claims against the individual Defendants. However, this motion was withdrawn when the Plaintiffs agreed to abandon their claim under s. 81 of the *Employment Standards Act, 2000* and in light of the Court of Appeal's decision in *Abbasbayli v. Fiera Foods Company*, 2021 ONCA 95.

included all the documents necessary to establish that Medcan had made mistakes about the payment of vacation pay and public holiday pay.

[18] On **June 25, 2021**: (a) I dismissed the summary judgment motion because the matter of the running of limitation periods and the matter of releases are genuine issues requiring a trial; and (b) I dismissed the certification motion because I concluded that the Plaintiffs had not satisfied the preferable procedure criterion.⁵ I concluded that all of the other certification criterion had been satisfied although I did not certify all of the proposed common issues.

[19] At the certification motion, there was no discussion about or analysis of claims other than vacation pay and public holiday pay. There was no discussion of overtime pay and what is colloquially called “in lieu pay,” the statutory minimum pay for a dismissal.

[20] The Plaintiffs appealed my decision to the Divisional Court, and on **September 19, 2022**, the Divisional Court certified the action. In the Divisional Court, there was no argument, analysis, or discussion of claims other than with respect to vacation pay and public holiday pay.⁶ The Divisional Court certified the common issues set out in the chart in the next part of these Reasons for Decision.

[21] The class is comprised of 1,772 persons who were employed by Medcan during the class period of approximately 17 years.

[22] On **March 22, 2023**, the Plaintiffs served their respective affidavits of documents.

[23] In March, the Defendants served unsworn affidavits of documents. To foreshadow, signed copies were served in September 2023.

[24] On **August 17, 2023**, the Plaintiffs served the Fresh as Amended Statement of Claim.

[25] On **September 15, 2023**, Medcan served its affidavit of documents.

[26] On **September 18, 2023**, the Plaintiffs served a draft Discovery Plan.

[27] Between **September 18 and 20, 2023**, the individual Defendants served their respective affidavits of documents.

[28] Medcan’s affidavit of documents contains 73 documents that are relevant to the issues of vacation pay and public holiday pay. The 73 documents comprise some 1,000 pages of documentation to add to the hundreds of pages of documents that were produced at the certification motion.

[29] The affidavits of documents sworn by the individual defendants do not list any documents. The explanation is that the individual defendants were not personally involved in the events leading up to and following the investigation that led to Medcan learning that it was not properly calculating and paying vacation pay and public holiday pay.

[30] In the Plaintiffs’ proposed Discovery Plan, one of the subjects of documentary and oral discovery is Shaun Francis. Mr. Francis is a member of Medcan’s Board of Directors.

⁵ *Curtis v. Medcan Health Management Inc.*, 2021 ONSC 4584.

⁶ *Curtis v. Medcan Health Management Inc.*, 2022 ONSC 5176 (Div. Ct.).

He is Chair and CEO of Medcan and an individual defendant. In response to inquiries from Class Counsel, the Defendants advised that there were 1,240,772 emails in Shaun Francis' work email without any culling for key words and 1,359,564 emails or attachments to Mr. Francis' emails that were sent to or accessible by class members that contain the keyword "vacation".

[31] On **September 20, 2023**, the Defendants served a draft Discovery Plan.

[32] On **September 21, 2023**, at a case management conference, I directed the parties to exchange discovery plans for the common issues stage of the litigation, with the Plaintiffs going first, the Defendants responding and the Plaintiffs producing a final draft response.

[33] On **October 5, 2023**, the Plaintiffs served a Discovery Plan.

[34] On **October 16, 2023**, the Defendants served a Discovery Plan.

[35] On **October 17, 2023**, the Defendants served a Fresh Statement of Defence. In the Statement of Defence, the Defendants formally admitted that:

- a. In late 2019, Medcan identified an issue with its payroll software such that it had not paid vacation pay and public holiday pay on variable compensation to certain employees during certain periods of time;
- b. Medcan investigated this issue and determined it would pay affected employees for vacation and public holiday pay on bonuses and commissions for the years 2018 and 2019;
- c. Medcan advised those affected by email on December 27, 2019;
- d. Medcan made retroactive payments to affected employees for the years 2018 and 2019 beginning in January 2020; and
- e. Medcan admits that for at least a period of time, for at least some class members, it failed to pay vacation pay and public holiday pay on certain variable compensation.

[36] I pause to emphasize that these statements in the Statement of Defence are formal admissions. There are two kinds of admissions: (1) a formal admission; and (2) an informal admission. A formal admission is a substitute for proof of a fact and the party making the admission cannot deny or dispute that the fact has been proven without leave of the court or the consent of the opponent.⁷ In *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*,⁸ the Court of Appeal noted that a formal admission may be made: (1) by a statement in the pleadings or by failure to deliver pleadings; (2) by an agreed statement of facts filed at the trial; (3) by an oral statement made by counsel at trial; (4) by letter exchanged between counsel before trial; or (5) under the request to admit procedure. An informal admission is a statement made by a party that concedes the proof

⁷ *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 at para. 77 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 66.

⁸ (2000), 51 O.R. (3d) 97 at para. 77 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 66.

of a fact or that is evidence that a fact is true.⁹ Statements made during an examination for discovery are not formal admissions but may constitute informal admissions.¹⁰ A trial judge may interpret what the admission means,¹¹ but a formal admission is conclusive, and the court is bound to take the admitted fact as proven even if other evidence contradicts the admission.¹² A party making an informal admission may lead evidence at trial to reduce its prejudicial effect.¹³

[37] On **October 25, 2023**, the Plaintiffs delivered a draft Discovery Plan.

[38] On **November 10, 2023**, the Plaintiffs served a Request to Admit.

[39] On **November 29, 2023**, the Defendants delivered their Response to the Request to Admit. Among other things, the Defendants admitted:

- a. Medcan employed 411 employees on December 15, 2020;
- b. Medcan paid approximately 357 employees for vacation and public holiday pay owed on commissions related to January 1 to December 31, 2018;
- c. Medcan paid approximately 341 employees for vacation and public holiday pay owed on commissions related to January 1 to December 31, 2019;
- d. Medcan’s management was advised in June 2019 by an employee that he had not received vacation or public holiday pay on his variable compensation for the last few years;
- e. Medcan had a statutory duty (incorporated as an implied term in the employment contracts of Class Members) to accurately record and maintain a record of Class Members’ vacation pay and public holiday pay to ensure that Class Members were appropriately compensated for same; and
- f. Medcan had a duty to implement and maintain an effective and reasonable system or procedure which ensured that duties in Common Issue 2 were satisfied for all Class Members.

[40] On **December 4, 2023**, the Defendants delivered their factum and their Responding Motion Record (233 pages), which included their Notice of Motion for their cross-motion.

[41] The cross-motion was supported by the affidavit of Tatiana K. Lazdins dated December 1, 2023. Ms. Lazdins is a professional engineer and a lawyer with Hicks Morley Hamilton Stewart Storie LLP. She has expertise in document management to fulfill discovery obligations including the discovery of Electronically Stored Information (“ESI”).

[42] On **December 8, 2023**, the Plaintiffs delivered their motion record for their discovery plan motion. The motion was supported by the affidavits dated November 9,

⁹ *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, supra*.

¹⁰ *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, supra*.

¹¹ *Champoux v. Jefremova*, 2021 ONCA 92; *Allto Construction Services Ltd. v. Toronto and Region Conservation Authority*, 2017 ONCA 488.

¹² *Champoux v. Jefremova, supra*; *Serra v. Serra*, 2009 ONCA 105.

¹³ *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, supra*.

2023 and December 4, 2023 of Arunima Choudhury and the affidavit dated December 7, 2023 of Tiana Van Dyk.

[43] Ms. Choudhury is a paralegal at Monkhouse Law.

[44] Ms. Van Dyk is an e-discovery expert and Managing Director at EPIQ, which is a company that provides litigation support. She was asked by Monkhouse Law to provide an opinion as to the discovery plan proposed by the Plaintiffs.

C. The Common Issues

[45] The common issues that were certified by the Divisional Court are set out in the left hand column in the chart below. The revised common issues proposed by the Defendants are set out in the right hand column in the chart below.

Common Issues	
Certified Common Issues	Proposed Common Issues
1. What are the terms (express or implied or otherwise) of the Class Members' contracts of employment with the Defendants regarding: (a) Regular and overtime hours of work; (b) Recording of the hours worked by the class members; (c) Payment of hours worked by class members; and (d) Lieu time as purported compensation for overtime hours worked.	1. What are the terms (express or implied or otherwise) of the Class Members' contracts of employment with the Defendants regarding vacation pay and public holiday pay on variable compensation?
2. Whether the Defendants breached any of the contractual terms and, if so, how. Without limiting generality of the foregoing, whether the Class Members are owed damages from the Defendants for: (a) Vacation pay; and (a) Public holiday pay.	2. Whether the Defendants breached any of the contractual terms and, if so, how. Without limiting generality of the foregoing, whether the Class Members are owed damages from the Defendants for: (a) Vacation pay on variable compensation earned by them during the class period; and (b) Public holiday pay on variable compensation earned by them during the class period.
3. Whether the Defendants have a duty (in contract or otherwise) to accurately record and maintain a record of all hours worked by Class Members to ensure that Class Members were appropriately compensated for same. (a) If such a duty exists, whether the Defendants breached that duty.	3. Whether the Defendants have a duty (in contract or otherwise) to accurately record and maintain a record of Class Members' vacation pay and public holiday pay to ensure that Class Members were appropriately compensated for same. (a) If such a duty exists, whether the Defendants breached that duty.
4. Whether the Defendants have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues 2 were satisfied for all Class Members. (a) If such a duty exists, whether the Defendants breached that duty.	4. Whether the Defendants have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues 2 were satisfied for all Class Members. (a) If such a duty exists, whether the Defendants breached that duty.

D. The Design of the Plaintiffs' Proposed Discovery Plan

[46] The major design elements of the Plaintiffs' proposed Discovery Plan are set out below.

1. Medcan is required to search all emails of all relevant staff members including the following seven senior staff: Andrew Rinzema (CFO), Shaun Francis, Ms. Kellokoski (Payroll Manager), Bronwen Evans, Janet Ozembloski, Hui Fraser and Varesh Mehra.
2. The individual defendants are required to conduct a search of their personal and Medcan emails for any relevant documents pertaining to the action and produce all non-privileged materials.
3. Medcan is required to do keyword searches of their email system, electronic document system, and physical document system.
4. The keywords to be searched include, but are not limited, to: (a) “vacation”, (b) “vacation” and “all inclusive”, (c) “vacation” and “underpayment”; (d) “lieu time”, (e) “public holiday pay”, (f) “holiday pay”, (g) “statutory holiday pay”, (h) “Employment Standards Act” and “holiday pay”, (i) “Employment Standards Act” and “vacation pay”, (j) “Employment Standards Act” and “holiday pay”, (k) “Employment Standards Act” and “record-keeping”, (l) “ESA” and “vacation pay”, (m) “ESA” and “holiday pay”, (n) “ESA” and “record keeping”, (o) “Employment Standards Act” and “15.1”, (p) “Employment Standards Act” and “24”, (q) “Employment Standards Act” and “25”, (r) “Employment Standards Act” and “26”, (s) “Employment Standards Act” and “29”, (t) “Employment Standards Act” and “30”, (u) “Employment Standards Act” and “31”, (v) “Employment Standards Act” and “32”, (w) “Employment Standards Act” and “35”, (x) “Employment Standards Act” and “36”, (y) “Employment Standards Act” and “38”, (z) “Employment Standards Act” and “40”, (aa) “Employment Standards Act” and “41”, and (bb) “Employment Standards Act” and “41.1”.
5. Medcan is required to produce the following documents: (a) copies of all pay stubs for class members; (b) employment contracts of all class members, or templates that apply to classes of class members; (b) policies relating to compensation, vacation pay, holiday pay, relating to any class members; (c) policies relating to overtime and/or regular hours of work for class members; (d) documents relating to the recording of hours worked by class members; (e) policies relating to hours of work or lieu time for class members; (f) policies or documents relating to the recording of hours worked by the class members; (g) schedules of class members that show the hours worked by class members; (h) all records kept by the company under s.15.1 of the *Employment Standards Act, 2000*.
6. Medcan is required to produce the emails, documents and calculations used to determine the outstanding vacation and public holiday pay referenced in the documents produced in its affidavit of documents.
7. Medcan is required to provide documents without redactions unless the redactions are (a) explained as to their purpose, and (b) for the reason of privilege. No redactions are to be made regarding the reasons of ‘privacy’, ‘competitive advantage’ or ‘confidentiality’ unless so approved by the case management Judge.

8. The Plaintiffs may examine for discovery their choice of the corporate representative for Medcan and also the eight individual defendants (80 hours, 10 business days of discoveries) plus more by court order.
9. Medcan to examine for discovery the three representative plaintiffs, each examination of three hours duration.

E. The Defendants' Proposed Discovery Plan

[47] As foreshadowed in the Introduction to these Reasons for Decision, I shall be approving the Defendants' proposed Discovery Plan based on the Defendants' revised common issues.

[48] I set out immediately below, the Defendants' Discovery Plan as proposed, which is the plan that I shall be approving.

DISCOVERY PLAN

1. Applicable Procedural Regime

1.0 The applicable procedural regime is the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

2. Legal Issues

2.1 This Discovery Plan is intended to serve as the Parties' discovery plan in relation to the common issues trial, for purposes of compliance with Rule 29.1 of the *Rules of Civil Procedure*.

2.2 It is not intended to address the scope of discovery for the individual issues phase. The Parties agree that they will prepare a Discovery Plan for the individual issues phase, following resolution of the common issues trial.

2.3 The Parties will produce documents in respect of the following legal issues:

1. What are the terms of the Class Members' contract of employment with the Defendants regarding vacation pay and public holiday pay on variable compensation?

2. Did the Defendants breach any of the contractual terms relating to vacation pay and public holiday pay and, if so, how? Without limiting generality of the foregoing, are the Class Members owed damages from the Defendants for:

- (i) Vacation pay on variable compensation earned by them during the class period;

- (ii) Public holiday pay on variable compensation earned by them during the class period?

3. Did the Defendants have a duty (in contract or otherwise) to accurately record and maintain a record of Class Members' vacation pay and public holiday pay to ensure that Class Members were appropriately compensated for same?

4. If the Defendants had a duty to accurately record and maintain a record of Class Members' vacation pay and public holiday pay, did they breach that duty?

5. Did the Defendants have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system or procedure which ensured that

Class Members were paid vacation pay and public holiday pay on variable compensation?

6. If the Defendants had a duty to implement and maintain a reasonable system, did the Defendants breach that duty?

3. Scope of Documentary Discovery

3.1 Each party is to produce every document relevant to any matter in issue in relation to the common issues that is, or has been, in the possession, control, or power of the party, as provided in Rules 30.01 to 30.10, subject to any privilege claim in respect of a document, and which documents should include, but not be limited to, the documents referred to below.

3.2 “Document” shall have the broad definition as provided for in the *Rules of Civil Procedure*. Relevant time period for scope of documents is April 7, 2005 to October 26, 2022.

3.3 The Parties agree that the documents relevant to matters in issue in relation to the common issues are:

(a) Template or sample employment contracts, which would be common to the class, which address the calculation of, or entitlement to, vacation pay and/or public holiday pay (Relevant to Legal Issue 1);

(b) Policies or internal guidelines, which would apply to the class, which address the calculation of, or entitlement to, vacation pay and/or public holiday pay (Relevant to Legal Issue 1);

(c) Template or sample employment contracts, which would be common to the class, which address Medcan’s system for recording vacation pay and/or public holiday pay (Relevant to Legal Issue 3);

(d) Policies or internal guidelines, which would apply to the class, which address Medcan’s system for recording vacation pay and/or public holiday pay (Relevant to Legal Issue 3);

(e) Template or sample employment contracts, which would be common to the class, which address any system/process Medcan used to ensure Class Members were paid vacation pay and public holiday pay (Relevant to Legal Issue 5); and

(f) Policies or internal guidelines, which would apply to the class, which address any system/process Medcan used to ensure Class Members were paid vacation pay and/or public holiday pay (Relevant to Legal Issue 5).

4. Affidavit of Documents

4.1 The affidavit of documents have already been delivered.

5. Timing/Format for Exchange of Records.

5.1 Documents shall be produced electronically in multi-page, searchable PDF files in the following format:

(a) A combined PDF file in the form of a productions brief, with numbered bookmarks corresponding to the documents identified in Schedule “A” of the party’s Affidavit of Documents.

Documents that cannot be produced in PDF format will be provided in original electronic format.

5.2 *Manner of production*: Documents will be exchanged using ShareFile or a similar online delivery system.

5.3 *Costs for production*: Each party shall bear its own costs associated with the production of documents for discovery.

5.4 Each party may print and bind the productions at their own expense.

5.5 *Deadline for production*: Already served.

6. Oral Discovery

6.1 *Name of Party Plaintiffs*: The discovery witnesses are Amr Galal, Nicole Curtis, and Katrina Buhlman.

6.2 *Dates of Discovery*: To be agreed by counsel, pending any potential discovery plan motion.

6.3 *Agreed Length of Discovery*: Up to 3 hours per representative plaintiff.

6.4 *Name of Party Defendants*: The discovery witness for corporate Defendant is Andrew Rinzema.

6.5. Counsel to discuss any additional discovery that the Plaintiffs may wish to pursue of the Individual Defendants following the examination for discovery of Medcan's corporate representative.

6.6 The examinations for discovery shall be conducted in person.

6.7 The Defendants' counsel will first discover the Plaintiffs and then Class Counsel will discover the Defendants' representative.

7. Undertakings, Advisements, and Refusals

7.1 The Parties agree that they will discuss a reasonable timeline for answers to undertakings following the completion of the examinations for discovery and shall come to a mutually agreeable schedule, taking into account the number of undertakings and amount of work reasonably anticipated in order to answer those questions.

General

8.1 This Discovery Plan may be amended by agreement of counsel for the parties or by Order of the Court. In the event that the parties agree to amend the discovery plan, the amendments will be reduced in writing.

8.2. Each party reserves its rights to request or move for additional documents or category of documents not included in this Discovery Plan.

8.3. The parties agree that the negotiations leading up to this Discovery Plan are not relevant to assessing the relevance of any category of documents which may be sought in the future.

8.4 By the agreement to this Discovery Plan neither party has conceded to the relevance or irrelevance of any document or category of documents.

8.5 The Parties shall comply with their obligations pursuant to the *Rules of Civil Procedure* in relation to preservation and production of electronic documents.

F. Jurisdiction to Settle the Discovery Plan and to Revise the Common Issues

[49] Both parties ask the court to settle a Discovery Plan. In its cross-motion, the Defendants ask the court to revise the common issues. The court has the jurisdiction to respond to the parties' respective motions.

[50] The relevant provisions of the *Rules of Civil Procedure*¹⁴ are rules 1.04 (1)(1.1) (2), 29.2.03 (1)(2), 30.02 (1), 31.03 (9), which are set out below:

Interpretation

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Matters Not Provided For

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

[...]

Proportionality in Discovery

Considerations

General

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source.

Overall Volume of Documents

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

¹⁴ R.R.O. 1990, Ont. Reg. 194.

[...].

*Scope of Documentary Discovery
Disclosure*

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

[...]

*Examination for Discovery
Limiting Multiple Examinations*

31.03 (9) Where a party is entitled to examine for discovery,

- (a) more than one person under this rule; or
- (b) multiple parties who are in the same interest, but the court is satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the court may impose such limits on the right of discovery as are just.

[51] In approving the proposed changes to the common issues and in approving the Defendants' Discovery Plan, I have the jurisdiction to do so pursuant to sections 8, 10, 12 and 35 of the *Class Proceedings Act, 1992*, which state:

Contents of certification order

8 (1) An order certifying a proceeding as a class proceeding shall,

- (a) describe the class;
- (b) state the names of the representative parties;
- (c) state the nature of the claims or defences asserted on behalf of the class;
- (d) state the relief sought by or from the class;
- (e) set out the common issues for the class; and
- (f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out

[...]

Amendment of Certification Order

(3) The court, on the motion of a party or class member, may amend an order certifying a proceedings as a class proceeding.

[...]

Where it appears conditions for certification not satisfied

10 (1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

[...]

Court may determine conduct of proceeding

12 The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[...]

Rules of Court

35. The rules of court apply to proceedings under this Act.

G. Critique of the Discovery Plans

[52] In my opinion, the Defendants' proposed Discovery Plan, which is augmented by (a) the disclosure that occurred at the certification motion; (b) the already delivered affidavits of documents; (c) the formal admissions in the pleadings and in the response to the Notice to Admit; and (d) the informal admissions, is more than adequate.

[53] Indeed, dare I say it, in my opinion, further documentary and oral discovery is unnecessary. The case is ready for a common issues trial or summary judgment motion, which appears to me just a formality to get the case to individual issues trials, where on - an individual basis - more oral and documentary discovery will be necessary.

[54] In contrast, in my opinion, the Plaintiffs' draft Discovery Plan for the common issues trial wants for common sense, commonality, efficiency, proportionality, and fairness. The Plaintiffs' Discovery Plan is also unnecessary.

[55] What this case is ultimately about is not the common issues but the individual issues. Given the Defendants' formal and informal admissions, the common issues are a foregone conclusion, and what this case is about and has been about from the outset is whether there is merit to the Defendants' defences based on releases and limitation periods. These are entirely individual issues. If the defences fail, then the Class Member's entitlement can be quantified, also as an individual issue.

[56] In a case: (a) where the fundamental issue is already precisely demarcated, (b) where Medcan has already admitted that it erred in calculating vacation and public holiday pay, (c) where Medcan principally is relying on releases and limitation periods, (d) where it has admitted that it has a duty to accurately record and maintain the class members' vacation pay and holiday pay, and (e) where the common issues already seem appropriate to be tried by a summary judgment, the Plaintiffs propose exhaustive, comprehensive, electronic searches of not only Medcan's email system but also its document system and its payroll system in an overwhelming overreach of what the action is only and actually about. This is just production and discovery overkill.

[57] In a class action, the scope of documentary discovery for the common issues trial is defined by the certified common issues and by the pleadings that were certified. In the immediate case, the Plaintiffs' Discovery Plan seeks the discovery of documents that are not relevant to the pleaded claims nor to the common issues.

[58] The Plaintiffs ignore what the case is actually about and have proposed a Discovery Plan for a class action advancing claims that have not been scrutinized by the Divisional Court or by me for any of the certification criterion, most notably, commonality, manageability, and preferability. The case at bar is not an employment misclassification case. It is not a case about underpaid salary. It is not a case about severance pay. It is not a case about unpaid overtime. It is not a case about miscalculated overtime. It is not a case about a failure to pay severance pay. It is not a case about breaches of the *Employment Standards Act, 2000* other than breaches associated with vacation pay and public holiday pay.

[59] The Plaintiffs' proposed Discovery Plan not only does not stay within boundaries of what the Divisional Court certified as common issues, the Discovery Plan seeks documents that are not relevant to the common issues and rather seeks to introduce into the common issues trial, individual issues documents.

[60] This Plaintiffs' design for a Discovery Plan in one fell swoop destroys the commonality of the common issues and opens the case to being decertified pursuant to s. 10 of the *Class Proceedings Act, 1992*.

[61] In my opinion, no electronic searches are called for in the immediate case. I agree with the Defendants that keyword searches are unnecessary. Therefore, I also agree that it is not necessary to identify custodians for keyword searches that are not necessary. Had keyword searches been necessary, the design of the Plaintiffs' Discovery Plan is grossly disproportionate to the point of being abusive and an interference with a defendant's right to access to justice. Medcan cost the electronic search of the Plaintiffs' long list of key words at \$2.7 million for a review of 3.7 million documents. This is not efficient, least-expensive litigation.

[62] Once this case reaches individual issues trials, there may be a need for electronic searches for information about an individual Class Member's claim; however, for the common issues trial, electronic searches are not necessary. But if they were necessary, the Plaintiffs' Discovery Plan is grossly disproportionate. Relevance is not the only criterion for document disclosure and the discovery rules and case law is infused with the proportionality principle.¹⁵ The Plaintiffs' Discovery Plan is bloated with disproportionality.

[63] Turning to the matter of oral discovery. Although, for the reasons that I have set out above, the case seems ready for a common issues determination with no further ado, Medcan's Discovery Plan provides for Mr. Rinzema to be examined as its corporate representative and then for Class Counsel and Defence Counsel to discuss whether it is necessary to examine the individual Defendants. This makes common sense. Provided that they agree to be bound by Mr. Rinzema's evidence, he knows far more than they do about the Class Members' entitlements to vacation pay and public holiday pay.

¹⁵ Rules 1.04, 29.2.03. *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.* 2014 ONSC 660; *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 leave to appeal ref'd 2011 ONSC 3685 (Div. Ct.); *Romspen Investment Corp. v Woods Property Development Inc.*, [2010] O.J. No. 2546 (Master).

[64] In the immediate case, the individual defendants will just be informing themselves from Mr. Rinzema or from administrative staff. In these circumstances 80 hours of discoveries of individual defendants is neither reasonable nor proportionate.

[65] Moreover, in their role as direct defendants, it is premature to involve the directors of Medcan at the common issues trial. In this action for employee salaries, the individual directors' liability is secondary as statutory guarantors under s. 131 of the Ontario *Business Corporations Act*.¹⁶ A director is only liable if there is a judgment against the corporation that is unsatisfied, or before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or is assigned into bankruptcy. The directors' liability if any will arise if there is a judgement against Medcan for unpaid wages that Medcan cannot pay.

[66] The Plaintiffs' Discovery Plan is inefficient with unnecessary and disproportionate documentary disclosure and unnecessary and disproportionate oral discovery. The Plaintiffs' Discovery Plan is not close to being the just, most expeditious, and least expensive determination of every civil proceeding on its merits. It is an abusive, least expeditious, most expensive determination of a proceeding.

[67] Finally, while not entirely necessary to adopting the Defendants' Discovery Plan, it is salutary to revise the common issues as suggested by the Defendants. In part, this amendment is to get this class action back on track. The amendments reflect what the action is actually about and will constrain the Plaintiffs from attempting to make this action about something that it is not.

H. Conclusion

[68] For the above reasons, the Plaintiffs' motion is dismissed, and the Defendants' motion is granted.

[69] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within twenty days of the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further twenty days.

Perell, J.

Released: December 29, 2023

¹⁶ R.S.O. 1990, c. B. 16.

CITATION: Curtis v. Medcan Health Management Inc., 2023 ONSC 7296
COURT FILE NO.: CV-20-00639259-00CP
DATE: 20231229

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**NICOLE CURTIS, AMR GALAL and NICOLE
CURTIS, AMR GALAL and KATRINA
BUHLMAN**

Plaintiffs

- and -

**MEDCAN HEALTH MANAGEMENT INC,
ANDREW CARRAGHER, SHAUN FRANCIS,
EDWIN HAWKEN, URBAN JOSEPH, BEAU
LASKEY, THOMAS REEVES, OWEN ROGERS,
CRAIG SHEPHERD**

Defendants

REASONS FOR DECISION

PERELL J.

Released: December 29, 2023