



## PROPOSED CERTIFICATION OF CLASS ACTION FAILS FOR WANT OF COMMONALITY

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In the recent case of *Kafka v. Allstate Insurance Company of Canada*, the Ontario Superior Court of Justice considered a motion for certification of a proposed class action. The Plaintiffs were former agents of the defendant, Allstate Insurance Company of Canada (“Allstate”), who alleged that they were constructively dismissed.

The background is that Allstate introduced a revised production distribution model and agent compensation system (the “New Model”) that was phased in over a period of two years. Under the previous model the agents were dispersed across Ontario in neighbourhood offices, which were operated as if the offices were their own.

As a result of the implementation of the New Model, the neighbourhood offices were closed and the agents had to operate out of new offices and assume one of a variety of new positions. All agents were provided with individual letters outlining their future roles, compensation and pending office relocations.

A total of 102 agents fell within the proposed class definition. Twenty-two of these agents retired, 12 agents accepted a new role then resigned, two agents turned down new roles and resigned, two agents made claims against Allstate for wrongful dismissal, two agents pursued compensation through Ontario’s *Employment Standards Act* and 62 agents simply resigned from their employment. The three Plaintiffs commenced the class proceedings alleging that the New Model unilaterally changed fundamental terms of their employment contracts, thus constituting constructive dismissal.

The central issue under consideration was whether the systemic changes that the New Model introduced resulted in a constructive dismissal of all the agents. The Court started by reaffirming the elements for a claim of constructive dismissal: the employee bears the onus of proving that “...changes of a fundamental nature were unilaterally imposed by the employer, and that the changes amount to a significant alteration of the employment contract.”

Further, the Court reiterated that “a unilateral and fundamental change to the employment contract imposes two important obligations on the employee: an obligation to accept or reject the change and an obligation to mitigate if the change is rejected.”

The application of this second obligation focused on whether each agent refused an offer of reasonable alternative employment with Allstate. The burden to prove a failure to mitigate rests on the employer and will typically require the employer to demonstrate that the employee acted unreasonably in refusing to accept an altered position.

The Court reviewed the certification requirements set out in Ontario’s *Class Proceedings Act*. The test for certification can be summarized as follows: (1) the pleadings must disclose a cause of action, (2) there must be an identifiable class of two or more persons, (3) the claim of the class members



raise common issues, (4) a class proceeding would be the preferable procedure for the resolution of the common issues and (5) 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
- iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members

The Court stated that the above requirements are linked, but that the core of a class proceeding is “the element of commonality”. It was conceded that the claim contained a valid cause of action and that a class was properly identified.

However, the Plaintiffs’ claim had a ‘fatal flaw’ in the eyes of the Court, as it lacked commonality. Issues are not common if individual findings of fact must be made with respect to each class member. The Court stated “...(W)hat might be an offer of reasonable alternative employment for one of the plaintiffs will not necessarily be so for another... They did not work in same location, have the same book of business and/or have the same earnings, bonuses, benefits and pensions...”.

The fourth criteria of ‘preferable procedure’ also failed as “there is no practical utility in allowing the class action to proceed” as a “fact finding and legal analysis procedure will be required for each class member”.

Lastly, the plaintiff failed to satisfy the fifth criterion of a workable litigation plan as the plan itself “failed to explain how the individual nature of a constructive dismissal can be managed in a class action”.

In summary, in considering the elements to establish a constructive dismissal, the Ontario Superior Court of Justice concluded that the individual fact finding analysis required in such a claim precluded a resolution on a class proceeding basis.