CITATION: Aps v. Flight Centre Travel Group, 2020 ONSC 6779
COURT FILE NO.: CV-19-614755-CP
DATE: 20201112

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

STEPHEN APS

Plaintiff

and

FLIGHT CENTRE TRAVEL GROUP (CANADA) INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Charles Sinclair, Nadine Blum, Joshua Mandryk and Melanie Anderson* for the Plaintiff

Randy Sutton and Ted Brook for the Defendant

HEARD: November 9, 2020

Certification and Settlement Approval

[1] This proposed class action about unpaid overtime has settled pre-certification for $7 million. The defendant employer has also agreed to implement a new system for tracking the employees' actual hours of work rather than just their scheduled hours.

[2] The plaintiff asks that that the action be certified for settlement purposes and that the proposed settlement and related matters, such as legal fees, be approved.

[3] It is widely recognized that the approval of class action settlements remains "the most difficult and problematic area of class action practice."[1] And it has often been said that class action settlements should be "viewed with some suspicion" and "seriously scrutinized by judges."[2] All the more so, with an early-stage settlement – one that, as here, was settled before certification.

[4] The core problem is that the players at the class action settlement table have interests and incentives that are not always aligned with the best interests of the class. Consider the impact of the contingency fee. I am in favour of the contingency fee in class action litigation.[3] However, as I noted in *Clegg*,[4] this fee structure creates a significant conflict of interest for class counsel in settlement scenarios. Should class counsel continue to press for more compensation for class members even if it means losing at trial and not getting paid at all, or settle much sooner for a sub-optimal amount but pocket a guaranteed contingency? An American class action study has concluded that class action attorneys were often more interested "in finding a settlement price that defendants would agree to – rather than finding out … how likely it was that the defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement against that background."[5]

[5] A related problem is the growing practice of paying an honorarium to the representative plaintiff. If the representative plaintiff is tempted with the possibility of a substantial honorarium, their core obligation to act in the best interests of the class and advise counsel accordingly may be compromised.

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[1] Watson, *"Settlement Approval – The Most Difficult and Problematic Area of Class Action Practice*," (Unpublished paper presented at the National Judicial Institute's Conference on Class Actions, Toronto, April 9, 2008).

[2] *Dobbs v. Sun Life Assurance*, (1998) 40 O.R. (3d) 429 (Gen. Div.) at para. 30.

[3] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686. Also see *Middlemiss v. Penn West Petroleum*, 2016 ONSC 3537 at para. 19: "It is only through a robust contingency fee system that class counsel will be appropriately rewarded for the wins and losses over many files and many years of litigation and that the class action will continue to remain viable as a meaningful vehicle for access to justice."

[4] *Clegg v. HMQ Ontario*, 2016 ONSC 2662 at para. 26.

[5] Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, (Rand Report, 2000) at 424.

[6] In too many cases, class action settlements are often "at the expense of the group that is not at the table: the absent class."[6] Hence, s. 29(2) of the *Class Proceedings Act*[7] provides that every class action settlement requires court approval before it can take effect. Judges must be satisfied that the settlement being proposed is fair and reasonable and in the best interests of the class.[8] An important component of this analysis is evidence that the settlement falls within a zone of reasonableness.[9]

[7] My initial reaction to the proposed settlement in this case was a healthy skepticism. I advised class counsel in a conference call that I would be hard-pressed to approve a $7 million settlement amount when the original claim for unpaid overtime was $100 million and covered a class period of more than 10 years with some 10,000 class members.

[8] I urged class counsel to file a motion record that could explain in some detail why, in their view, a relatively modest $7 million settlement was fair and reasonable and in the best interests of the class. I was particularly interested in evidence that the average class member would be content with a settlement that could generate individual payments in the range of $1500 for what for many may have been years of unpaid overtime. I was also concerned about the $10,000 honorarium that was being requested for the representative plaintiff.

[9] To their credit, class counsel took my concerns to heart and filed an expanded motion record containing detailed analyses and dozens of affidavits that, in the end, answered all my questions.

[10] For the reasons that follow, I am now satisfied that this matter should be certified for settlement purposes and that the proposed settlement and related matters should be approved.

Background

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[6] Koniak, *"How like a Winter – The Plight of Absent Class Members Denied Adequate Representation"* (2004) 79 Notre Dame L. Rev. 1787 at 1797.

[7] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[8] *Dobbs v. Sun Life Assurance*, (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.).

[9] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70.

[11] The plaintiff, Stephen Aps, worked as a travel consultant for the defendant Flight Centre Travel Group for about nine months, from April 2014 to January 2015. Four years later, in February 2019, he commenced a proposed class action on behalf of:

> All current or former Travel Consultants employed by Flight Centre Travel Group (Canada) Inc. in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland, for the period from December 2008 to the date of certification. …

[12] The defendant Flight Centre Travel Group is the largest brick and mortar travel retailer in Canada. In 2019 when the action was commenced, it had about 150 locations in seven provinces, Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland.

[13] The plaintiff claims that the defendant failed to record the actual hours that were worked and required or permitted class members to work uncompensated overtime. The claim is based on the employment standards legislation in each of the seven provinces and alleges breach of contract, unjust enrichment and negligence.

[14] The parties wisely agreed to mediate the matter. The two-day mediation was successful and resulted in the proposed settlement agreement. Before I turn to this settlement, I must first determine if the proposed class action can be certified for settlement purposes.

Certification for settlement purposes

[15] Like many other proposed class actions for unpaid overtime that involve a common employment agreement, the requirements set out in s. 5(1) of the *Class Proceedings Act*[10] are easily satisfied. The pleadings disclose causes of action in contract, unjust enrichment and negligence; there is an identifiable class; the proposed common issues (primarily breach of contract) can be decided on a class-wide basis; a class action is the preferable procedure for their resolution; and Mr. Aps would be a suitable representative plaintiff who would fairly and adequately represent the interests of the class.

[16] The proposed class action is certified for settlement purposes.

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[10] *Supra*, note 7.

The settlement agreement

[17] As noted, the defendant has agreed, among other things, to pay $7 million in damages and implement a new system for tracking the hours actually worked and not just scheduled.

[18] The defendant has also agreed to a simple and fair-minded distribution protocol. Class members will not be required to prove their overtime hours. Instead, class member entitlements will be determined using a formula that takes into account the length of their employment (both before and after the applicable limitation period) and the province in which they worked.

[19] Compensation is adjusted to discount pre-limitation period work by 75% relative to post-limitation period work. Compensation is also adjusted to reflect the different overtime thresholds in the seven provinces – for example, 40 hours in B.C., Saskatchewan, Newfoundland and Manitoba; 44 hours in Ontario and Alberta; and 48 hours in Nova Scotia. The formula also includes an appropriate discount for class members in B.C. that worked under the "commissioned sales person" exemption as defined in that province's employment standards statute.[11]

[20] The proposed claim process is straightforward. The class member submits a claim form that sets out their employment start and stop dates and the province in which they were employed. The agreed-to formula is then used to calculate the payout. The amounts paid pursuant to this settlement are, of course, income and the claims administrator will deduct/remit employee and employer portions of CPP, EI and income tax, and prepare the T4A forms as needed.

[21] The payout for each class member will depend on the overall take-up. The current tally of eligible class members is just under 5000. The funds available for distribution to class member claimants, after legal and administrative costs, will be about $4.6 million. Class counsel believe, based on their previous experience in similar cases, that the take-up in this case will be between 45 and 65 per cent. If so, the average payout will be in the range of $1426 to $2060. If the take-up is higher, say 70 per cent, the payout will be $1320.

[22] Class counsel has provided the following chart:

Recovery on $4,620,000 Net Settlement

[11] *Employment Standards Act*, RSBC 1996, c 113, s. 37.14(1).

	45% take-up	65% take-up	70.25% take-up
Claimant Pool Size	2,242	3,238	3,500
Average Gross Compensation per Class Member	$2,060	$1,426	$1,320

[23] The obvious advantage of the proposed distribution protocol is the simplicity of the claims process and the formula-based payout calculation. Costly individual assessments – that would normally be needed to decide discoverability and limitation issues and appropriate payout amounts – will be avoided.

[24] It should also be noted that the defendant's commitment to implement the new time-keeping system is a significant non-monetary benefit – both for current and future Flight Centre employees. This is a noteworthy achievement in behavioural modification.

[25] My initial concern about this settlement, however, was not the sensible distribution protocol or the obvious benefit of the new time-keeping system but the $7 million settlement amount.

Settlement approval

[26] As already noted, I was initially skeptical about the reasonableness of the $7 million settlement. Having reviewed the detailed motion record, I am now satisfied that the $7 million settlement amount is fair and reasonable and should be approved.

[27] I say this for four reasons: (i) the actual size of the claim is much smaller than initially pleaded; (ii) the amount of the settlement compares favorably with other overtime settlements and falls within the so-called 'zone of reasonableness'; (iii) there is a major litigation risk that was truly unforeseen when the action was commenced, namely the impact of the Covid-19 pandemic on the defendant's financial viability; and (iv) the impressive level of class member support.

[28] I will explain each of these points in turn.

[29] ***Size of claim.*** Based on the data that was provided by the defendant for the mediation, class counsel concluded that a fair-minded damages claim was at most in the range of $15 million and not $100 million as pleaded. Also, their assumption that class members worked on average about 50 hours per week proved to be too high. This was readjusted to a more realistic 45 to 50 hours per week.

[30] Using the average of 45 hours worked per week, and discounting for limitation periods and the B.C. "commissioned sales person" exemption, the damages sustained were just over $6.7 million and thus less than the $7 million proposed settlement. Using a mid-point estimate of 47.5 hours per week, and again applying the same discounts, the damages sustained were just over $15 million. The adjusted class size is 4982, just under half of the 10,000 class-member size that was initially pleaded.

[31] The $7 million settlement amount therefore either exceeds the actual loss or is about one-half of the actual loss. If the former, it is more than reasonable; and if the latter, given the "bird in the hand" reminder, the $7 million settlement is not outside the settlement norm.

[32] ***Comparable settlements.*** The overall settlement and individual payout amounts compare favorably to similar overtime settlements in both Canada and the U.S. In *Eklund v. GoodLife Fitness Centres,*[12] this court approved an $8.5 million settlement that resulted in average individual payouts (before legal and administrative costs and assuming full take-up) of $386. Here, the average gross payout amount (before legal and administrative costs and assuming full take-up) will be $1405 per class member.

[33] The comparable American overtime settlement involved Liberty Travel, a subsidiary of the defendant Flight Centre.[13] The *Liberty Travel* class action settled for $3 million (US) with $1.93 million (US) available for distribution. There were 1,283 class members. The average class member payout of $1,504 is higher than the proposed payout herein. However, *Liberty Travel* did not involve limitation issues and presumptively time-barred claims and the overtime threshold was a uniform 40 hours per week which is lower than in most of the relevant Canadian jurisdictions.

[34] I am therefore satisfied that the proposed distribution amounts and, indeed, the overall $7 million settlement amount falls within a zone of reasonableness.

[35] ***Risks of continued litigation.*** As in every settlement, class counsel referred to the usual risks of continuing the litigation such as the added time and expense and the possibility that the case could be lost when tried on the merits. But these are familiar risks that are probably foreseeable the moment any lawsuit is commenced. The one risk that was truly unforeseeable when this action began was the Covid-19 pandemic and its global impact, both in human and economic terms.

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[12] *Eklund v. GoodLife Fitness Centres Inc*., 2018 ONSC 4146.

[13] *Bredbenner v. Liberty Travel*, 2011 US Dist Lexis 38663 (NJ Dist Ct).

[36] The economic impact was particularly devastating in the travel industry. At the end of September 2020, the defendant permanently terminated the employment of the majority of its Canadian employees. As of October 2020, only 14 of the original 150 Canadian locations remained open. Given the continuing pandemic, class counsel were understandably concerned that even if the plaintiff prevailed after the trial and related appeals, there was a real risk that Flight Centre would not be able to satisfy the judgment.

[37] This was a genuine and significant risk in continuing the litigation.

[38] ***Impressive class member support.*** The settlement is obviously supported by the representative plaintiff. This is not only expected but required. Here, however, in addition to Mr. Aps support, some 65 class members filed affidavits and another 45 sent emails to voice their support for the settlement and urge judicial approval – even though, as set out in the notice program, the individual net payout amounts could be as low as $1320. The class members said they were particularly pleased with the straightforward claims process, the payment formula and the immediacy of the payments.

[39] Only four class members objected, two of whom remain in the defendant's employ. The objections, mainly about the payout amount, are no doubt genuine but they cannot undermine what for the vast majority of class members is a good settlement.

[40] ***Conclusion.*** For all of these reasons, I am satisfied that the proposed $7 million settlement is fair and reasonable and in the best interests of the class. I note again that an important non-monetary objective of the class action – the defendant's commitment to implement a proper time-keeping system – has also been achieved.

[41] The proposed settlement is approved.

Honorarium approval

[42] Class counsel ask for court approval of their request that the representative plaintiff be paid a $10,000 honorarium.

[43] Normally, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. However, where the representative plaintiff can demonstrate a level of involvement and effort that goes beyond what is normally expected and is truly extraordinary, or where there is evidence that they were financially harmed because they agreed to be the class representative, the payment of an honorarium may well be justified.

[44] Here, there is evidence of the latter – that Mr. Aps paid a personal price in job opportunities and foregone employment income simply because his was the lead name in this proposed class action. I refer in particular to the uncontroverted evidence that Mr. Aps set out in his affidavit:

> When the class action was launched in February 2019, I was unemployed and looking for work. I spoke with a recruiter in the travel industry in or around June 2019 who told me that I would not be hired in the industry because I was the representative plaintiff in this action. Although I was not explicitly told by employers that they would not hire me for this reason, I was unable to secure work in the travel industry.
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> I believe that being the representative plaintiff in this action has impacted my ability to get work in other industries as well. In 2019, I applied for more than 85 different jobs and I interviewed at more than twenty of those employers. However, I was unable to secure permanent employment. Prior to this time, I never experienced similar difficulty securing employment at any point during my career; in fact, given my experience I had always felt that I was sought-after, and I had previously been contacted by recruiters looking to hire me into different roles in the travel industry. I believe that this change was because employers found out about my involvement in this class action against my former employer given the significant media attention it received, and then did not want to employ me.
>
> For example, I was hired at an insurance company in or around June 2019. My employment was terminated after three weeks, during the probationary period. After my employment was terminated, two different employees who remained at that company told me the company had found out about my involvement in this class action and that is why they let me go.
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> In or around December 9, 2019, I secured temporary work with Canada Post as a Mail Service Carrier delivering parcels to offices in downtown Toronto. I am still with Canada Post, although now I work as a Postal Clerk handling and sorting mail and doing other manual tasks at the plant in Mississauga. These positions are outside the scope of work that I had experience in, and I do not make as much money as I was making in the travel industry.

[45] It appears that certain players in the travel and insurance industry decided to punish the representative plaintiff for simply exercising his legal rights. I hasten to point out that there is no suggestion that the defendant Flight Centre was in any way involved in this petty and retaliatory behaviour.

[46] In any event, for Mr. Aps the financial impact in terms of lost job opportunities and income was significant. The requested $10,000 honorarium does not make him whole -far from it - but it is certainly justified and is easily approved.

(4) Legal fees approval

[47] Based on the retainer agreements, class counsel are entitled to a 25 per cent contingency fee plus disbursements and taxes. As discussed in *Cannon*,[14] and as further refined in *Brown*,[15] this contingency fee amount is presumptively valid on the facts herein and should be approved.

[48] I therefore have no difficulty approving class counsels' fees request in the amount of $1.75 million and their disbursements in the amount of $34,589.07 - plus applicable taxes.

Disposition

[49] The proposed class action is certified for settlement purposes. The $7 million settlement amount and distribution protocol are approved. As are the requested legal fees and disbursements and the $10,000 honorarium for the representative plaintiff.

[50] Orders to go as per the draft orders that were signed by me today.

[51] My compliments again to counsel on both sides for achieving a fair-minded settlement in an expeditious fashion.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

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[14] *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[15] *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

Date: November 12, 2020