

- [3] TI then contacted T.E.S. to advise it that TI wished to hire Ms. Davidson and set out the terms of the offer. Ms. Davidson incorporated a personal corporation, CDD, which entered into an agreement with T.E.S. (the “IC Agreement”). The IC Agreement describes CDD as “the Independent Contractor”. Ms. Davidson signed the IC Agreement on behalf of CDD.
- [4] The IC Agreement was a template agreement. T.E.S. signed the IC Agreement pursuant to its obligations under a “Master Professional services Agreement” (the “MPSA”) between T.E.S. and TI. TI created the MPSA pursuant to which T.E.S. was to provide a basket of services, depending on each temporary worker. Those services could include providing personnel, contract administration, and payroll administration. T.E.S. played no role in Ms. Davidson’s recruitment, but it did have a role in the administration of her contract with TI and in paying her.
- [5] In the action, Ms. Davidson argues that T.E.S. misclassified her as an independent contractor when she should have been classified as an employee. This resulted in her failing to receive benefits that she was entitled to under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“*ESA*”). She also seeks reimbursement of certain CPP or EI contributions that she claims are owed as a result of the alleged misclassification. Ms. Davidson makes these claims on behalf of herself and a proposed class consisting of all persons who worked on contract with T.E.S. and were misclassified as independent contractors, from November 9, 2009, until the date that the notice of class action was sent to class members.
- [6] While T.E.S. filed a number of objections to certification, the motion judge’s decision focused on three core objections that covered the bases on which Ms. Davidson was asserting that she was an employee as opposed to an independent contractor:
- (a) Whether there was some basis in fact for the commonality of a proposed common issue (“PCI 1”) seeking to find that T.E.S. was an employer pursuant to s. 74.3 of the *ESA*.
 - (b) Whether there some basis in fact for the commonality of a proposed common issue (“PCI 2”) seeking to find that T.E.S. was an employer under s. 1(1) of the *ESA*; and
 - (c) Whether there was some basis in fact for the commonality of a proposed common issue (“PCI 3”) seeking to find that T.E.S. was an employer at common law.
- [7] The motion judge found that none of the proposed common issues could be determined in common. They all required individual determinations. Having made this finding, he also held that the common issue of whether T.E.S. owed a fiduciary obligation to the class members could not be certified as the existence of any fiduciary obligation arose out of the employer-employee relationship. Therefore, he dismissed Ms. Davidson’s motion for certification without considering any of T.E.S.’s other objections or the other criteria for certification (the “Certification Decision”). He then awarded T.E.S. its partial indemnity costs of the motion, fixed in the amount of \$333,114.05: *Davidson v. T.E.S. Contract Services Inc.*, 2024 ONSC 4362 (the “Costs Decision”).

- [8] On this appeal, Ms. Davidson seeks to set aside the Certification Decision and seeks leave to appeal the Costs Decision. For the following reasons, I would dismiss the appeal and refuse leave to appeal the Costs Decision.

Jurisdiction

- [9] Prior to the hearing of the appeal, the court requested that the parties address the question of whether the Divisional Court had jurisdiction to hear the appeal. The court accepted that it had jurisdiction under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 as the Statement of Claim was filed in August of 2020. However, the court wished to hear submissions on whether the Certification Decision had effectively brought the proceedings to an end, making the decision a final one that had to be appealed to the Court of Appeal: see *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, 173 O.R. (3d) 682.
- [10] Ms. Davidson argued that we had jurisdiction; TES submitted we did not.
- [11] In *Lilleyman*, the motion judge decided that the claim did not disclose a cause of action. This, according to the Court of Appeal, had the practical effect of bringing the proceeding to an end. In *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 D.L.R. (4th) 670, the Court of Appeal found that the order refusing to certify the class proceeding on the basis that a class proceeding was not the “preferable procedure” was just an order refusing to certify and not a final order. However, the order refusing to certify the proceeding against one defendant on the basis that the claim did not disclose a cause of action was more than an order refusing to certify; it ended the proceeding against that defendant.
- [12] In this case, the motion judge did not find that Ms. Davidson had no cause of action. He chose not to address that criterion. He only found that her action was not suitable for certification. This does not bring Ms. Davidson’s proceeding to an end. She can still choose to advance her claim through an individual action.
- [13] In reaching this conclusion I do not accept T.E.S.’s position that the motion judge’s findings when dealing with the core common issues would, in effect, preclude an individual action. While the motion judge does comment on the strength of Ms. Davidson’s case in relation to her argument that T.E.S. could be considered an employer under s. 74.3 of the *ESA*, those comments would not be binding on a judge hearing an individual misclassification action. Again, the motion judge did not determine that Ms. Davidson had no cause of action for misclassification; he only determined that the core common issues were not suitable for certification.

Issues Raised

- [14] Ms. Davidson submits that the motion judge committed the following errors:
1. He improperly reformulated the common issues.

2. He erred when he found that there was insufficient commonality to certify the core common issues.
3. He failed to consider the common issue of whether T.E.S. owed fiduciary duties to class members.
4. He erred in awarding costs in the amount of \$333,114.05 against a plaintiff who was bringing a novel employment law class action seeking access to justice for placement workers.

Standard of Review

[15] The appellate standards of review apply. Questions of law are reviewable on a standard of correctness. Questions of fact and mixed fact and law are reviewable on a standard of palpable and overriding error. If there is an extricable error of law, the standard of correctness applies: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[16] As set out in *Waxman v Waxman* (2004), 186 O.A.C. 201 (C.A.), at paras. 296-297, leave to appeal refused, [2004] S.C.C.A. No. 291:

A “palpable” error is one that is obvious, plain to see or clear Examples of “palpable” factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

An “overriding” error is an error that is sufficiently significant to vitiate the challenged finding of fact.

[17] Deference is owed to a motion judge’s application of the test for certification and determination of the common issues, particularly motion judges with expertise and experience in the complex area of class proceedings: *Fehr v. Sun Life Assurance Co. of Canada*, 2018 ONCA 718, 84 C.C.L.I. (5th) 124, at para. 39, leave to appeal refused, [2019] S.C.C.A. No. 38387. “On such questions, appellate court intervention should be restricted to matters of general principle”: *Palmer v. Teva Canada Ltd.*, 2024 ONCA 220, 495 D.L.R. (4th) 151, at para. 103.

Analysis

The motion judge did not reformulate the common issues

[18] Ms. Davidson submits that the motion judge unilaterally reformulated her common issues without warning and without giving her an opportunity to address why his changes had an impact on whether those issues could be certified. Ms. Davidson made these submissions in her factum, and she did not abandon them in oral submissions. However, it was not the focus of her oral submissions.

[19] Ms. Davidson’s proposed common issues relating to the existence of an employer/employee relationship were as follows:

- (1) Did the actual circumstances of the relationship between T.E.S. and the class members constitute an employee/employer relationship such that class members were in fact employees of T.E.S. and not “independent contractors” based on:
 - a. Part XVIII.1 “Temporary Help Agencies” of the *ESA*;
 - b. Alternatively, the definition of “Employee” found in s. 1(1) of the *ESA*;
 - c. In the further alternative, under the common law.

[20] Ms. Davidson argues that the motion judge’s reformulation of the common issues omitted the words “actual circumstances”, focused exclusively on T.E.S., ignored the temporary workers, and ignored the actual circumstances of the relationship between T.E.S. and the class members.

[21] There is no merit to the submission that the motion judge reformulated Ms. Davidson’s proposed common issues. The motion judge’s reasons summarize the three core objections to those common issues, which he accurately sets out. In dealing with those objections, he does not set out the exact wording of each proposed common issue but refers to them in abbreviated form as “PCI 1”, “PCI 2” and “PCI 3”. Nowhere in the Certification Decision is the wording of the proposed common issues a factor in denying certification. Further, as will be detailed below, there is no merit to the suggestion that the motion judge’s adoption of a paraphrasing of the common issues caused him to misapply the “some basis in fact” test that was applicable to his determination of whether any of the proposed common issues could be determined in common.

The motion judge did not err when he refused to certify PCI 1

[22] PCI 1 is the common issue that asserts that the relationship between Ms. Davidson and T.E.S. should be characterized as an employer/employee relationship on the basis of s. 74.3 of the *ESA*.

Ms. Davidson’s Submission

[23] Ms. Davidson asserts that the motion judge erred in his analysis by failing to emphasize that “[t]he common law criterion presents a low bar An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution”: *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, at para. 109, rev’d 2020 ONSC 913, 51 C.P.C. (8th) 351 (Div. Ct.).

[24] Ms. Davidson submits that based on the following findings of fact that the motion judge made he should have found that the low bar for certifying PC1 was met:

- a. T.E.S. provides placement services for some temporary workers (as shown by the fact that T.E.S. applied for a licence to operate as a Temporary Help Agency in Ontario) and provides payroll processing and/or contract administration for other workers.
- b. In the contract that Ms. Davidson and T.E.S. entered into, T.E.S. described itself as a corporation which “carries on the business of providing staffing services to, among others, [TI]”.
- c. T.E.S. signed the agreement with class members pursuant to its obligations under the MPSA with TI. T.E.S. was to “provide a basket of services, depending on each temporary worker, including contract administration and providing personnel.”
- d. T.E.S. had at least “104 recruitment and payroll workers who T.E.S. either assigned or only conducted payroll services and contract administration over the class period.”

[25] Ms. Davidson argues that the motion judge committed two palpable and overriding errors. First, he found that T.E.S. was only providing contract administration services when there was evidence that the class members had no contract with T.E.S.’s clients; their only contract was with T.E.S. Second, he found that T.E.S. and class members were in a payrolling arrangement, like in the case of *Sondhi v. Deloitte*, 2017 ONSC 2122, which was not certified. However, in Ms. Davidson’s case T.E.S. clearly did much more.

[26] Ms. Davidson submits that the motion judge waded into the merits of what constitutes a s. 74.3 agreement and erred in his interpretation of the section. In particular, the motion judge found that there was no s. 74.3 agreement between T.E.S. and Ms. Davidson since Ms. Davidson applied to TI and TI decided to hire her. According to Ms. Davidson, this creates an exception that does not exist in the legislation. In any event, the fact that there is an agreement between Ms. Davidson and T.E.S. where T.E.S. substantially oversees TI’s work conditions forms some basis in fact for a finding that T.E.S. arranged Ms. Davidson’s placement with TI, which is sufficient to support a finding of a s. 74.3 agreement. According to Ms. Davidson, the motion judge made no mention of certification not being a test of the merits.

[27] Ms. Davidson argues that, contrary to the motion judge’s finding, s. 74.3 does not turn on how the worker and the client came to meet. The focus is on the relationship between the THA and the worker. Further, there are no exceptions for THAs claiming to provide only certain types of services, e.g., only recruitment but not payrolling or contract administration. To read s. 74.3 in this way would allow companies like T.E.S. to avoid *ESA* employee protections. In this regard, the motion judge failed to consider the recent decision *2517906 Ontario Inc. (c.o.b. Temporary Personnel Solutions) v. Ontario (Labour Relations Board)*, 2023 ONSC 4890, 77 C.C.P.B. (2d) 57 (Div. Ct.), where the Divisional Court endorsed the OLRB’s broad and liberal interpretation of s. 74.3 and found that there did not need to be a direct agreement between the THA in that case and the worker that the

THA would assign on a temporary basis to perform work for its clients. The agreement could be an indirect one.

- [28] To be certified, common issues need only be issues of fact or law that move the litigation forward. In this case, according to Ms. Davidson, there is a common issue as to whether s. 74.3 should be interpreted to apply not only to employees but to independent contractors. The motion judge found that the issue of whether independent contractors were subject to s. 74.3 agreements was “an important question of statutory interpretation”, but then declined to address it. However, if s. 74.3 does apply to independent contractors, that could impact the analysis of whether and how it applies to the relationship between T.E.S. and class members. According to Ms. Davidson, since s. 74.3 is a deeming provision, there is a strong likelihood that it applies to independent contractors. Its whole purpose is to create employee/employer relationships that would not otherwise exist. Certifying this issue would move the litigation forward.

Section 74.3 of the *ESA*

- [29] Section 74.3 of the *ESA* reads as follows:

Employment relationship

74.3 Where a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency,

- (a) the temporary help agency is the person’s employer;
- (b) the person is an employee of the temporary help agency.

Work assignment

74.4 (1) An assignment employee of a temporary help agency is assigned to perform work for a client if the agency arranges for the employee to perform work for a client on a temporary basis and the employee performs such work for the client.

(4) An assignment employee of a temporary help agency is not assigned to perform work for a client because the agency has,

- (a) provided the client with the employee’s resume;
- (b) arranged for the client to interview the employee; or
- (c) otherwise introduced the employee to the client.

- [30] As summarized by the motion judge, The *Employment Standards Act* Policy and Interpretation Manual (the “Manual”) states:

[88] Under the review of s. 74.3 in the Manual, it is a question of fact as to whether a s. 74.3 agreement exists. The Manual provides the following example of how such an agreement could be demonstrated, through an attempt by the agency to “match” the individual with a client:

For example, **agreement would be demonstrated by an attempt by the agency to match the individual** who had submitted a resume [to the THA] with a client. [Emphasis added].

[89] The Manual also reviews a “work assignment” under s. 74.4(1) and refers to both “arranged” and “placement” as a basis on which an assignment under s. 74.3 could occur:

A work assignment arises “if the agency **arranges** for the employee to perform work for the client on a temporary basis and the employee is performing the work.”[Emphasis added].

“The work is considered to be temporary because there is no permanent **placement** with the client; the assignment employee continues to be the employee of the agency and not the client throughout the period of the assignment.” [Emphasis added].

[31] In *Sondhi*, Belobaba J. dealt with a proposed class action involving lawyers who worked as document reviewers on discrete projects. The document reviewers decided which projects to work on and they worked at their own schedule. The defendants were Deloitte, who provided document review services for client law firms, and Procom Consultants Group Limited (“Procom”), a placement agency. Justice Belobaba refused to certify the claim against Procom as it played no role in the placement of the document reviewers with the clients. “It was Deloitte that recruited, interviewed and hired the document reviewers and assigned them to the various projects. Procom only kept track of the hours worked and provided the payroll services”: para. 15.

[32] Justice Belobaba found that there was no basis for applying s. 74.3 of the *ESA* to deem Procom as an employer:

[17] There is also no basis for the application of s. 74.3 of the *ESA* which provides that a temporary help agency will be deemed to be an employer if the agency assigns or attempts to assign temporary workers for its client. It is true that Procom has been found to be a “placement agency” by the Customs and Revenue Agency for certain CRA purposes and it has also been described as such in a backdrop umbrella agreement involving the two defendants. But on the uncontroverted evidence herein, Procom only provided payroll services. Procom had nothing to do with the placement of document reviewers – it did not “assign or attempt to assign [the document reviewers] to perform work on a temporary basis for [a] client.” As already noted, this was Deloitte’s responsibility. Section 74.3 of the *ESA* does not apply.

- [33] Thus, as the motion judge correctly emphasized, s. 74.3 only applies if the agency in question assigned or attempted to assign the employee to perform work on a temporary basis. “Assignment” requires “arranging” for an employee to perform the work. This could include “matching” or “placing” the individual with the client. Merely providing payroll administration services for a client is not sufficient for an agency to be deemed a s. 74.3 employer even if the agency is registered as a placement agency and is described as such in its agreement with the client.

The motion judge’s analysis regarding s. 74.3 and lack of commonality discloses no error

- [34] In this case, as the motion judge found:

[98] [The] uncontested evidence is that TES performed various roles for TI and other clients, including a “recruitment” or “payroll” role which could include contract administration. TES’ role would depend on the client and on the particular person. In both “recruitment” and “contract administration” cases, the individuals sign contracts with TES to have them perform work for a client of TES, regardless of whether (i) there was a s. 74.3 agreement pursuant to which TES placed the person with the client or (ii) the client directly offered temporary work to the person without a s. 74.3 agreement under which TES agreed to “match”, “arrange”, or “place” the client (or attempt to do so so).

[99] Davidson provided no direct evidence as to the commonality of s. 74.3 agreements of putative class members. She did not lead evidence that all persons who signed an IC Agreement with TES were subject to a s. 74.3 agreement (and Davidson’s own experience is to the contrary).

- [35] The motion judge correctly determined that Ms. Davidson had not established any basis in fact that the issue of whether a putative class member was subject to a s. 74.3 agreement could be determined in common given the uncontested evidence that T.E.S. performed a wide spectrum of services for TI ranging from payroll administration (which *Sondhi* determined does not result in the application of s. 74.3) to recruitment (which could result in the application of s. 74.3) and the lack of evidence as to the commonality of the putative class member’s particular arrangements. As showcased here, each case must be determined on its own facts.
- [36] In Ms. Davidson’s case, the motion judge found that her own evidence called into question whether her arrangement with T.E.S. was subject to s. 74.3 since it was clear that she had applied directly to TI, been interviewed a number of times with TI, been offered her job by TI, and was directed to T.E.S. by TI. However, he then went on to examine the other evidence that she argued made it clear that she had been “placed” by T.E.S. with TI and that she asserted provided some basis in fact for a finding of commonality.
- [37] First, the motion judge examined the template agreements: (i) the IC Agreement between the temporary worker and T.E.S., and (ii) the MPSA between TI and T.E.S. These agreements were templates and were signed regardless of whether T.E.S. actually placed

the worker in question with TI. He then looked at the Booklet that was forwarded to Ms. Davidson and was described in a cover letter as “being designed to protect you while you are on assignment”. He found that “the use of the term ‘assignment’ in the context of the Booklet cannot be considered a basis in fact that every putative class member was subject to a s. 74.3 agreement”: para. 116. He also examined the “Payroll Instructions” and found that the reference to “placement and employment agency workers” said nothing about whether T.E.S.’s role in a particular case was as a placement agency: paras. 118-123. Again, T.E.S. provided a spectrum of services, which in some cases included placement and in others did not. As put by the motion judge:

[122] In each case, the evidence is that TES’ role depends on the facts of each individual client and each individual worker.

[123] Consequently, the existence of a “frequently asked question” about workers in a set of Payroll Instructions which would be relevant to some workers who were placed by TES pursuant to a s. 74.3 agreement does not serve as a basis in fact that every putative class member was assigned pursuant to such an agreement. The s. 74.3 agreement issue cannot be determined in common based on the Payroll Instructions.

- [38] Finally, the motion judge looked at T.E.S. and Ms. Davidson’s email correspondence. He found first, and most importantly, that there was no evidence that these emails were common to every putative class member and therefore they could not be used as evidence of commonality. He also found that “[i]n any event, the emails do not support the commonality of a s. 74.3 agreement”: para. 126.
- [39] All these findings were findings of fact that do not disclose any palpable and overriding error.
- [40] Without sufficient evidence of commonality, the motion judge correctly refused to certify PCI 1. He was also correct to do so without analyzing the statutory interpretation issue of whether s. 74.3 can apply to independent contractors. That is an issue that may have to be determined in a case where there is a common set of facts that governs the arrangements between the THA and the putative class members. In this case, as the motion judge repeatedly noted, there was no evidence that such common facts existed among the putative class members.
- [41] The same is true with respect to Ms. Davidson’s argument that the motion judge failed to mention the Divisional Court’s decision in *2517906 Ontario Limited*. Apart from the fact that the decision was never cited to the motion judge during the certification motion, the applicable principles about the need for a broad and liberal interpretation of s. 74.3 would only be relevant if there was a sufficiently common set of facts that governed the arrangements between THA and the putative class members.

The motion judge did not err in refusing to certify PCI 2 or PCI 3

- [42] PCI 2 asserts that even if the issue of whether the putative class members are deemed to be employees under s. 74.3 of the *ESA* cannot be determined in common, there is some basis in fact to support her assertion that the issue of whether each putative class member is an employee of T.E.S. pursuant to s. 1(1) of the *ESA* can be determined in common (PCI 2). The same is true with respect to the allegation that each putative class member is an employee of T.E.S. pursuant to the common law (PCI 3).
- [43] As the motion judge notes, Ms. Davidson relies on the same evidence she relied on with respect to PCI 1 to support her submission in this regard.
- [44] The relevant portions of the definition of “employee” in s. 1(1) of the *ESA* include:
- (a) a person, including an officer of a corporation, who performs work for an employer for wages,

 - (b) a person who supplies services to an employer for wages...
- [45] Section 1(1) defines an “employer” as including “an owner, proprietor, manager ... of an activity, business, work ... project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it”
- [46] The motion judge noted that at common law the courts have moved from “a strict analysis of control or direction” to a “more holistic approach”: para. 137. He further found at para. 139 that while “there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor”, the question of “whose business is it? ... lies at the heart of the matter”: *Braidon v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464, 294 D.L.R. (4th) 172, at para. 34.
- [47] The motion judge then pointed out that in proposed misclassification class actions (where workers who are classified as independent contractors or managers are asserted to be employees entitled to benefits under the *ESA* and other legislation) there is often an issue as to whether the question can be determined as a common issue. He then provided examples of cases where misclassification class actions were certified. *Omarale v. Just Energy Group Inc.*, 2016 ONSC 4094, 89 C.P.C. (7th) 113, leave to appeal refused, 2016 ONSC 7096 (Div. Ct.), where the motion judge found that there were systemic policies and practices that applied in common to all the putative class members; *Navartnarajah v. FSB Group Ltd.*, 2021 ONSC 5418, leave to appeal refused, 2021 ONSC 7414 (Div. Ct.), where the motion judge found that the “essence” of the job functions of the putative class members was similar enough to allow the classification question to be answered in common; and *Sondhi*, where, while the motion judge did not certify an action against Procom, he did certify a claim against Deloitte as he found that there was some evidence of certain facts that applied to each putative class member that could allow the misclassification issue to be decided in common.

- [48] The motion judge also reviewed cases where the actions were not certified. *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, 24 C.P.C. (7th) 251, aff'd, 2014 ONCA 677, 326 O.A.C. 159, where the motion judge refused to certify a claim that the employer had misclassified the class members as managers, resulting in unpaid overtime, on the basis that the job duties performed by the class members differed significantly; and *McCracken v. Canadian National Railway*, 2012 ONCA 445, 111 O.R. (3d) 745 (C.A.), where the different job responsibilities and functions also produced a lack of commonality that made it impossible to certify the action as a class action.
- [49] With respect to the action before him the motion judge found as follows:
- [160] In the present case, Davidson led no evidence that the putative class members hired for temporary work on IC Agreements held the same job title or had the same responsibilities. Davidson only led evidence as to her experience working at TI, when TI (i) was only one of TES' clients and (ii) had 104 recruitment and payroll workers who TES either assigned or only conducted payroll services and contract administration over the class period.
- [161] On a "job function" basis, the scope of variability in the present case is more pronounced than in either *McCracken* or *Brown*. In *McCracken*, though proposed class members all held the same job title and worked for the same entity, certification was denied because their job responsibilities varied. In *Brown*, the proposed class members also worked for the same employer.
- [162] In the present case, proposed class members do not work for the same entity, and the proposed class action is not based on a similar job function.
- [50] The motion judge then turned to Ms. Davidson's evidence regarding the establishment of common systemic policies and practices: the IC Agreement, the MPSA, the Booklet, the Payroll Instructions, and email correspondence.
- [51] With respect to the IC Agreement, the motion judge found that the provisions Ms. Davidson pointed to were equally applicable to independent contractors as they were to employees. Further, as with PCI 1, the agreement to provide "staffing services" says nothing about whether those services will be supplied by an employee or an independent contractor.
- [52] The same was true of the MPSA, which essentially stated that T.E.S. was to provide contract administration services for temporary workers, regardless of whether those workers were independent contractors or employees.
- [53] With respect to the Booklet and the letter enclosing it, T.E.S.'s provision of health and safety benefits was available to any employee, contractor or consultant who was working "on assignment" with a client. The requirement to comply with the policies in the Booklet was "unrelated to whether the person is an employee, contractor or consultant."

- [54] The motion judge found that the Payroll Instructions set out a payment process that was similar to the one used by Procom in *Sondhi*. He also found that the invoice process was more like one used in an independent contractor relationship. The “frequently asked questions” were relevant to some workers, not others. They say nothing about whether all workers were employees.
- [55] Finally, again, the motion judge found that the email correspondence could not be used as evidence of commonality. There was no evidence that the same emails were exchanged between T.E.S. and every other putative class member.
- [56] Thus, the motion judge concluded that there was no evidence of systemic commonality to meet the ‘some basis in fact’ threshold necessary to certify PC2 or PC3. Individual trials would still be required to make the determination as to whether a particular class member was an employee or an independent contractor. This was unlike the “follow all instructions or directions” in the IC Agreement in *Sondhi* or the other evidence in that case that led Belobaba J. to certify the action as against Deloitte.

Ms. Davidson’s Submissions

- [57] Ms. Davidson submits that while the motion judge referred to the paramountcy of the “whose business is it?” test for determining who is an employee at common law, he did not focus on this factor when applying the law to the facts. Instead, he focused on the lack of similarity in job functions.
- [58] According to Ms. Davidson, considering the five principles in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, there was some basis in fact that all the putative class members were employees and not independent contractors. In particular:
- a. Agent was limited exclusively to the service of the principal: Ms. Davidson’s agreement contained a non-competition clause requiring exclusive service, and she worked 35 to 40 hours per week exclusively for T.E.S.’s client.
 - b. Agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold: T.E.S.’s client, TI, controlled where and when Ms. Davidson performed her work.
 - c. Agent has an investment or interest in what are characterized as the “tools” relating to their service: TI provided Ms. Davidson with her tools, being her desk space, laptop, and software.
 - d. Agent has undertaken any risk in the business sense or has any expectation of profit associated with the delivery of service as distinct from a fixed commission: TI set Ms. Davidson’s pay. Ms. Davidson did not take on any risk in the business sense and

there was no expectation of profit associated with the delivery of her service.

- e. Activity of the agent is part of the business organization of the principal for which they work. In other words, whose business is it?: Ms. Davidson was fully integrated into the TI business organization and performed work similar to the work that a full-time employee would perform.

[59] According to Ms. Davidson, the only reasonable conclusion is that she was carrying on the business of TI. She was only labelled as an independent contractor because TI had been directed by its head office not to hire any permanent staff.

Conclusion Regarding Ms. Davidson's Submissions

- [60] The problem with Ms. Davidson's submissions is that the question was not whether there was some basis in fact for determining that Ms. Davidson was an employee as opposed to an independent contractor. It was whether there was some basis in fact for determining employee status across the putative class, which was composed of people who worked with 935 client organizations pursuant to 21,252 individual contracts over a 12-year period.
- [61] As the motion judge noted, there was no evidence as to similarity in job functions. Given this, Ms. Davidson's argument turned on the evidence that she alleged established systemic commonality between the class members. This was the evidence that the motion judge reviewed, namely, the IC Agreement, the MPSA, the Booklet, the Payroll Instructions, and Ms. Davidson and T.E.S.'s email correspondence.
- [62] The IC Agreement is a template agreement, which the motion judge found did not contain any basis in fact for finding systemic commonality of employee status.
- [63] The MPSA was only signed with TI and not with any other client of T.E.S. Further, the motion judge found that it contained no provisions that helped determine whether a temporary worker was an independent contractor or an employee.
- [64] The Booklet was provided to both employees and contractors. The motion judge found that it could not provide evidence of employee status since the obligations under s. 25(2)(h) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, apply equally to employees and contractors.
- [65] The motion judge found that the Payroll Instructions were like the payroll processor role in *Sondhi* and contained provisions that were more consistent with an independent contractor role than employee status.
- [66] Ms. Davidson failed to establish that the motion judge's findings with respect to any of this evidence contained a palpable and overriding error.

[67] The final piece of evidence, the email correspondence, cannot be used to establish systemic commonality since it was unique to Ms. Davidson.

[68] For the above reasons, Ms. Davidson has failed to demonstrate that the motion judge erred either in his analysis or in his conclusion that PCI 2 and PCI 3 were not suitable for certification as common issues.

The motion judge did not err when he refused to certify the common issue regarding fiduciary duty

[69] Ms. Davidson’s claim alleged that T.E.S. owed a fiduciary duty to the class members and that if that duty was breached any profits should be disgorged. She proposed a fourth common issue as follows:

Whether the position of the Defendants relative to the class members was one of fiduciaries such that the Defendants had a fiduciary duty to the class members.

- i. If such a duty exists, whether the Defendants breached that duty.
- ii. Whether any profits made through a breach ought to be disgorged.

[70] The motion judge found that this issue (PCI 4) could not be certified as a stand-alone common issue since “the commonality of that fiduciary obligation is based on a common finding of employment under PCIs 1, 2, or 3”: para. 16.

[71] Ms. Davidson alleges that this was an error; the common issue of finding a fiduciary duty can be based on the fact that T.E.S. holds itself out as a THA and has a fiduciary duty to workers that it assigns. According to Ms. Davidson, she relied on T.E.S. to properly classify her and act in her best interests.

[72] In the Plaintiff’s Factum at the Certification Motion, at para. 131, Ms. Davidson framed her breach of fiduciary claim before the motion judge as follows:

...the Class members had a reasonable expectation that they would be properly classified in accordance with employment legislation, and thus TES would act in their best interests accordingly. By misclassifying the Class Members as independent contractors and resultingly depriving them of employment standards to which they are entitled, TES’ actions resulted in a breach of trust and the employer’s fiduciary obligations.

[73] This makes it clear that the breach of fiduciary duty claim is dependant on a finding that T.E.S. misclassified the putative class members. Having found that there was insufficient commonality to certify the proposed common issues relating to misclassification, it follows that there is insufficient commonality to certify the breach of fiduciary duty claim.

Leave to appeal the motion judge’s Costs Decision

- [74] Leave to appeal a costs order is not granted in the absence of “strong grounds upon which the appellate Court could find that the judge erred in exercising his discretion.”: *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 31879.
- [75] The motion judge awarded costs of \$333,114.05 against Ms. Davidson. Ms. Davidson submits that the motion judge erred in principle and that the costs award is clearly wrong.
- [76] Ms. Davidson argues that her motion raised a novel question of law and concerned a matter of public importance. As stated in her factum: “[I]f left untouched, the costs award would have a chilling effect on public interest class actions that impact a large segment of vulnerable workers and would substantially hinder access to justice.”
- [77] The motion judge dealt with Ms. Davidson’s argument that she raised a novel point of law “because the courts have not considered the issue of whether s. 74.3 deems workers who are hired by a THA to be an employee”. As put by the motion judge, Ms. Davidson’s argument rested on her submission that “the deeming provision in s. 74.3 rendered it irrelevant as to whether she was an employee or independent contractor at common law or under s. 1(1) of the *ESA*”: Costs Decision, at para. 35. This was the statutory interpretation issue.
- [78] However, as the motion judge found at para. 36 of the Costs Decision “[t]he statutory interpretation argument was not necessary to determine certification.” The parties only considered and addressed that issue “because Davidson took the position that she could establish a basis in fact for a finding of commonality that the proposed class members were assigned by TES The inquiry into the commonality of assignment does not present a novel issue. It is a question of fact”: paras. 36, 38. Therefore, the motion judge rejected Ms. Davidson’s “submission that a “no costs” order should be made (or costs should be reduced) because the class action was either a test case, raised a matter of public interest, or was based on a novel legal issue”: para. 42.
- [79] The motion judge’s analysis discloses no error in principle. Further, there is no basis upon which to find that his award of costs was clearly wrong. In fixing the quantum of costs, the motion judge canvassed the cases Ms. Davidson put forward where lower costs awards had been made and distinguished them. He examined the time spent by T.E.S.’s counsel and did not find it to be excessive. He noted that the claim “sought general damages of \$72.5 million and separate punitive, aggravated, and moral damages of the same amount”: para. 66. Given this, he found that it was “reasonable to expect that a defendant (and the plaintiff) will leave no stone unturned on the motion”: para. 66.
- [80] The motion judge also noted that it was “improper for class counsel to suggest that the proposed representative plaintiff may be exposed to the significant costs consequences of an unsuccessful certification motion”: para. 25. Costs awards of six or seven figures are not unusual if a motion for certification is unsuccessful. An individual plaintiff cannot risk exposure for costs of that amount, especially when the recovery for an individual class member is usually dramatically smaller than the amounts claimed for the class. The motion

judge questioned whether counsel should be permitted to act as class counsel unless they have obtained funding and are prepared to indemnify the representative plaintiff. According to the motion judge, this is an issue that should be addressed at the outset of the proceedings, not “after the fact, when certification has already been denied”: para. 26.

Conclusion

[81] For these reasons, the appeal and the motion for leave to appeal the Costs Decision are dismissed. Pursuant to the agreement of the parties, T.E.S. is entitled to its costs of the appeal and the motion for leave to appeal, fixed in the all-inclusive amount of \$25,000.

	_____	Sachs J
I agree	_____	
		Lococo J
I agree	_____	
		Kurke J

Released: June 17, 2025

CITATION: Davidson v. T.E.S. Contracting Services Inc., 2025 ONSC 3537
DIVISIONAL COURT FILE NO.: 443/24
DATE: 2025/06/17

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Sachs, Lococo and A.D. Kurke JJ.

BETWEEN:

Ann Davidson

Plaintiff (Appellant)

– and –

T.E.S. Contracting Services Inc.

Defendant (Respondent)

REASONS FOR JUDGMENT

Released: June 17, 2025