



# What's New in HR Law

## ***Curtis v Medcan*: a vacation and holiday pay class action wake-up call**

February 27, 2023 | By [Caroline DeBruin](#)

### **Bottom Line**

In [Curtis v. Medcan Health Management Inc., 2022 ONSC 5176](#) (“*Medcan*”), the Divisional Court certified a class action against an employer for unpaid vacation and holiday pay calculated on employees’ variable compensation. The plaintiff class members claimed that their employer violated the *Employment Standards Act, 2000* (“*ESA*”) when it calculated vacation and holiday pay based on salary alone, ignoring other elements of their remuneration.

### **Background Facts**

The employer provided its employees with variable compensation, consisting of a base salary, commissions, and/or bonuses. In 2019, an employee who earned a base salary, commissions, and bonuses notified the employer that it violated the *ESA* by only paying vacation and public holiday pay on base salary alone.

In response to this notification, the employer retroactively provided all current and former employees with unpaid vacation pay and public holiday pay. However, the employer elected to correct its error for only the two-year period preceding the complaint (2017 to 2019), relying on the basic limitation period under the *Limitations Act, 2002*.

In 2020, various employees commenced a proposed class action to claim unpaid vacation and public holiday pay on their variable compensation (*i.e.*, commissions and bonuses) dating back to 2003. In its

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Statement of Defence, the employer alleged that the claim was untimely and barred by full and final releases that the employees had signed.

This *Medcan* decision deals solely with the certification of the proposed class proceeding.

## The Decision

At [the original certification motion](#), a lower court judge refused to certify the proposed class action based on the plaintiffs' failure to meet the "preferable procedure" criterion of the class proceeding process.

On appeal, however, the Ontario Divisional Court found that the lower court had made an error in principle and certified the class proceeding.

## The Test for Class Action Certification

Section 5(1) of the *Class Proceedings Act, 1992* states that a class proceeding shall be certified if:

- (a) the pleadings or notice of application disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding is the preferable procedure to resolve the common issues; and
- (e) there is a representative plaintiff or defendant who
  - i. would fairly represent the interests of the class;
  - ii. has produced a plan that sets out a workable method for advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
  - iii. would not have a conflict of interest with other class members on the common issues.

## Was the Proposed Class Action the "Preferable Procedure?"

To demonstrate that a class action is the "preferable procedure," a representative party must show that a class action is the superior means to resolving a dispute. In doing so, the representative party should address the goals of class actions: judicial economy, behaviour modification, and access to justice.

In allowing the appeal, the Divisional Court found that the lower court judge failed to properly consider whether certification of the proposed class action would promote access to justice. Notably for employers, the Divisional Court highlighted the following access to justice considerations that favoured the certification of the class proceeding:

- A class proceeding would remove restrictive barriers for individuals who may have only small claims against the employer. Some individuals represented by the class had claim to only a few hundred dollars of vacation and holiday pay. It would be difficult for them to obtain counsel given the low value of their claims as compared to the cost of litigation.
- The class proceeding would provide anonymity and security in numbers to current employees who were owed vacation and holiday pay. This enhanced access to justice as current employees may be reluctant to bring individual claims due to fear of reprisal.
- Individuals may be unaware that they had a claim for unpaid vacation and holiday pay. The class action's notice requirements would ensure that these individuals were aware of their ability to make such a claim.

- A class action would be preferable for class members who, due to psychological and economic barriers (e.g., limited language skills, frail emotional or physical states, alienation from the legal system, etc.), could be prevented from bringing individual claims.

In addition, the Divisional Court found that the lower court judge had failed to adequately consider the behaviour modification criterion. The Court emphasized how certification of a class action of *Medcan's* nature could achieve behaviour modification:

**In employment cases such as this one, class proceedings would serve the goal of behaviour modification because they would signal to employers that they are expected to be informed of and to comply with their statutory obligations regarding employee compensation.** Individual claims under the *ESA* and individual actions would be much less effective in achieving this goal because the amounts recovered would be relatively small. Moreover, individual claims would never result in the employer being held entirely accountable for the “full costs of their conduct.” [Emphasis added]

The Divisional Court also noted that “class proceedings have repeatedly been found to be the preferable procedure for employment and *ESA*-related cases” (para 54).

## Check the Box

The *Medcan* decision acts as a wake-up call for employers to re-assess and ensure that all statutory obligations are properly followed. In addition, *Medcan* indicates that Ontario courts are increasingly favouring class action proceedings to address employment-related claims. Given the significant liability that may result from a successful class action, legislative compliance is now all the more important for employers.

## Need More Information?

For more information or assistance with legal compliance issues affecting your business, contact [Caroline DeBruin](mailto:Caroline DeBruin) at [cdebruin@filion.on.ca](mailto:cdebruin@filion.on.ca) or your regular lawyer at the firm.



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