CITATION: Rosen v. BMO Nesbitt Burns Inc. 2013 ONSC 7762
DIVISIONAL COURT FILE NO.: 381/13
COURT FILE NO.: CV-10-396685
DATE: 20131217

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Yegal Rosen Plaintiff (Responding Party)	*Eli Karp, Jonathan Ptak & Jody Brown*, for the Plaintiff (Responding Party)
– and –	
BMO Nesbitt Burns Inc. Defendant (Moving Party)	*Peter H. Griffin & Monique Jilesen*, for the Defendant (Moving Party)
	HEARD: November 28, 2013

H. SACHS J.:

Overview

[1] The Defendant, BMO Nesbitt Burns Inc., moves for leave to appeal the decision of Belobaba J., dated August 13, 2013, certifying this proceeding as a class action: see *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, 9 C.C.E.L. (4th) 315. The motion judge certified a claim by the representative plaintiff (the "Plaintiff") that alleges the Defendant failed to provide investment advisors with overtime pay required under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*").

[2] The Defendant does not pay its investment advisors overtime because their compensation is based on commissions earned, not hours worked. However, under the *ESA*, even commission-based employees are entitled to overtime. The Defendant acknowledges this, but argues that investment advisors are, nonetheless, exempt from the overtime provisions of the *ESA*, based on two exemptions in the legislation: (1) their work is supervisory or managerial in character (the "managerial" exemption); and (2) their employment contract provides a greater benefit than the *ESA*'s overtime protection (the "greater benefit" exemption).

[3] According to the Defendant, the decision of the motion judge conflicts directly with the decision of the Divisional Court, in *Brown v. Canadian Bank of Commerce*, 2013 ONSC 1284, 34 C.P.C. (7th) 270 (Div. Ct.), aff'g 2012 ONSC 2377. The key question in each certification motion was whether eligibility of investment advisors for overtime pay could be determined on a common basis.

[4] The Defendant also asserts there is good reason to doubt the correctness of the motion judge's decision.

[5] For the reasons that follow, I would dismiss the motion for leave to appeal.

The Test for Leave to Appeal

[6] The test for leave to appeal is set out in rule 62.02(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides as follows:

> (4) Leave to appeal shall not be granted unless,
>
> > (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
> >
> > (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

Is there good reason to doubt the correctness of the decision?

[7] This case is not the first class action overtime case in the banking sector. Two others have been certified: see *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 326; and, *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 O.R. (3d) 501, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 379. Both were "off the clock" cases in which the central issue was whether the effect of policies, practices, or systems of the banks has been to routinely deny class members overtime compensation. This case and *Brown* are referred to as "misclassification cases" in which the central issue is whether the class members have been wrongly classified by their employers as ineligible for overtime.

[8] The Ontario Court of Appeal's *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745, is the leading decision on the principles applicable to certifying a common issue in a misclassification class action case.

[9] In *McCracken*, at para. 103, Winkler C.J.O. reviewed the principles concerning commonality that need to be satisfied—the resolution of a common issue will avoid duplication of fact-finding or legal analysis; all of the class members must benefit from the successful

prosecution of the action, although not necessarily to the same extent; "a common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant;" and "common issues should not be framed in overly broad terms."

[10] Winkler C.J.O. then went on to state as follows, at para. 104:

> For these legal principles to be satisfied in the context of a proposed common issue of misclassification, the plaintiff's evidence must establish some basis in fact to find that the job functions and duties of class members are sufficiently similar that the misclassification element of the claim against CN could be resolved without considering the individual circumstances of the class members.

[11] In *McCracken*, and, in *Brown*, the courts found that this evidentiary hurdle had not been met. In the case at bar, the motion judge found that it had. He did so for the following reasons:

(i) Unlike in *Brown*, all of the investment advisors involved in managerial or supervisory work as conventionally understood have been excluded from the class.

(ii) While their compensation levels, client bases, and individual routines may vary, they all had the same core functions—business development, research and reviewing investment products, and managing clients' investment portfolios. The evidence of this commonality in core job duties was contained in the affidavits filed by the Plaintiff's affiants and, as noted by the motion judge, at para. 53 of his reasons, "the defendant's own affiants have sworn to identical duties in many cases, with cut-and-paste verbatim descriptions of their duties."

(iii) The rationale advanced by the Defendant for applying the managerial exemption to investment advisors was the high degree of flexibility and independence given to *all* investment advisors to develop and manage their client base. With respect to the Associate investment advisors and the investment advisor trainees, the motion judge noted there was no serious suggestion that these members of the class fell within the managerial exemption.

[12] Based upon this evidence, the motion judge concluded that given the commonality in the job functions and the Defendant's position that all investment advisors were not eligible for overtime compensation for the same reason, the question of whether the managerial exemption applied could be posed as a common issue.

[13] According to the Defendant, the motion judge only considered the "supervisory" aspect of the managerial exemption, not the "managerial" aspect of the exemption. I disagree. The motion judge, at para. 47 of his reasons, is clear that the use of the word "managerial" is understood by most judges and legal commentators to suggest the following:

> (a) the supervision of other employees; (b) having the power to hire, fire and/or discipline other employees; (c) having the ability to make decisions on behalf of the company; (d) exercising discretion and independent judgment in management affairs; and (e) performing a leadership or administrative role as opposed to an operational role. To qualify as a manager or supervisor, the preponderance of one's work must be managerial or supervisory in nature.

[14] The motion judge, at para. 50, found that all of the investment advisors who were "involved in management or supervisory work as conventionally understood, i.e. branch managers and team leaders, have been excluded from the class definition." In other words, the investment advisors who remained in the class did not have a preponderance of their work that included any of the functions described in paragraph 47; functions that go beyond a consideration of the "supervisory" aspect of the managerial exemption.

[15] The Defendant also submitted that the motion judge erred in failing to note the extent to which there was a great deal of variation in the actual degree of autonomy and flexibility that the investment advisors in the class had over their hours of work and where and how that work was done.

[16] It is true the Defendant provided evidence about the differences between the work done by individual investment advisors. However, as detailed by the motion judge, there was a great deal of evidence about the common nature of the duties and responsibilities of all investment advisors. Further, there was evidence that it was the common nature of these duties and responsibilities that the Defendant was relying upon in advancing the managerial exemption. As noted by the motion judge, the threshold for certifying a common issue is "some basis in fact" that the duties and responsibilities of class members were sufficiently similar such that the issues concerning their misclassification claims could be decided on a common basis. On the record before him, this threshold was met when it came to the managerial exemption.

[17] The same is true of the "greater benefit" exemption. The argument of the Defendant with respect to this exemption is, as put by the Defendant's most senior witness, Richard Mills, "[t]he equal opportunity for investment advisors to earn a high income and long term financial benefits, combined with flexibility and independence in schedules, is viewed by investment advisors as a greater benefit than overtime compensation." The argument of the Plaintiff, on the other hand, is that for a benefit to qualify as a "greater benefit" under the exemption, it must directly relate to the same type of benefit as the overtime benefit provided for in the *ESA* and the benefit the Defendant relies on for the exemption does not pass this hurdle. The question of what constitutes a "greater benefit" is clearly an issue that can be decided on a common basis.

[18] Furthermore, if the Defendant succeeds on this aspect of the "greater benefit" exemption issue, the question then becomes whether the "equal opportunity provided to all investment advisors" is a "greater benefit" than the one provided by the overtime provisions of the *ESA*. Since the evidentiary record supports the fact that no members of the class received overtime pay, but all members of the class were offered an "equal opportunity" to enjoy what the Defendant submits is a "greater benefit," the issue is one that the motion judge correctly certified as a common issue.

[19] The Defendant also submitted that the motion judge misapprehended or ignored the evidence in the Defendant's records with respect to which investment advisors worked on "teams". The word "team" is used in the exclusionary part of the class definition. According to the Defendant, the answers to undertakings showed that the Defendant does not keep complete records of who is on a "team" or who is a "team leader".

[20] In his reasons, at para. 40, the motion judge reviewed the evidence as to the Defendant's usage of the word "team" and the fact that it is a standardized term on the website profiles for investment advisors. The fact that complete records may not exist as to who was on a team at certain times does not mean the class is not identifiable. Every class member does not have to be identified at the time of certification. Often, class members self-identify. What is required is the existence of stated, objective criteria that is rationally connected to the common issues and that any particular person's claim for class membership be determinable by the criteria: see *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, at paras. 57, 90.

Is there a conflicting decision?

[21] The parties made extensive submissions to the motion judge about the differences between the facts in *Brown* and the facts in this case. The motion judge noted and applied the same legal principles to the facts before him as the motion judge and the Divisional Court did to the facts in *Brown.* Further, the motion judge carefully distinguished between the facts in this case and the facts in *Brown.* The most notable differences between the two cases are as follows:

(i) Unlike in *Brown,* there is no element of discretion in the Defendant's overtime policy.

(ii) Unlike in *Brown,* no class members exercised managerial functions as that term is traditionally understood.

(iii) Unlike in *Brown*, there was extensive evidence, both from the Plaintiff and the Defendant, as to the common nature of the duties and responsibilities of all the investment advisors in the class.

(iv) Unlike in *Brown,* the Defendant treated overtime compensation for investment advisors as an all or nothing proposition. According to the Defendant's affiant Richard Mills, at para. 52 of his Affidavit, all investment advisors "decide independently, based on their personal career goals and financial objectives, how best to structure their business. The career of an investment advisor is built upon personal choices." In effect, all the investment advisors in the class function as independent entrepreneurs within the corporate environment. According to the Defendant's Affidavit of Jamie Loughery, at para. 47, "[o]vertime compensation is inconsistent with performance-based renumeration and the flexibility and independence given" to all "investment advisors to develop and manage their client base in a manner that allows them to

> move up the Grid to a level that satisfies their personal goals and financial objectives."

[22] Having noted these differences, the motion judge exercised his discretion, to which considerable deference is owed, and reached a different result.

[23] If two judges apply the same legal principles to a similar type of case and in the exercise of their discretion reach different results, that is not a conflicting decision within the meaning of rule 62.02(4)(a). In *Parker v. Pfizer Canada Inc.*, 2012 ONSC 6604, Swinton J. stated, at para. 7, "[a] decision is not conflicting within the meaning of the rule unless judges have applied different legal principles."

Conclusion

[24] For these reasons, the motion for leave to appeal is denied. If the parties cannot agree on the question of costs, written submissions may be made to me within 21 days of the release of these reasons.

H. SACHS J.

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REASONS FOR JUDGMENT

H. SACHS J.

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