CITATION: Kafka v. Allstate Insurance Company of Canada, 2011 ONSC 2305
COURT FILE NO.: CV-08-00355100-CP00
DATE: 20110412

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING UNDER the Class Action Proceedings Act, 1992, S.O. 1992, C. 6

BETWEEN:	)	
	)	
ESTHER KAFKA, KETAL (KEN) PATEL and MARK CASSELLS	)	*Colin P. Stevenson* and *Harvin D. Pitch*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
ALLSTATE INSURANCE COMPANY OF CANADA and THE ALLSTATE CORPORATION	)	*John C. Field* and *Seann D. McAleese*, for the defendants
	)	
Defendants	)	
	)	
	)	**HEARD:** January 12, 13, and 14, 2011

C. HORKINS J.

INTRODUCTION

[1] This is a motion for certification of a proposed class action pursuant to s. 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the "*CPA*").

[2] The plaintiffs are former employees of the defendant Allstate Insurance Company of Canada ("Allstate") who allege that they were constructively dismissed. The putative class members (the "Agents") are Agents of Allstate.

[3] Allstate is in the business of selling auto and property insurance services and products in Ontario and elsewhere in Canada. The action against The Allstate Corporation is dismissed because it did not employ the Agents in Ontario.

[4] On July 24, 2007, Allstate issued a general announcement letter to all active Agents, advising that effective September 1, 2009 a revised product distribution model and agent

compensation system would be implemented (the "New Model"). The New Model was phased in from September 1, 2007 through 2009.

[5] The plaintiffs allege that the New Model unilaterally changed fundamental terms of their employment contracts and that these changes constitute constructive dismissal. They resigned from Allstate and commenced this proposed class action seeking termination and/or severance pay pursuant to the *Employment Standards Act, 2002*, S.O. 2000, c. 41 (the "*ESA*").

[6] At the heart of this certification motion is a debate about whether an action alleging constructive dismissal is suitable for certification. The plaintiffs argue that the question of whether Allstate constructively dismissed the Agents can be determined by looking at the "big picture". Specifically, did the systemic changes that the New Model introduced result in a constructive dismissal of all Agents? It is Allstate's position that the law of constructive dismissal requires an individualized inquiry and in this case the impact of the New Model on each agent depends upon a myriad of factors.

[7] In brief, it is my conclusion that this is not an appropriate case for certification. While some of the certification requirements are satisfied, the action lacks the essential element of commonality. There is no common issue capable of being determined on a class wide basis that would sufficiently advance this litigation to justify certification.

CONSTRUCTIVE DISMISSAL - THE LEGAL FRAMEWORK

[8] A useful place to start is a review of the law that governs a constructive dismissal claim. A certification motion cannot be considered in a vacuum. In this case, the section 5 criteria in the *CPA* must be considered with a correct understanding of the employment law that will ultimately govern the success of the action at trial.

[9] As the following review explains, the law of constructive dismissal requires an individual inquiry to determine if an employee's claim should succeed.

The Employment Standards Act

[10] The relief requested in the amended statement of claim has been narrowed. The plaintiffs confirmed at the certification hearing that they are claiming termination and severance pay under the *ESA* plus punitive damages and pre-judgment interest.

[11] Section 57 of the *ESA* provides that an employee whose employment has been terminated is entitled to termination pay based upon one week's notice for each year worked up to a maximum of eight weeks, if that individual worked eight years or more.

[12] Section 65(6) of the *ESA* provides that an employee whose employment has been terminated is entitled to severance pay, if employed for five years at the time of severance and is entitled to be paid a weekly wage, multiplied by the number of years of service up to a maximum of 26 weeks. The employer must have a payroll of 2.5 million or more. In the case of a commission sales employee, as in this case, the weekly wage would be determined by averaging the commission receipts over a three month period, prior to the date of resignation.

[13] The plaintiffs allege that they were constructively dismissed. Since the *ESA* does not define the term constructive dismissal, the common law definition of constructive dismissal set out below, will guide the court.

[14] If constructive dismissal is proven then a further inquiry under the *ESA* is required to determine if the employee is disentitled to termination and/or severance pay by refusing to accept reasonable alternative employment. This is stated in O. Reg. 288/01 of the *ESA* in ss. 2(1)5 and 9(1)4 as follows:

> 2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:
>
> ….
>
> 5. An employee whose employment is terminated after refusing an offer of reasonable alternative employment with the employer.
>
> ….
>
> 9. (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:
>
> ….
>
> 4. An employee whose employment is severed after refusing an offer of reasonable alternative employment with the employer.

Constructive Dismissal – Essential Elements

[15] What is constructive dismissal? The Supreme Court of Canada answered this question in *Farber v. Royal Trust Co,* [1997] 1 S.C.R. 846 at para. 34. The court adopted the definition of constructive dismissal provided by Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal in an article entitled "Constructive Dismissal", in B. D. Bruce, ed., *Work, Unemployment and Justice* (1994), 127 as follows:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.
>
> [Emphasis added.]

[16] The employee has the onus of proving, on a balance of probabilities, that constructive dismissal has occurred. Whether a constructive dismissal has occurred is a question of fact. The employee "must demonstrate 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." (See R. S. Echlin and J. M. Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada*, (Aurora, Ont.: Canada Law Book Inc.. 2001 at p. 35) ("Echlin and Fantini").

[17] The inquiry into whether there has been a constructive dismissal "focuses primarily upon the breach itself and its impact upon both the employee's position and the broader employment relationship" (Echlin and Fantini at p. 31, [Emphasis added.])

[18] When considering a change in an employee's job duties, "it is not the direction of the change but the degree of the change which is critical to assessing whether altered job duties amount to a fundamental breach of the employment contract."(Echlin and Fantini at p. 196).

[19] The question of whether the employer has provided reasonable notice of the change is specific to the employee and will require an analysis of the factors set out in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.). At p. 145, McRuer C.J.H.C. stated:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
>
> [Emphasis Added.]

[20] Recently in *Russo v. Kerr Bros. Ltd.*, [2010] O.J. No. 4654 at para. 50, the court confirmed that the *Bardal* factors remain the law today for determining if an employee was provided with reasonable notice of a change.

[21] 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 to mitigate if the change is rejected. I will now review each obligation.

[22] The employee must make a "timely election as to whether or not to accept the unilateral alteration made by the employer." If "a clear and unequivocal rejection" is not communicated, the employee risks being viewed as condoning the changes. (Echlin and Fantini at pp. 42-3)

[23] As explained in *Wronko v. Western Inventory Service Ltd.*, [2008] O.J. No. 1589 at paras. 34-36, an employee has three options when faced with a unilateral and fundamental change to a term of the employment contract:

> 34 First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms.
>
> 35 Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a "constructive dismissal", as discussed in Farber, although this term was not in use when Hill was decided.
>
> 36 Third, the employee may make it clear to the employer that he or she is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then -- unless proper notice of termination is given -- the employer is regarded as acquiescing to the employee's position. As Mackay J.A. so aptly put it: "I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."

[24] As Echlin and Fantini discuss at pp. 50-51, case law confirms that there are a variety of factors to be considered in determining if an employee condoned changes to his position. These include:

- How long the employee remained in the altered position without protest
- How clearly the employee protested the variation
- How clearly the new terms of employment were set out by the employer
- Whether there was express acceptance by the employee of the new terms
- The employee’s length of service
- The state of the job market
- Whether the parties had an understanding that the employee’s acceptance of the changes was merely temporary
- The personal vulnerabilities of the employee

[25] The second obligation resting on the employee is the duty to mitigate. This duty is addressed in ss. 2(1)5 and 9(1) of O. Reg. 288/01 of the *ESA* noted above. As a result, mitigation in this action will focus on whether each agent refused an offer of reasonable alternative employment with Allstate.

[26] When considering the employee's duty to mitigate, the court in *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661 at para. 27, emphasized the "case-by-case" inquiry that is required in a constructive dismissal case:

> Given that both wrongful dismissal and constructive dismissal are characterized by employer-imposed termination of the employment contract (without cause), there is no principled reason to distinguish between them when evaluating the need to mitigate. Although it may be true that in some instances the relationship between the employee and the employer will be less damaged where constructive rather than wrongful dismissal has occurred, it is impossible to say with certainty that this will always be the case. Accordingly, this relationship is best considered on a case-by-case basis when the reasonableness of the employee's mitigation efforts is being evaluated, and not as a basis for creating a different approach for each type of dismissal.

[27] The burden to prove a failure to mitigate rests with the employer. This will "often require the employer to demonstrate that the employee acted unreasonably in refusing to accept an altered position as a temporary means of avoiding losses." (Echlin and Fantini at p. 38).

[28] With the benefit of this legal framework, I will now review the evidence and then consider the certification requirements of s. 5 of the *CPA*.

THE EVIDENCE

[29] At the certification stage, evidence explains the background to the action. A certification motion is not the time to resolve conflicts in the evidence: *Cloud v Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.) at para 50.

[30] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at paras. 16-26; *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.) at paras. 56-74; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.) at paras. 49 to 52; *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (S.C.J.) at para. 21; *LeFrancois v. Guidant Corp*., [2009] O.J. No. 2481 (S.C.J.) at paras. 13-14, leave to appeal ref'd [2009] O.J. No. 4129 (Div. Ct.); *Ring v. Canada (Attorney General)*, [2010] N.J. No. 107 (Nfld. C.A.) are all authority for the propositions that a plaintiff's evidentiary burden on a certification motion is low and the plaintiff is only required to adduce evidence to show some "basis in fact" to meet the requirements of ss. 5(1)(b) to (e) of the test for certification as a class action.

[31] Affidavit evidence was filed on this certification motion. Each plaintiff filed an affidavit and was cross-examined. Eric Pickering, the Vice President of Human Resources at Allstate filed two affidavits and cross-examined.

[32] A detailed review of the evidence is required to appreciate the depth of the individualized inquiry that is required to determine if an Agent was constructively dismissed.

Allstate Changes its Business Model

[33] Under what I will call the Old Model, Agents were geographically dispersed across the province in neighbourhood offices. Agents, including the plaintiffs, operated, managed and controlled these offices. They hired personnel, rented space, trained support staff and basically operated the office as if it was their own.

[34] Agents were responsible for the neighbourhood office expenses, equipment, specialized staffing support, and lease and/or mortgage costs, which Allstate reimbursed wholly or partially through the Office Expense Allowance.

[35] The relationship between the Agent and the customer was leveraged as a means to differentiate Allstate in the marketplace. The Agents sold insurance to new and existing customers, collected premiums, processed renewals of insurance and generally maintained and serviced the customers. It is agreed that this book of business belonged to Allstate.

[36] The Agents were the face of Allstate in the community and Allstate's brand image was premised on the commitment that "You are in good hands with Allstate".

[37] Agents were encouraged to invest their time and effort to build up their book of business and client base. As they sold increasingly more insurance over the years and expanded their client base, their commission income including renewals grew. For some, renewal commission was significant.

[38] Allstate began to experience an increasingly competitive insurance market. The increased competition included new competitors and the deployment of complex new distribution models, with multiple delivery channels for insurance products. Allstate engaged in a review of its business model to determine how best to respond to the competitive landscape that was increasingly focused on serving customer needs.

[39] Allstate concluded that the location and structure of its existing neighbourhood offices did not effectively respond to the changing environment. Agents in the neighbourhood offices were responsible for many aspects of the service experience which limited responsiveness to customer needs, diverted Agents from their primary sales function and placed them under additional financial and performance pressures. The smaller more dispersed neighbourhood offices were not as visible.

[40] Allstate determined that consolidated and more conveniently located offices (new offices), corporately managed and staffed, were required to facilitate easier and more cost competitive access for customers. Allstate decided to close the neighbourhood offices and move Agents to one of the new offices where they would assume one of a variety of new positions that were created.

[41] Allstate believed that this approach would relieve Agents of the responsibility for expenses and staffing an office and better position Allstate to compete and grow in the evolving and highly competitive market for insurance products.

[42] On July 24, 2007, Allstate delivered a general announcement letter ("July letter") to all active Agents. The July letter advised the Agents that effective September 1 2009, Allstate was going to implement a revised product distribution model and agent compensation system (referred to in the July letter as the "new agent distribution model"). Mr. Pickering refers to the new agent distribution model in his affidavit as the "Enhanced Model". I refer to it as the "New Model" since the term enhanced is obviously a point of dispute.

[43] The July letter informed the Agents that they had 24 months to adjust and transition to the New Model and that Allstate would meet and discuss the impact of the change with each agent. The new compensation system was scheduled to become effective September 1, 2009. The July letter notified the Agents that the time between the letter and the final implementation date was considered as a working notice period.

[44] All Agents, including the plaintiffs, were provided with individual letters outlining their future roles, compensation and pending office relocation. The individual letters to the plaintiffs were delivered in July 2007. The timetable for implementation of the changes varied among the Agents.

Changes in Job Descriptions

[45] The role that each Agent was offered in the New Model varied. Several positions were created: Agency Manager, Business Development Agent, Relationship Development Agent and Customer Care Agent. The plaintiffs were each offered continued employment in a new office as a Business Development Agent.

[46] The Agency Manager role involves increased management responsibility and the potential to earn more income. This role was a promotion in the Allstate organization. The Agency Manager is responsible for managing all aspects of the office including staff budgets and developing marketing plans.

[47] In Ontario, there were 43 Agents who were offered Agency Manager roles after July 24, 2007 and before September 1, 2007. An additional 10 Agents were offered the Agency Manager role after September 1, 2007. This included one Agent who had been offered the Agency Manager role before September 1, 2007, but declined for personal reasons and subsequently applied for and obtained this role in November, 2008. Approximately one-quarter of all Agents employed by Allstate in Ontario as of July 24, 2007 were offered the Agency Manager role.

[48] The Business Development Agent was primarily a sales role. Some Agents were offered or became Business Development Agents. They then applied for and were offered the Agency Manager role. As of September 2009, there were 73 Business Development Agents across 54 new offices.

[49] The Relationship Development Agent and Customer Care Agent focused on customer service needs. In Ontario, 52 Agents were deployed to these roles after September 1, 2007.

[50] Some Agents requested and received different positions after receiving their individual letters and assignment. Some Agents negotiated additional terms upon their receipt of their

individual letters (for some this included additional compensation). After the announcement of the New Model, 22 Agents in Ontario requested or voluntarily applied for alternative roles.

Changes to Compensation

[51] Under the Old Model, the compensation system for Agents consisted of the following key elements:

(i) Commission on renewal business at 6.5%;

(ii) Commission on new business at 15%;

(iii) Participation in the variable corporate Profit Sharing Plan; and

(iv) Certain health and pension benefits.

[52] Commissions on renewal business were not eliminated in the New Model, but rather put into a pool with other monies to create an individual agency performance bonus. Under the New Model, Agents had the potential to earn higher commission payments.

[53] Agents who continued in their sales capacity as Business Development Agents after September 1, 2009, had the opportunity to earn increased commission on new business, as well as a pooled bonus made up of several components including renewals. The key elements of their compensation follow:

(i) An advance on commissions, paid semi-monthly with commission at 15% for new business, potentially increasing to a maximum payable rate of 19.5%

(ii) An Individual Performance Bonus Plan paid monthly

(iii) An Agency Performance Bonus reflecting shared pool for growth, retention, profitability, including renewals, paid quarterly, and

(iv) Some Business Development Agents were provided with an opportunity to participate in the Top Up Bonus

[54] The compensation system for Agents who did not become Business Development Agents was significantly different (the nature of the difference was not explained in the evidence).

[55] Agent participation in the Allstate Profit Sharing Plan was replaced with the Agency Performance Bonus, two months following the Agent's relocation to the new office. The Agent's share of the Agency Performance Bonus varied depending upon what position they assumed.

[56] Pension and benefit eligibility for all Agents was maintained on the same terms as under the Old Model.

[57] Allstate advised all Agents that from September 1, 2007 through September 1, 2009, they would be provided with a minimum guaranteed income, equal to or greater than their earnings in

2006 on auto and property commissions from both new business and renewals. If an Agent relocated to the new office before September 1, 2009, the Agent was eligible to receive the greater of the 2006 guarantee or the actual income generated under the New Model for the duration of the guarantee period.

The Variable Impact on Agent Compensation

[58] The impact of the new compensation model was unique to the Agent. A variety of factors, such as the size, nature and distribution in the Agent's book of business determined the Agent's compensation profile. Ms. Kafka, Mr. Patel and Mr. Cassells confirmed this variable impact on compensation on cross-examination.

[59] The Agent's compensation potential also depended on the new office as whole, having regard to its location, market conditions, staff competency and other factors.

[60] Agents with a history of generating more new business were better positioned to earn more commission income under the New Model. Those Agents who depended heavily upon renewal or rollover business found themselves in a different position. It was expected that they would need to focus their efforts on securing new business under the New Model.

[61] The size and distribution of the business that each Agent serviced as of July 2007 varied markedly. Furthermore, the Agent's business yielded different compensation results under the Old and New Models.

[62] Pension and benefits also varied among Agents. Allstate has a flexible employee group benefit plan that provides each employee with flex dollars to use towards their benefit coverage selections. Benefit coverage and premiums payable under the Old and New Models varied by agent depending upon income and the number of flex dollars that Allstate provided.

[63] Allstate has two different pension plans. Agents hired on or before December 31, 2003 were eligible to participate in the Defined Benefit Pension Plan. Agents hired on or after January 1, 2004 are eligible to join the Employee Retirement Savings Plan which is a defined contribution plan. Individual amounts payable upon retirement will varied by Agent depending upon income, level of contributions, plan type, age and length of service.

[64] The treatment of office expenses is another example of how each Agent's financial circumstances varied. Under the Old Model, Allstate reimbursed office expenses, including lease and/or mortgage costs, through its Office Expense Program. However, this reimbursement varied depending on the type of contract the Agent had with Allstate. The Office Expense Program was specific to each Agent and was calculated based on a complex formula derived from the Agent's prior performance.

[65] If an Agent incurred office expenses in excess of the reimbursement available from Allstate through the Office Expense Program, the excess may have been a deductible. However, the deductibility of expenses for income tax purposes varied by Agent.

[66] After relocation to the new office, Agents were no longer required to fund the majority of office related expenses, such as staff, rent, telephone, maintenance. Allstate assumed full responsibility for these expenses upon relocation. This ensured that the Agent's net income would not be reduced by these expenses.

[67] Ms. Kafka, Mr. Patel and Mr. Cassells confirmed on cross-examination that reimbursements under the Office Expense Program and the corresponding impact and potential tax treatment varied by Agent.

[68] Bonus payments to Agents also varied. Under the Old Model, Agents with higher earnings were eligible for additional bonuses based on various performance factors and financial modeling.

[69] In the New Model, some Business Development Agents, including Mr. Patel, were paid a Top Up Bonus. Some Agency Managers were paid a Supplemental Performance Bonus. Eligibility for these bonuses was based upon a comparison of the Agent's income guarantee during the implementation phase, against projected income under the New Model after expiry of the guarantee period.

[70] Allstate also individually adjusted compensation for certain Agents under the New Model. The adjustment resulted in an increase in the advance on commission or minimum annual earnings originally communicated to these Agents in their individual letter. Some Agents signaled their agreement to the changes by signing an acceptance letter. In Ontario, there were approximately 15 Agents who received such adjustments before September 1, 2007 (to be effective September 1, 2009). Of these individuals, nine were Agency Managers and three of them signed acceptance letters agreeing to the changes.

Different Employment Agreements

[71] Since a constructive dismissal requires a unilateral change to a fundamental term of the employment contract, it is important to consider the contracts that govern the class. A variety of employment contracts were in use when Allstate decided to introduce the New Model.

[72] Mr. Cassells and Ms. Kafka were subject to Agent Employment Agreement numbered CR1501 and Mr. Patel was subject to the Agent Employment Agreement numbered CR1500.

[73] In addition to Employment Agreements CR1501 and CR1500, there were other employment agreements in use at Allstate at the material time. These employment agreements involved longer serving Agents and are referred to as the 830 Employment Agreements. There were three different types of agreements in this category: the 830A, 830-1 and 830-2. There are no representative plaintiffs for the 830 series of Agreements.

[74] The CR1501 Employment Agreement included the following provisions that are relevant to the issue of whether the New Model was a unilateral change:

I. EMPLOYMENT:

A. Effective _____, 19__, the Company employs you and you accept employment as an Allstate CR1501 Agent. The terms and conditions of employment will be governed by this Agreement, as may be amended from time to time. The Company reserves the right to make whatever changes in the terms and conditions of your employment as it may deem necessary and appropriate in the furtherance of its business objectives, subject to the terms and conditions of this Agreement.

….

C. The Agents Employment Procedure Manual for the CR1501 Agreement, as may be amended from time to time, hereinafter referred to as the "Manual", is expressly incorporated in its entirety as part of this Agreement. The Company reserves the right to amend the Manual, including compensation amounts and rules, at any time without prior notice to you. In the event of any inconsistency between the Manual and any other provision of this Agreement, the Manual shall control.

….

II. DUTIES:

….

C. You will act as an agent of the Company for the purposes of soliciting, selling and servicing insurance and such other business as is specified in the Manual (herein referred to as "Company Business"). You will carry out all activities in the performance of such duties according to the terms of this Agreement under the direction and control of the Company or its authorized representatives. …

X. SALES LOCATION:

A. The Company will designate the sales location to which you will be assigned. You understand that such location is nonexclusive. The Company reserves the right in its sole discretion to change your sales location at any time. You agree that you will reside within reasonable proximity to your sales location.

….

XI. OPERATION OF BUSINESS:

The Company shall determine in its sole discretion all matters relating to its business and the operation of the Company, including, but not limited to the following:

….

XIV OWNERSHIP OF BUSINESS AND POLICIES IN YOUR ACCOUNT

A. The Company will own all business produced under the terms of this Agreement. You acknowledge that you have no interest in or rights to any such business.

[Emphasis added.]

[75] Contracts 1501 and the 830 series contained the following clause (that is not found in contract 1500):

XV. GENERAL:

A. This Agreement may not be modified except by a written agreement between the Company and you which expressly states that it modifies this Agreement. No other written statements, representations, or agreements and no oral statements, representations, or agreements shall be effective to modify this Agreement. No representative of the Company shall have authority to modify this Agreement except as provided in this Section. Nothing in this Section shall affect the Company's right to amend the Manual as provided in Section I. C.

[Emphasis added.]

[76] As noted in the above excerpt, the agreement incorporates by reference, the terms of the Agent Employment Procedure Manual that is subject to change at Allstate's discretion. It governs ethics, compensation, fees and products offered by other insurers.

[77] Each of the agreements, and accompanying manuals, have a variety of distinctive provisions relating to Allstate's ability to amend compensation and relocate Agents, as well as differing restrictive covenants and clauses relating to enforceability and severability. As well, the 830 and 1500 Employment Agreements included an internal review and appeal process before termination.

[78] At various times during the employment relationship, Agents including Ms. Kafka, Mr. Patel and Mr. Cassells, received and signed back Confirmation and Acknowledgement forms regarding changes in compensation, lines of business and other business related functions. These forms documented the Agents' receipt of such changes rather than seeking their consent.

[79] Ms. Kafka, Mr. Patel and Mr. Cassells agreed on cross-examination that Allstate was entitled to change and/or approve office locations at its discretion, whether under the 1500 or 1501 contract or the subsequent amendments to the contracts.

Who are the Agents?

[80] Unlike many class actions, much is known about the Agents who fall within the class description. Allstate's records describe the 102 Agents who fall within the class definition as follows:

- 22 Agents who retired, including 2 Agents who had been promoted to a managerial role (if any retired with an unreduced pension they would be excluded);
- 12 Agents who were promoted to and accepted a managerial role but subsequently resigned;
- 2 Agents who resigned after turning down an offer of a promotion to a managerial role;
- 2 Agents who are currently involved in litigation with Allstate claiming wrongful dismissal;
- 2 Agents who pursued a claim against Allstate through the procedure available under the ESA; and
- 62 Agents who simply resigned from their employment with Allstate.

[81] Of the 62 Agents who resigned from their employment with Allstate in Ontario between September 1, 2007 and September 1, 2009:

- 48 of those Agents' employment was governed by and subject to the terms and conditions of the CR1501 Employment Agreement;
- 5 of those Agents' employment was governed by and subject to the terms and conditions of the CR1500 Employment Agreement; and
- 9 of those Agents' employment was governed by and subject to the terms and conditions of the 830 Employment Agreement.

Specific Evidence about the Plaintiffs

[82] Ms. Kafka, Mr. Patel and Mr. Cassells were all provided with continued employment in the New Model as Business Development Agents. They each rejected the changes, resigned from Allstate and commenced this action. Beyond these basic facts, there are unique features to the individual circumstances of the three plaintiffs that I will now review.

Ms. Kafka

[83] Ms. Kafka was hired as an Allstate agent on February 1, 1994. She signed Agent Employment Agreement CR1501. On May 1, 1995, Ms. Kafka executed an amendment to her

Agent Employment Agreement which included a reservation of rights to Allstate to modify rules and procedures at any time and maintained Allstate's discretion over office location.

[84] When Allstate officials met with Ms. Kafka, they gave her an individual letter announcing the New Model and confirming her continuing role with Allstate as a Business Development Agent and income guarantee until September 1, 2009.

[85] When the New Model was announced, Ms. Kafka was operating a neighbourhood office with a partner. The office expenses, including lease costs and staffing, were reimbursed by Allstate through its Office Expense Allowance. The ratio of Office Expense Allowance reimbursement to expenses incurred was variable, with a corresponding variance in the tax deductibility of expenditures. This financial exposure would have been eliminated for Ms. Kafka under the New Model if she had continued to work with Allstate. She acknowledged this fact on her cross-examination.

[86] Ms. Kafka's participation in the corporate Profit Sharing Plan remained in place at the time of her resignation from employment. Ms. Kafka's pension and benefit entitlements were maintained on the same terms as under the Old Model and she acknowledged this on her cross-examination.

[87] The eventual implementation of Allstate's New Model would have had a unique impact on Ms. Kafka's income, benefit coverage, applicable premiums and pension because of the variety of factors which affected her compensation, including the size, nature and distribution of the book of business Ms. Kafka serviced on behalf of Allstate.

[88] In an e-mail dated May 5, 2008, Ms. Kafka advised Allstate that she was resigning due to the "distressing issue and the substantial modification of the Agent Employment Agreement as outlined in your letters of July 2007 and July 24, 2007". The "distressing issue" related to Ms. Kafka's concern that she may share office space in the new office with an Agency Manager who was a brother-in-law to her former spouse who was the subject of a restraining order. Allstate assured Ms. Kafka that she would not be relocated to this office.

[89] Ms. Kafka incorporated her own company called Kafka Insurance Brokers as part of her "game plan" in the event her request for an alternative office location was not granted.

[90] On February 28, 2008, before Ms. Kafka resigned, she filed a complaint with the Ontario Human Rights Commission pursuant to the *Human Rights Code*, R.S.O. 1990, c. H.19, alleging discrimination in employment based on gender as a result of her treatment under the New Model. Specifically, Ms. Kafka claimed she was not offered the Top Up Bonus solely on the basis of her gender. Ms. Kafka is pursuing her complaint.

[91] Ms. Kafka remained employed as an agent with Allstate until her resignation effective May 31, 2008. At no time before her resignation did Ms. Kafka move to a new office, cease receiving income for renewal business or receive income less than the 2006 guarantee. Before Ms. Kafka resigned, she was paid more than her guarantee for several of the months in the guarantee period.

Mr. Patel

[92] Allstate hired Mr. Patel as an Agent on May 30, 1987. He signed Agent Employment Agreement, 1500. On July 27 1992, Mr. Patel executed an amendment to his Agent Employment Agreement which included a reservation of rights to Allstate to modify rules and procedures at any time and maintained Allstate's discretion over office location.

[93] Allstate officials met with Mr. Patel and gave him an individual letter confirming the New Model, his continuing role as a Business Development Agent and the income guarantee through September 1, 2009.

[94] Under the Old Model, Mr. Patel operated a neighbourhood office with a partner. Allstate reimbursed the office expenses, including lease costs and staffing, through the Office Expense Allowance. The ratio of Office Expense Allowance reimbursement to expenses incurred was variable, with a corresponding variance in the tax deductibility of expenditures. This financial exposure would have been eliminated for Mr. Patel under the New Model and he acknowledged this on his cross-examination.

[95] Mr. Patel's participation in the corporate Profit Sharing Plan remained in place when he resigned from employment. Mr. Patel acknowledged on cross-examination that his pension and benefit entitlements were maintained on the same terms as under the Old Model.

[96] The eventual implementation of Allstate's New Model would have had a unique impact on Mr. Patel's income, benefit coverage, applicable premiums and pension because of the variety of factors which affected his compensation, including the size, nature and distribution of the book of business Mr. Patel serviced on behalf of Allstate.

[97] Shortly after Allstate announced the New Model, Mr. Patel asked Allstate if he could negotiate a severance package and/or transfer to Allstate in the United States. Following his resignation Mr. Patel relocated to the United States to manage a family run liquor store.

[98] On February 14 2008, following the announcement of the Agency Manager appointments, Mr. Patel advised Allstate that he ought to have been named an Agency Manager because in his view, he was more qualified than the Agents selected for the Windsor region. Mr. Patel further advised that he was "shocked" and "upset" and believed that because of his ethnicity he was discriminated against in the selection process.

[99] On cross-examination, Mr. Patel alleged that his resignation was in part due to Allstate's failure to advise him how to properly respond to customer inquiries regarding the relocation of his former partner. Mr. Patel also stated that his resignation was motivated by the allegedly adverse treatment by his manager and the impact this had upon his health.

[100] Despite Allstate's assurance that no improper considerations affected his candidacy for an Agency Manager role, Mr. Patel advised Allstate by letter dated June 16 2008, that he would be resigning effective July 15, 2008. Mr. Patel claimed constructive dismissal as a result of the changes to the Agent Employment Agreement as well as "recent and additional wrongful acts by Allstate [that] have exacerbated my situation and have had an adverse impact on my health."

[101] Mr. Patel remained employed as an agent with Allstate until his resignation effective July 15, 2008. Before Mr. Patel's resignation he had relocated to the new office for approximately one month and then commenced a leave of absence due to illness until the date of his resignation.

[102] At no time prior to his resignation did Mr. Patel cease receiving income for renewals or receive income less than the 2006 guarantee. Mr. Patel received the benefit of the guarantee in several months when his actual earnings in those months were substantially less.

Mr. Cassells

[103] Allstate hired Mr. Cassells as an Agent on February 3, 1992. He signed Agent Employment Agreement CR1501. In April 1995, Mr. Cassells executed an amendment to his Agent Employment Agreement which provided a reservation of rights to Allstate to modify rules and procedures at any time and maintained Allstate's discretion over office location.

[104] Allstate officials met with Mr. Cassells and gave him an individual letter confirming the New Model, the income guarantee and his continuing role as a Business Development Agent.

[105] Under the Old Model Mr. Cassells operated his neighbourhood office with a partner. Allstate reimbursed the office expenses, including lease costs and staffing through the Office Expense Allowance. The ratio of the Office Expense Allowance reimbursement to expenses incurred was variable, with a corresponding variance in the tax deductibility of expenditures. Mr. Cassells acknowledged on his cross-examination that his financial exposure to these expenses would have been eliminated under the New Model.

[106] Mr. Cassells' participation in the corporate Profit Sharing Plan remained in place at the time of his resignation from employment. Mr. Cassells acknowledged on his cross-examination that his pension and benefit entitlements were maintained on the same terms as under the Old Model.

[107] The eventual implementation of Allstate's New Model would have had a unique impact on Mr. Cassells' income, benefit coverage, applicable premiums and pension because of the variety of factors which affected his compensation including the size, nature and distribution of the book of business Mr. Cassells serviced on behalf of Allstate.

[108] Mr. Cassells advised Allstate, by letter dated October 19, 2007, that with respect to the changes occurring in September 2009, he intended to continue his employment but would not "consent to the imposition of any quotas that might effectively reduce the income I have been enjoying".

[109] Mr. Cassells alleges that Allstate treated him unfairly because he was denied entitlement to the Office Expense Allowance allocation when his partner decided to retire. He alleges that Allstate failed to honour an historic arrangement for office expenses, triggered when an Agent retired. It is alleged that Allstate was required to pay the office expense allowance of the retiring partner for up to 24 months following the retirement until the end of the office lease. When

Mr. Cassels' partner decided to retire, Mr. Cassels requested that Allstate cover his partner's share of the office expenses and Allstate refused.

[110] Mr. Cassells also objected to the referral of his partner's clients to another office, alleging that this was contrary to past practice. As well, Mr. Cassels objected to Allstate's decision to close his neighbourhood office at the end of February 2008 and relocate him to another neighbourhood office before moving him to his proposed new office.

[111] Allstate alleges that after the July 24 2007 announcement, Mr. Cassells started to plan a competing brokerage. Specifically from November 2007 until April 2008, while receiving the benefit of an income guarantee from Allstate, Mr. Cassells engaged in substantial efforts to facilitate his establishment as a competitor through the broker channel. Further, Allstate alleges that Mr. Cassells used Allstate's resources and equipment for this purpose, exporting detailed customer information for future use, disclosing confidential and proprietary book valuations, soliciting or and/or arranging for the departure of other Allstate employees, corresponding with the principals of competing brokerages, negotiating financing and facilitating his licensing requirements as an independent broker.

[112] In January 2008, Mr. Cassells made inquires with Allstate to inquire about retirement options. He was thinking about retiring in April and in fact communicated his intention to do so.

[113] By letter dated April 15, 2008, Mr. Cassells again corresponded with Allstate to assert that "….any reduction to my current earnings or slightest change in working conditions is constructive dismissal." In this letter Mr. Cassells provided 30 days' notice of his resignation.

[114] Mr. Cassells remained employed as an Agent with Allstate until his resignation effective May 15, 2008. He did not move to a new office before his resignation. Like all Agents, Mr. Cassells received the benefit of the income guarantee. There were several months when the actual earnings he generated were substantially less than the income guarantee that he was paid.

[115] With the benefit of this evidentiary review, I will now consider requirements for certification.

CERTIFICATION REQUIREMENTS

[116] Section 5(1) of the *CPA* sets out the criteria for the certification of a class proceeding. The language is mandatory. The court is required to certify the action as a class proceeding where the following five-part test for certification is met:

> (a) the pleadings or the notice of application discloses 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 would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant 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. 1992, c. 6, s. 5 (1).

[117] These requirements are linked: "There must be a cause of action, shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers." (*Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14.)

[118] Winkler J. (as he then was) pointed out in *Frohlinger v. Nortel Networks Group,* [2007] O.J. No. 148 at para. 25 (S.C.J.), that the core of a class proceeding is "the element of commonality". It is not enough for there to be a common defendant. Nor is it enough that class members assert a common type of harm. Commonality is measured qualitatively rather than quantitatively. There must be commonality in the actual wrong that is alleged against the defendant and some evidence to support this.

[119] The decision to certify is not merits-based. The test must be applied in a purposive and generous manner, to give effect to the important goals of class actions - providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers and encouraging them to modify their behaviour: *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 26-29; *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 15.

[120] In *Hollick, supra,* at para. 25, the “some basis in fact” test was introduced when the court stated that “the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.”

[121] Since it is not the role of the court on a certification motion to “find facts”, I conclude that *Hollick* directs the court to confirm that there is <u>some evidence</u> to support the s. 5 (b) – (e) requirements. This interpretation of the test is consistent with the low burden that rests on the plaintiff as explained in *Hollick* at para. 16 and generally consistent with how the numerous courts have applied the “some basis in fact” test.

5(1)(a) - Cause of Action

[122] The test under s. 5(1)(a) is well settled and identical to the test under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The following principles apply to the determination of the issue of whether the pleadings disclose a cause of action under s. 5(1)(a):

- No evidence is admissible for the purposes of determining the s. 5(1)(a) criterion: *Hollick* at para. 25.

- All allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and thus assumed to be true.

- The pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50.

- Matters of law not fully settled in the jurisprudence must be permitted to proceed: *Ford v. F. Hoffmann-LaRoche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 17(e).

- The pleading must be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery information: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679.

[123] The amended statement of claim alleges that Allstate unilaterally made “substantive material changes” to the terms of their employment contracts and that these changes constitute constructive dismissal. The plaintiffs rejected the changes and resigned from Allstate. They were not paid termination or severance pay under the *ESA*.

[124] During the hearing the plaintiffs confirmed that the damages claimed are limited to termination or severance pay, punitive damages and interest.

[125] In support of the punitive damage claim, the plaintiffs allege that Allstate’s conduct “was entirely without care, deliberate, callous, willful and an intentional disregard of the rights of class members”. Specifically, the plaintiffs allege that Allstate forced older better paid employees to leave their employment to allow Allstate to hire younger replacements and that such conduct was systemic discrimination.

[126] It is conceded that the plaintiffs’ amended statement of claim discloses a cause of action.

[127] I am satisfied that the first criterion for certification is met.

5(1)(b) - Identifiable Class

[128] Section 5(1) (b) requires that there be "an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant". The purpose of a class definition is: (a) to identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. Toronto Transit Commission,* [1998] O.J. No. 4913, 27 C.P.C. (4th) 172 (Gen. Div.) at para. 10. To serve the mutual benefit of the parties, the class definition should not be unduly narrow or unduly broad

[129] Class members are not required to have identical claims and class membership identification is not commensurate with the elements of the causes of action advanced on behalf of the class: *Cloud, supra,* at para. 45.

[130] In response to defendants' position that the class definition was over-inclusive and not rationally connected to the common issues, the plaintiffs revised class definition during the hearing. The revisions are underlined as follows:

> All individuals who had been employed in Ontario for at least three (3) months by the defendant, Allstate Insurance Company of Canada (hereinafter "Allstate") as Agents as of July 24, 2007 and whose employment with Allstate ended between July 24, 2007 and September 1, 2009, without having received termination and/or severance pay pursuant to the ESA, S.O. 2000, c. 41 ("ESA") but not including the nine (9) Agents that Allstate alleges were dismissed for cause or anyone who retired with an actuarially unreduced pension benefit as defined in ESA Reg. 288/01, s. 9(1)3.

[131] The above revisions address some of the defendants' criticism. The nine Agents dismissed for cause and those who retired with unreduced pension benefits are not entitled to *ESA* benefits and should not be part of the class definition. The revision excludes these Agents.

[132] Allstate's remaining criticism is that the class definition is not rationally connected to the proposed common issues. Allstate submits that only an Agent, who was constructively dismissed and resigned within a reasonable period and was not found to have refused an offer of reasonable alternative employment, would fit within the class.

[133] However, this criticism invites a merit based definition of the class. Membership in the class should not require a determination of the merits of the claim. I adopt the following passage in *Robertson v. Thompson Corp.* (1999), 43 OR (3d) 161 at page 169 where Sharpe J stated:

> I agree with Winkler J. in Bywater, and with Newberg, Class Actions, 3rd ed. at p. 6-61, that the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided. Such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.

[134] The identity of the Agents who fall within the class definition is known. Eric Pickering confirms that as of July 24 2007, when Allstate introduced the New Model, 236 Allstate Agents were employed in Ontario. Of the 236 Agents, 125 remained actively employed with Allstate after September 1, 2009. Nine of the remaining 125 Agents were dismissed for cause leaving 102 potential class members.

[135] In summary, I am satisfied that the revised class definition identifies persons who have a potential claim against Allstate, defines the parameters of the lawsuit so as to identify those who will be bound by the result and describes those entitled to notice. The second criterion for certification is met.

5(1)(c) - Common Issues

The Legal Test

[136] Section 5(1) of the *CPA* requires that "the claims or defences of the class members raise common issues". Section 1 of the *CPA* defines "common issues" as:

> (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.

[137] For an issue to be common it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick* at para. 18.

[138] An issue will not be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant: *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (S.C.J.), aff'd, [2003] O.J. No. 3918, 39 C.P.C. (5th) 151 (Div. Ct.).

[139] The underlying question is whether the resolution of a proposed common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc.*, *supra*, at para. 39.

[140] An issue can be common even if it makes up a very limited aspect of the liability question and although many individual issues remain to be decided after its resolution: *Cloud* at para. 53. It is not necessary that the answers to the common issues resolve the action or even that the common issues predominate. It is sufficient if their resolution will significantly advance the litigation so as to justify the certification of the action as a class proceeding.

[141] The common issues criterion is not a high legal hurdle, but a plaintiff must adduce some basis in the evidence to show that issues are common: *Hollick* at para. 25. As Lax J. stated in *Fresco v. Canadian Imperial Bank of Commerce,* [2009] O.J. No 2531 at para. 61 “[w]hile only a minimum evidentiary basis is required, there must be some evidence to show that this issue exists and that the common issues trial judge is capable of assessing it in common. Otherwise,

the task for the common issues trial judge would not be to determine a common issue, but rather to identify one." [Emphasis added.]

Proposed Common Issues

[142] During the certification hearing the plaintiffs presented the following revised the list of common issues:

(1) Does Allstate's new agent distribution model make substantial material changes to the Class' employment terms thereby constituting constructive dismissal under the *ESA*?

(2) Can Allstate make substantial material changes to the Class' employment terms by giving two years notice?

(3) If not, did the employment contracts permit Allstate to impose such substantial material changes?

(4) Was the Class obligated to resign any time prior to September 1, 2009 and, if so, when?

(5) Does the Class have any mitigation obligations under the *ESA* and, if so, what are they?

(6) Does Allstate's new agent distribution model constitute an offer of reasonable, alternative employment within the meaning of the *ESA* Regulations and, if so, what are the consequences?

(7) Is Allstate in breach of the *ESA* in failing to pay termination and/or severance pay to the Class?

(8) Is Allstate liable to the Class for damages and, if so, in what amount?

(9) Does the conduct of Allstate justify an award of punitive damages?

(10) If the answer to (i) is yes, what is the amount of punitive damages?

Analysis

[143] I start my analysis with some general observations about the plaintiffs' common issues.

[144] Common issues must be connected to the essential elements of the cause of action otherwise the resolution of a common issue will not move the action forward. While the common issues attempt to track essential elements of a constructive dismissal claim, some of the common issues as drafted are problematic.

[145] Generally, there is some basis in the evidence to show that these common issues exist. As well, the common issues generally focus on an issue that is a substantial ingredient of each class member's claim.

[146] However, the plaintiffs' common issues have a fatal flaw: they lack commonality. The resolution of an issue for the plaintiffs will not avoid individual fact finding and legal analysis to determine the answer for each member of the class.

Common Issue # 1

Does Allstate's new agent distribution model make substantial material changes to the Class' employment terms thereby constituting constructive dismissal under the ESA?

[147] The new agent distribution model is what I have called the New Model.

[148] The wording of this common issue raises two problems. First, the law of constructive dismissal requires a "fundamental" change not a "substantial material" change. While the difference in wording is perhaps not that significant, the language of the common issues should track the essential elements of the cause of action. The words "substantial" and "material" are used elsewhere in the common issues. If I was prepared to certify this common issue, I would require the words "substantial" and "material" to be replaced with the word fundamental.

[149] A more significant problem is the imbedded assumption in the question that such a change leads automatically to a constructive dismissal. It is wrong in law to assume that if there was a fundamental change it "thereby [constitutes] constructive dismissal under the *ESA*". A finding that there has been a fundamental change to a term of an employment contract is but one step, albeit an important one, in the analysis.

[150] If the common issue is revised to reflect these points, it should read: Did Allstate's New Model make a fundamental change to the terms of the Class' employment contract?

[151] There is some basis in the evidence to show that this issue exists. The changes that the New Model introduced applied to all of the Agents in Ontario. There is no dispute that the New Model was different from the Old Model. The New Model changed how Allstate sold insurance. It introduced new consolidated offices, new positions and a new method of agent compensation.

[152] However, there is no evidence that this issue is capable of being assessed in common.

[153] The plaintiffs argue that there is commonality because the New Model applied to all Agents. As a result, they all experienced the changes that the New Model introduced. However, the focus is not on whether the terms of employment were changed but rather was the change fundamental. There is no commonality in the core of this issue: was it a fundamental change? The answer to this question depends upon individual findings of fact for each class member's claim.

[154] Plaintiffs' counsel submits that that there is no need to delve into the individual circumstances of the three named plaintiffs to decide if they were constructively dismissed. The

plaintiffs argue that since the plaintiffs all resigned, the effect that the New Model would have had on them is speculative. I disagree. Typically, employees who allege that they were constructively dismissed have rejected the change and resigned and yet the law still requires an individualized inquiry.

[155] The plaintiffs also argue that since Allstate communicated the change to all Agents in a form letter (the July letter), then the substance of this letter should be used to decide if Allstate made a fundamental change to a term or condition of all Agents' employment.

[156] The plaintiffs intend to prove that they were constructively dismissed by focusing on the macro level and the changes that the New Model introduced for all Agents. Specifically, at the common issues trial, they submit that the court can look at the July letter and compare the Old Model with the New Model to determine if Allstate made a fundamental change to the terms of the plaintiffs' employment. For example, the plaintiffs plead that the New Model unilaterally:

- Required all Agents to close their offices and move to new locations
- Changed the entrepreneurial role the Agents had in the neighbourhood office
- Changed their compensation system
- Changed the control the Agents had over their book of business
- Removed their renewal book of business
- Changed their reporting structure

[157] The plaintiffs submit that these changes will be the evidentiary foundation that will allow the court to determine if Allstate made a fundamental change to a term or condition of the employment contract.

[158] The plaintiffs' approach is flawed because it ignores the nature of the individual inquiry that the courts require to decide if an employee has been constructively dismissed. While the July letter explained the areas of change or the "direction of the change", it did not reveal the degree of change for each agent. As explained in Echlin and Fantini, it is the "degree of the change which is critical to assessing whether altered job duties amount to a fundamental breach of the employment contract." Determining the degree of a change in an employment contract is a contextual, relative, and individual assessment.

[159] Furthermore, the plaintiffs cannot preclude the defence from conducting an inquiry into the individual and unique circumstances of each plaintiff and each Agent. The July letter is merely the beginning of an inquiry into whether the New Model made a fundamental change to an agent's employment contract. First, the specific contract and any amendments must be reviewed. The inquiry from this point forward descends into a detailed review of how the New Model impacted each agent. Of necessity this requires the Agent's job description, office location, expenses, earnings and benefits under the Old Model to be compared with the same or similar features under the New Model. This would not be a simple exercise, since there were

several variable elements to an Agent's compensation under both models (i.e. commissions for new and renewal business, bonuses, pensions, benefits and office expense reimbursement).

[160] The size, nature and distribution of the Agent's book of insurance business determined the Agent's compensation profile under the Old Model and directly impacted how the Agent would be compensated under the New Model. For example, under the New Model, Agents are expected to focus their efforts on securing new business. An Agent who had a history of generating new business was better positioned to earn commission income under the New Model than an Agent who relied more heavily on renewal or rollover business.

[161] Further, the impact of closing the neighbourhood offices and moving the Agents to new consolidated offices would not have been the same for all Agents. For example, an Agent in a neighbourhood office that was poorly located may be better off in a centrally located office. Other Agents may have been asked to give up good locations to travel a long distance to a new office.

[162] Resolution of this issue for the plaintiffs will not avoid individual fact finding and legal analysis for each class member. I conclude that this is not a common issue.

Common issue # 2

Can Allstate make substantial material changes to the Class' employment terms by giving two years notice?

[163] This issue deals with reasonable notice. However, the question as drafted incorrectly places the focus on whether the employer has the right to make a change. Constructive dismissal occurs when an employer makes a "unilateral and fundamental change" to a term of the employment contract "without providing reasonable notice of that change to the employee."

[164] Allstate informed all Agents in the July letter that they were being given 24 months notice of the changes. The issue should focus on whether 24 months was "reasonable notice" of the change. Clearly, there is evidence that this issue exists and it is a substantial ingredient of each class member's constructive dismissal claim.

[165] However there is no evidence that this issue is capable of being assessed on a common basis. It lacks commonality. As confirmed in *Bardal*, the reasonable notice issue requires an individual inquiry. It "must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant." (*Bardal*, at para. 21)

[166] Clearly, the resolution of this issue for the plaintiffs will not avoid individual fact finding and legal analysis for each class member. I conclude that this is not a common issue.

Common Issue # 3

Did the employment contracts permit Allstate to impose such substantial material changes?

[167] This issue focuses on whether the changes were unilateral. There is some evidence that this issue exists. The various Employment Agreements, and accompanying Agent Procedure Manuals, had a variety of distinctive provisions relating to Allstate's ability to amend compensation and relocate Agents, as well as differing restrictive covenants and clauses relating to enforceability and severability.

[168] On occasion, the Employment Agreements were amended and Confirmation and Acknowledgement forms were signed. When the plaintiffs were cross-examined, they acknowledged that these forms were documenting their receipt of the changes rather than seeking consent.

[169] Ms. Kafka, Mr. Patel and Mr. Cassells agreed on cross-examination that Allstate was entitled to change and/or approve office locations at its discretion, whether under the 1500 or 1501 contract or the subsequent amendment to such contracts. This is their evidence and is not necessarily what another class member might say.

[170] The fact that Allstate used different forms of employment contracts can be managed in a common issues trial. However, amendments to these contracts and signed Confirmation and Acknowledgement forms individualize this issue and take away the commonality.

[171] I reject this as a common issue.

Common issue # 4

Was the Class obligated to resign any time prior to September 1, 2009 and, if so, when?

[172] This issue focuses on condonation and the obligation of an employee to make a "timely election" whether or not to accept the change.

[173] The wording of this common issue is problematic and requires some explanation. The plaintiffs take the position in their factum (paras. 95-96) that three fundamental terms of their employment contract were breached:

- loss of identity when their neighbourhood offices were eliminated, with resulting damage to their good will and relationship with their clients;
- loss of management duties at the AIA offices; and
- a material change to their compensation terms by removing their right to renewal commissions, which is a substantial part of their income.

[174] The plaintiffs argue that the third breach did not occur until September 1, 2009, when the income guarantee expired. Since the class is limited to Agents who resigned before September 1

2009, all of the class had resigned before this final breach occurred. In these circumstances, the plaintiffs argue that the class had no obligation to resign before September 1, 2009. Viewed in this way, it is suggested that the "timely election" of whether or not to accept the change is not relevant.

[175] First, this approach is premised on an incorrect understanding of law of constructive dismissal. The reasonable period of time within which an employee may resign, runs from the date of notification of the fundamental change, not from the date of implementation. If it ran from implementation of the change, the principles of reasonable notice of change and condonation would be removed from the law of constructive dismissal.

[176] The principle of condonation is specific and very individual. What is a "timely" rejection of the change for one agent may vary for another. Personal circumstances may dictate whether a rejection was timely.

[177] If a "clear and unequivocal rejection" is not communicated, the employee risks being viewed as condoning the change. As noted in para. 24 of this judgment, the issue of condonation requires the court to consider many factors that are specific to the employee.

[178] Agents may have used letters, e-mails, telephone conversations and/or meetings to communicate their rejection of the change. If one plaintiff clearly and unequivocally communicated her rejection of the change, this manner of communication would be personal to her.

[179] The evidence, as reviewed above, shows that each of the three plaintiffs responded differently to the change and resigned at different points in time.

[180] Apart from Mr. Cassells, Mr. Patel and Ms. Kafka, the evidence about how other Agents responded to the change varied. For example, approximately 18 Agents in Ontario notified Allstate of their disagreement with the New Model:

- Three of these Agents were Agency Managers in Ontario who subsequently provided Allstate with written acceptance of the changes. Two of the three resigned from their employment with Allstate after having signed acceptance letters. The other remains employed with Allstate.

- One Agent was subsequently dismissed from his employment for cause (and is one of the Agents referred to above).

- One of these Agents subsequently applied for and was promoted to an Agency Manager role and is still employed by Allstate.

- Four of these Agents subsequently retired from their employment with Allstate.

- Of the 14 Agents who resigned, 11 of those Agents in Ontario were subject to contractual language which expressly recognizes Allstate's right to amend agent compensation and/or location.

[181] Of the 236 Agents in Ontario as of July 24, 2007, approximately 214 Agents did not express any disagreement with the changes. This is an important piece of evidence and demonstrates once again the variety of different circumstances among the Agents. It highlights why the resolution of this issue for the plaintiffs is not common to the whole class.

[182] Several Agents communicated their recognition that Allstate had to revise its existing structure to compete effectively in the increasingly competitive insurance environment. The plaintiffs also acknowledged this competitive environment when cross-examined.

[183] Of the 62 Agents in Ontario who actually resigned from their employment with Allstate, only two Agents resigned in the first six months after July 24, 2007. In the first year after July 24, 2007, 25 Agents resigned from their employment. In the second year after July 24, 2007, 37 Agents resigned from their employment (19 of these 37 did not resign until 2009).

[184] Of the 62 Agents in Ontario, who resigned from their employment between July 24, 2007 and September 1, 2009, 33 of those Agents never assumed their roles in their new offices under the New Model.

[185] Of the Agents in Ontario who were promoted to the Agency Manager role and who resigned from their employment with Allstate between July 24, 2007 and September 1, 2009, 10 of those 14 Agents never assumed their new roles in their new office location under the New Model.

[186] Of the 62 Agents who resigned from their employment with Allstate between July 24, 2007 and September 1, 2009, 13 of them do not have Registered Insurance Brokers of Ontario (RIBO) licences which is required to sell property and casualty insurance as an insurance broker.

[187] Of the 22 Agents who retired from employment with Allstate between July 24, 2007 and September 1, 2009, 17 of them do not have RIBO licences.

[188] In summary, there is some basis in the evidence to conclude that this issue exists. The common issue as drafted incorrectly approaches the principle of condonation. However, even if it is revised my conclusion remains that the issue has no commonality and cannot be decided on a common basis. I reject this as a common issue.

Common issues # 5 and 6

#5 Does the Class have any mitigation obligations under the ESA and, if so, what are they?

 # 6 Does Allstate's new agent distribution model constitute an offer of reasonable, alternative employment within the meaning of the ESA Regulations and, if so, what are the consequences?

[189] These common issues deal with mitigation. The burden rests on the employer to prove that the employee did not mitigate.

[190] It is unclear why common issue # 5 is necessary. The plaintiffs have chosen to limit their claims to severance and termination pay under the *ESA* and this triggers the issue of mitigation set out in O. Reg. 288/01 of the *ESA* in Sections 2(1)5 and 9(1)4.

[191] While the plaintiffs' factum argues that it is not necessary to consider mitigation for the claims under the *ESA*, I disagree.

[192] It is clear that under O. Reg. 288/01 an employee who refuses an offer of reasonable alternative employment with the employer is not entitled to severance and termination pay. There is no basis in the evidence to question the applicability of this duty to mitigate set out in the *ESA*. Common issue # 5 is unnecessary.

[193] There is some basis in the evidence for common issue # 6, but there is no basis in the evidence to conclude that it is capable of being answered on a common basis. The issue of mitigation needs to be considered on a "case-by-case basis" (see *Evans v. Teamsters, supra*, at para 27).

[194] It is obvious that the reasonableness of an alternative offer will require a court to consider the nature of the Agent's job under the Old Model and how it compares with the offer under the New Model. It is equally obvious that this requires an individual assessment and that the issue cannot be managed as a common issue.

[195] The following passage in *Hart and Cooley Manufacturing Co. of Canada Ltd.* ESC 2135 (June 27, 1986) is frequently quoted by referees acting under *ESA* who must decide entitlement to termination and/or severance pay. While I am not bound by this decision, it is instructive on this point. In *Hart and Cooley*, Referee Brown addressed the issue of reasonable alternative employment as follows at page 69:

> ... In determining whether the employment offered is "reasonable alternative employment", the referee must take into consideration all the circumstances of the case, including the nature of the job offered compared with the one which the employee performed, any express or implicit understandings or agreements between the parties, the geographic proximity or costs of dislocation, the comparable wages, benefits, working conditions and security and any objective personal circumstances which might reasonably militate against the acceptance of the position.

[196] In summary, this issue lacks commonality. The resolution of the issue depends upon individual findings of fact that will have to be made for each class member. What might be an offer of reasonable alternative employment for one of the plaintiffs will not necessarily be so for another Agent. Their circumstances of employment under the Old Model varied. They did not work in same location, have the same book of business and/or have the same earnings, bonuses, benefits and pensions. They were not all offered the same job function in the New Model. Their new place of employment, earnings, bonuses, benefits and pensions varied. Age, education and training also varied.

The issue is devoid of commonality and I reject it as a common issue.

Common issues #,7 and 8

#7 Is Allstate in breach of the ESA in failing to pay termination and/or severance pay to the Class?

#8 Is Allstate liable to the Class for damages and, if so, in what amount?

[197] Liability to pay termination and/or severance arises if the employee was constructively dismissed. I refer to my earlier discussion explaining why the constructive dismissal issue cannot be decided as a common issue.

[198] If a court finds that an agent was constructively dismissed, then the entitlement to termination and/or severance is driven by the provisions of the *ESA* and becomes a straight forward mathematical calculation.

[199] Viewed in isolation this one issue may be common to the Agents who succeed in proving that they were constructively dismissed. Given that none of the "liability" issues are common, there is no reason to certify this damage issue.

Common issues # 9 and 10

#9 Does the conduct of Allstate justify an award of punitive damages?

#10 If the answer to #9 is yes, what is the amount of punitive damages?

[200] These common issues deal with punitive damages. The plaintiffs have not pointed to "some" evidence to show that this issue exists. While the punitive damage claim survived the "cause of action" test under s 5 (1) (a), the mere fact that the plaintiffs plead conduct that can attract a punitive damage award, does not meet the some evidence test that applies to s. 5(1)(c).

[201] There is no evidence that Allstate forced older and better paid employees to leave their employment to allow Allstate to hire younger replacements and there is no evidence that such conduct was systemic discrimination.

[202] It does not meet the some evidence test to simply state that Allstate's conduct "was entirely without care, deliberate, callous willful and an intentional disregard of the rights of class members."

[203] The available evidence suggests that the issue does not exist. For example, each plaintiff acknowledged on cross-examination that because of increased competition and changes in the insurance market, Allstate needed to adjust its business to remain competitive. All Agents were given individual letters explaining the impact of the change. Some were promoted. Some asked for new positions. All Agents were given a two-year income guarantee. None of them suffered any reduction in income during the two years if they failed to meet performance standards.

[204] Instead of pointing to "some" evidence to show that the punitive damage issue exists, the plaintiffs simply argue that "it is appropriate to list punitive damages as a common issue and to

deal with it at the common issues trial because the complaint is the conduct of Allstate in the manner in which it attempted to alter the fundamental terms of the contract." Further, they say that any individual class member issues are unrelated to this common issue.

[205] I decline to certify this issue since there is no evidence to show that it exists. In any event, certification of this issue serves no useful purpose given that none of the liability issues are common.

5(1)(d) - Preferable Procedure

[206] Section 5(1)(d) of the CPA requires that a class proceeding be the preferable procedure for the resolution of the common issues. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[207] The preferability inquiry is conducted through the lens of the three goals of class actions: access to justice, judicial economy and behaviour modification and by taking into account the importance of the common issues to the claims as a whole including the individual issues: *Cloud* at para. 73; *Hollick* at paras. 27-28; *Markson* at para. 69.

[208] In determining whether a class proceeding is the preferable procedure for resolving the common issues, the court must consider not just the common issues, but rather, the claims of the class in their entirety: *Hollick* at para. 29.

[209] The preferable procedure requirement can be met even when there are substantial individual issues. However, a class proceeding will not satisfy the preferable procedure requirement when the common issues are overwhelmed or subsumed by the individual issues, such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning.

[210] In this case, there is no single common issue that will significantly advance the litigation for the class. Instead, an individual inquiry is at the heart of every liability issue. In these circumstances, there can be no doubt that a class action is not the preferable procedure. Every issue will break down into individual trials. A fact-finding and legal analysis procedure will be required for each class member.

[211] In these circumstances, a class action would not be a fair, efficient or manageable procedure to use and it would not promote judicial economy or improve access to justice. Simply put, this is a case where there is no practical utility in allowing the class action to proceed.

[212] The cases that the plaintiffs rely on do not assist in demonstrating that a class action is the preferable procedure. For example, the plaintiffs compare their constructive dismissal claims to the following cases that were certified: *Ormrod v. Etobicoke (Hydro-Electric Commission)* (2001), 53 O.R. (3d) 285, [2001] O.J. No. 754 (S.C.J.), *Wicke v. Canadian Occidental Petroleum Ltd*. (1998), 40 O.R. (3d) 731 (Gen. Div.) and *Webb v. 3584747 Canada Inc.*, (2001), 54 O.R. (3d) 587, [2001] O.J. No. 2681. None of these cases involved constructive dismissal claims and

so the individual nature of such a claim was not a problem that these courts had to consider. In fact, counsel were not able to point to a single constructive dismissal case that has been certified.

[213] *Ormrod, supra,* was based on a common representation alleged to have been made and relied upon and then subsequently eliminated, i.e. premium sharing for retiree benefits. The employer announced that it would pay paid 100% of the premiums of a health and dental plan for retirees and then several years later announced that it would only pay 50% of the premiums. In that case, the Court found that a common issues trial could address and determine whether or not the premium sharing arrangement vested with the retirees upon retirement. The court described it as a "quintessential class action" because "the plaintiffs' case, as formulated, rests entirely on the written representations made by Etobicoke Hydro regarding the premium-hearing arrangement and the subsequent elimination of that arrangement" (at para 34). In this case, Allstate's general announcement (the July letter) is not a document that can form the basis of a finding of common constructive dismissal.

[214] *Wicke, supra,* was a claim for lost overtime wages that did not require an individual inquiry that is at the heart of a constructive dismissal claim. *Webb, supra,* involved certification of claims arising from the mass termination of employees at K-Mart when they closed stores in Ontario. In *Webb* there was an admission that the individual employees had been terminated under their contracts of employment and that all proposed class members' contracts contained an implied term of entitlement to reasonable notice of termination or pay in lieu thereof. In this case, Allstate does not acknowledge severance of the employment relationship and Allstate denies that any of the employees were constructively dismissed.

[215] Alternative procedures are available to resolve these claims. A civil action can be commenced and depending on the value it can be pursued as a Simplified Procedure under rule 76 of the *Rules of Civil Procedure* or in the Small Claims Court.

[216] Part XXII of the *ESA* sets out a "Complaint and Enforcement" procedure. An employee can file a written complaint with the Ministry of Labour seeking severance and termination pay. A process is detailed for handling these complaints. Recovery is capped at $10,000 and the employee has six months to file a complaint. While Agents may now be out of time to use this complaint procedure, a civil action is still an option.

[217] This is not a situation where the goal of behaviour modification is engaged and the issue was not discussed in the plaintiffs' factum. Allstate notified all Agents of the change two years in advance, gave them each individual letters explaining their new role and provided a two year income guarantee. The plaintiffs agree that the changes were needed to respond to increased competition in the marketplace. This evidence does not suggest that a class action is needed to address the goal of behaviour modification.

[218] This criterion has not been satisfied.

5(1)(e) - A representative plaintiff with a workable litigation plan

The Representative Plaintiff

[219] Whether a proposed representative plaintiff can provide adequate representation was addressed by Chief Justice McLachlin in *Western Canadian Shopping Centres* at para. 41:

> ... In assessing whether the proposed representative plaintiff is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by class members). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied however, that the proposed representative will vigorously and capably prosecute the interests of the class (citation omitted).

[220] Assuming there were true common issues to be certified, Ms. Kafka and Mr. Patel would be competent representatives on behalf of a class. Mr. Cassels' situation is a concern because Allstate will argue that he breached his obligations by taking steps to set up a competing business. If I had certified this action, I would have questioned his motivation to proceed with this action in the face of Allstate's allegations about his conduct and he might have been an unsuitable class representative.

The Litigation Plan

[221] The production of a workable litigation plan serves a two-fold purpose: (a) it assists the court in determining whether the class proceeding is the preferable procedure; and (b) it allows the court to determine if the litigation is manageable: *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Sup. Ct.), aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.). The plan must provide sufficient detail that corresponds to the complexity of the litigation. The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed: *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Sup. Ct.) at para. 76.

[222] It is recognized that litigation plans are a work in progress and may have to be amended during the course of the proceeding: *Cloud* at para. 95

[223] The Plaintiffs' litigation plan sets out the typical steps taken in a class action but it fails to explain how the individual nature of a constructive dismissal can be managed in a class action. The plan assumes that the oral and documentary discovery of the representative plaintiffs will allow the plaintiffs to proceed to a common issues trial or perhaps move for summary judgment. Either way, the plan ignores the reality of a constructive dismissal action that I have discussed above.

[224] This criterion has not been satisfied.

CONCLUSION

[225] In summary, the plaintiffs' motion to certify this action is denied. If the parties cannot agree on costs, written submissions are to be exchanged and submitted to the court no later than May 16, 2011.

C. Horkins J.

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CITATION: Kafka v. Allstate Insurance Company of Canada, 2011 ONSC ONSC 2305
COURT FILE NO.: CV-08-00355100-CP00
DATE: 20110412

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ESTHER KAFKA, KETAL (KEN) PATEL and MARK CASSELLS

Plaintiffs

– and –

ALLSTATE INSURANCE COMPANY OF CANADA and THE ALLSTATE CORPORATION

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

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