

**CITATION:** Curtis v. Medcan Health Management Inc., 2025 ONSC 2902  
**COURT FILE NO.:** CV-20-00639259-00CP  
**DATE:** 20250514

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** NICOLE CURTIS, AMR GALAL and KATRINA BUHLMAN, Plaintiffs

**AND:**

MEDCAN HEALTH MANAGEMENT INC., ANDREW CARRAGHER, SHAUN C. FRANCIS, EDWIN F. HAWKEN, URBAN JOSEPH, BEAU LASKEY, THOMAS P. REEVES, OWEN ROGERS, and CRAIG SHEPHERD, Defendants

**BEFORE:** Glustein J.

**COUNSEL:** *Andrew Monkhouse and Alexandra Monkhouse*, for the plaintiffs

*Elisha C. Jamieson-Davies, Eleanor A. Vaughan and Jeffrey E. Goodman*, for the defendants

**HEARD:** May 13, 2025

**ENDORSEMENT**

**Nature of motion and general principles**

[1] The plaintiffs bring a motion to compel answers to (i) refusals and (ii) questions taken under advisement which were not answered, from the examination for discovery of the defendants' representative Andrew Rinzema held on June 25, 2025. I refer to the defendants collectively as "Medcan".

[2] At the outset of the hearing, counsel made submissions as to the general approach that the court should take on the motion. I make the following comments based on those submissions:

- (i) In late 2018, Medcan identified an issue with its payroll software such that it had not paid statutory vacation pay and public holiday pay on variable compensation. Medcan made a business decision to compensate impacted employees for statutory vacation and public holiday pay on their variable compensation for the years 2018 and 2019.
- (ii) Medcan acknowledges that it was required to pay employees for statutory vacation and public holiday pay on their variable compensation under the *Employment Standards Act 2000*, S.O. 2000, c. 41 (the "ESA").

- (iii) Medcan acknowledges that its payroll software system did not capture the payment as required under the *ESA*, but submits that certain class members, such as (a) fitness trainers who were paid on a *per diem* basis and (b) class members who started employment after December 25, 2017 (and thus compensated under the compensation program), were properly paid their statutory vacation and public holiday pay on their variable compensation.
- (iv) The certified common issues relate to (a) the terms of the contract between the class members and Medcan, (b) whether Medcan breached the contract, (c) whether Medcan breached the duty to maintain statutory vacation and public holiday pay records and (d) whether Medcan breached the duty to maintain a reasonable system to ensure proper payment of statutory vacation and public holiday pay.

[3] At its core, the claim asserts that the class members were employees of Medcan who were entitled under the *ESA* to statutory vacation and public holiday pay on their variable compensation. Medcan acknowledges that such requirement existed under the *ESA*, but submits that not all class members suffered damages.

[4] The applicable principles for examination for discovery in a class action are:

- (i) Prior to the common issues trial, discovery is limited to the common issues.
- (ii) Common issues provide a narrower scope for discovery than the pleadings since they are based on the list of common issues upon certification.
- (iii) Questions on individual issues which are also relevant to common issues must be answered: *Dadzie v. Ontario*, 2021 ONSC 5049, at paras. 27 and 39.

[5] I now address, in summary form, each of the refusals and questions taken under advisement, as presented in the chart jointly prepared by the parties. I refer to the “UA” number set out in the chart for questions taken under advisement, and the “R” number set out in the chart for refused questions. I do not set out the specific question number. I address the questions in order as presented in the charts and not in sequential numerical order.

#### **Endorsement on questions taken under advisement and not answered**

UA 1: The issue of the formula used to calculate remedy payments is relevant to the issue of whether those class members paid by Medcan were properly compensated, and would require a common determination to address whether those class members should be excluded from compensation. Question to be answered.

UA 9: Defendants to advise as to which groups of class members were not affected by the payroll error since a common determination is required to address whether such class members should be excluded from compensation. Question as to which groups were “affected” is unclear and is not to be answered.

UA 10: The cap on statutory holiday pay was a common approach taken by Medcan. It is relevant to the scope of liability to class members. I find that the question has been fully answered by Medcan except for the issue of which individual class members were impacted by the cap, which is not a common issue, but is instead an individual issue of damages calculation.

UA 4: The formula used in the Excel spreadsheet for remedial payment is relevant to whether the repayment plan implemented by Medcan was appropriate and is a common issue. Question is to be answered.

UA 6: Medcan will comply with Rule 31.06(2) and produce a list of all individuals who have knowledge of the issues at trial, prior to the upcoming pre-trial conference.

UA 7: Requiring Medcan to explain the relevance of each document in its affidavit of documents is disproportionate. Question is not to be answered.

UA 12: Question to be answered only to the extent that the emails between a single Medcan employee and staff relate to the common issue complaints of underpayment of statutory vacation and public holiday pay. Medcan's position on veracity limited to such complaints.

UA 13: It is disproportionate to require Medcan to produce a list of all employees listed in the Medcan affidavit of documents and their positions. The defendants have delivered template documents which relate to the common issues. Question not to be answered.

UA 14: To the extent any additional audit or review was conducted which is not set out in the answer provided by Medcan, question to be answered.

UA 16: If Medcan takes the position that any class member was not covered by the template agreements, any individual employment agreements for such employees are to be produced, but only as they relate to statutory vacation and public holiday pay.

UA 18: Question seeks Medcan's position on whether statutory vacation and public holiday pay should have been paid on the profit-sharing bonus program as variable compensation. It raises a common issue on the issue of breach, and is to be answered.

UA 39: The issue of whether *ESA* provisions supersede all less favourable contractual provisions seeks, in effect, an acknowledgement that Medcan cannot contract out of *ESA* requirements through lower contractual payment. Medcan has already answered that question in its response.

UA 41: This question relates to the plaintiff attempting to claim that those class members who received higher vacation or public holiday pay in their contracts can pursue such claims in the class action. Even if such claims could be pursued (which I do not decide), they do not address any certified common issue in the class action, as there is no issue about underpayment on contracts for class members at higher rates than *ESA* entitlements. The common issue raised in the class action is underpayment of minimum *ESA* standards. Question not to be answered, without prejudice to the positions of the parties as to whether damages can be claimed for any such class members (if they exist) at an individual damages trial.

UA 43: The Divisional Court did not approve a subquestion related to the existence of a trust relationship and Justice Perell accepted Medcan's proposed common issue on the contract which did not include a separate question on that issue. However, such inclusion was not required as the plaintiff submits that it is a common term of all contracts (common issue 1) that there was a trust relationship under the *ESA* for any vacation pay. Common issue 2 asks whether there was a breach of any term of the contracts. Consequently, Medcan's position on whether a trust relationship exists is relevant. Question to be answered.

UA 44: To be answered on the same basis as UA 43.

UA 45: The Divisional Court did not approve a subquestion related to the requirement to pay all class members vacation pay seven days after they leave their employment and Justice Perell accepted Medcan's proposed common issue on the contract which did not include a separate question on that issue. However, such inclusion was not required as the plaintiffs submit that it is a common term of all contracts (common issue 1) that there was a seven-day payment requirement under the *ESA* for any vacation pay. Common issue 2 asks whether there was a breach of any term of the contracts. Consequently, Medcan's position on whether a seven-day payment requirement exists is relevant. The question is also relevant to common issues which could arise on the applicable limitation periods. Question to be answered.

UA 46 and 47: These are the same questions as UA 45.

UA 50: This question seeks Medcan's position based on the *ESA* as to whether the 2019 legislative changes were a contractual term. Question to be answered.

UA 51: This question seeks Medcan's position based on the *ESA* as whether the method of calculation of public holiday pay under the 2019 legislative changes is a contractual term. Question to be answered.

UA 52: See UA 39 – question on contracting out of *ESA* has been answered.

UA 53-55: These questions have been answered through the admissions of Medcan. Any issues of commonality are to be addressed by other questions such as production of template agreements which address any position of non-commonality.

UA 57: Question to be answered only to extent Medcan relies on any differences in record-keeping between class members, regarding the payment of statutory vacation and public holiday pay.

UA 58: Question to be answered only to extent Medcan relies on any differences in systems or procedures between class members, regarding the payment of statutory vacation and public holiday pay.

### **Endorsement on refusals**

R 12: Whether class members were underpaid is a legal question. Factual answers to that question were provided under that refusal. Refusal is proper.

R 13: It is a factual question as to whether the payroll issue was addressed for employees other than those paid back two years and is relevant to common issue 2 concerning breach. Refusal to be answered.

R 14: The plaintiffs are entitled to a template spreadsheet used to calculate the remedy payment. The formula is common and is relevant to the issue of breach. Refusal to be answered on a template basis.

R 15: Whether Medcan could have done a calculation back to 2005 is speculative. Even if such information could be relevant to a claim for aggregate damages, no such claim was certified and that decision was not appealed to the Divisional Court. Refusal is proper.

R 16: No redactions are appropriate if the documents relate to class members since class counsel is subject to the deemed undertaking and is counsel to the class members. If any documents arise from individuals who opted out of the class action, redactions of personal information is appropriate with only names to be produced.

R 17: Refusal is proper. Defendants will be providing answers at UA9 on groups of people not affected.

R 27: There is no common issue that class members were underpaid for bonuses. The refusal is proper.

R. 28: See R 27

R 29, 30, 31: See R 17

R 34: Refusal to be answered. It seeks the defendants' positions on the common issue of the term of contract and is relevant to a possible common determination of the limitation issue.

R 35: Refusal to be answered. It seeks the defendants' positions on the common issue of the terms of the contract.

R 37: Refusal is not to be answered. The answer is moot because breach is acknowledged and the defendants shall advise which groups are not affected. How the breach occurred is not a live issue.

R 44: Refusal to be answered – see R 34. Terms set out in Medcan policies relate to the common issue of the terms of the contract, as well as to issues of entitlement to variable compensation and the limitation period issue.

R 45: Refusal is proper. How an employee is paid is not a common issue.

R 46: Refusal is proper. There is no common issue of fiduciary duty or whether the contract was performed in good faith. There is no claim for punitive damages as it was abandoned on appeal.

R 48: Refusal to be answered. The plaintiffs are entitled to have the defendants' best information as to the amounts paid back to determine whether the class members were made whole for that time period.

R 49: See R 48

R 52-53: There is no common issue for breach of the duty of good faith or breach of fiduciary duty. Refusals are proper. Even if Rinzema was aware of underpayment, it would not be relevant to the breach of contract issue which is a certified common issue.

R 54: Refusal is proper. The claim is for rights under the *ESA* and not for greater rights.

R 55, 56, 57: Refusal to be answered for both public holiday and statutory vacation pay— see UA 10.

R 58, 59 and 61: Refusals are proper. There is no common issue that Medcan failed to implement the changes to statutory vacation pay.

R 60: Refusal is proper. See R 58, 59 and 61 above. The question still seeks an answer to whether Medcan properly implemented statutory changes to vacation pay, which is not a certified common issue.

R 69: Refusal is proper. See R 54

R 70-71: Refusals to be answered. The terms of the contract are a certified common issue and the plaintiffs are entitled to the defendants' position on whether they accept that there is a duty of good faith at common law. Medcan's response as ordered is without prejudice to Medcan's position that punitive damages cannot be raised as at a common issues trial.

[6] R 72: Refusal is proper. See R 54

### **Order and Costs**

[7] The parties agreed prior to the hearing that partial indemnity costs would be \$5,000 on full success, with the court having the discretion to adjust the amount (or order no costs) based on the success of the parties. The parties had almost equal success and as such I order no costs.

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GLUSTEIN J.

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and CRAIG SHEPHERD

Defendants

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**ENDORSEMENT**

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Glustein J.

**Released:** May 14, 2025