COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Basyal v. Mac's Convenience Stores Inc.,* 2019 BCCA 276

Date: 20190726
Dockets: CA44830; CA44832

Docket: CA44830

Between:

Prakash Basyal, Arthur Gortifacion Cajes, Edlyn Tesorero and Bishnu Khadka

Respondents (Plaintiffs)

And

Mac's Convenience Stores Inc.

Respondent (Defendant)

And

Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd.

Appellants (Defendants)

- and -

Docket: CA44832

Between:

Prakash Basyal, Arthur Gortifacion Cajes, Edlyn Tesorero and Bishnu Khadka

Respondents (Plaintiffs)

And

Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd.

Respondents (Defendants)

And

Mac's Convenience Stores Inc.

Appellant
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Savage
The Honourable Madam Justice Fisher

Supplementary Reasons to *Basyal v. Mac's Convenience Stores Inc.,*
2018 BCCA 235

Counsel for P. Basyal, A. Cajes, E. Tesorero and B. Khadka:	R.C. Gordon, Q.C. C. Allevato K. Smith S. Quail
Counsel for Mac's Convenience Stores Inc.:	D.G. Cowper, Q.C. A. Chowdhury T.A. Posyniak
Counsel for Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd.:	D.B. Lebans C.D. Hermanson
Place and Date of Hearing:	Vancouver, British Columbia May 7 and 8, 2018
Place and Date of (Original) Judgment:	Vancouver, British Columbia June 8, 2018
Written Submissions Received:	March 15 and 25, 2019 May 24, 2019
Place and Date of Supplementary Hearing:	Vancouver, British Columbia May 22, 2019
Place and Date of Supplementary Judgment:	Vancouver, British Columbia July 26, 2019

Supplementary Reasons of the Court

Summary:

Amendments to pleadings in Class action required by Court in previous appeal were reviewed.

Supplementary Reasons for Judgment of the Court:

[1] These reasons should be read in conjunction with our earlier reasons dated June 8, 2018, which are indexed as 2018 BCCA 235. At that time, we ruled that certain claims in breach of contract against the defendant Mac's Convenience Stores Inc. ("Mac's") could continue in the proceeding as a certified class action (subject to the creation of a subclass of plaintiffs), and that the claim could include breach of the duty of honest performance of contract. We also ruled that the certification of the class action as against Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. (collectively called "Overseas") and Trident Immigration Services Ltd. (all three being called the "Overseas Defendants") for breach of fiduciary duty could proceed; but we stayed the remaining purported causes of action in order to give the plaintiffs an opportunity to amend their pleading "such that the material facts relating to each cause of action and to the existence of an agency relationship … are clearly stated".

[2] The plaintiffs have now prepared a Second Further Amended Notice of Civil Claim ("NOCC") and seek an order allowing them to file that document and lifting the stay. The defendants counter that the proposed amendments should not be permitted as the pleading deficiencies have not been remedied. Counsel filed written submissions in March of this year on the subject and eventually it became apparent that it would be necessary for us to hear oral submissions. That hearing took place on May 22, 2019.

Creation of Subclass

[3] At para. 80(1) of our earlier reasons, we directed that a subclass of plaintiffs be created to reflect the fact that only "some of" the plaintiffs were asserting that Mac's had failed to provide "a job" or to provide the numbers of hours of work promised to "some of" the plaintiffs. This appears to have been done satisfactorily at para. 29(b) of the proposed NOCC.

[4] We note that some parts of the pleading refer to "the Plaintiffs and Class Members" as if the two are different; and that in other places — e.g. at paras. 61–66 — the pleading alleges that "the Plaintiffs and many of the Class Members" ended up without jobs that had been promised by Mac's and thus suffered damages. As we understand it, the plaintiffs who were in this situation are the members of the *subclass*. If that is correct, the pleading should

be amended accordingly wherever necessary. If it is not correct, further clarification should be provided in the definition of the subclass.

[5] We also note that subparagraphs (a) and (b) of para. 71 refer to breach of contract and breach of the duty of honest performance allegedly suffered by the "Plaintiffs and Subclass Members". Given that the Subclass Members are also Plaintiffs, the document should be clarified as to who exactly is alleged to have suffered these breaches. Subparagraphs (d), (e) and (f) should also be clarified, presumably to refer to "the Plaintiffs", since all Class Members are Plaintiffs. Indeed this is a problem that pervades the new NOCC.

Recruitment Fees Allegations

[6] At para. 60 of our previous reasons, we stated that it was only if the $8,000 fees paid by the workers to the Overseas Defendants were in whole or in part, payment for "recruiting" or "jobs" *and Mac's and one or more of its co-defendants shared the benefit of such payments in some way* that most of the other causes of action against Mac's could be viable. The pleading at that time made various oblique suggestions that Mac's and the Overseas Defendants had shared the $8,000 fees in some way, but the allegation was not made directly.

[7] Paragraph 2 of the proposed NOCC now defines the term "Recruitment Fee" to refer to the fee of approximately $8,000 said to have been charged by the Overseas Defendants to each Class Member "to secure employment at Mac's". The NOCC alleges at para. 38 that Overseas agreed to provide Mac's with "the following services in recruiting qualified candidates". It lists recruitment trips, pre-screening of candidates, videoconference interviews, "settlement services", and completion of required business and immigration documents, including assistance with LMOs. Para. 38 alleges that Mac's was to pay (presumably to the Overseas Defendants) a $500 retainer plus $1,000 following the completion of three months' probation *for those services* in respect of each worker. It is not alleged that it was illegal for Overseas to charge such fees or for Mac's to pay them.

[8] Paragraph 67 then asserts that:

> The Recruitment Fees paid by the Plaintiffs and Class Members [sic] benefitted Mac's because they <u>included costs of recruitment which Mac's was obligated to pay under the terms of the employment contracts</u> and TFWP. These include:
>
> a. costs of airfare to Canada;
>
> b. costs of Overseas pre-screening candidates for employment and ascertaining their motivation to emigrate to Canada;

c. costs of preparing and submitting immigration documents required to work in Canada; and

d. costs of initial settlement in Canada.

[Emphasis added.]

Under the heading "Damages" on page 16, the plaintiffs then seek:

Damages

a. an order that Mac's identify each Class Member from its records and pay compensatory damages into a fund for distribution to each Class Member:

….

ii. the value of the Recruitment Fees paid by the Class Members;

b. an order that Overseas and Trident Immigration identify each Class Member from their records and pay damages into a fund for distribution to the Class Members, in the value of Recruitment Fees paid by the Class Members;

[Emphasis added.]

It is unclear what is meant by the "value" of the Recruitment Fees. If something other than "amount" is intended, this should be stated explicitly. If not, then "amount" should be substituted.

[9] As Mac's observes in its written submission, the new para. 67 sweeps together "lawful fees for services and improper fees for jobs. This confuses rather than clarifies the pleadings." The costs of workers' airfares to Canada are amounts Mac's agreed to reimburse to the workers. If and to the extent they have not been paid, they remain payable under the employment contracts. It is unclear how they could represent "benefits" to Mac's at this point.

[10] The other three items listed in para. 67 are "costs" of the services for which the plaintiffs have pleaded at para. 38 that "Overseas indicated that it would charge Mac's" a total of $1,500. If it is the case that Mac's paid the Overseas Defendants $1,500 per worker as the plaintiffs allege, again no benefit to Mac's is apparent. There is no express allegation that Mac's was "enriched" by being saved certain expenses that *it would otherwise have had to pay* in connection with the hiring of the plaintiffs; nor (as we stated in our previous reasons) does the pleading specify why the listed "costs" would have represented obligations of Mac's. Indeed, the previous pleading stated that it was unknown whether Mr. Higuchi and/or Mac's "received a portion of the Recruitment Fees or any other payment from the [Overseas Defendants] in exchange for its role in the scheme." This difficulty has not, in our view, been overcome.

[11] Finally, para. 86 states that Overseas was unjustly enriched by collecting the Recruitment Fees which were “illegal under statute”. This conflates the Overseas Defendants with Mac’s. As noted earlier, it was not illegal for persons *other than Mac’s* to charge for the specified services. The fact that an agency relationship is pleaded with respect to the Overseas Defendants’ hiring workers on behalf of Mac’s does not mean that all payments made by workers to the Overseas Defendants were received by or attributable to Mac’s as principal. In the absence of a clear allegation of a “kickback” or “recoupment” of Recruitment Fees by Mac’s, no cause of action in unjust enrichment as against it is pleaded.

[12] We stated in our previous reasons that the starting point of the plaintiffs’ amendments should be to plead the material facts relating to Mac’s ‘recouping’ or otherwise benefiting from the Overseas Defendants’ receipt of the Recruitment Fees. Since no such material facts have been pleaded and the cause of action in unjust enrichment as against Mac’s remains incomplete, it would be impossible for Mac’s to plead a proper defence to the damage claims at para. 71B(a)(ii) under “Damages”; para. C(a) under “Other Remedies”; and para. 75(a) of the NOCC. All references to a claim in unjust enrichment as against Mac’s must therefore be deleted.

Breach of Fiduciary Duty

[13] In our previous reasons, we noted that the former pleading contained “no material fact that supports an undertaking given by Mac’s to act in the best interests of its employees”, nor an assertion that the contracts of employment gave Mac’s “any discretionary power to affect the plaintiffs beyond the strictly stated employment relationship.” The proposed NOCC does not change this.

[14] Paragraph 34 of the proposed pleading again states that temporary foreign workers are “uniquely vulnerable to abuse” by reason of their immigration status and restrictions on their mobility in the Canadian labour market. However, as we observed in our previous reasons, vulnerability alone does not create a fiduciary duty. Setting aside for the moment the question of agency, the material facts that would support a breach of fiduciary duty on the part of Mac’s have simply not been provided. All references to this purported cause of action must therefore be deleted.

Agency Allegation

[15] The new pleading does now contain allegations designed to show an agency relationship between Mac’s and the other defendants. Paragraph 41 cites an “appointment of representative” form (apparently a standard governmental form) in which Mr. Higuchi “residing at c/o Mac’s Convenience Store Inc.” appointed Mr. Bansal as his representative to

obtain a Labour Market Opinion, and agreed to “ratify and confirm all that my representative shall do or cause to be done by virtue of this appointment.”

[16] Further, para. 42 alleges that Mac’s was required to make certain attestations to the Canadian authorities, including one that it was “aware that *I will be held responsible for the actions of any person recruiting temporary foreign workers on my behalf.*” Assuming these representations were made to the government of Canada and not directly to the foreign workers, a question will arise whether *the plaintiffs* can rely on them. That will be a matter for the trial judge.

[17] Paragraphs 42–43 allege it is said that Mr. Higuchi signed the attestations and Appointment of Representative forms on behalf of Mac’s; and that the attestations again contained undertakings (presumably by Mac’s) that “recruitment would be done in compliance with applicable laws and that Mac’s *would be held responsible for the actions of any person recruiting TFWs on its behalf.*” We are satisfied that these allegations are sufficient to plead an agency on the part of Overseas with Mac’s as principal. (It should be understood, of course, that even if the plaintiffs are able to show that those Defendants were acting as agents of Mac’s in their dealings with temporary foreign workers, and even if breaches of fiduciary duty on the part of those Defendants are proven, Mac’s itself would not thereby become a fiduciary. The agency might make Mac’s, however, responsible as principal for damages for the breaches of fiduciary duty by its agent(s) vis à vis the plaintiffs.)

Disposition

[18] In the result, the allegations made against Mac’s in respect of breach of contract and breach of the duty of honest performance of contract remain standing. A cause of action against Mac’s in unjust enrichment has not been pleaded; nor has breach of fiduciary duty *as against Mac’s* been pleaded. An agency with Mac’s as principal appointing “any person recruiting TFWP workers” on its behalf as agent; *may* arise on the facts as now pleaded at paras. 42–43 of the NOCC.

[19] An amended NOCC should now be filed in the usual way in the court below, subject to the foregoing directions.

“The Honourable Madam Justice Newbury”

“The Honourable Mr. Justice Savage”

“The Honourable Madam Justice Fisher”