IN THE SUPREME COURT OF BRITISH COLUMBIA

(Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50)

Citation: ***Vasquez v. United Steel Workers of America, Local No. 1-3567***, 2006 BCSC 1399

Date: 20060918
Docket: L050130
Registry: Vancouver

Between:

Avelina Vasquez

Plaintiff

And

United Steel Workers of America, Local No. 1-3567

Defendant

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff: G. James Baugh
Christopher J. Foy

Counsel for the Defendants: Sandra I. Banister

Date and Place of Hearing: July 31, 2006
Vancouver, B.C.

[1] This is an application by the plaintiff to have this action certified as a class proceeding pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

BACKGROUND

[2] Avelina Vasquez is employed as a cleaner at St. Paul's Hospital. Her claim is that between November 4, 2003 and May 20, 2004, her employer, Aramark Canada Facility Services Ltd., ("Aramark"), deducted union dues and remitted them to the International Wood and Allied Workers of Canada, Local No. 1-3567, now United Steelworkers of America, Local No. 1-3567. I will refer to the defendant in these reasons as the "IWA". Her claim is that these funds should not have been sent to the defendant. Her claim is that the defendant was paid these dues by mistake; that the defendant had no right to these dues; that the defendant was unjustly enriched by payment of the dues; and that the defendant negligently misrepresented that there was a collective agreement in effect with Aramark which required these dues.

[3] The plaintiff seeks to prosecute this claim on behalf of all Aramark employees at 30 health care facilities in the Lower Mainland and on the Sunshine Coast areas of British Columbia.

[4] The context of the agreement signed between Aramark and the defendant was described in a decision of the B.C. Labour Relations Board, ***Re Aramark Canada Facility Services Ltd.*** BCLRBD - #173, May 20, 2004. In 2002, the Vancouver Coastal Health Authority (the "Health Authority") and Providence Health Care ("Providence") decided to contract out certain non-clinical work at health care facilities. In November 2002, the Health Authority and Providence sent out a request

for proposals to provide housekeeping and food services at the 30 sites. Aramark decided that it would make a proposal. It had no union at the time.

[5] Aramark's main competitors were Sodexho MS Canada Ltd. ("Sodexho") and Compass Group Canada (Health Services) Ltd. ("Compass"). In 2002, Aramark learned that Compass had entered into a voluntary recognition agreement with the IWA. That is, it voluntarily recognized the IWA as the bargaining agent for its employees and negotiated a collective agreement with it.

[6] Aramark met with the IWA in 2002, but decided not to pursue a similar agreement.

[7] In late spring of 2003, Aramark was competing with Compass and Sodexho for contracts with the Health Authority and with Providence. It learned from the Health Authority and Providence that it was at a competitive disadvantage if it did not have a collective agreement in place when the contract was awarded.

[8] In June 2003, Aramark met with representatives of the Hospital Employees Union and discussed entering into a voluntary recognition agreement. No agreement was reached. Aramark then pursued a voluntary recognition agreement with the IWA. It accepted an agreement that was similar to an agreement the IWA had signed with Sodexho. This agreement was signed on July 17, 2003.

[9] The plaintiff alleges that Aramark was awarded the Health Authority/Providence contract between July 17, 2003 and late August 2003. The agreement between Aramark and the defendant required that employees maintain

membership in the IWA as a condition of employment. It also required that they pay initiation fees and, where appropriate, monthly dues and assessments.

[10] In August and September 2003, Aramark began to hold "job fairs" for the purpose of hiring employees to provide services at the 30 sites. Aramark informed the IWA of the location of the job fairs and the IWA rented space at the same location at the same time.

[11] In August 2003, the plaintiff attended a job fair. She described a three-step process. First, an Aramark representative interviewed her. Second, after that interview, she was directed to a nearby room where a representative of the IWA conducted an orientation session. She was given a copy of the agreement signed by Aramark and the union. She was also given a letter from the president of the IWA advising her and the other applicants that this agreement would govern their terms and conditions of employment. She was asked to sign a form for dues check-off, authorizing deduction of dues from her pay. She was also asked to sign a form that stated she agreed with "the terms and conditions of employment described in the collective agreement". She says that other applicants who attended the job fair were also required to complete this three-step process.

[12] There was then a second and more detailed interview with a representative of Aramark. This did not take place unless the applicant had obtained a form indicating that she or he had completed the three-step IWA process.

[13] The plaintiff was hired through this process. Aramark also hired employees for these sites through two other processes. First, it could hire through hiring halls

set up by the IWA. Second, it could hire independently and then have the employees become IWA members.

[14] The plaintiff says that starting in October 2003, Aramark began deducting 2.8% of wages as union dues from its employees. It also deducted union initiation fees of approximately eight hours pay as well as assessments of $5 per month for a national strike fund and $2 per month per employee for an organizing fund.

[15] Aramark remitted union dues to the IWA from approximately October 2003 to May 2004. The IWA says that it represented the Aramark employees.

[16] In February, March, and April 2004, the Hospital Employees Union applied to the Labour Relations Board to be certified as the bargaining agent for employees at nine of the sites. Aramark and the IWA objected to these applications. They argued that there was a collective agreement in force between Aramark and the IWA. A collective agreement is a bar to a certification application by another union except during certain specified periods: ***Labour Relations Code***, R.S.B.C. 1996, c. 244, s. 19(1).

[17] On May 20, 2004, the Board held in ***Re Aramark*** that there was no collective agreement in force. Therefore, there was no bar to the certification.

ANALYSIS

[18] Section 4(1) of the ***Class Proceedings Act*** provides as follows:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
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> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[19] The defendant objects to certification on the basis that only one of the five requirements is satisfied: the pleadings disclose a cause of action.

[20] I turn to the five requirements of a class proceeding.

(1) Do the pleadings disclose a cause of action?

[21] The plaintiff must establish that a cause of action is disclosed by the pleadings. The test has been described as having "a very low threshold". The approach was described in ***Brogaard v. Canada (Attorney General)*** (2002), 7 B.C.L.R. (4th) 358, 2002 BCSC 1149 at para. 30:

> It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. This test is similar to the onus on the defendant to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the Rules of Court. However, on a certification application, the burden is on the plaintiffs to demonstrate affirmatively that a cause of action is properly pled. The threshold is a very low one.

[22] In ***Brogaard***, Allan J. adopted with approval the comments of Moldaver J., as he then was, in ***Abdool v. Anaheim Management Ltd.*** (1995), 21 O.R. (3d) 453 at 469 (Ont. Gen. Div.):

> The principles to be applied in considering whether pleadings support a legal cause of action are as follows:
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> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
>
> (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
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> (c) The novelty of the cause of action will not militate against the plaintiffs; and
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> (d) The statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

[23] The plaintiff advances her claim on four bases:

(1) Mistake: the plaintiff and IWA were under the mistaken belief that the collective agreement was valid, that the IWA represented the employees, and that the plaintiff and other employees were required to pay union dues.

(2) Money had and received (a claim in restitution): the IWA has the union dues which the employees paid by mistake and must therefore return them.

(3) Unjust enrichment: the IWA has been unjustly enriched because it was paid union dues under an invalid agreement and the employees have suffered a corresponding deprivation without juristic reason.

(4) Negligent misrepresentation: the IWA owed the employees a duty of care. They negligently misrepresented that there was a collective agreement in effect for the 30 sites. A consequence of this representation is that employees agreed to have union dues deducted.

[24] I am satisfied that the pleadings do disclose a cause of action in respect of money had and received, mistake and negligent misrepresentation. Indeed, the defendant does not take issue with that. The defendant does argue that the pleadings fail to disclose a cause of action for the claim of unjust enrichment. Although the fact that there are other causes of action pled, which are not subject of objection, is sufficient to dispose of this issue for certification process, I will go on to consider the defendant's argument respecting unjust enrichment because it must be considered in any event in deciding the issues for which the action is to be certified.

[25] The defendant argues that to establish a claim for unjust enrichment, the plaintiff must establish (i) an enrichment; (ii) a corresponding deprivation; and (iii) the absence of a juristic reason for the enrichment.

[26] The defendant says there is no enrichment here: the union used the dues it obtained to represent the plaintiff and other members of the proposed class. The plaintiff herself used the grievance procedure.

[27] The defendant also disputes the absence of a juristic reason. It notes that the Supreme Court of Canada held in ***Pacific National Investments Ltd. v. Victoria (City)***, [2004] 3 S.C.R. 575, 2004 SCC 75 at para. 23 that the onus is on the plaintiff to show there is no juristic reason within the established categories:

> There are now two stages to a juristic reason inquiry. At the first stage, a claimant (here the appellant) must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law, donative intent, and "other valid common law, equitable or statutory obligatio[n]" (*Garland*, at para. 44). The categories may be added to over time (para. 46). On proving that none of these limited categorical reasons exist to deny recovery, the plaintiff (here the appellant) will have made out a *prima facie* case of unjust enrichment. It will have demonstrated "a positive reason for reversing the defendant's enrichment" (*Smith, supra*, a p. 244).

[28] The defendant argues first that the collective agreement constitutes a juristic reason. The Labour Relations Board merely decided that there was no collective agreement on the dates that the Hospital Employees Union applied for certification. There is no indication that the Board's ruling had retroactive effect.

[29] Second, in the alternative, if the collective agreement was not in existence, the terms of the agreement were converted to individual contracts of service. Counsel relies upon ***Redl v. Maple Food Fair Ltd.***, [1995] B.C.J. 98 (Prov. Ct.) at para. 22:

> … [U]pon a collective agreement becoming void, the new individual common law contract of employment between the employer and an employee incorporates all those terms of employment contained in, or resulting from the preceding collective agreement, to the extent they are applicable to the particular employee, and are consistent with the terms of an individual contract of employment, unless and until the parties agree to a variation of the terms of the new common law contract, or, to put it differently, until the employment contract is novated. Such terms as are only consistent with a collective agreement do not survive, e.g., grievance arbitrations.

[30] Third, in the further alternative, there was a contract between the employees and the union, consisting of the union dues check-off.

[31] Fourth, in the further alternative, the defendant argues that the plaintiff did not address the further categories of juristic reason enumerated in ***Pacific National Investments***.

[32] Finally, the defendant says that there is a juristic reason entitling the defendant to retain the dues: the defendant provided services to the plaintiff. Neither the plaintiff nor the defendant expected those services to be gratuitous. The defendant relies on ***Bond Development Corp. v. Esquimalt (Township)***, [2006] 6 W.W.R. 473, 2006 BCCA 248. In that case, the developer was held to be entitled to be paid for work performed even though the contract failed for a lack of consideration.

[33] It must be recalled that the plaintiff need only show a *prima facie* case at this stage of the proceedings and that the threshold is relatively low.

[34] I now turn to address the defendant's arguments. To begin, I am satisfied that the plaintiff meets the requirement for "enrichment". The Supreme Court of Canada noted in ***Garland v. Consumers' Gas Co.***, [2004] 1 S.C.R. 629, 2004 SCC 25, at para. 36:

> The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit. …

[35] With regard to the defendant's first argument against juristic reason, I agree with the plaintiff's assertion that whether the collective agreement was void *ab initio* is a question for trial. The plaintiff has pleaded that it is void *ab initio* and that is sufficient.

[36] I note that that there is nothing in the decision of the Labour Relations Board to found an argument that the collective agreement was valid and that something occurred which caused the Board to rule that it was no longer in effect. The Board's reasoning is based on the collective agreement not meeting the threshold requirement; it is not based on some subsequent event, like decertification, which brought the collective agreement to an end.

[37] The Board did not rule that there was a collective agreement in place until May 2004. It held there was no collective agreement. The Hospital Employees'

Union filed applications for certification in March and April. The Board held that there was no collective agreement in effect on the dates those applications were made.

[38] I note as well that the defendant does not allege that the statement of claim fails to disclose a cause of action based on mistake. Mistake itself undermines a juristic reason. In ***Pacific National Investments*** at para. 39***,*** the court held that the plaintiff and the City had entered into a contract on the basis of a common mistake as to the City's legal authority and that such a mistake undermined the juristic reason relied upon by the City:

> The result, accordingly, is that the City and the appellant purported to contract with respect to the extra works and improvements under a common mistake of law as to the enforceability of their agreement. "It cannot be disputed", wrote Bacon V.C. in 1881, that "Courts of Equity have at all times relieved against honest mistakes in contracts … where not to correct the mistake would be to give an unconscionable advantage to either party" (*Burrow v. Scammell* (1881), 19 Ch. D. 175, at p. 182). Such a mistake undermines the juristic relied upon by the City, as La Forest, J. pointed out in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1200:
>
>> From his analysis, Dickson J. [in *Hydro Electric Commission of Napean v. Ontario Hydro,* [1982] 1 S.C.R. 347] concluded that the judicial development of the law of restitution or unjust (or as Dickson J. noted, "unjustified") enrichment renders otiose the distinction between mistakes of fact and mistakes of law. He would abolish the distinction, and would allow recovery in any case of enrichment at the plaintiff's expense <u>provided the enrichment was caused by the mistake</u> and the payment was not made to compromise an honest claim, subject of course to any available defences or equitable reasons for denying recovery, such as change of position or estoppel.
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> [Emphasis added.]

[39] The defendant's second and alternative position is that the terms of the agreement were converted to individual contracts of service. This assertion is in issue as well and is a question for trial. In ***Redl*** the collective agreement became void as a result of decertification. There was no question about the validity of the agreement at the time it was entered into. In any event, it is not every clause of a collective agreement that is incorporated into an employment agreement. In this regard the Labour Relations Board has held that the existence of a union security clause is only consistent with an existing collective agreement and does not survive when employees have individual contracts: see ***Re Interior Roads Ltd.*** (March 8, 2006), BCLRB Decision No. B64/2006 and ***Re Vogue Theatre Inc***. (February 16, 2006), BCLRB Decision No. B44/2006. Moreover, the plaintiff argues that the defendant was not privy to any individual contracts of employment and can hardly attempt to claim a benefit from them.

[40] For its third argument against juristic reason, the defendant relies on the dues check-off form which the plaintiff signed. Again, that is an issue for trial. The plaintiff has alleged in the statement of claim that the employees were compelled to sign the forms and that they cannot be relied upon by the defendant.

[41] It is noteworthy in this regard that the Labour Relations Board held in **Re *Aramark*** at para. 42 that completing the membership form was necessary in order to obtain a job. It did not constitute evidence that employees were "freely choosing" the IWA.

[42] With regard to the defendant's fourth argument against juristic reason, I agree with the IWA the plaintiff does not address the further categories of juristic reason enumerated in ***Pacific National Investments***. However, there is no suggestion of "donative intent", i.e., that the Aramark employees wished to donate money to the IWA. In fact, the plaintiff has pleaded that these employees were required to sign the dues check-off in order to proceed through the hiring process.

[43] As to other enumerated categories of juristic reason - "disposition of law" and "other common law, equitable or statutory obligation" – these can hardly assist the defendant in light of the Board's decision that the collective agreement was not in effect.

[44] The final argument of the defendant for alleging there is no *prima facie* case is that it provided services to the employees. This position could succeed at trial. However, it is a matter of evidence to be led at the trial of the action on its merits.

[45] I conclude the pleadings disclose a cause of action for the claim of unjust enrichment.

(2) Is there an identifiable class of two or more persons?

[46] The second issue is whether there is an identifiable class of two or more persons. The class identified by the plaintiff is "all Aramark employees at the 30 sites who were required to remit union dues to the IWA or on whose behalf union dues were remitted to the IWA." This appears to be an identifiable class.

[47] Nevertheless, the defendant objects. The first objection is that the class is overly broad because it includes employees who were not hired through the job fairs. Some employees became union members by responding to newspaper advertisements and were dispatched by the defendant to the employer.

[48] The defendant objects that these latter employees were not subject to the representations made by the defendant. Where the definition of a class is overly broad, the court may dismiss the certification application rather than make wholesale changes to arrive at an acceptable definition: see ***Caputo v. Imperial Tobacco Ltd.*** (2004), 236 D.L.R. (4th) 348, 44 C.P.C. (5th) 350 (Ont. Sup. Ct. J.), and ***Bellaire v. Independent Order of Foresters*** (2004), 5 C.P.C. (6th) 68 (Ont. Sup. Ct. J.).

[49] This argument misconstrues the requirement for an identifiable class. Section 7(e) of the ***Class Proceedings Act*** reads:

> 7. The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> …
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[50] All the persons in the class have a claim based on mistake, unjust enrichment and money had and received. The fact that some of the class have an alternative claim in negligent misrepresentation does not mean that there is no identifiable class. A less inclusive definition would arbitrarily exclude persons sharing the same interest in the resolution of common issues.

[51] It is open to the court to create subclasses: ***Williams v. College Pension Board of Trustees*** (2005), 45 B.C.L.R. (4th) 158, 2005 BCSC 788. That has not been shown to be necessary at this time.

[52] The defendant also objects that there is no evidence that there is a group of people who wish to have their complaint determined.

[53] That was the conclusion reached in ***Bellaire***. But in that case, the plaintiff was cross-examined. She was unable to name any other person who would satisfy the definition of the class.

[54] The ***Class Proceedings Act*** does not require evidence that members of the class support the action. In ***Bellaire***, the fact that the plaintiff was unable to name anyone who would come within the class put in question whether there was an identifiable class at all.

[55] Here there is no such difficulty. The defendant itself put forward a list of Aramack employees who were employed during the period in question. If such employees wish to opt out of the class action, they will have that opportunity.

[56] I am satisfied there is an identifiable class.

(3) Do the claims of the class members raise common issues?

[57] The third issue is whether the claims of the class members raise common issues.

[58] The term "common issues" is defined in s. 1 of the ***Act*** as:

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[59] The common issues test must be approached purposively. The Supreme Court of Canada explained in ***Western Canada Shopping Centres v. Dutton***, [2001] 2 S.C.R. 534, 2001 SCC 46 at para. 39:

> Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be “common” only where its resolution is necessary to the resolution of each class members’ claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member’s claim. However, the class members’ claims must share a substantial common ingredient to justify a class action.

[60] The test has been held to be a “low bar”: ***M.C.C. v. Canada (Attorney General)*** (2005), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (C.A.).

[61] The focus at this stage of the inquiry is on the question and not its answer. Therefore, “[t]he possibility that the question will be answered differently for some members of the class does not diminish the commonality of the question": ***Endean v. Canadian Red Cross Society*** (1997), 36 B.C.L.R. (3d) 350, 148 D.L.R. (4th) 158 at para. 40 (S.C.), rev.’d on other grounds, 48 B.C.L.R. (3d) 90, 157 D.L.R. (4th) 465 (C.A.).

[62] As well, it does not matter at this stage of the inquiry whether the individual issues predominate over the common issues. That is a matter relevant to determining whether a class action is a preferable procedure: ***M.C.C.*** at 416.

[63] Here, I find that the following common issues are present:

(1) Was the collective agreement void *ab initio*?

(2) Did the IWA provide representation services to the employees?

(3) Did Aramark deduct union dues from the wages of employees and remit them to the IWA?

(4) Were the IWA and the employees under the mistaken assumption that the collective agreement was valid and that the employees were required to pay union dues to the IWA?

(5) Was the IWA unjustly enriched?

(6) Did the employees suffer a corresponding deprivation without juristic reason?

(7) Did the IWA negligently misrepresent to the employees that the collective agreement was valid?

(8) Did the employees suffer damages as a result of any negligent representation?

(9) If mistake, unjust enrichment or negligent misrepresentation is established, what relief will the employees be entitled to?

(10) Did Aramark reimburse employees in whole or in part for union dues deducted from their wages and paid to the IWA?

(11) If the collective agreement was void *ab initio*, did individual contracts of service contain an obligation to pay dues to the IWA?

(12) Were employees required to pay dues apart from any employment agreement because of the union dues check-off assigned by employees?

[64] The defendant objects that the persons who obtained positions through the hiring hall were not subject to the representations on which the plaintiff bases the claim. That does not matter at this stage of the proceedings. Common issues do not have to be identical for every member of the class. The question need not have an identical answer for each member of the class: ***Endean***.

[65] In any event, there is an argument that the terms of the agreement negotiated with Aramark amounted to representations as well. That is, the terms of the agreement are arguably a representation that there was a collective agreement in effect.

[66] The defendant also argues that negligent misrepresentation and unjust enrichment claims must be based on the facts of each case. As such, "the individual

issues will overwhelm the common issues”: ***Nelson v. Hoops L.P., a Limited Partnership***, 2003 BCSC 277, aff’d 2004 BCCA 174.

[67] But s. 41(c) directs the court to exclude this consideration. The court in ***Endean*** at para. 35 makes this clear:

> The proper approach to the third statutory requirement engages the following principles. The question of whether individual issues predominate over common issues, which so permeates American law on this subject, is expressly excluded as a relevant consideration by s. 41(c) of the *Act*. Further, a common issue need not be dispositive of the litigation. A common issue is sufficient if it is an issue of fact or law common to all claims, and that its resolution in favour of the plaintiffs will advance the interest of the class, leaving individual issues to be litigated later in separate trials, if necessary: *Harrington v. Dow Corning Corporation et al*. (1996), 22 B.C.L.R. (3d) 97 at 105, 110 (S.C.).
>
> [Emphasis added.]

[68] ***Nelson v. Hoops*** does not assist the defendant. In that case, Mr. Justice Groberman held that in fact there were some common issues raised by the class members. Certification was refused because it had not been shown that a class proceeding would be the preferable procedure. If there is any doubt about that, the Court of Appeal’s decision at para. 20 makes it clear that Mr. Justice Groberman’s reason for refusing certification was that it would not be conducive to the fair and efficient resolution of the common issues. The Court of Appeal agreed with him in that regard. There was a cross-appeal concerning the finding of the chambers judge that the statement of claim disclosed a cause of action for fraudulent misrepresentation. There was no cross-appeal with regard to common issues.

(4) Is the class proceeding process the preferable method for resolving the common issues?

[69] The fourth question is whether a class proceeding is the preferable procedure for the fair and efficient resolution of common issues. In this regard the courts have emphasized the three principles underlying class proceedings legislation: access to justice, judicial economy and behaviour modification: ***Endean*** at para. 23. The most relevant in this case are access to justice and judicial economy.

[70] Section 4(2) of the ***Class Proceedings Act*** sets out the factors the Court must consider in determining whether a class proceeding is the preferable proceeding:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

I will consider each of these factors, but I note at the outset that those most relevant in this case are paragraphs (a), (d) and (e).

(a) Predominance of Common Issues

[71] I have concluded that the individual issues I have discussed will not predominate over the common ones. There are possible issues that will depend on each individual's treatment. However the court can deal with common issues of the class under s. 11 of the ***Act*** before dealing with common issues of the subclass and with the individual issues.

(b) Interest of Potential Class Members in Pursuing Individual Actions

[72] There is no evidence that a significant number of class members have a valid interest in pursuing separate actions.

(c) Claims Subject of Other Proceedings

[73] There is no evidence that any of the potential claims of other class members are the subject of separate proceedings.

(d) and (e) Practicality of Class Proceedings as Compared to Other Available Proceedings

[74] I have collapsed considerations (d) and (e) for the purposes of this analysis because they address essentially the same considerations.

[75] In this case, the quantum claimed in the litigation is relevant in determining the efficiency of a class proceeding as compared to other available proceedings.

[76] The cost of pursuing these claims individually strongly favours a class proceeding. Although the defendant argues that Small Claims Court is an inexpensive process for dispute resolution, the argument is not supportable. These claims are for $300 or less. The cost of filing a claim and reply in Small Claims Court is approximately $126. Photocopying costs and service costs are in addition to that. There is no recovery for legal fees under the ***Small Claims Act***, R.S.B.C. 1996, c. 430.

[77] The defendant has admitted that it received union dues from the employees. The plaintiff believes there are 800 to 900 people who paid dues during the material time. The interests of judicial economy strongly favour a class proceeding. This Court's comments in ***Scott v. TD Waterhouse Investor Services (Canada) Inc.*** (2001), 94 B.C.L.R. (3d) 320, 2001 BCSC 1299 at paras. 144 to 146 have application here:

> Similarly, the allegations are such that individual class members are unlikely to make their own claims. The dollar value of any loss is said to be from $50 to $400 to $500. Yet, because of the number of class members, the total loss could be millions of dollars: *Chadha v. Byer Inc.* [(2001), 200 D.L.R. (4th) 309 (Ont. Sup. Ct., Div. Ct.)].
>
> The practical reality is that absent certification, the issues may go unresolved because of the relatively insignificant quantum of any individual claim. That would be unfair and should be discouraged when the claims in the aggregate are substantial: *Howard Estate v. British Columbia* (1999), 66 B.C.L.R. (3d) 199 (S.C.).
>
> In addition, the legal arguments required and the factual basis underlying them are sophisticated. Experienced lawyers, as well as expert witnesses are needed. Individual class members would be unlikely to either want to, or be in a position to, retain these professionals. The class proceeding places the defendants and the class members on a more equal footing in that respect.

[78] The defendant argues if this action is certified as a class proceeding, it will lose important procedural safeguards such as discovery and the ability to collect costs.

[79] Section 17 of the ***Act*** makes discovery possible not only for the representative plaintiff but for other class members as well. The defendant's ability to collect costs if the plaintiff's claim is unsuccessful is not a factor recognized by the ***Act.***

[80] Having considered the economics of the litigation, I turn now to consider whether there are procedural alternatives available to the plaintiff that are preferable to a class proceeding. I have already dealt with the suggestion of multiple Small Claims actions. The defendant also argues that a special case under Rule 33, a proceeding on a point of law under Rule 34, a summary trial under Rule 18(A) and a complaint to the Labour Relations Board are all preferable.

[81] I deal first with the Labour Relations Board. No specifics were provided by the defendant as to how such a complaint would proceed. The defendant has not objected to the jurisdiction of this Court and argued that the Labour Relations Board has jurisdiction.

[82] The plaintiff argues that she has no standing at the Board and that the Board does not have jurisdiction to order the defendant to repay any of the dues to the employees.

[83] The plaintiff may well have the ability to bring a complaint before the Labour Relations Board. Whether the Board deals with it is a matter for the Board's discretion. However, the problem is the same as in the Small Claims Court. The plaintiff does not have standing to complain on behalf of all other employees of Aramark.

[84] A special case could be brought if the parties agreed to it. There is no such agreement. The court may also order it. A special case could address a threshold issue, whether the collective agreement is void *ab initio.* However, that would not likely dispose of all of the issues.

[85] A proceeding under Rule 34 requires agreement on the point of law. As the defendant argues, such a procedure is inappropriate for a contested matter such as this. In ***Alcan Smelters and Chemicals Ltd. v. Canadian Association of Smelter & Allied Workers, Local No. 1*** (1977), 3 B.C.L.R. 163 (S.C.), this Court held that the facts relating to the point of law must not be in dispute.

[86] Further, there is no suggestion that proceeding under Rule 34 would eliminate the need for a trial of the facts and other legal issues.

[87] A summary trial under Rule 18A is not truly an alternative to a class proceeding: Rule 18A remains available to the parties even if I grant certification.

[88] I conclude that the class proceeding is the preferable process for determining this complaint and the complaints of the proposed class.

(5) Representative plaintiff

[89] Section 4(1)(e) of the ***Class Proceedings Act*** requires that the court consider whether there is a representative plaintiff who,

> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying the class members of the proceeding; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[90] The defendant objects to the appropriateness of the plaintiff as a representative of the class. The defendant relies on several circumstances which, taken together, it argues suggests that the Hospital Employees Union is directing this litigation and not the plaintiff. First, it points to the fact that the plaintiff has held and holds a number of positions with the Hospital Employees Union including that of chief shop steward at St. Paul's Hospital. Second, three letters from counsel for the plaintiff to the defendant's counsel on this file were copied to Ms. Sue Fisher. Ms. Fisher, according to the Hospital Employees Union website, is the Director of Organizing of that Union. Third, the defendant points to the fact that no action has been brought against Aramark for negligent misrepresentation although Aramark represented that membership in the IWA was a requirement of the job.

[91] The defendant relies on ***Hoffman v. Monsanto Canada Inc.***, [2005] 7 W.W.R. 665, 2005 SKQB 225, leave to appeal granted, [2006] 5 W.W.R. 400, 2005 SKCA 105. In that case, the court stated at para. 337:

> The representative plaintiff under The *Class Actions Act* has the responsibility to prosecute the lawsuit, once certified, in the interests of the members of the class. Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the Court for the adequate performance of these obligations. These are duties that cannot, in my view, be delegated to another party who is not answerable to the Court.

[92] The evidence does not establish that Ms. Vasquez has delegated her duties to a non-plaintiff. There is no evidence of any interest that is in conflict with the interest of other class members. The evidence is that the plaintiff would represent the interests of the class. The plan that has been produced for the proceeding may require amendments from time to time but I am satisfied that it is a workable method which meets the requirements of s. 4(1)(c).

[93] Therefore I conclude that this action meets the requirements for certification as a class proceeding. The parties should turn their minds to the precise wording of the certification order, which will be considered at that next case management meeting.

"Mr. Justice Kelleher"