
CANADA / JUDGMENT

Service v. University of Victoria

2019 BCCA 474

COURT

British Columbia Court of Appeal

DECIDED

27 December 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCCA 474 Service v. University of Victoria

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Service v. University of Victoria,

2019 BCCA 474

Date: 20191227

Docket: CA45780

Between:

Susan Service

Appellant

(Plaintiff)

And

University of Victoria

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

November 19, 2018 (Service v. University of Victoria, 2018 BCSC 2027,
Victoria Docket 15-2506).

Counsel for the Appellant:

D.S. Mulroney

C.A. Siver

Counsel for the Respondent:

R.W. Sieg

Place and Date of Hearing:

Victoria, British Columbia

September 10, 2019

Place and Date of Judgment:

Vancouver, British Columbia

December 27, 2019

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals the dismissal of her application to certify her claim as a class action. She seeks to bring a class action on behalf of certain University employees after the University implemented a direction by a provincial Minister to impose a salary freeze. Held: Appeal allowed, action certified as a class action and remitted to the trial court. The judge misapprehended the issues between the parties as to the legal effect of the Minister's direction. There is a significant common issue regarding whether the Minister's direction provided a lawful excuse for the University to not perform the terms in an employment contract regarding salary increases. There are likely additional common issues arising out of the question of whether the University's notice to employees about the salary freeze was notice of a change in the terms and conditions of the contract, but this will become more apparent once the defence pleading is filed. Further, the claim for damages is not based on constructive dismissal but is based on foregone salary increases as a result of the alleged breach of contract, which would not give rise to unduly complex individual issues. A class proceeding would be the preferable procedure.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] Susan Service appeals the dismissal of her application for certification of a class proceeding against the University of Victoria under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]. She commenced the claim on behalf of a group of employees who she claims were wrongly subjected to a salary freeze in breach of their employment contract in the years 2013-2016. She claims that while the provincial government gave notice of a salary freeze to the University, the salary freeze was not legally authorized and the University erred in implementing it. As a result, she says the University breached the employees' employment contracts by failing to give them the annual salary increases they were due, also negatively impacting their pensions.

Background

- [2] The facts are largely uncontroversial; where the parties differ is as to the legal effect of the facts.
- [3] Ms. Service was employed by the University and was one of a category of non-union employees classified as "management excluded employees" ("ME Employees").
- [4] As of January 1, 2012, the ME Employees were subject to employment terms contained in a document described as "Management Excluded Terms and Conditions". For ease of reference, I will consider this the employment contract at issue, and will refer to it as the Contract. I do so without intending to determine any issues concerning the applicability and enforceability of the Contract.
- [5] The Contract sets out terms regarding salary ranges, performance reviews, and salary increases. Section 3.3 of the Contract describes the administration of salaries at the University:

3.3 Roles and Responsibilities

Salary administration at UVic is founded on a shared responsibility:

The Human Resources Department is accountable for:

- Developing and revising policies governing salary administration for approval by the Board of Governors and in compliance with applicable statutes and regulations;
- Establishing competitive salary ranges;
- Directing the salary administration process; and
- Providing guidelines to supervisors to ensure that salary decisions are made on a sound and consistent basis throughout the organization.

Supervisors are accountable for:

- Administering compensation policies consistent with the University's compensation philosophy and framework;
- Evaluating the performance of their employees on an annual basis; and
- Establishing actual rates of pay within established ranges in discussion with Human Resources.

3.4 Salary Plan

The salary plan is designed to respond to the needs of the organization, and more specifically to enable the attraction and retention of skilled, and motivated employees.

The Salary Plan

- Applies to all management excluded positions;
- Establishes a salary range for each position and a mechanism for salary progression within the salary range;
- Offers flexibility to manage pay while considering a combination of factors;
- Provides a common review period for annual salary progression; and
- Provides for and links annual salary progression to individual performance and contribution to organizational goals.

[6] At section 4.1 of the Contract, the Salary Administration is set out, establishing a range of salary levels assigned to a salary grade from 4 to 16. Salary ranges are divided into three portions: "developmental", "competitive", and "performance". Each category is described as a percentage of the mid-point of the salary range. The Contract describes these portions as follows:

4.0 Salary Administration

4.1 Salary Ranges

The university reviews the salary structure and undertakes market surveys as required, but no less frequently than every 4 years. Adjustments to the salary ranges will be done as needed consistent with the University's compensation philosophy and guiding principles. A copy of the current salary structure is available from Human Resources.

Ranges are divided into three portions as illustrated: Developmental, Competitive and Performance.

Performance

Level

Developmental

Portion

80% - 90%

Competitive Portion

90% - 110%

Performance

Portion

110% - 115%

Not Achieved

No increase

No increase

no increase

Partially

Achieved

Discretionary

increase up to

3%

Discretionary

increase up to

2.5%

no increase

Fully Achieved

3%

2.5%

Discretionary

increase up to

2.0%

Exceeded

Discretionary

increase up to

5%

3%

Discretionary

increase up to

2.5%

Note: Scores of "Exceeded" are intended to recognize exceptional achievement situations (i.e. less than 10% of employees), requiring written justification and VP sign-off.

Developmental Portion: Salaries established in the Developmental Portion are generally reserved for individuals who are on a steep learning curve toward mastering the responsibilities and accountabilities associated with their position. The Developmental portion is viewed as a temporary compensation arrangement. The goal is to move the employee into the Competitive portion of the range as quickly as possible based on a robust development plan.

Competitive Portion: Salaries established in the Competitive portion are normally reserved for individuals who display full competence in their role.

Performance Portion: Salaries established in the Performance portion are normally reserved for high performing employees. All performance-informed salaries in this portion of the range require Vice President approval.

- [7] The majority of ME Employees were below the ceiling of the competitive portion, and into either the developmental or lower competitive salary ranges.
- [8] Under the Contract, supervisors were to evaluate the performance of ME Employees annually, before July 1, with reference to the chart above. Salary increases would depend on the performance assessment and would be either no raise, a fixed percentage raise, or a discretionary raise. Range progression would be pro-rated for employees starting after July 1.
- [9] By email dated June 5, 2012 from the human resources department, supervisors were told that the performance review process started from the assumption and expectation that each ME Employee met the "fully achieved" performance level. A tailored list was provided to supervisors of the salary range progression expected to be recommended by them for the ME Employees under their supervision, if this achievement level was met. Supervisors were informed that salary range progression recommendations above or below this amount "should be very exceptional" and would require the supervisor to review the same with their vice-president by June 15.
- [10] In accordance with the Contract, Ms. Service received a salary increase as of July 1, 2012.

- [11] The University is a "public sector employer" under section 1 of the Public Sector Employers Act, R.S.B.C. 1996 c. 384 [PSEA].
- [12] On September 5, 2012, the Lieutenant Governor in Council ordered that the Minister of Finance be the minister responsible for the PSEA.
- [13] On September 13, 2012, by news release the British Columbia Ministry of Finance announced a freeze of public sector management salaries.
- [14] The University received an email from the Minister of Finance on September 17, 2012, directing a compensation freeze (the "Ministerial Direction"). The University accepted the direction as legally binding. The direction stated:

Under the Public Sector Employers Act I have the authority to direct public sector employers and employer associations to prepare compensation plans for public sector employees not subject to a collective agreement. Pursuant to that authority I am directing that compensation for all managers and executives in the public sector be frozen effective September 13. This freeze applies to any movement within existing compensation ranges on the basis of service, merit or other progression, or changes to existing ranges and to position reclassifications without substantive changes to responsibilities.

- [15] It appears understood by the parties that s. 14.3 of the PSEA was the legal authority the Minister purported to rely on as authority for the salary freeze.
- [16] In short, under s. 14.3(1) and (6) of the PSEA, the Minister may direct a public sector employer to prepare a compensation plan concerning that employer's employees, and upon issuing that direction, no employee subject to the direction may receive an increase in compensation, unless one of the exceptions in s. 14.3(6)(a) to (d) apply.

- [17] The relevant subsections provide:

14.3 (1) The minister may direct an employers' association or a public sector employer to prepare

- (a) one or more compensation plans respecting compensation that will be provided to
 - (i) employees in the sector or within the employ of the public sector employer, or
 - (ii) persons employed by the employers' association and who are not subject to a collective agreement, and
- (b) a report in respect of each compensation plan required under paragraph (a) describing, in accordance with the minister's directions,
 - (i) the methodology used in devising the plan, and
 - (ii) how the employers' association or public sector employer intends to implement and monitor the compensation plan.

-
- (2) The minister may do one or more of the following for the purposes of a direction issued under subsection (1):
- (a) make the direction specific to one or more employees or persons referred to in subsection (1) (a) and, for this purpose, may specify a position or an occupation or categories of positions or occupations;
 - (b) prescribe information that must be included in a compensation plan;
 - (c) without limiting paragraph (b), require that the employers' association or public sector employer include in the plan
 - (i) a detailed description of the nature, amount and range of compensation that will be provided to the employees or persons in respect of whom the plan applies, and
 - (ii) any other information the minister considers appropriate;
 - (d) prescribe information that must be included in a report referred to in subsection (1) (b);
 - (e) without limiting paragraph (d), require that the employers' association or public sector employer include in the report
 - (i) comparisons of actual compensation provided to persons employed in the same or a similar sector, position or occupation, whether those persons are employed in the public sector or the private sector, as considered appropriate by the minister, and
 - (ii) any other information the minister considers appropriate;
 - (f) specify the form and manner in which a compensation plan and the report in respect of it are to be prepared and submitted for review by the minister.
- (3) The minister may issue different directions under subsection (1) for different employers' associations, public sector employers, public sector employees or persons referred to in paragraph (a) of that subsection.
- (4) If directed to prepare a compensation plan and report under this section, the employers' association or public sector employer in respect of whom the direction is issued must, in accordance with the minister's direction,
- (a) prepare the plan and report, and
 - (b) submit them for review by the minister.
- (5) If, following a review of a compensation plan, the plan is approved by the minister, that compensation plan is adopted as an employment compensation standard on that approval.
- (6) On the minister issuing a direction to an employers' association or a public sector employer under subsection (1), no increase in compensation may be provided to employees or persons in positions or occupations in respect of which the direction is issued unless

- (a) a compensation plan in respect of those employees or persons is approved by the minister and the increase in compensation is consistent with the applicable employment compensation standard resulting from the operation of subsection (5),
- (b) the increase in compensation was agreed to before the date on which the minister issues the direction and the increase in compensation is consistent with the applicable employment compensation standard, if any, that was in force and effect before the issuance of the direction,
- (c) the increase is the result of a change in an employee's or person's position within a range of positions that was established for the sector, employee or person before the issuance of the direction, or
- (d) the increase is within a range of compensation that was established for the employee's or person's position before the issuance of the direction.

[18] Initially in September 2012, the University gave notice to ME Employees of the salary freeze and that the University was reviewing its implications.

[19] In December 2012, the University circulated to ME Employees a memorandum informing them that the University was applying the salary freeze direction to them; a similar written notice was sent in June, 2013. These notices: referred to the freeze as temporary; stated that the University had been working to express its concerns about the direction and its inequitable message; and at the same time, indicated that "all legally binding terms and conditions in [the Contract] will be honored".

[20] The University did not attempt to re-write the Contract to remove the terms regarding salary increases. It did not expressly state that the terms and conditions in the Contract were changed.

[21] New employees hired as ME Employees after the salary freeze were given a form letter that stated that the University's compensation policies were as in the Contract; but also stated that the "[U]niversity has been affected by the [Ministerial Direction]".

[22] Salary increases which would have arisen under the Contract in each of July 2014, 2015, and 2016, were not given to ME Employees, due to the University's application of the salary freeze, nor were the pensions of employees increased accordingly.

[23] Ms. Service wrote to the University in July 2013 objecting to the application of the salary freeze to ME Employees. The University responded, stating that the salary freeze did apply to ME Employees.

[24] The University alleges that no other employee communicated an objection to the salary freeze.

[25] Ms. Service resigned from her employment with the University as of January 6, 2016, to take a position elsewhere.

Judgment Dismissing Certification Application

- [26] The judge began his judgment, indexed as 2018 BCSC 2027, by reviewing the background facts.
- [27] He then reviewed the five criteria for a class action under the CPA, that: the pleadings disclose a cause of action (s. 4(1)(a)); there is an identifiable class of two or more persons (s. 4(1)(b)); the claims of the class members raise common issues (s. 4(1)(c)); a class proceeding would be a preferable procedure (s. 4(1)(d)); and there is a representative plaintiff who would fairly and adequately represent the class, does not have a conflict, and has produced a plan for the proceeding (s. 4(1)(e)).
- [28] Dealing with the first criterion, under s. 4(1)(a), whether the plaintiff's claim disclosed a cause of action, the judge noted that the respondent did not contest certification on this basis. The judge found that Ms. Service had a cause of action in breach of contract.
- [29] However, the judge found that Ms. Service was advancing a "second cause of action", which he considered to be based on the argument that the Minister ought to have granted her an exemption from the salary freeze under s. 14.3(6) of the PSEA. The judge expressed a concern that Ms. Service's claim attempted to impose responsibility on the University for a decision made by the Minister, which ought to have been brought by way of judicial review (paras. 52-53). The judge held the argument that the Minister ought to have granted an exemption was bound to fail, as a matter of law, because it was a claim that could only be made against the Minister:
- [54] Taken overall, it is plain and obvious that the plaintiff's proposed claim/cause of action as it relates to the exemptions in s. 14.3(6) of the PSEA cannot succeed. This is primarily because the cause of action is not pled against the Minister, the person or office who is responsible for making the decision about exemptions. As demonstrated by the defendant's unsuccessful attempts to obtain an exemption to the September 2012 direction of the Minister, it has virtually no control over how decisions are made under the PSEA. And, in argument the plaintiff acknowledged that the defendant could not exempt employees under s. 14.3(6) of the PSEA. Rather than being a novel cause of action, the plaintiff's proposed cause of action is one that is fatally flawed because the person that can remedy the situation complained of is not a party. Despite the broad scope permitted to a cause of action at the certification stage, I conclude this is an issue of law that should be decided at this stage.
- [55] The result is that, under s. 4(1)(a) of the CPA, the plaintiff has not established a cause of action with respect to the exemptions under s. 14.3(6) of the PSEA.
- [30] As to the requirement of an identifiable class (s. 4(1)(b) of the CPA), the judge accepted that Ms. Service had proposed an identifiable class of two or more persons, and there was a rational relationship between the class and the common issues. The judge understood that the objective of the class description was to include all the ME Employees who were or would have been entitled to an increase in salary, but for the University implementing the

salary freeze (para. 63). The judge considered that the class might need to be amended to exclude employees hired subsequent to the Ministerial Direction, with notice of the direction, but that this was not a fatal problem (paras. 64-65).

[31] The appellant's proposed class description, approved by the judge, was:

All persons who were employed by the Defendant

- a. both before June 30, 2013 and after July 1, 2013;
- b. both before June 30, 2014 and after July 1, 2014;
- c. both before June 30, 2015 and after July 1, 2015; or,
- d. both before June 30, 2016 and after July 1, 2016

as Management Excluded employees subject to the Management Excluded Terms and Conditions of Employment as promulgated in or around January 1, 2012 and as modified from time to time thereafter, and who:

- i. were entitled to:
 - 1. an annual determination of overall performance (an "Evaluation") as referred at section 3.4 and elsewhere in the Terms and Conditions; and
 - 2. range progression as outlined in sections 4.1 and 4.2 of the Terms and Conditions, which includes an annual salary increase (a "Progression") that, depending on the salary range prior to the Progression and subject only to the achievement of a particular "Performance Level" as referred to in the Terms and Conditions, was either:
 - a. a fixed percentage of salary prior the Progression; or
 - b. a variable percentage of the salary prior to a Progression which percentage is to be determined at the sole discretion of the supervisor but which percentage was within a fixed range;

to take effect on the July 1 immediately following an Evaluation;

ii. either:

- 1. achieved in any Evaluation a Performance Level which entitled them to:
 - a. a Progression; or
 - b. to be considered for a Progression at the sole discretion of their supervisor; or
- 2. during any fiscal year in which they were Excluded employees, did not receive an Evaluation; and

iii. did not receive a Progression for any fiscal year that immediately followed a fiscal year during which they either:

1. achieved in their Evaluation a Performance Level at which they were entitled to a Progression or to be considered for a Progression at the sole discretion of their supervisor; or

2. were not subject to an Evaluation that resulted in the determination of a Performance Level,

(para. 60)

[32] The judge next considered the requirement of common issues (s. 4(1)(c) of the CPA). He noted that the University's position was that this was the most serious problem with the certification application.

[33] The judge cited *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 22-23 for guidance on the determination of common issues.

[34] The proposed common issues were:

1. Contract and terms

1.1 Are or were the "Management Excluded Terms and Conditions", of January 1, 2012, a part of the Contract with the Management Excluded Employees then employed or hired thereafter?

1.2 Did the Management Excluded Terms and Conditions remain binding on the University of Victoria with respect to their obligations to perform an annual Evaluation and allow Progression raises, or wage increases, after September 13, 2012, when the Public Sector Management & Executive Compensation Freeze Policy (hereinafter referred to as the "Policy") was announced, by virtue of those Terms and Conditions meeting any one of the exemptions provided in the Public Sector Employers Act?

2. Breach

2.1 Did the University of Victoria Breach its contracts of employment with Class members by failing to grant raises or properly exercise discretion to raise in cases where the terms and conditions provided that discretion applied, in accordance with the Management Excluded Terms and Conditions?

3. Damages

3.1 If the University of Victoria breached its contract with Class members as a result of failing to conduct evaluations or allowing Progression raises, did the class suffer loss or damages and how are those damages, including but not limited to future pension losses, calculated[?]

[35] The judge found that issue 1.1 was a common issue (para. 74).

[36] The judge found that issue 1.2 could be a common issue, but for his conclusion that Ms. Service was bound to fail in her argument that she ought to have been granted an exemption from the Ministerial Direction (which he described as a "second cause of action") (para. 116).

- [37] The judge implicitly found that issues 2.1 and 3.1 were not common and involved multiple individual issues, although he focused his discussion on the individual nature of any damages claims.
- [38] The judge held that "assessing damages for each of these employees is an individual exercise" (para. 87). He considered that the damages assessment for each employee would require looking at individual factors relevant to the award of damages for constructive dismissal, such as the employee's age, length of service, qualifications, experience, and marketability (paras. 81-88, 92).
- [39] The judge also found that the basis and calculation of salary increases under the contract required an individual assessment and exercise of the respondent's discretion (paras. 107-108). He described the system of salary increases as "intensely individual", with the respondent having "considerable discretion" (paras. 109-110). He acknowledged there might be some general issues, "ranges, for example", but each "specific calculation is very much an individual matter" (para. 110). He found that the proposed common issue 3.1 on the issue of damages "literally asks the question rather than answering it" (para. 112).
- [40] The judge next considered whether a class proceeding would be a "preferable procedure" for the resolution of the common issues (s. 4(1)(d) of the CPA).
- [41] The judge gave considerable weight to his view that "the situations of individual employees predominate over the common issues", referring to such individual factors as age, length of service, availability of alternative work, and damages calculations based on the salary increases in the Contract, which he found "involves the exercise of discretion by the [University]". He concluded that "[w]hile there is a common issue of breach of contract it would be an overly broad approach, with little substance, to certify this as a class proceeding on that basis" (para. 123).
- [42] The judge found the situation analogous to that in another case where it was held that there were no common issues that could move the litigation forward "in other than a minimal way" (para. 126, citing *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 235). Because of the number of individual issues, he found that certification would "create few economies of scale" (para. 132).
- [43] The judge further found that behaviour modification was not a factor because the party responsible, the Minister, was not a party to the action, and the University had tried to obtain exemptions for the class (para. 128-129). The judge considered that had the employees accepted salary increases during the salary freeze, they could have been liable in debt to repay the money based on s. 15.1 of the PSEA (paras. 130-131).
- [44] Turning to the requirement that there be a suitable representative plaintiff (s. 4(1)(e) of the CPA), the judge concluded that Ms. Service could fairly and adequately represent the class and did not have a conflict with other class members (para. 139).

- [45] The judge was critical of the litigation plan. This criticism was in the main based on his assessment that the common issues would do little to advance the case and there would be many individual issues to be determined (para. 148). He concluded that individual summary trials would overwhelm any summary trials on common issues, making the class proceeding no more efficient than individual claims (para. 145).
- [46] In the result, the judge dismissed the application for certification of the proceeding as a class proceeding.

Issues

- [47] Ms. Service raises a number of issues on appeal which can be summarized as:
- a) the judge misapprehended the issues between the parties as to the legal effect of the Ministerial Direction, and had these issues been understood, the judge would have recognized them as giving rise to common issues; and
 - b) the judge misapprehended the class members' individual damages claims as damages for constructive dismissal, as opposed as claims to be paid what they were contractually entitled to be paid had the University not breached the Contract by instituting the salary freeze. At the same time, the judge overstated the individual issues and complexity in determining damages.
- [48] The University does not disagree that the judge erred in his approach to one issue, namely, in concluding that what Ms. Service was seeking was bound to fail as it was equivalent to a claim that the Minister ought to have granted an exemption. The University accepts that this is not the theory of Ms. Service's claim. Nevertheless the University contends that this Court should defer to the judge's conclusion that there are numerous individual issues, a class proceeding is not a preferable procedure because of the individual issues, and Ms. Service does not advance a workable litigation plan.

Standard of Review

- [49] The standard of review of a decision to grant or dismiss an application for certification of a proceeding depends on the alleged error. The criteria for certification may involve legal determinations, assessment of facts, or the exercise of discretion.
- [50] An alleged error of law will be reviewed on a standard of correctness. If the decision rests on a mixed error of fact and law or error of fact, the standard of review requires a palpable and overriding error. Considerable deference will be shown to the judge's exercise of discretion: Finkel at paras. 55-56; N&C Transportation Ltd. v. Navistar International Corporation, 2018 BCCA 312 at para. 90.
- [51] Ms. Service alleges the judge made errors of law which in turn impacted his exercise of discretion and balancing of factors under the preferable procedure analysis.

Certification Requirements

[52] Section 4(1) of the CPA sets out five statutory requirements for certification. If the following five criteria are met, the court must certify the proceeding as a class proceeding:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (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
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[53] Also relevant to certification is s. 7, which provides as follows:

7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not known;
- (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[54] As noted by this Court in Finkel at para. 13, class proceedings are a procedural tool animated by three principal goals: behaviour modification, judicial economy, and access to justice. At the certification stage, the court performs a gatekeeping function by ensuring that only claims in the common interest of the class are permitted to advance: Finkel at para. 15.

The Pleadings Must Disclose a Cause of Action

- [55] The first requirement under s. 4(1), that the pleadings disclose a cause of action, is assessed on the same standard as an application to strike pleadings for failure to disclose a cause of action under Rule 9-5(1) of the Supreme Court Civil Rules: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para. 63; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 44. In other words, assuming the facts pleaded to be true, the court must ask whether it is "plain and obvious" that the claim cannot succeed: *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24 at para. 20. This is not a high threshold: *Jiang v. Peoples Trust Co.*, 2017 BCCA 119 at para. 71.
- [56] Once the plaintiff has demonstrated that the pleadings disclose a cause of action, she must show "some basis in fact" for each remaining requirement under s. 4(1). This does not require the court to weigh evidence, as the focus at this stage is on the appropriate form of the action rather than its merits: *Finkel* at paras. 19-20.

There Must be an Identifiable Class

- [57] The judge's finding that there was an identifiable class is not challenged on appeal. It is therefore not necessary to set out in detail the relevant legal principles. However, I note that this criterion is closely linked to the common issues requirement as there must be a rational relationship between the two: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 20.

The Claims of the Class Members Must Raise Common Issues

- [58] Under s. 1 of the CPA, "common issues" is defined as follows:

"common issues" means

- (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 threshold for this requirement is low. The plaintiff need only show that there is a triable factual or legal issue that, once determined, will advance the litigation: *Finkel* at para. 22. Resolution of the common issues need not determine liability: *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 152.
- [60] In *Pro-Sys*, the Court noted that the commonality requirement has been described as the "central notion of a class proceeding": at para. 106. The Court went on to summarize the relevant considerations as follows:

[108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

- (1) The commonality question should be approached purposively.
- (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
- (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
- (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
- (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[61] The requirement of common issues is tied to the analysis of a class proceeding being a preferable procedure.

A Class Proceeding Must be the Preferable Procedure

[62] Under s. 4(2) of the CPA, the court must consider all relevant matters in determining whether a class procedure is the preferable procedure, 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.

- [63] As discussed in *AIC Limited v. Fischer*, 2013 SCC 69, the preferability analysis is comparative. The court must consider the advantages of a class proceeding over other procedures for resolving the common issues, including non-litigation alternatives. In doing so, the court must consider the common issues within the context of the action as a whole, and must adopt a practical, cost-benefit approach in assessing the impact of a class proceeding on both the parties and the court: *AIC* at paras. 19-21.
- [64] Further, preferability must be assessed with reference to the underlying goals of the CPA, as noted above: behavior modification, judicial economy, and access to justice: *Pro-Sys* at para. 137.
- [65] With respect to whether a class proceeding will advance access to justice, Cromwell J. in *AIC* set out an analytical approach that includes both substantive and procedural aspects. The substantive component asks whether a class proceeding will provide class members with a just and effective remedy, while the procedural component asks whether they will have access to a fair process: *Finkel* at para. 26.

There Must be a Representative Plaintiff who Satisfies Certain Requirements

- [66] While the judge found that Ms. Service was a suitable representative plaintiff with respect to the requirements under s. 4(1)(e)(i) and (ii), he was critical of her proposed litigation plan, which must set out a workable method of advancing the proceeding pursuant to s. 4(1)(e)(ii).
- [67] The representative plaintiff need not detail every step that will be required in the proceeding. Rather, the purpose of the litigation plan is to set out a framework for how the case may proceed and a plan to address the complexities of the case. As such, the court should not scrutinize the proposed plan too closely, as any plan will likely require modification as the litigation proceeds: *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 at para. 77, *aff'd* 2004 BCCA 594; *Scott v. TD Waterhouse Investor Services*, 2001 BCSC 1299 at para. 164.

Discussion

- [68] As I will discuss in more detail, I agree with Ms. Service that the judge misapprehended the issues between the parties as to the legal effect of the Ministerial Direction, and as to the nature of Ms. Service's damages claim. Respectfully, it is my view that:
- a) The judge misunderstood that one important aspect of the claim being advanced by Ms. Service was a claim that the Minister ought to have granted to the ME Employees an exemption from the Ministerial Direction. This is not part of the theory of Ms. Service's claim.

- b) Although the judge found that the claim for breach of the Contract was not bound to fail, the judge erroneously thought that there was no dispute that the Ministerial Direction was lawfully made and applied to the ME Employees. However, the legal effect of the Ministerial Direction is a matter in dispute and gives rise to at least one common issue and perhaps more.
 - c) The judge misunderstood that the damages claim arising from the alleged breach of contract was a claim for damages for constructive dismissal, which would give rise to multiple individual issues. Ms. Service is not seeking damages for constructive dismissal.
- [69] The above misapprehensions of the nature of Ms. Service's claim led to errors in the analysis of common issues, preferable procedure, and the litigation plan. As such, the appeal must be allowed. I will address the remedy following my analysis.
- [70] I will organize my analysis in accordance with the criteria for certification.

Cause of Action

- [71] In his analysis of the cause of action, the judge correctly noted that the University did not take the position that Ms. Service's claim failed to disclose a cause of action. The judge correctly agreed that Ms. Service's claim based on a breach of the employment contract did disclose a cause of action (para. 37, 46).
- [72] However, the judge appeared to incorrectly understand that Ms. Service's true issue with the Ministerial Direction was that the Minister failed to grant the ME Employees an exemption under it: see paras. 54-55, set out above.
- [73] It may be that the judge read s. 14.3(6)(a) of the PSEA as providing authority to the Minister, on application, to approve a new compensation plan that might be considered exempt from the Ministerial Direction. If so, and leaving aside whether this is the correct interpretation of that section of the PSEA, the judge would be correct in concluding that if Ms. Service was advancing a claim based on the failure of the Minister to grant an exemption, that claim would have to be brought by way of judicial review as against the Minister and would not succeed in the present action. However, Ms. Service says this is not the nature of her claim.
- [74] Ms. Service says her claim is that the University breached the Contract by not performing the provisions for annual salary increases. It is the University in its proposed defence that says it did not breach the Contract because it was subject to the Ministerial Direction which prohibited it from performing the terms of the Contract related to annual increases.
- [75] Ms. Service argues that the Ministerial Direction did not direct the preparation of a compensation plan, it directed a compensation freeze, which the PSEA does not give the Minister authority to do.

[76] Further and alternatively, Ms. Service argues that even if the Ministerial Direction could be said to be a direction for preparation of a compensation plan, the exceptions under ss. 14.3(6)(a), (b) and (d) applied to the existing terms for salary increases under the Contract, and so the freeze did not apply to the ME Employees. I take Ms. Service to read s. 14.3(6)(a), (b) and (d) as creating exceptions for certain existing compensation plans that had in the past been approved by the Minister, and not as requiring an application to the Minister for an exemption. This gives rise to questions of statutory interpretation best left to trial.

[77] For ease of reference I will set out the Ministerial Direction again:

Under the Public Sector Employers Act I have the authority to direct public sector employers and employer associations to prepare compensation plans for public sector employees not subject to a collective agreement. Pursuant to that authority I am directing that compensation for all managers and executives in the public sector be frozen effective September 13. This freeze applies to any movement within existing compensation ranges on the basis of service, merit or other progression, or changes to existing ranges and to position reclassifications without substantive changes to responsibilities.

[Emphasis added.]

[78] Nowhere in the notice from the Minister did he ask for preparation of a compensation plan or set a timeline for when the plan must be prepared. Further, the University did not prepare such a plan in response.

[79] The judge appeared not to appreciate Ms. Service's position or he found there was no triable issue in this regard, as he held that the Ministerial Direction "directed a compensation plan" (para. 15); and that other government documents "confirmed" that it applied to the ME Employees (para. 16). The judge therefore held:

[45] It seems plain enough that the PSEA is a "statute" and it is the authority for the Minister's direction in 2012. And there is no dispute the Minister's direction applied to the [respondent] (and other public sector employers).

[80] Since it is the University that advances a defence that its non-performance of the provisions under the Contract for salary increases was due to it being subject to the Ministerial Direction, the University must show that it is plain and obvious the defence will succeed, if that defence is to defeat a cause of action. As held in *Jer v. Samji*, 2014 BCCA 116 at para. 64:

While it is true to say that the applicant for certification bears the onus of establishing a cause of action, it may fairly be said that where a party opposes certification on the basis of a statutory defence, the onus ought to fall upon that party to show it is plain and obvious the defence will succeed.

- [81] The judge assumed the Ministerial Direction was made in compliance with the PSEA and that the University was legally bound to follow it in respect of ME Employees. This was an error, as it is not plain and obvious this defence will succeed. It cannot be said there is no triable issue in this regard.
- [82] As for the judge's concern that Ms. Service's claim ought to be a claim for judicial review brought against the Minister, this was based on a misapprehension that the plaintiff's claim was based on the Minister's refusal to grant an exemption to the ME Employees. The judge's concern does not arise under a proper understanding of the parties' respective positions.
- [83] So long as Ms. Service pleads the elements of a private law cause of action she is entitled in this litigation to advance the position that the University's defence is without merit because the Ministerial Direction lacked authority to impose the salary freeze: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62; *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214.
- [84] As I will address shortly, the triable issue as to whether the Ministerial Direction provided a lawful excuse for the University to suspend the provisions regarding salary increases in the Contract, is also a significant common issue.

Class Identification and Size

- [85] There is no appeal from the judge's conclusion that there was an identifiable class.
- [86] Ms. Service applied to introduce fresh evidence on appeal of the size of the class. The estimate is at least 134 members; there may be others if persons who became employees subsequent to the Ministerial Direction are added. The judge proceeded on a class estimate of 120 members. The University does not oppose the admission of the fresh evidence on appeal. I would admit the evidence simply to support the conclusion as to possible class size. The evidence does not change the analysis of the main issues on appeal.
- [87] There may be some disagreement between the parties as to whether persons who became employees after the Ministerial Direction ought to belong to the class, or whether they should form a sub-class. It is not necessary to determine this issue other than to note it may be something to be addressed on a subsequent application in the trial court.
- [88] I turn to the common issues.

Common Issues

Did the University Have a Lawful Excuse for Non-Performance of the Contract Based on the Ministerial Direction?

- [89] The judge considered the only relevant common issue to be whether the "Management Excluded Terms and Conditions" of July 1, 2012, was a contract with each ME Employee. This is what I have been referring to as the Contract.

[90] While that is a common issue (identified as issue 1.1 by Ms. Service in her application for certification), there is another common issue which is more significant in terms of its probability of advancing the claims of the class members.

[91] The judge suggested there might be a second common issue related to the applicability of the exceptions in s. 14.3(6) of PSEA (common issue 1.2) although he dismissed that notion due to his erroneous conclusion that this was a claim that was premised on an application to the Minister, and so it required the Minister to be named by Ms. Service as a party and was therefore bound to fail (paras. 113, 116).

[92] Ms. Service framed the second proposed common issue before the judge in this way:

1.2 Did the Management Excluded Terms and Conditions remain binding on the University of Victoria with respect to their obligations to perform an annual Evaluation and allow Progression raises, or wage increases, after September 13, 2012, when the Public Sector Management & Executive Compensation Freeze Policy (hereinafter referred to as the "Policy") was announced, by virtue of those Terms and Conditions meeting any one of the exemptions provided in the Public Sector Employers Act?

[93] In my view, this issue overlaps somewhat with Ms. Service's next proposed common issue:

2.1 Did the University of Victoria Breach its contracts of employment with Class members by failing to grant raises or properly exercise discretion to raise in cases where the terms and conditions provided that discretion applied, in accordance with the Management Excluded Terms and Conditions?

[94] I am of the view that both proposed common issues can be better understood with an appreciation of the University's proposed defences.

[95] As distilled from its positions in opposing certification, the University appears to advance two general defences to non-performance of the terms of the Contract related to salary increases:

- a) the University would have been acting unlawfully to perform the terms of the Contract relating to salary increases, as to do so would have been contrary to the lawful Ministerial Direction, and so the University has a lawful excuse for non-performance; and
- b) the University changed the terms and conditions of the Contract to comply with the Ministerial Direction, which, by the Contract terms it was authorized to do; it gave notice of the change to ME Employees; and the ME Employees accepted the change.

[96] I will deal with the second proposed defence shortly.

[97] Dealing with the first proposed defence, the law of contract will sometimes give relief to a party's non-performance of the contract terms, if performance would be illegal: S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017) at para. 372, p. 253.

[98] As I have touched on already, Ms. Service's position in reply to the University's proposed defence is that the Ministerial Direction was not a lawful excuse for the University's non-performance of the Contract. Again, Ms. Service breaks this down into two reasons: first, the Ministerial Direction was not a direction to prepare a compensation plan under s. 14.3(1), and so s. 14.3(6) cannot provide authority for the salary freeze; and second, even if the Ministerial Direction was a direction to prepare a compensation plan, the Contract fit within one of the categories that was excepted from the consequential salary freeze, under any of s. 14.3(6)(a), (b) or (d).

[99] The issue of whether the University had a lawful excuse to not perform the Contract based on the Ministerial Direction requires interpretation of the statute, the Ministerial Direction, and the Contract, matters that are common to all class members. It is a significant issue, the determination of which would advance the litigation. Because the judge misapprehended the theory of the plaintiff's claim as being based on an application to the Minister for an exemption, the judge did not recognize this common issue.

[100] In my view it would be helpful to restate common issue 1.2 to better match the parties' positions as articulated on this appeal. I see the issue as:

1.2 Did the Ministerial Direction provide a lawful excuse, pursuant to ss. 14.3(1) and (6) of the PSEA, for the University to not perform the Contract terms related to increases in the compensation of ME Employees?

[101] This question meets the test for certifiable common issues, as described in Finkel at paras. 22-23.

Did the University Give Notice of a Change in the Contract's Terms and Conditions?

[102] Turning to the University's second proposed defence, another potential common issue has to do with whether the University gave notice of a change in the terms and conditions of the Contract in such a way as to potentially affect the class members' legal rights to advance this claim if they did not voice objection.

[103] The University relies on the following provisions of the Contract:

The [U]niversity reserves the right to make additions, deletions, or changes to the Terms and Conditions of Employment as required. ...

Employees should also note that other statutes and regulations may from time to time govern the University's interpretation and application of the terms and conditions of employment contained in this contract. The University will, at all times, conform with the requirements of such statutes and regulations.

- [104] The University proposes to advance the defence that the notices of the salary freeze it gave to employees constituted reasonable notice of a change in the terms and conditions of the Contract, and that employee conduct in not voicing objection amounts to acceptance of or condonation of the change in terms and conditions. The University submits that these issues require individual analysis for each employee.
- [105] As mentioned, the University gave a common form of written notice to ME Employees about the salary freeze, in December 2012 and June 2013. The notice conveyed certain messages: the freeze was temporary; the University portrayed itself as acting as the employees' advocate to argue that the salary freeze was inequitable, and to continue to express concern to the government; the University communicated that it was subject to the salary freeze and prohibited from implementing any salary adjustment, expressly or implicitly portraying the salary freeze as legally binding; and the University continued to state that "all legally binding terms and conditions in employment contracts will be honored" (emphasis added).
- [106] There may also have been some meetings with individual employees, but there is no suggestion in the evidence that employees were told messages contrary to the above themes.
- [107] The University took no steps to rewrite the Contract, including to change the written terms regarding salary structure and increases.
- [108] The University states that employees hired after the salary freeze were given a letter advising of the salary freeze, before they became employees. The form of letter in evidence stated that the University's compensation policies were as in the Contract; but also stated that the "[U]niversity has been affected by the [Ministerial Direction]". In other words, the evidence suggests that the University did not rewrite the terms of the Contract regarding salary progression for new employees, but rather, told new employees those terms continued to apply, with the additional statement that the University was "affected" by the salary freeze.
- [109] The University submits the legal impact of the University's notice of the salary freeze is not a common issue because Ms. Service wrote to the University and stated that she did not accept the change. It seems that every other employee was silent, or perhaps the University argues that some employees by other conduct accepted the salary freeze. The University also argues that persons who became ME Employees after the salary freeze must have accepted that their Contract was subject to the salary freeze.
- [110] This is an unusual employment contract case, because the University on the one hand stated to the ME Employees that all legally binding terms and conditions of the Contract continued to apply; and on the other hand stated that it was legally bound by the Ministerial Direction to suspend some of those terms and conditions dealing with salary increases. At the same time, the University suggested that it was voicing to government that it had concerns about the salary freeze, and it was unclear as to how long it would be in effect and

what would happen when it ended.

- [111] If the University was in error, and the Ministerial Direction was not binding on it, can one say, on the unusual facts of this case, that silence by the employees amounted to acceptance of a unilateral change in the Contract in this context? I am not of the view that this can be determined in the University's favour as plain and obvious at the pleadings and certification stage.
- [112] If the University was mistaken, and it was not legally bound by the Ministerial Direction, there is a triable issue as to what impact this would have on the employees' rights to enforce the terms and conditions under the Contract.
- [113] As I see it, the University's proposed defence that the terms of the Contract changed to conform with the salary freeze and that the ME Employees condoned or accepted this change, appears to give rise to issues that will affect every member of the class. These potential common issues are:
- a) Did the University provide to each ME Employee written notice that the salary freeze affected the Contract?
 - b) Is there any legal consequence to these forms of notice that is common to the class, regarding the class members' ability to enforce the Contract? For example, did the notices constitute a notice of a change in the terms of the Contract?
 - c) Can employee silence in the face of any of the University's notices, without more, be considered acceptance of a change in terms of the Contract, if the University was in error as to it being legally bound by the Ministerial Direction?
- [114] If the answers to these questions are no, then this will advance the interests of all class members.
- [115] The answers, if in favour of the class, will also advance Ms. Service's claim, as this will make Ms. Service's subsequent conduct irrelevant. If silence on the part of employees was not acceptance of a change in terms of the Contract, then her express rejection of the salary freeze is also unlikely to be seen as acceptance of a change in terms.
- [116] By agreement of the parties, the University has not yet filed a Response to Civil Claim. It will be easier to identify and define additional common issues along these lines once the University's position is stated clearly in a defence pleading.
- [117] I have reservations as to whether it was wise in this case for the parties to proceed to a certification application without the University's Response to Civil Claim in hand. The availability of a defence pleading assists in crystallizing the issues for purposes of analyzing the certification criteria. While it is not an uncommon practice for parties to agree that a Response to Civil Claim need not be filed pending the hearing of a certification application, this practice has been subject to valid criticism. I agree with the comments of Myers J. in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2015 BCSC 74 at paras. 31-34 that deferring the

filing of a defence should only be allowed where there is good reason; see also *Gomel v. Ticketmaster Canada LLP*, 2019 BCSC 3178 at paras. 78-86.

[118] In any event, it seems likely that once the University provides its defence pleading, common issues along the above lines will emerge as to the legal effect of the University's notice to employees about the salary freeze. At a minimum, even if the issues are not common to each of the ME Employees, there will be very similar issues regarding the University's form of notice of the salary freeze and the legal consequences for ME Employees. Considerable efficiencies can be gained, including avoidance of duplication of fact-finding and consistent application of legal analysis, if these similar and closely related issues regarding the legal impact of the University's notices are decided within the class proceeding.

Common or Individual Issues: Damages

[119] The judge found that the "specific calculation" of damages was "very much an individual matter" (para. 110).

[120] Ms. Service proposed the following common issue on damages:

2.1 If the University of Victoria breached its contract with Class members as a result of failing to conduct evaluations or allowing Progression raises, did the class suffer loss or damages and how are those damages, including but not limited to future pension losses, calculated[?]

[121] The judge found that calculating damages was "considerably more complicated" and the proposed common issue "literally asks the question rather than answering it" (para. 112).

[122] As I understand it, Ms. Service was not seeking actual damages to be calculated as a common issue, but rather, three things to be determined under the umbrella of a common issue relating to damages:

- a) If breach of contract is established, is it the type of breach which as a general proposition did cause members of the class to suffer damages of some type? This, I presume, is in contrast to a breach which could be said as a general proposition to have caused no compensable harm.
- b) Can individual members of the class seek as damages both lost salary increases and lost contributions to their pensions?
- c) Are there any common questions to be resolved that will set the parameters for individual damages claims? As an example, it could advance the interests of the class to know, if liability is established, whether there is a common theory as to the time frame that will apply for the calculation of damages. Can it be determined that each employee will be entitled to claim damages for the entire period of their employment which was subject to the salary freeze? Or will the time frame of damages have to be determined on an individual basis as depending on individual circumstances other than start date and end date of employment and the salary freeze?

[123] In my view, until we know more, including having in hand the University's defence pleading, it cannot be determined that there is a common issue on damages that will significantly advance the interests of the class. In any event, it is not uncommon in many actions for the theory of damages to turn on the findings related to liability, and so whether or not common issues of damages arise may have to await those findings.

Complexity of Individual Damages Assessments

[124] The CPA expressly provides that a court must not refuse to certify a proceeding as a class proceeding simply because the relief claimed will require individual assessment of damages: s. 7(a). However, here the judge found that the individual damages issues predominated over common issues. In my view this was because of the judge's misapprehension of the theory of the claim and proposed defences.

[125] In addition, the judge appeared to consider that the damages claims of individual employees would need to be assessed as damages for constructive dismissal, that is, damages in lieu of reasonable notice of dismissal which would require inquiry into each individual employee's circumstances (paras. 77-85, 88).

[126] The judge was of the view that there would be little to be gained by having the issues of damages for wrongful dismissal determined in a class proceeding, citing two cases where a similar conclusion was reached: *Kafka v. Allstate Insurance Company of Canada*, 2011 ONSC 2305, aff'd 2012 ONSC 1035 (Div. Ct.) and *Agostino v. Allstate du Canada, compagnie d'assurances*, 2013 QCCS 3049.

[127] However, the Amended Notice of Civil Claim does not plead that employees were constructively dismissed. The cases of *Kafka* and *Agostino* which involved mass claims of constructive dismissal do not involve similar facts to the case at bar. The judge made an error in considering the damages issues from this perspective.

[128] As noted in *Zaraweh v. Hermon, Bunbury & Oke*, 2001 BCCA 524 at para. 18, "the law of wrongful dismissal is a manifestation of the law of contract". Not all employer breaches of the employment contract amount to repudiation; some may be less than repudiation and give rise to a cause of action in damages: *Zaraweh* at paras. 31, 34, 35.

[129] Ms. Service's theory of her claim does not suggest that the University's imposition of the salary freeze was repudiation of the Contract with the employees, effectively dismissing them. Rather, she argues that the University breached the terms and conditions of the Contract and the employees are entitled to sue for damages for breach of contract.

[130] Rather than pleading constructive dismissal, Ms. Service pleads that as a result of the University's breach of Contract, employees suffered lost wages (foregone salary increases that were otherwise provided for by contract), lost pensions (based on the foregone salary increases), and will suffer future wage losses as all future raises will start from a base which is lower than it would have been had the Contract not been breached (para. 23).

- [131] This is not the first proceeding to advance claims on behalf of a class of employees for breach of the employment contract that pays employees less than what they claim to have been entitled, where the claim falls short of advancing claims for wrongful dismissal. These types of breach of employment contract claims are not generically unsuitable for class proceedings and do not require the damages claim to be based on the theory that each employee was terminated from their job. For example, courts have certified the following claims as class proceedings:
- a) claims by temporary foreign workers to not have received promised hours of work, payments for overtime, reimbursement of certain expenses, and to have been charged unlawful fees under a standard form of common employment contract in *Dominguez v. Northland Properties Corp.*, 2012 BCSC 328; and
 - b) claims by workers for unpaid overtime wages in *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, leave to appeal refused, [2012] S.C.C.A. No. 379, and in *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at paras. 78-84, leave to appeal refused, [2012] S.C.C.A. No. 326.
- [132] On the other hand, if after receiving the University's defence, there is a legal issue as to whether the members of the class can sue for damages for breach of contract in the nature of foregone salary increases and related lost pensions, or were or are required to advance claims based on constructive dismissal, this would be a common issue in line with the issue stated by Ms. Service as common issue 2.1.
- [133] The judge went on to conclude that the determination of damages, on the basis of foregone salary increases that would have been paid had the Contract been performed, would be "complicated" and "intensely individual" as the University had "considerable discretion" in assessing the employees' annual increases (paras. 107-109).
- [134] Respectfully, I do not see the determination of damages based on foregone salary increases and pension contributions to be very complicated. Had the Contract otherwise been applied, the personnel of the University would have been able to determine these things, and presumably the University still has the tools to do so.
- [135] In calculating salary increases under the Contract, there appeared to be only a few variables, largely turning on the starting salary range of the employee and the performance of that employee. For many long-term employees one would assume the experience in July 2012 would provide some predictability or at least a starting point to determine salary range and to compare future performance.
- [136] Ms. Service pleaded that if an employee was in the "development" or "competitive" salary range category and "fully achieved" their performance level, they were entitled to an automatic 3% or 2.5% raise respectively, and there was no discretion on the employer's part as to granting the salary increase.

- [137] There is an evidentiary basis for Ms. Service's pleading, as it seems to be at least based on a fair reading of the salary range chart set out in the Contract and repeated in the background facts above. In addition, as I have noted in the background facts, a June 2012 email sent to supervisors of ME Employees by a manager in the University's human resources group, suggested that "fully achieved" would be the default performance expected of employees. Supervisors reviewing performance and seeking to slot an employee into a different category would have to provide written justification for doing so. It seems therefore that there is a good possibility that the "fully achieved" level of performance would be found to apply to a significant number of employees, entitling them to a fixed salary increase.
- [138] The judge appeared to overlook the evidence that there was a large category of employees for which the determination of damages might well be straightforward.
- [139] The University appears to take the position that all raises were discretionary. The judge picked up on this language, seemingly accepting that the determination of performance levels was "discretionary", which is far from clear. If, on the University filing a Response to Civil Claim, the University does take the position that all raises were discretionary, this might give rise to an issue common to the members of the class who were in two employment categories. For example, a common issue might arise such as: if the "developmental" and "competitive" groups of employees "fully achieved" their performance level, were they entitled to an automatic 3% or 2.5% raise, respectively, under the Contract or did the University retain a discretion to refuse those increases?
- [140] Regardless, the determination of which employees would be entitled to salary increases under the Contract does not strike me as difficult, even if an individual analysis of each employee is required. For the years in question, discovery procedures could readily determine: the starting category of each employee under the Contract; whether any employee was given written performance reviews during the Contract; whether any employee received an oral performance review; and the content of these reviews.
- [141] If indeed no discretion was involved, it would be a simple thing to calculate the 3% or 2.5% bonuses for those employees who "fully achieved" expected performance and who were in the two largest categories of salary ranges, development and competitive.
- [142] The bottom line is that evidence on performance and the applicable salary range category is unlikely to be so complicated as to make a class proceeding untenable. If liability for breach of the Contract is established, I see no reason why discovery together with some kind of summary procedure could not be used to provide the answers to the questions necessary to calculate damages in the form of what the employee would have earned had the Contract been applied absent the salary freeze. Likewise, presumably pension contributions could be calculated based on the salary increase the employee would have received but for the breach of contract.

Preferable Procedure

- [143] The judge's erroneous view of the cause of action and related common issues, and the resultant misunderstanding of the complexity of the individual damages' claims, shaped his analysis of whether a class proceeding would be a preferable procedure in this case. These errors are the foundation for his conclusion that the "situations of individual employees predominate over the common issues" (para. 123). This conclusion, therefore, cannot stand.
- [144] In these circumstances, it is open for this court to determine the issue of whether a class proceeding is a preferable procedure: see, for example, *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at paras. 56, 115-125, 139, application for leave to appeal filed; *N&C Transportation Ltd.* at paras. 144-149; *Halvorson v. British Columbia (Medical Services Commission)*, 2003 BCCA 264 at paras. 31-35, *Fresco*.
- [145] Here, determination of the known common issues will significantly advance the litigation. There may be more common issues, but this will become clearer once the University files its Response to Civil Claim.
- [146] There are in addition some issues which if they do not emerge as common to all class members, will be very similar, involving the legal impact of common or similar kinds of notice given by the University to ME Employees, and the legal significance of employee silence in response. Having a single judge determine these issues will create judicial efficiencies and will avoid inconsistencies and duplication.
- [147] While there will likely be a need to determine individual damages claims, these are not inherently complex. It seems likely given the nature of the damages claimed that a class proceeding judge could, with the assistance of counsel, readily develop streamlined procedures to determine those issues. There are broad powers under ss. 27 and 28 of the CPA to effectively manage individual issues including individual damages claims.
- [148] Individual employees are unlikely to have sizeable claims, yet individual lawsuits, which are likely to pose cost barriers, seem to be their only other recourse. Further, individual employees are likely to be reluctant to advance individual claims against their employer if still employed by the University. If their claims are valid, the class members are unlikely to have access to justice except under the structure of a class proceeding. There seems to be no practical alternative. Further, if the defences advanced by the University are decided in its favour, it will benefit the University to have all members of the class subject to that determination.
- [149] I have little difficulty in concluding that a class proceeding would be the preferable procedure.

Litigation Plan

[150] The judge's criticism of the litigation plan was heavily influenced by his misapprehension as to the theory of Ms. Service's claim and the University's proposed defences, which affected his view of the common issues. He found that "the common issues are not capable of being determined in any meaningful way that advances the litigation"; and "[t]he matrix of individual claims is a complex one" (paras. 148, 149).

[151] On a correct view of the common issues and damages claims, the litigation plan was a satisfactory one at this early stage of the proceedings. However a revised litigation plan will likely be necessary once the University files a Response to Civil Claim, and to take into account these reasons.

Remedy

[152] For these reasons, I would allow the appeal and set aside the order below, and certify the action as a class proceeding.

[153] The common issues, of which the first one was found to be common by the judge, are:

1. Was the document, the "Management Excluded Terms and Conditions", of January 1, 2012 (the "Contract"), a common contract between the University and members of the Class?
2. Did the Ministerial Direction provide a lawful excuse, pursuant to ss. 14.3(1) and (6) of the PSEA, for the University to not perform the Contract terms related to increases in the compensation of ME Employees?

[154] I recognize that the parties have not had an opportunity to comment on the wording of the second common issue. They certainly have liberty to seek to revise the wording of that issue before the judge below. For example, they may decide it is appropriate to expand that issue into sub-issues or to use different language to achieve the same result. The point is that a very significant and common issue is whether the Ministerial Direction was a lawful excuse for the University to breach the Contract, or to put it another way, to not perform the Contract in relation to salary increases.

[155] Further, it seems likely that once the defence pleading is filed there will be additional common issues that emerge that will need to be included in the certification order.

[156] I would remit the matter to the trial court to address any additional mechanics of certification, such as the form and means of notice to class members, and any issues regarding the management of the proceeding. At that hearing, consistent with s. 8(3) of the CPA, the parties will also be free to seek an amendment to the articulation of the common issues by this Court, as well as address any additional common issues that may arise.

[157] Each party will bear their own costs in accord with s. 37(1) of the CPA.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/19/04/2019BCCA0474.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/service-v-university-of-victoria-2019>

Prepared on 28 October 2026 · Esheria