CITATION: Walmsley v. 2016169 Ontario Inc., 2020 ONSC 1416
COURT FILE NO.: CV-17-584523CP
DATE: 20200304

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KAREN WALMSLEY, Plaintiff

AND:

2016169 ONTARIO INC., 2170616 ONTARIO INC., and 2429131 ONTARIO INC., alone or together o/a Blyth Academy, Defendants

BEFORE: Justice Glustein

COUNSEL: *Stephen J. Moreau and Kaley Duff*, for the Plaintiffs

Elizabeth Bowker and Thanasi Lampropoulos, for the Defendants

HEARD: March 3, 2020

REASONS FOR DECISION

Nature of motion and overview

[1] The representative plaintiff, Karen Walmsley ("Walmsley"), brings this motion pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "*CPA*") for an order (along with ancillary relief) to:

(i) on consent, certify the action for the purposes of settlement,

(ii) on consent, approve the settlement of the action (the "Settlement") in accordance with the terms of the settlement agreement executed on November 27, 2019 (the "Settlement Agreement"),[1]

(iii) approve the payment of fees and disbursements for Class Counsel (Cavalluzzo LLP),

(iv) on consent, approve the payment of a $6,000 honorarium to Walmsley, and

[1] (including the proposed *cy-près* distribution of funds to the Workers' Action Centre as per the terms of the Settlement Agreement)

(v) on consent, approve the discontinuance of this action brought by those teachers who only taught online courses with the defendants.

[2] At the hearing, by endorsement, I granted the above relief sought and signed orders with reasons to follow. I now set out my reasons below.

Facts

(a) Background facts

[3] In February 2019, Walmsley brought a motion under s. 5 of the *CPA* to certify the claim as a class action against the defendants, whom I collectively refer to as Blyth.

[4] The defendants operated several business entities including "Blyth Academy", "Blyth Academy Downsview", and "Blyth Educational Travel" (who did not hire the teachers who are part of the proposed class, but is alleged to be a common employer).

[5] Walmsley alleged that she and a class of teachers (excluding those who worked exclusively as Principals or Vice-Principals) who worked or work at Blyth since 2002 and who taught or teaches at least one course are entitled to certain minimums (overtime pay, minimum wage, vacation pay, and public holiday and premium pay)[2] owed to employees under the *Employment Standards Act, 2000*, S.O. 2000, c. C. 41 (the "*ESA*").

[6] The Class consists of teachers who were hired by Blyth under contracts both as "independent contractors" and as "employees". Walmsley alleges that all members of the Class, whether they signed contracts with Blyth as "independent contractors" or as "employees" were and are employees of Blyth for the purposes of the *ESA*. At the certification hearing, the Class included teachers who only taught online courses, as well as teachers who taught at Blyth locations.

[7] The claim is based on (i) statutory entitlement under the *ESA*, (ii) breach of contract, (iii) negligence, and (iv) unjust enrichment.

[8] Walmsley also sought to certify a claim for punitive damages against Blyth, alleging that Blyth "was in a position of power over vulnerable employees and owed them a contractual duty of good faith and flagrantly breached its duties to the Class in order to increase its own profits."

[9] The central issue arising out of the certification motion was whether there was some basis in fact to certify a proposed common issue that those teachers who were hired by Blyth under

[2] I refer to these minimums as the "*ESA* Entitlements".

"independent contractor" contracts were misclassified and ought to have been classified as employees.

[10] The certification hearing was heard on February 20 and 21, 2019. Counsel later requested that I defer the release of my reasons to enable the parties to pursue settlement discussions. The parties eventually reached a settlement and Walmsley now brings the present motion.

(b) The settlement process

[11] The parties conducted mediation in the fall of 2018 with The Honourable Warren Winkler. The evidence of Walmsley's counsel is that the two days of mediation were "long and sometimes heated", and Mr. Winkler "did not hesitate to share his views on liability, certification, the viability of the action and any common issues trial, damages, and the many subjects one would expect would be touched on". The parties could not reach a settlement.

[12] Shortly after the certification motion was argued, counsel agreed to attend before Clifford Lax for another day of mediation, which took place on April 24, 2019. Settlement was not reached but talks progressed.

[13] Further mediation sessions were then held, and discussions continued outside of mediation. The parties reached an agreement in principle on June 28, 2019, with the Settlement Agreement executed on November 27, 2019.

(c) Discontinuance of the action on behalf of online-only teachers

[14] As a result of settlement discussions and Walmsley's counsel's review of the case, Walmsley proposes that the action be discontinued on behalf of those Blyth teachers who only taught online courses. That decision was based on the following factors:

(i) The plaintiff had no evidence from online-only teachers, and the evidence from such teachers delivered by Blyth suggested that it might be more difficult to establish "employee" status for such individuals;

(ii) By way of example, Blyth delivered evidence from individuals such as a professional animator whose claim to employee status may have been more difficult to establish;

(iii) It would likely have required individual trials to determine the degree of specialization for each of the online-only teachers, and the oversight exercised by Blyth. Issues such as ownership of tools and location of work would also be factors. Consequently, the individualized nature of the claims could have either resulted in a difficult common issues trial, or perhaps a decision by the common issues judge that no common determination could be made; and

(iv) Consequently, a fair and reasonable settlement for the other teachers would be put at risk if the plaintiff had insisted on the inclusion of online-only teachers and payment for the settlement of those claims.

[15] Under the proposed discontinuance, the limitation period for the claims of the online-only teachers will not begin to run until July 1, 2020.

(d) The Settlement Agreement

[16] The Settlement Agreement binds all of the initial proposed class members, except those who only taught online courses. In other words, any teacher who taught at least one course at Blyth between 2002 and August 31, 2019 is a party to the Settlement Agreement.

[17] The essential terms of the Settlement Agreement are set out below.

[18] For those teachers who taught from September 2015 to August 31, 2019, Blyth will pay the non-reversionary amount of $2.5 million (the "Main Settlement Fund"), with the possibility of payment of an additional $100,000 into the Main Settlement Fund if at least 90% of Class members take-up the Settlement.

[19] Payments as set out below are based on a take-up rate of approximately 80%. Payments can be increased or decreased depending on the actual take-up, but cannot exceed twice the expected payments based on the anticipated take-up rate (which would only arise if there was a very low take-up rate of less than half the anticipated rate).

[20] Payment from the Main Settlement Fund is to be effected on a *pro rata* basis, as per the following classification of teachers, based on the anticipated 80% take-up rate:

(i) Full-time teachers hired as employees will receive $5,300 for each employment agreement;

(ii) Teachers hired as independent contractors will receive $125 per contract for each semester, but if they have three or more contracts per semester (referred to as a "Cluster"), they will receive $2,100 per Cluster;

(iii) Teachers hired as independent contractors under summer contracts will receive $200 for each contract; and

(iv) Teachers hired by Blyth Academy Downsview as independent contractors between March and July 2016 will each receive $2,500.

[21] If there remain any settlement funds after distribution (including amounts in the fund from stale-dated cheques and interest earned after the distribution date), up to $50,000 will be paid to the Workers' Action Centre by a *cy-près* distribution, with the parties returning to court

for directions as to the disposition of the additional monies if more than $50,000 remain. In no event would any balance from these funds revert to Blyth.

[22] Blyth will also pay a reversionary amount of $25,000 (the "Pre-Limitations Fund") for work done from 2002 until September 1, 2015, with funds distributed *pro rata* of up to $100 each, and remaining funds (if any) after distribution being paid back to Blyth.

[23] Blyth will administer the distribution of the funds and assume all costs associated with the administration except for the costs of Class Counsel posting notices on its website and sending emails to those on its own lists.

[24] Class members can opt-out of the Settlement by June 1, 2020. Payment is to be completed by January 31, 2021.

(e) The retainer agreement

[25] The retainer agreement provides that Class Counsel would (i) "request a legal fee of 25% from the Court if this matter is resolved within one year of the date on which a class action is filed and if the resolution does not require that a contested motion for summary judgment or certification be heard by the Court" and (ii) request a legal fee of 30% "after one year has elapsed, and following a settlement or judgment for the class".

[26] The percentage legal fee is to be calculated based on all damages and amounts obtained for the Class members, including legal costs. Disbursements were to be paid if the class action was successfully resolved by judgment or settlement.

(f) Docketed time

[27] Class Counsel's docketed time in prosecuting the action, as of January 30, 2020, is slightly more than $500,000, and the total estimated docketed time including all remaining steps is approximately $550,000.

(g) Objectors

[28] Two written objections were filed with the court, along with nine letters of support.

[29] The first objection, filed by Donna Fujita, does not state a basis for the objection. Ms. Fujita states that "[a]s a contract teacher at Blyth Academy, I was and have been fully aware, and in agreement, that I was not compensated for overtime, public holiday pay, and benefits".

[30] The second objection, from Alan Jones, expresses his dissatisfaction that the online-only teachers are not part of the Settlement.

[31] Michael McNeely spoke at the approval hearing and expressed his gratitude to counsel for the Settlement. He expressed concerns as to his alleged treatment by Blyth which raised issues outside the scope of the class action.

(h) The involvement of Walmsley in the litigation

[32] The relevant evidence is set out in affidavits from counsel as well as from Walmsley, and establishes that:

(i) Walmsley brought the claim to the attention of Class Counsel;

(ii) Many other teachers raised concerns that they were not being paid *ESA* Entitlements, but did not take steps to pursue an action, perhaps due to a fear of reprisals which often arises in the employment context;

(iii) Walmsley became the "face" of the litigation despite any concern of reprisal;

(iv) Walmsley reviewed documents and court materials; and

(v) Walmsley was the point of contact with class members, such that within a few months of commencing the litigation, Class Counsel received and catalogued more than 10,000 documents from over 100 persons who appeared to be class members.

Analysis

[33] In *Park v. Nongshim Co., Ltd.*, 2019 ONSC 1997, I addressed the law on all of the same issues before the court in the present case. I rely on that analysis and do not restate it in these reasons. Consequently, I address below each of the issues based on the evidence before the court on this motion.

(a) Issue 1: Certification of the action

[34] On the less rigorous test to be applied on a consent certification motion, I find that the requirements under s. 5 of the *CPA* have been established.

[35] Under s. 5(1)(a), the pleadings disclose a cause of action. The claims for *ESA* Entitlements have been certified in many misclassification cases and are certifiable in this case as well (see *Eklund v. Goodlife Fitness Centres Inc.*, 2018 ONSC 6931 ("*Eklund*"); *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 ("*Rosen*"); and *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576 ("*Fulawka*")).

[36] Under s. 5(1)(b), the class is easily identifiable. The court can determine whether a teacher is in or out of the class, and the proposed group of "teachers between 2002 and August

31, 2019 (excluding principals and vice-principals and those who only taught online courses) is defined by objective criteria without reference to the merits of the action.

[37] The s. 5(1)(c) requirement was the seminal issue at the certification hearing. I find that there was a basis in fact (as assessed on the less "rigorous" basis for consent certification) for a common issue, given the evidence of control by Blyth over teachers, the lack of distinction between teachers designated as independent contractors and those designated as employees, and the common standards applied to all teachers.

[38] The preferable procedure requirement under s. 5(1)(d) is also met. There was evidence before the court that workers (whether classified as employees or independent contractors) are reluctant to bring complaints for *ESA* Entitlements to the Ministry of Labour out of fear of reprisals, and, in any event, the cost of such a proceeding could be prohibitive given the amounts to be claimed for overtime or other *ESA* Entitlements. A finding that a class action is the preferable procedure for such *ESA* Entitlement claims has been adopted in *Rosen*, *Eklund*, *Fulawka*, and other employee misclassification decisions.

[39] The suitability of Walmsley as a representative plaintiff under s. 5(1)(e) was not challenged by Blyth. She had a common interest with other class members and no conflict of interest. She vigorously prosecuted the claim.

[40] For the above reasons, I certify the action as a class proceeding for settlement purposes as per my endorsement.

(b) Issue 2: Approval of the Settlement Agreement

1. <u>The proposed Settlement is fair and reasonable</u>

[41] I find that the Settlement Agreement is within the "zone of reasonableness" required for approval by the court. I rely on the following:

(i) The Settlement was reached after extensive mediation before two senior and respected members of the bench and bar, through good faith and arm's-length bargaining;

(ii) The Settlement is recommended by Class Counsel with considerable expertise in both class actions in general, and employee misclassification cases in particular;

(iii) The proposed terms of payment are reasonable. In particular,

1. The amount of $5,300 for each employment contract from September 2015 to August 31, 2019 is within the reasonable range of the maximum amounts for *ESA* entitlement that could have been proven, allowing for a reasonable deduction for difficulties of proving the hours claimed, and is

consistent with the evidence obtained by counsel as to the amount of overtime worked by teachers classified as employees;

2. The amount of $125 per contract for teachers classified as independent contractors, for two or fewer courses per semester, is consistent with the difficulties in establishing that those teachers worked sufficient hours to engage an overtime claim. Consequently, a focus on those teachers based on vacation pay (4%) and public holiday pay (approximately 3%) is reasonable;

3. The amount of $2,100 for those teachers classified as independent contractors who worked a "Cluster" of courses (three or more per semester) is reasonable. Those teachers would have been much more likely to have worked overtime, and the payment provided reflects the pay they would have received in comparison to "employee" teachers;

4. The amount of $200 for each summer school course reflects the more concentrated nature of a summer course, taught over the full day for four weeks. Consequently, more overtime would be expected as compared to a single course during the academic year, justifying the higher amount; and

5. The amount of $2,500 for Blyth Academy Downsview teachers is for the small group who worked at those premises between March and July 2016, after Blyth assumed operation of the school and converted employment contracts into independent contractor agreements. The amount for the four-month period is consistent with the amount of $5,300 paid for a full-year employment contract

(iv) With respect to the $25,000 Pre-Limitations Fund, for the work done in the period from 2002 until September 2015, I accept the submissions of Class Counsel that the maximum amount of $100 available to each teacher for work done in that time period reflects the considerable risks attached to their claim. While those teachers could have argued that the limitations period was extended since they were advised by Blyth that they were independent contractors, Class Counsel obtained evidence from their clients[3] that could have established that they knew they could bring a claim for *ESA* Entitlements either as employees or as mischaracterized independent contractors. There was also evidence of (a) meetings where these issues were discussed, (b) other discussions between teachers in which these matters were raised, and (c) the retainer of lawyers to address some of the claims;

[3] By way of example, see the letter from Ms. Fujita described at paragraph 29 above.

(v) There was an overarching concern that a common issues trial could devolve into numerous and unmanageable individual hearings, since there were some teachers (such as the art school teacher who gave classes and the professional animator who created an online course) whose individual circumstances might exclude them as employees. There was a risk both that extensive time would be required and that a common issues judge might find that a common issues trial was not appropriate;

(vi) There was a legitimate concern as to the ability of the corporate defendant to pay any judgment;

(vii) For teachers employed after 2018, there was an arbitration clause in the agreement which might have precluded recovery;

(viii) The limitation period issues affecting work before September 2015 could also have increased the complexity of a common issues trial, raising numerous individual issues. Consequently, the common issues trial could have been significantly lengthened for all class members or could have overwhelmed the common issues trial; and

(ix) The punitive damages claim of the Class may not have succeeded.

[42] Based on the above, I approve the Settlement Agreement.

2. The proposed *cy-près* distribution of funds to the Workers' Action Centre as per the terms of the Settlement Agreement is appropriate

[43] In the present case, there is no defined distribution of the settlement funds to the Workers' Action Centre pursuant to the Settlement Agreement, but there is a likelihood that at least a minimal amount will be paid (for stale-dated cheques and interest on amounts held past the distribution date), and up to $50,000 if there is a much lower than expected take-up rate. Further court approval would be required for any amounts greater than $50,000.

[44] For the minimal amount of up to $50,000 that would be available after distribution of payments to the class members, it would not be practical to distribute the benefits in any other manner. Further, I agree with Class Counsel that the "cap" of twice the anticipated amounts is reasonable. The cap is based on a very low take-up rate situation (likely less than 40%) and prevents Class members from obtaining a windfall in the guise of damages.

[45] The Workers' Action Centre has a rational connection to the subject matter of the present case and the interests of class members. Its website describes the organization as a "worker-based organization […] committed to improving the lives and working conditions of people in low-wage and unstable employment". Part of their mandate is to ensure that workers "know

[their] rights", and to "provide workers' rights workshops at our Centre and at locations across the Greater Toronto Area". Since the issue in this case involves the rights of workers to *ESA* Entitlements, the connection is apparent.

[46] For the above reasons, I approve the *cy-près* distribution of funds to the Workers' Action Centre as per the terms of the Settlement Agreement.

(c) Issue 3: Approval of class counsel fees and disbursement

[47] I find that there is no basis to rebut the "strong presumption of validity" of the contingency fee arrangement. I rely on the following factors:

(i) Class Counsel obtained significant benefits for the class through the Settlement Agreement;

(ii) The agreed-to contingency fee amount is not excessive;

(iii) The application of the continency fee does not result in a legal fees award that is so large as to be unseemly or otherwise unreasonable;

(iv) The fees sought under the retainer agreement are a reasonable multiplier of approximately 1.5 times fees actually incurred;

(v) No fee is sought from the $100,000 amount Blyth may pay if the take-up rate is high. No fee is sought on the $25,000 paid for the pre-September 2015 period;

(vi) Class counsel took on the risks discussed above in relation to the Settlement Agreement; and

(vii) The disbursements claimed of $42,301.91 (plus HST of $5,154.42) are reasonable.

(d) Issue 4: Payment of honorarium to Walmsley

[48] Based on the evidence I set out at paragraph 32 above, I approve of the payment of a $6,000 honorarium to Walmsley, to be paid by Blyth in addition to the settlement amounts.

[49] Walmsley's involvement in this action was "exceptional". While other teachers raised the concerns about Blyth not paying the *ESA* Entitlements, only Walmsley brought the case forward, and engaged in her role as representative plaintiff to such an extent that within a few months, Class Counsel had heard from more than 100 teachers and received more than 10,000 documents. Walmsley then was an active member of the litigation team, involved in strategy as well as fulfilling her responsibilities as representative plaintiff. I find that the action would not have been brought without Walmsley's involvement.

[50] For the above reasons, I grant the honorarium requested.

(e) Issue 5: Approval of the discontinuance

[51] I reviewed the factors relevant to the discontinuance at paragraph 14 above.

[52] The lack of evidence for online-only teachers raises a serious concern as to the viability of their claims. Rather than endangering a fair and reasonable settlement for those teachers who taught at Blyth premises, Class Counsel and the plaintiffs made a reasonable decision to discontinue the action brought by the online-only teachers, without prejudice to any of those teachers bringing their own action if within the applicable limitation period.

[53] Further, the individualized nature of the online-only teachers would have raised significant barriers to an expeditious process, either affecting certification or, at a minimum, causing significant difficulties at a common issues trial, increasing time and expense, and possibly risking the collapse of the process.

[54] The interests of the online-only teachers will not be prejudiced, as they can continue with claims they might have had prior to the issuance of the class action, subject to any applicable limitation period. There is no evidence that the discontinuance is for an improper purpose. To the contrary, the basis for the discontinuance is justifiable for the reasons I set out above.

[55] Consequently, I approve the discontinuance without costs for the claims of the online-only teachers.

Order

[56] For the above reasons, I grant the relief sought as per the orders signed at the hearing.

GLUSTEIN J.

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Defendants

REASONS FOR DECISION

Glustein J.

Released: March 4, 2020