CITATION: Kafka v. Allstate Insurance Company of Canada, 2012 ONSC 1035
DIVISIONAL COURT FILE NO.: 235/11
DATE: 20120404

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Cunningham A.C.J., Jennings, Harvison Young JJ

BETWEEN:	)	
	)	
ESTHER KAFKA, KETAL (KEN) PATEL and MARK CASSELLS	)	Colin P. Stevenson, J. Daniel McConville, for the Plaintiffs (Appellants)
	)	
Plaintiffs (Appellants)	)	
	)	
– and –	)	
	)	
ALLSTATE INSURANCE COMPANY OF CANADA and THE ALLSTATE CORPORATION	)	John C. Field, Seann D. McAleese, for the Defendants (Respondents)
	)	
Defendants (Respondents)	)	
	)	
	)	**HEARD at Toronto:** January 17, 18, 2012

REASONS FOR DECISION

HARVISON YOUNG J.

INTRODUCTION

[1] Esther Kafka, Ketal (Ken) Patel and Mark Cassells appeal from the decision of Horkins J. dismissing their motion for certification as a class action. They are former agents of Allstate Insurance Company of Canada who resigned between July 24, 2007, and September 1, 2009.

[2] The appellants claim termination and severance pay in accordance with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"). They do not claim common law damages for constructive dismissal.

[3] The motion judge did find that the claim discloses a cause of action, that the class was identifiable, and that at least two of the plaintiffs were proper class representatives. She found, however, that there was "no common issue capable of being determined on a class wide basis that would sufficiently advance this litigation to justify certification", and that a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") was not the preferable procedure. The motion judge also had concerns with the litigation plan, but as the appellants acknowledged in the course of the appeal hearing, the appeal turns on the motion judge's conclusions with respect to common issues.

[4] For the reasons that follow, I conclude that the motion judge did not err in law or in principle in dismissing the application for certification.

BACKGROUND

[5] The appellants were agents with Allstate. Before July 24, 2007, Allstate operated in such a way that each agent's individual operations, in some ways, resembled their own business. Though agents each had an employment contract with Allstate, agents sold insurance products through Neighbourhood Office Agencies ("NOAs"). Agents operated NOAs (e.g. renting space, hiring and training personnel), and were paid in commissions. Commission compensation was tied to both signing up new customers for Allstate, as well as renewal business from existing customers. For agents who had built up books of business, renewals were a significant portion of their compensation.

[6] Based on changes to the market for insurance products, Allstate decided to change its business model. Instead of NOAs, it would consolidate operations into Allstate Insurance Agency ("AIA") offices, which were larger offices where many agents would work. According to the appellants, their new roles would be more like employees than business managers. The compensation structure would change, where instead of commissions, agents would receive bonuses based on the successes of their AIA office. According to Allstate, there was still an option for individual rewards via the Individual Performance Bonus ("IPB") plan.

[7] Agents were notified of these changes by way of a form letter dated July 24, 2007, and through a video presentation. The changes were scheduled to take effect September 1, 2009, with NOAs being gradually closed before that date. Allstate considered this time period to be "working notice" of the change to the terms of employment.

[8] After the form letters were sent, each active agent received an individual letter setting out their future roles, including their individual guaranteed compensation for the next two years, and individual compensation plan after September 1, 2009.

THE CLASS

[9] The class is defined as Ontario agents who had been employed with Allstate for at least three months prior to July 24, 2007, whose employment with Allstate ended between July 24, 2007, and September 1, 2009, and who did not receive termination and/or severance pay

pursuant to the *ESA* (other than the nine agents who were dismissed allegedly for cause, or agents who retired with a full pension). According to the appellants, there are approximately 100 prospective class members.

[10] The appellants seek termination and severance pay under the *ESA*, which includes termination pay of one week's notice for each year worked, up to a maximum of eight weeks. For those agents who were employed for at least five years at the time of severance, severance pay of a weekly wage multiplied by the number of years of service is also sought. For commissioned salespeople, such as the agents, the weekly wage is determined by averaging the commissions for the three months prior to the severance date.

STANDARD OF REVIEW

[11] The law is clear that, on an appeal from a judge's decision, the applicable standard of review is one of correctness with respect to issues of law or legal principle: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The standard of review for findings of fact is that such findings cannot be reversed unless there is a palpable and overriding error: *Housen*, at para. 10. Questions of mixed fact and law are on a spectrum. If a legal question can be separated out, it will be reviewed for correctness, but otherwise, questions of mixed fact and law will not be overturned absent palpable and overriding error: *Housen*, at paras. 36-37.

[12] Appellate courts have recognized the special expertise of class action judges in this highly specialized area of the law, and have held that substantial deference is owed on certification decisions: see *Cassano v. The Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23; *Anderson et al. v. Wilson et al.* (1999), 44 O.R. (3d) 673 (C.A.), at para. 12; and *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33, leave to appeal refused at [2007] S.C.C.A. No. 346.

THE *ESA* PROVISIONS ON CONSTRUCTIVE DISMISSAL

[13] Section 56(1) of the *ESA* provides as follows:

> 56 (1) An employer terminates the employment of an employee for purposes of section 54 if,
>
> …
>
> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period.

[14] Section 63(1) states:

> 63 (1) An employer severs the employment of an employee if,

…

> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period.

[15] Sections 2(1)5 and 9(1)3 and 4 of *Regulation 288/01* provide 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:
>
> …
>
> 3. An employee who, on having his or her employment severed, retires and receives an actuarially unreduced pension benefit that reflects any service credits which the employee, had the employment not been severed, would have been expected to have earned in the normal course of events for purposes of the pension plan.
>
> 4. An employee whose employment is severed after refusing an offer of reasonable alternative employment with the employer.

[16] In sum, it is common ground that, in order to claim termination and severance pay pursuant to the *ESA*, the employee must establish that:

(a) he or she has been constructively dismissed;

(b) he or she resigned in response; and

(c) he or so did so within a “reasonable period”.

[17] Pursuant to the *Regulations* as cited above, once those factors have been established, an employer may defeat the *ESA* claim by establishing that the employee had refused an offer of "reasonable alternative employment".

THE COMMON ISSUES PROPOSED

[18] The appellants' central submission is that the motion judge erred in principle in concluding that there were no common issues that supported granting an order of certification. They argue that she erred in so concluding with respect to each of the common issues. The common issues asserted were as follows:

(a) Were the contractual changes implemented by Allstate "fundamental" in nature?

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

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

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

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

(f) 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?

[19] The central issue at the core of these questions, and particularly the first, is whether the claim of constructive dismissal pursuant to the *ESA* may be made out by means of a class action in these circumstances.

[20] The appellants submit that the motion judge based her analysis on a misunderstanding of the *ESA* and a misapplication of the law and elements of constructive dismissal pursuant to the *ESA*. In particular, they take issue with her finding that the nature of constructive dismissal requires an individualized analysis that undermines the potential for common issues in the circumstances.

[21] According to the appellants, once the proper application of the law of constructive dismissal is accepted, there are several common issues of fact and law that can be determined on a class-wide basis, which would substantially advance the litigation for each class member.

Common Issue 1: Were the contractual changes implemented by Allstate "fundamental" in nature?

[22] The first step in establishing constructive dismissal requires that the employee establish that the changes sought to be imposed are "fundamental" changes to the contract of employment. The appellants propose that this may be determined as a common issue. The appellants raise two principal and related arguments as to why the changes announced by Allstate in July 2007 were fundamental changes to the contract.

[23] The appellants submitted that the system wide changes were fundamental and basic to the nature of the positions held by the appellants, regardless of whether an individual employee's compensation was to be negatively affected by the changes. They pointed to a number of changes which they claim constituted fundamental and class wide changes to the employment contracts. These include, first, the elimination of NOAs in favour of corporate AIA offices, second, the elimination of the reporting structure, entrepreneurial role and management responsibilities, and third, the alteration of the commission structure.

[24] Mr. Stevenson for the appellants drew the analogy of a corporation that changes the compensation for its lawyers from a salary system to one based on docketing time.

[25] Mr. Stevenson also pointed out, quite rightly, that a plaintiff in a class action is entitled to frame the issues as he or she wishes. See *Fulawka v. Bank of Nova Scotia*, 2011 ONSC 530, 337 D.L.R. (4th) 319 (Div. Ct.), at paras. 134-138; see also the trial decision in *Fulawka*, 2010 ONSC 1148, [2010] O.J. No. 716, at paras. 158-164. He emphasized that the appellants do not rely on the argument that compensation or other such benefits would be negatively affected. Rather, they argue that the magnitude of the structural changes in themselves constituted fundamental change for all the employees. He submitted that the motion judge erred in emphasizing the importance of impact is assessing whether a change is fundamental, arguing that she should have focused on the changes irrespective of their impact.

[26] In the course of her discussion of the elements of constructive dismissal, the motion judge stated,

> [t]he 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").

> 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).
>
> 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). [Reasons, at paras. 16-18; emphasis in original].

[27] In concluding that the question of whether the changes were fundamental could not be determined as a common issue, the motion judge stated as follows at paras 158-161:

> 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.… Determining the degree of a change in an employment contract is a contextual, relative, and individual assessment.
>
> 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).
>
> 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.
>
> 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.

[28] In my view, the motion judge was correct in deciding that in order to determine whether an employee has been constructively dismissed, a court must consider the impact that the changes have on the individual concerned. It may be that in certain cases, this issue could be a common one, such that the litigation would be significantly advanced. For example, if an employer purported to lower the salaries of employees across the board by a fixed percentage, it might be easy to establish a common issue. But when the changes are of the nature of those announced by Allstate, the impact on individual employees is likely to vary significantly. For example, the change in location in and of itself might constitute a fundamental change for some employees, but not for others. Some might not be asked to move at all. Some might be asked to move away from their established communities and families. Some might be asked to relocate to a location where their income would be likely to increase, while others might move to locations where their income would be likely to decrease.

[29] In addition, the positions offered by Allstate would also affect the individual impact of the changes. The record indicates that some employees negotiated aspects of their positions under the New Model subsequent to the letters sent in July 2007. As the motion judge stated, a finding that the structural changes were significant is only the beginning of the inquiry.

[30] The appellants invite the court, in effect, to presume a negative impact inherent in the changes themselves. This is not supported by the authorities, which emphasize context and impact in constructive dismissal cases before concluding that a change is fundamental and amounts to a repudiation of the contract of employment: "[W]ould a reasonable person in the same position as the employee have considered the essential terms of the employment contract to have been substantially changed?... The current test focuses primarily upon the breach itself and its impact upon both the employee's position and the broader employment relationship." (Echlin & Fantini, at p. 31).

[31] Accordingly, even if it is admitted that the nature of the changes were fundamental or systemic, in order to establish constructive dismissal an employee must show more precisely the impact of the changes upon *his or her* position and the employment relationship: Echlin & Fantini, at p. 31. This is a highly individual and contextualized exercise, as the motion judge recognized. A finding that the changes were "fundamental" in a general sense would not, in itself, advance the litigation in a significant manner.

Common Issue #2: Can Allstate make substantial material changes to the Class' employment terms by giving two years notice?

[32] The motion judge found as follows with respect to this proposed common issue:

> 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."

> 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.
>
> 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)
>
> 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. [Reasons, at paras. 163-66.]

[33] The appellants submit that the motion judge accepted Allstate's "proposed interpretation" of constructive dismissal law in relation to the ability to give notice of changes to employment contracts. They characterize this interpretation as "highly controversial". The motion judge stated that "[t]he issue should focus on whether 24 months was 'reasonable notice' of the change" (Reasons, at para. 164). The appellants argue that this proposition is contrary to standard contract law and to the holding of the Ontario Court of Appeal in *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, 90 O.R. (3d) 547 ("*Wronko*").

[34] The appellants do not, on appeal, question the amount of notice given in this case. They acknowledge that 24 months' notice would have been ample, but they argue that an employer cannot effect unilateral and fundamental changes to the employment contract with any amount of notice. They cite *Wronko* in support of this proposition. They argue that the only option open to Allstate in July 2007 was to fire the employees and then offer to rehire them on the different terms.

[35] In my view, *Wronko* does not support the position advanced by the appellants. Mr. Wronko's contract had included a provision for the payment of two years' salary in the event he was terminated. He was sent a contract in September 2002 that purported to reduce this entitlement to thirty weeks. He refused to sign it. According to the Court of Appeal decision, "[the employer] took the position that the termination provision in the new contract would come into effect in two years time. Wronko continued to object to the amended termination provision over the ensuing two years." (*Wronko*, at para. 2).

[36] Mr. Wronko's employment ended in September 2004 when the employer wrote to him and advised him that the new provision was now in effect. Mr. Wronko replied that he

understood his employment to be terminated, did not report for work, and sued for wrongful dismissal.

[37] The Court of Appeal held that an employer cannot simply unilaterally change the terms of an employment contract. On the facts of the case, it held that the employer had not provided Wronko with notice that it intended to treat his objection to the new termination provision as grounds for dismissal. It concluded that, "[g]iven Wronko's continued opposition to this change in his contract, Western's act of terminating Wronko in September 2004 constituted a wrongful dismissal that triggered the termination provision in his existing contract." (*Wronko*, at para. 43).

[38] In *Wronko,* Winkler C.J.O. distinguished its circumstances from those in *Farber v. Royal Trust Co.,* [1997] 1 S.C.R. 846:

> The Supreme Court [in *Farber*] … was not purporting to outline the rights and obligations of the parties in circumstances where an employee registers an unequivocal rejection of an intended fundamental change to the terms of his employment and where the employer permits him to continue to work according to the existing terms without giving notice that refusal to accept the new terms will result in termination. Those are the circumstances in the present case. [at para. 30.]

[39] The Court of Appeal held that the period during which the employee had been permitted to work according to his existing contract could not count as notice in lieu of damages in the absence of notice that refusal to accept them would result in termination.

[40] The circumstances of *Wronko,* however, are not those of the present case. The general announcement and individual letters sent by Allstate in July 2007, as well as the notice provisions provided, made it very clear that the changes would be implemented in September 2009. The record does not support the inference that employees were permitted to continue as though nothing was changing. There was a clear transitional period and it was understood as such. Some employees accepted the new positions offered, some negotiated further changes, and some resigned. In the meantime, Allstate provided compensation during the 24 month period of notice that maintained or exceeded employees' prior levels of compensation.

[41] This was not a case, like *Wronko,* where the employer issued an ultimatum following a period of time in which it had permitted an employee to continue employment after he had refused to accept proposed terms. In *Wronko*, the two year period between 2002 and 2004 was one of some ambiguity. As the Court held, it was not made clear to Mr. Wronko that he would be terminated if he did not accept the change prior to September 2004. It makes sense, in those circumstances, that the two year period prior to September 2004 would not be considered as notice.

[42] This case is very different. There was no ambiguity, in my view, in Allstate's position. The changes it announced were to be implemented, and were in fact implemented, in September

2009. The appellants submit that the only option open to Allstate in the circumstances would have been to terminate all the employees and then offer them new contracts of employment at that time. However, in these circumstances, unlike *Wronko*, there could be no suggestion that Allstate was acquiescing to the continuation of the Old Model.

[43] The appellants' position does not make sense in the circumstances. Had Allstate chosen to terminate all the agents in July 2007, there is no suggestion that they would have been obligated to provide for any more notice than the 24 months' notice that they did, in fact, provide. An employee terminated outright in July 2005 would not have been in any better position than he or she actually was in light of the manner in which Allstate proceeded.

[44] Moreover, the suggestion made by the appellants ignores the potentially increased level of stress and trauma that notices of termination would likely have had on the employees. Employment law increasingly recognizes the importance of one's work to one's emotional well-being and self-respect. There is little doubt that many employees found the changes announced by Allstate to be stressful. Having said that, it seems that receiving letters of termination instead would have been much worse. Given that Allstate was providing as much notice as it would have been required to provide if it had, in fact, terminated the employees and provided new offers in July 2009, it would seem very strange to require an employer to pursue a course of conduct likely to engender more stress and trauma than the course it pursued.

[45] In short, the *Wronko* analysis does not change or purport to change the law established by the Supreme Court in *Farber*, which affirmed that a fundamental change does not amount to a constructive dismissal where the employer provides the employee with reasonable notice of the change.

[46] The motion judge was, therefore, correct in the circumstances of this case to focus on the amount of the notice provided to the employees, which correctly presupposed that this is a case in which constructive dismissal would not exist if reasonable notice was given. I find no basis for interfering with her conclusion that this was not a common issue.

Common Issue #3: Did the employment contracts permit Allstate to impose such substantial material changes?

[47] The motion judge noted that this proposed common issue focuses on whether the changes were unilateral. She agreed that there is some evidence to support the existence of the issue. 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.

[48] 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.

[49] The motion judge acknowledged that the fact that Allstate used different forms of employment contracts could 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. For that reason, she rejected this as a common issue.

[50] The appellants submit that the motion judge erred by emphasizing the individual differences in light of the fact that there were basically just a few basic contracts, and that the essential elements were common across the class.

[51] The problem with the appellants' position on this point is that, while there were certainly aspects of the contracts that were similar or even identical across the class, there were also amendments made to the contracts over time which individualized them. The motion judge noted that 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, but she also noted that this was their evidence and not necessarily evidence that would be given by other members of the class.

[52] I find no basis for interfering with the motion judge's conclusion with respect to proposed common issue #3.

Common Issue #4: Was the Class obligated to resign any time prior to September 1, 2009 and, if so, when?

[53] The appellants argue that the motion judge's conclusion that this is not a common issue was coloured by "an incorrect understanding of the law of constructive dismissal". They argue that the law of constructive dismissal requires that the employees must accept or reject changes to the employment contract within a reasonable time, and that under the *ESA* the employee is only required to resign within a reasonable period of time after implementation of the unilateral amendments.

[54] The motion judge rejected the appellants' argument on this issue, stating as follows:

> 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.
>
> 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.

> 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. [Reasons, at paras. 175-177.]

[55] As discussed above concerning common issue #2, the changes to the contracts were announced in July 2007 and Allstate provided for a 2 year period before the changes would be implemented. In these circumstances, the announcements and letters advising the employees of the changes triggered the consequences which flow from an attempt to unilaterally amend a term of a contract of employment: see *Farber*, at para. 34 and *Wronko*, at paras. 33-36. Again, this is not a situation where the circumstances were ambiguous as far as whether the changes announced were going to be implemented or not.

[56] The appellants submit that the motion judge erred by, in effect, relying on common law principles in interpreting the *ESA* in respect of the "reasonable time" requirement. They do not, however, offer an explanation as to why the common law principles relating to condonation and mitigation in relation to common issues #5 and 6 should not inform the interpretation of the *ESA* provisions on constructive dismissal.

[57] The effect of the appellants' position that the time period within which an employee must resign only began to run at implementation of the changes, and not when they were announced, is to undercut the principles of constructive dismissal, and repudiatory or anticipatory breach of contract, without any apparent legislative policy justification.

[58] At common law, an employee's refusal or acceptance of repudiation must be made within a reasonable period following the breach: *Kussman v. AT&T Capital Canada Inc.* (2000), 49 C.C.E.L. (2d) 124 (B.C.S.C.), aff'd 2002 BCCA 281, 100 B.C.L.R. (3d) 278. What constitutes a reasonable time depends on the individual facts and circumstances of each case: *Tilbe v. Richmond Realty Ltd.*, [1995] B.C.J. No. 954 (S.C.).

[59] Moreover, the *ESA* Manual itself appears to consider that the principles of constructive dismissal also operate under the *ESA*.

[60] In cases of anticipatory breach, the reasonable period (i.e. the reasonable period for resignation) will be considered to start running when the employer announces its intention. What constitutes a "reasonable period" may be varied with the circumstances of each case. (Policy and Interpretation Manual (*ESA 2000*) at p. 19-22).

[61] In addition, the OLRB and adjudicators applying the *ESA* have not interpreted or applied different principles relating to constructive dismissal from those applied at common law. *Huynh v. Garbo Group Inc.*, 2003 CanL11 42204 (O.L.R.B.), at paras. 13-15; *Daniels v. Dr. Michael Blackmore*, 2008 CanL11 6521 (O.L.R.B.), at para. 15; *Trepanier v. Biax International Inc.*, 2004 CanL11 9771 (O.L.R.B.), at para. 11.

[62] In sum, I do not agree that the motion judge made any error in principle in concluding that the "reasonable period" within which employees were obliged to resign if they did not wish to risk being found to have acquiesced to the new terms began to run when the changes were introduced in July 2007. Accordingly, it would have been necessary to consider all the individual circumstances in each case before determining whether each employee resigned within a reasonable time. The motion judge was correct in concluding that this was not an appropriate common issue.

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

Common Issue #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?

[63] The motion judge disagreed with the appellants' submission before her that the principles applicable to the duty to mitigate are inapplicable to a claim pursuant to the *ESA*. She held, in essence, that the question of whether the employment Allstate offered constituted "reasonable alternative employment" is a mitigation issue. She held that the employer has the burden of proof on this point.

[64] The appellants argue, as they do with respect to common issue #4, discussed above, that the motion judge erred in treating common law principles of mitigation as applicable to the consideration of whether an employer has offered "reasonable alternative employment".

[65] As discussed above, there is no authority or principle that supports the appellants' position. Of course, the question to be considered under the *ESA* is whether the employer has offered reasonable alternative employment rather than a more general consideration of whether the employee has met his or her duty to mitigate in the larger sense. There is no basis, however, to support the appellants' argument that the range of considerations relevant in common law cases should not apply.

[66] The *ESA* provision and the common law duty to mitigate rest on similar principles. An innocent party to a contract which has been breached is entitled to damages flowing from that breach, but he or she cannot treat the breach as an opportunity to run up damages. Put another way, the innocent party is only entitled to damages flowing from the breach, and failing to reasonably mitigate damages arguably means that such damages flow from that failure rather than from the original breach. See e.g. *Red Deer College v. Michaels*, [1975] S.C.J. No. 81, 57 D.L.R. (3d) 386 at p. 390: "a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation."

[67] As the motion judge noted, the cases decided under the *ESA* have clearly understood this similarity between the *ESA* provision relating to reasonable alternative employment and the duty

to mitigate. She cited the following passage from *Hart and Cooley Manufacturing Co. of Canada Ltd.*, ESC 2135 (June 27, 1986), noting that it is frequently quoted by referees acting under the *ESA* who must decide entitlement to termination and/or severance pay. In that case, 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.

[68] Once it is acknowledged that these considerations apply to the issue under the *ESA*, as they clearly do, it must also be concluded that the motion judge was correct to conclude that this issue requires individual assessment in each case and cannot be determined as a class issue. On the facts of this case, the agents operating out of NOAs were offered one of four types of alternative positions: Business Development Agent; Relationship Development Agent; Customer Care Agent; or Agency Manager.

[69] As her reasons indicate, these were different positions with different levels of responsibility. For some agents, the positions offered were, or appeared to be, promotions. Others did not see the new positions offered as promotions.

[70] Even if it were possible to determine the earlier issues proposed as common issues, the nature of this issue, as the factors set out in cases such as *Hart & Cooley* illustrate, require very individualistic analysis. Whether the new offers made by Allstate constituted "reasonable alternate employment" would, in each case, require a consideration of a matrix of factors including the nature of the position offered, the compensation and other conditions relative to the former position, the location of the new position both in relation to its future prospects and in relation to any dislocation issues. The motion judge was correct to conclude that proposed common issues #5 & 6 could not be common issues.

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

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

[71] The motion judge concluded that if a court did find constructive dismissal, then the entitlement to termination and/or severance is driven by the provisions of the *ESA* and becomes a straightforward mathematical calculation. She found, however, that given that none of the liability issues were common, there was no reason to certify the damages issue. I see no basis for interfering with her conclusion on this issue.

Conclusion on common issues

[72] In essence, all of the common issues related to elements necessary to a claim for constructive dismissal under the *ESA*. The theme running through them all is the reality that the impact upon the class members of the changes could only be assessed individually. The fact that there undoubtedly were major changes that did apply to all the employees begs the question of how each employee was affected, whether the changes constituted fundamental breaches of their employment contract, and whether the offers made constituted offers of reasonable alternate employment for them. The existence of the major, system wide changes in this case would not advance the litigation in any meaningful way given the nature and range of the individual inquiries necessary at each stage.

Is a class proceeding a preferable procedure under s. 5(1)(d) of the *CPA*?

[73] The appellants submit that a class proceeding is the preferable procedure for addressing their claims, in that certification will accomplish the three goals of the *CPA*:

> (a) *Access to justice*: The individual damage awards will be relatively small, while the costs and risks to each individual would be too great to proceed alone;
>
> (b) *Judicial economy*: Over 100 claims will be consolidated and significantly advanced in one proceeding; and
>
> (c) *Behaviour modification*: the class action would signal to employers that they must abide by their duties under employment legislation.

[74] The motion judge observed that,

> [t]he 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. [Reasons, at para. 207.]

[75] In light of her reasons on the lack of commonality running through the claim, she found as follows:

> 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.

> 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. [Reasons, at paras. 210-211.]

[76] The motion judge noted that she was not directed to any constructive dismissal claims that had been certified. While this does not mean that a constructive dismissal case could never be certified, it is true that for the reasons set out above, such claims will often (as here) involve highly individualized inquiries at each step of the way.

[77] Contrary to the appellants' submissions, this was not a strong access to justice case because, as the motion judge noted, other effective recourses do exist. Although the appellants may now be out of time, Part XXII of the *ESA* sets out a "Complaint and Enforcement" procedure. A civil action remained open and depending on the value, could have been pursued as a Simplified Procedure under rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, or in the Small Claims Court.

[78] The motion judge also concluded that this situation did not engage the goal of behaviour modification and this was not pursued by the appellants before this court.

[79] 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. The employees received at least as much notice as they would have been entitled to had they been terminated when the changes were announced. This evidence does not suggest that a class action is needed to address the goal of behaviour modification.

[80] The motion judge, then, reviewed all the relevant considerations in concluding that a class action is not the preferable procedure in this case. She committed no error that could justify the intervention of this court on this point.

Was there a workable litigation plan under s. 5(1)(e) of the *CPA*?

[81] The appellants submit that the motion judge, in finding that the appellants had not satisfied this requirement, erred in failing to take into consideration the fact that a litigation plan is a work in progress. In the course of oral argument, the appellants acknowledged that the motion judge's conclusion on this issue is closely related to her conclusion on the common issues.

[82] At para. 223 of her reasons, the motion judge explained that "[t]he 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."

[83] Accordingly, she found that this requirement had not been satisfied. I see no basis for interfering with her conclusion on this issue.

Conclusion

[84] As the motion judge held, the central and pervasive problem with the application in this case was the lack of commonality, which drove her conclusions both with respect to the proposed common issues as well as the other elements of the *CPA* which she was required to consider. The circumstances of this case, as well as the nature of constructive dismissal pursuant to the *ESA*, were critical factors that combined to justify her conclusions. The appeal is therefore dismissed.

Cunningham A.C.J.

Jennings J.

Harvison Young J.

Released: , 2012

CITATION: Kafka v. Allstate Insurance Company of Canada, 2012 ONSC 1035
DIVISIONAL COURT FILE NO.: 235/11
DATE: 20120404

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Cunningham A.C.J., Jennings, Harvison Young JJ

BETWEEN:

ESTHER KAFKA, KETAL (KEN) PATEL and MARK CASSELLS

Plaintiffs
(Appellants)

– and –

ALLSTATE INSURANCE COMPANY OF CANADA and THE ALLSTATE CORPORATION

Defendants
(Respondents)

REASONS FOR JUDGMENT

Harvison Young J.

Released: April 04, 2012