ONTARIO

SUPERIOR COURT OF JUSTICE

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Total No. of Pages: Nine
Date: July 25, 2016

RE: YAGEL ROSEN v. BMO NESBITT BURNS INC.
DOCKET: CV-10-396-396685CP

Please contact Gladys Gabbidon at (416) 327-5052 if you do not receive all pages.

Thank you.

CITATION: Rosen v. BMO Nesbitt Burns Inc., 2016 ONSC 4752
COURT FILE NO.: CV- 10-396685CP
DATE: 20160725

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding under the Class Proceedings Act, 1992

BETWEEN:	)	
	)	
Yegal Rosen	)	*Jonathan Ptak, Jody Brown and Eli Karp* for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
	)	*Peter Griffin and Monique Jilesen* for the Defendant
BMO Nesbitt Burns Inc.	)	
	)	
Defendant	)	
	)	
	)	**HEARD:** July 21, 2016

SETTLEMENT APPROVAL

Justice Edward P. Belobaba:

[1] This misclassification class action claiming unpaid overtime for Nesbitt investment advisors has settled. The plaintiff now seeks judicial approval of the settlement, the legal fees for class counsel and an honorarium for the representative plaintiff.

[2] For the reasons set out below, all of the requests are approved. The settlement amount, the legal fees and the honorarium are fair and reasonable and the overall settlement is in the best interests of the class.

Background

[3] This action was commenced in 2010 and was certified as a class proceeding in 2013. The plaintiff says this is the first and so far only misclassification overtime class action in Canada to be certified on a contested basis[1] and upheld on appeal.[2] There are about 1800 class members. The class period, as amended, covers some 14 years, from January, 2002 to June, 2016.

[4] The parties have settled after six and a half years of litigation, the production of more than two million documents and extensive cross-examinations on the affidavits filed for certification. The trial was to begin in April, 2017.

[5] The settlement was achieved after two days of mediation in January, 2016 before the Hon. Warren Winkler. A term sheet was signed a week later and the settlement agreement was executed on April 22, 2016.

The settlement

[6] The defendant has agreed to pay $12 million on a non-reversionary basis for class member compensation and a further $500,000 to cover the costs of administration. The administrator will distribute the net settlement amount on a confidential and non-contested basis. Settlement class members will not be required to prove any overtime hours to establish entitlement. Nesbitt cannot challenge any class member's entitlement. All that a class member has to do to receive an "equal share" distribution is to confirm his or her address to the administrator.

[7] After deductions for the legal fees, the requested honorarium for the representative plaintiff and the ten per cent levy to the Class Proceedings Fund, the net amount payable to the class members is about $7.8 million.

[8] The approximately 1800 class members have been divided into two groups: 705 trainees (the "rookie" IAs who completed the Nesbitt Trainee Program and the six month period of close supervision) and 1136 non-trainees (the more senior IAs who were hired laterally into Nesbitt generally with existing clients or who completed the training program prior to the start of the class period in 2002).

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[1] *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2149.

[2] *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 7762.

[9] The $12 million settlement fund has been allocated as follows: $10 million to the trainees and $2 million to the non-trainees, or on a net basis, about $6.5 million to the trainees, and about $1.3 million to the non-trainees. The allocation makes sense because the non-trainees, given their duties and responsibilities, are more likely to fall within the "managerial" or "greater benefit" exemptions of the *Employment Standards Act.*[3]

[10] As already noted, the $12 million settlement, or about $7.8 million net to class members, is non-reversionary and must be paid out in its entirety. The actual amount that each class member will receive will depend on the take-up rate. For the trainee group, the "equal share" payment will range from about $10,000 per class member if the take-up is 100 per cent, to about $20,000 per person if the take-up is 50 per cent. For the non-trainee group, the payments will range from about $700 if the take-up is 100 per cent to $1400 if the take-up is fifty per cent. Class counsel anticipates that the overall take-up rate will be around 75 per cent.

[11] The plaintiff asks that the settlement be approved.

Settlement Approval

[12] Section 29(2) of the *Class Proceedings Act*,[4] provides that a settlement of a class proceeding is not binding unless approved by the court. The court must be satisfied that the settlement is fair, reasonable, and in the best interests of the class.[5] An important component of this analysis is evidence that the settlement falls within a zone of reasonableness.[6]

[13] In my experience, class counsel generally spend too much time in their affidavit material and factum explaining why they were wise to settle and why their judgment about the settlement amount should accepted. They set out a litany of reasons that I have described as "boiler plate"[7] – their vast litigation experience, the always "hard fought" negotiations and the many risks of further litigation. The boiler plate, in essence, comes down to this: *"We're experienced class counsel; we negotiated the best possible deal for*

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[3] *Employment Standards Act, 2000*, S.O. 2000, c. 41.

[4] *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA").

[5] *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57.

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

[7] *Sheridan Chevrolet v. Furakawa Electric*, 2016 ONSC 729, at para. 10.

the class members; trust us."[8] These self-serving assertions, although well-intentioned, are not helpful. Nor are they very persuasive.

[14] The problem is the contingency fee. It is well known that I favour the contingency fee in class action litigation.[9] But, as I noted in *Clegg*,[10] the contingency fee creates a significant dilemma, indeed a 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 for a sub-optimal amount but pocket a guaranteed contingency? A major American class action study published in 2000 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."[11]

[15] Boiler-plate submissions about, say, the risks of further litigation, become credible only if the settlement is achieved in the later stages of litigation.[12] The closer class counsel is to trial the more he or she will know about the risks and rewards of further litigation. Put simply, in late stage settlements, the court is more prepared to accept the "trust us" boiler-plate than in early stage settlements.

[16] Here, class counsel's knowledge base about the risks of further litigation was detailed and significant. I agree that this settlement was akin to a late stage settlement – the parties have been engaged in more than six years of litigation; just over 2 million documents have been produced; and more than 20 potential witnesses including junior and senior Nesbitt employees at various offices across the province, were cross-

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[8] *Sheridan Chevrolet, supra,* note 7, at para. 11. Also see *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532, at para. 11 *et seq* and *Clegg v. HMQ Ontario*, 2016 ONSC 2662 at para. 29 *et seq.*

[9] *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."

[10] *Clegg, supra,* note 8.

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

[12] As I stated in *Clegg, supra,* note 8, at para. 26: "Most class action settlements materialize just before or just after certification. In most of the cases, documents have not been exchanged, discoveries have not taken place and class counsels' information or knowledge about the risks and rewards of going further is, to say the least, at a minimum."

examined. But having said this, even if the so-called boiler-plate in this case is more credible because of the late stage of settlement, it only explains why the parties settled, not why they settled for $12 million.

[17] In other words, even in a late stage settlement where class counsel's knowledge base is at or near its highest and the boiler-plate about litigation risk is more believable, more is needed. Class counsel must still present hard evidence showing why the settlement amount falls within a range or zone of reasonableness.

[18] Here class counsel satisfied the "zone of reasonableness requirement" by presenting data from comparable U.S. overtime settlements in the financial services sector. Similar data is not available in Canada because this is the first overtime misclassification settlement. In the U.S., however, there have been numerous class action settlements for misclassified financial services employees. Class counsel reviewed the U.S. settlement amounts[13] and calculated the "per month" overtime compensation.

[19] The compensation in the comparable U.S. settlements ranges from $28 to $179 per month of eligible employment on a net basis. The "per month" compensation that flows out of the $12 million settlement herein will range from about $64 (if the take-up is 100 per cent) to about $130 per month (if the take-up is 50 per cent.) Given the American comparators, the projected range herein of $64 to $130 per month of eligible employment on a net basis falls squarely within the zone of reasonableness.

[20] Here, of course, class members will receive an "equal share" payout that does not depend on months worked and thus does not require a costly claims process, individual adjudications and related appeals. This alone provides a significant benefit to every class member. As I noted in *Fulawka,* "The overall benefit to class members of an immediate and substantial payout, without further delay or uncertainty, is significant and justifies judicial approval."[14]

[21] In sum, I am satisfied that he $12 million settlement falls within a zone of reasonableness and is in the best interests of the class. The settlement is approved.

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[13] Settlements from California were excluded in these calculations because certain features in the state's labour legislation (acknowledged in the case law) make direct comparisons impracticable.

[14] *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576, at para. 13.

Legal Fees Approval

[22] Class counsel is seeking a legal fee of $2,736,138 plus taxes and disbursements. The fee accords with the retainer agreement and represents a 25 per cent contingency fee on the $12 million settlement minus $263,861 for the costs recovered on the certification and leave motions.

[23] I have no difficulty approving a 25 per cent contingency fee. In *Cannon*[15] I concluded that "contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable."[16] In my view, the multiplier approach that has judges assessing the "risk" assumed by class counsel by considering only the case that is before the court is unworkable and frankly nonsensical.[17] If the plaintiff has shown that the settlement is indeed within a zone of reasonableness I will continue to accord presumptive validity to contingent fee agreements – at least for settlement amounts up to $100 million, which in Canada covers the vast majority of class action settlements.[18]

[24] The legal fees are approved.

Honorarium approval

[25] Class counsel also asks that the representative plaintiff receive an honorarium of $10,000 to be paid out of the settlement fund. I am satisfied that such a payment should be made.

[26] Mr. Rosen assisted in the preparation of the case and contributed to the success of the action. He retained and instructed counsel. He helped with the statement of claim. He was cross-examined on his certification affidavit and in doing so was obliged to disclose personal financial and employment information. Mr. Rosen maintained contact and solicited input from other class members. In a word, he participated in every step of the six-year litigation including settlement discussions, the mediation and the finalization of the settlement agreement.

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[15] *Cannon, supra,* note 9.

[16] *Ibid.*, at para 8.

[17] See above note 9. No judge can reasonably assess the "risk" undertaken by class counsel by looking only at the case that is before the court.

[18] Exceptionally large class settlements (for me, anything over $100 million) will require more thought about the calculation of the appropriate contingency fee: see *Cannon, supra,* note 9, at para. 9.

[27] The amount of the honorarium requested is appropriate and in line with other cases in which honoraria have been granted.[19] The requested honorarium is approved.

Conclusion

[28] This overtime settlement is a first in Canada for investment advisors and has already achieved behaviour modification. Nesbitt has implemented an overtime policy for the six month period of close supervision for IA trainees.

[29] The settlement falls within a zone of reasonableness and is in the best interests of the class. The amount of the settlement, the requested legal fees and honorarium are fair and reasonable. The motions for approval are granted.

Belobaba J.

Released: July 25, 2016

[19] *Healey v. Lakeridge and Horgan v. Lakeridge*, 2014 ONSC 5209, at paras. 42 and 57; *Frank v. Caldwell*, 2014 ONSC 1484, at paras. 34-40; and *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 at para. 24.

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BETWEEN:

Yegal Rosen

Plaintiff

– and –

BMO Nesbitt Burns Inc.

Defendant

REASONS FOR SETTLEMENT APPROVAL

Justice Edward P. Belobaba

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