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Foreign worker class action 'sounds the alarm'

Denny's employees allege systematic, repeated breaches of employment contracts

An important case that could reshape the recruitment and employment of temporary foreign workers is winding its way through the courts.

In a recent decision, the British Columbia Supreme Court certified a foreign worker's claim for damages as a class action — the first case of its kind in Canada. The claim arose out of the worker's employment relationship with Denny's Restaurants.

This should give employers pause to evaluate their dealings with foreign workers and the international agencies they engage for recruiting them.

In *Dominguez v. Northland Properties Corp. (c.o.b. Denny's Restaurants)*, the court is dealing with allegations of systematic and repeated breaches of employment contracts by an employer that hired a large number of foreign workers, mostly from the Philippines.

The nature of the claim is the breaches took place within an employment situation where the workers had a significant disadvantage in terms of protecting their own interests, and the employer sought to take advantage of these vulnerable individuals, given their precarious status in Canada.

The plaintiff, Herminia Vergara Dominguez, was a temporary foreign worker who came to Canada in 2008 to work at a Denny's restaurant operated by the defendant. She contends the employer failed to give her as much work as promised and failed to pay overtime or reimburse her for expenses related to her employment, such as travel from the Philippines and agency recruitment fees.

As a result, she alleges she suffered damages arising out of breach of contract, including breach of duty of good faith and fair dealing, and breach of fiduciary duty. Dominguez also alleges the employer was unjustly enriched by reason of non-payment of these wages and other expenses, and the breaches were systemic in the sense the employer failed to implement the necessary procedures to ensure she and other employees were appropriately compensated.

LEGAL VIEW

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Dominguez sought to have the matter certified as a class-action proceeding on behalf of herself and all other current and former employees who came to Canada under the Temporary Foreign Worker Program (TFWP) to work for the defendant. There were about 75 people in the putative class. The question for the court was whether Dominguez was the appropriate representative plaintiff in a class action.

Dominguez was recruited as a temporary foreign worker and she initiated her application in order to join her husband, who was already working for the defendant. She was required to send her resumé to an agency in B.C., designated by the employer, that obtained the necessary approvals for the foreign workers. The agency carried its recruitment activities in the Philippines through a counterpart. Most of the foreign workers were recruited as a result of the dealings between the agency in B.C. and its counterpart in the Philippines.

Additional fees required

At some point, the agency in Canada advised Dominguez's husband he would have to pay an initial $3,000 in order to proceed with his wife's application. After that payment, Dominguez was contacted in the Philippines by the agency's counterpart and advised a positive Labour Market Opinion (LMO) had been issued by Service Canada relating to her job with the defendant employer as a food and beverage server, and she would be paid $9.80 per hour for a 24-month period.

The hours of work were not specified in her LMO. However, in the case of other putative class members, the LMO specifically said the employees would work 40 hours per week.

The agency was very involved in the process to obtain LMOs for the foreign workers placed with the defendant's restaurants. The agency's counterpart in the Philippines copied the contents of the Human Resources and Skill Development Canada sample contract, which specified employees shall work 40 hours per week and would receive 50 per cent more than the regular wages for any hours worked over that limit.

The contract also specified the employer shall not recoup from the employee, through payroll deductions or any other means, any costs incurred in recruiting or retaining the employee, including, but not limited to, any amount payable to a third-party recruiter. Further, the employer agreed to assume the cost of two-way air transportation for the employee and to abide by the standards set out by all relevant provincial labour legislation.

Shortly after the contract was signed, Dominguez underwent a medical examination and a work visa was approved. At that point, she was advised by the agency's counterpart in the Philippines she would have to pay a $2,750 "agency fee" to continue with the hiring process. All of the putative class members were similarly required to pay

fees in order to complete the hiring process, found the court.

Employees each paid between $6,000 and $7,000 in total, depending on currency conversion. In addition, Dominguez and other employees purchased their airfare for travel to Vancouver from the agency's counterpart at a cost of about $1,000 and were not provided with a receipt.

After arriving in Canada, Dominguez began to work for the defendant as a server at one of its Vancouver locations. The problems started almost immediately and Dominguez complained she was often provided with fewer than 40 hours of work and was not compensated for hours she did not work, despite being able to do so. There was evidence other foreign workers were treated in a similar fashion.

The employer contended there was a shortage of work and it chose to cut the hours of foreign workers before reducing those of Canadian citizens or permanent residents.

Dominguez alleged she occasionally worked more than eight hours per day but was not paid overtime, and she lodged numerous complaints with management. The lack of payment of overtime had been the subject of a separate investigation by the director of employment standards in B.C., which had led to a voluntary settlement by the defendant with other claimants.

There was evidence the fees charged by the agency and its counterpart in the Philippines were also the subject of a prior investigation by the director, and at least one employee who filed a complaint with the Employment Standards Branch was subsequently terminated, apparently in retaliation. All these factors made for a negative work environment.

Certifying class action

The court had to determine whether there was an identifiable class of "two or more persons," as required by the B.C. legislation, to certify a class action. It answered in the affirmative, dividing the class into two subsets — one comprising all current and former employees with a positive LMO allowed to work in Canada under the TFWP who were still in Canada, and another one with all the current and former employees who no longer resided in the province.

Although each foreign worker had a separate contract, there was sufficient commonality to deal with all of them together as the issues arising were very similar, if not identical, in many cases, said the court.

A claim was advanced that there is a further common issue that the defendant acted as fiduciaries in the context of the vulnerability of the temporary foreign workers and took advantage of them. In that regard, there was sufficient commonality of experiences of all the foreign workers who were employees of the defendant to be part of the class action, found the court.

While the merits of the case are yet to be decided, the certification of this case sounds the alarm amongst employers with a large number of foreign workers. A defendant employer faces the prospect of a very large monetary award against it in a class-action proceeding. This being the first case of its kind in Canada, it will no doubt attract considerable scrutiny by employers and employees alike.

In addition to potential financial liability, employers may be subject to significant administrative sanctions by Service Canada for breach of conditions set out in LMOs, which can result in a two-year suspension from the TFWP.

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