Endorsement

Before Justice Glustein Action # CV 19-00672034-00CP

Kelli Harding
(Plaintiff)
v
AE Hospitality et al
(Defendants)

Counsel:
Alexandra Monkhouse
Andrew Monkhouse
(Plaintiff)

Pavel Sergeyev
Paul Martin
(Defendants)

Nature of motion and overview

The plaintiff, Kelli Harding ("Harding") brings this motion (i) on consent, for certification for settlement purposes (ii) approval of the settlement agreement made as of November 2021 (the Settlement Agreement) (iii) appointing Harding as representative plaintiff (iv) approving the distribution and notice plan and appointing the defendant as the administrator of the proposed settlement and the dissemination of the notice and (v) approving the retainer agreement between Harding and Class Counsel (the Retainer Agreement) and the fees and disbursements incurred by Class Counsel (Monkhouse Law).

Background to the action

The claim arises out of the alleged misclassification of wait staff (servers and bartenders) and chefs (as well as supervisors) who worked with the defendant in their catering operations. The class seeks damages for Employment Standards Act benefits such as minimum hourly wage, overtime pay, vacation pay and holiday pay. The claim is against (i) the corporate defendant AE Hospitality Ltd (AE), 1513563 Ontario Limited (Encore Food with Elegance), Applause Catering Inc. (Applause) and 2354398 Ontario Limited, and (ii) the personal defendants Cary Silber, David Silber, and Ryan Silber.

Mediation and settlement

The parties attended two days of mediation before Justice Winkler, with a first day on June 10, 2021 and a second day on July 8, 2021. An agreement in principle was reached at the end of the second mediation session, and later confirmed in writing and finalized on December 10, 2021. The parties and the mediator recommend the settlement.

During the mediation, evidence was put forward that there was a high probability that the Corporate Defendants would be unable to satisfy a judgment due to the risk of insolvency, and the individual defendants would not have sufficient assets to satisfy a judgment. Public statements by Mr. Silber confirmed that as a result of a Tax Court decision that determined all 218 of workers on AE's roster in 2013 were misclassified as independent contractors, "paying the tab for those years of EI and CPP contributions would leave AE Hospitality insolvent".

Notice of the present settlement approval hearing was given by email on December 28, 2021, as provided in the dissemination order dated December 22, 2021. The proposed settlement provides for certification of a class defined as "all supervisors, servers, bartenders, and chefs who worked for one or more of the Corporate Defendants since October 1, 2012 to the date of certification of this Action who have not filed a complaint with the Ministry of Labour or signed a release relating to the matters in question".

Settlement Agreement

Under the Settlement Agreement, the defendants will pay $250,000 (the Settlement Amount). Harding agrees and approving of the settlement. Class Members may opt out by the deadline set out in the order. Those class members who do not opt out will provide a release from any claims in relation to or in connection with the misclassification and employment of the class members by the corporate defendants. The defendants will administer and distribute the settlement and will have reasonable costs relating to the administration reimbursed if (i) agreed to by the parties and (ii) approved by the court.

Of the global amount of $250,000, Class Counsel seeks approval of $125,000, inclusive of legal fees, HST, and disbursements, based on 33% of the settlement amount with a small discount to ensure that the fees, disbursements and HST do not exceed the amount available to class members.

Distribution of settlement funds

50% of the net settlement funds are to be allocated to wait staff, and 50% of the net settlement fund to be allocated to chefs. While chefs are a much smaller group then wait staff, chefs were the only class members to work overtime hours. Calculations of payments for ESA entitlement will be based on an average of earnings for all class members, with all class members receiving half the ESA stated amounts for vacation and holiday pay for work between October 1, 2012 and September 9, 2017, and chefs receiving $3,250 per year for overtime for the period from September 9, 2017 to when AE Hospitality ceased operations and $1,625 for the period prior to September 9, 2017. Such overtime payment corresponds to approximately 20% of overtime pay for the more current period, and 10% for the earlier period.

If the claims made exceed the amount allocated, each individual claim will be proportionately reduced by the ratio of the value of a class member's claim to the total value of all claims.

Prior to pro-rating, an individual wait staff class member could receive up to $1,908.96 for vacation and holiday pay from 2012 to 2019, while an individual chef class member could

receive up to $18,565.21 for vacation, holiday, and overtime pay. The defendants will administer the distribution based on their records through providing a claims form to the class member. Any amounts remaining from undeliverable or stale cheques are to be paid to designated charities, which must be related in some way to the nature of the claim.

Retainer agreement/fees/disbursements

The Retainer Agreement provided for 33% payment of any amount awarded at trial or paid in settlement, plus disbursements. Harding understood the Retainer Agreement when she signed it and supports approval of the Retainer Agreement and the fees and disbursements sought by Class Counsel.

Class Counsel seeks (i) $82,5000 (33% of $250,000) plus $10,725.00 for HST on fees, (ii) disbursements of $38,807.79 (inclusive of HST), less a discount of $7,032.79 so that the total combined amount of $125,000 is not more than the amount which will go to the class.

Analysis

Issue 1: Certification

The requirements under s. 5 of the CPA are met:

(i) There is a cause of action based on systemic breach of ESA standards (s.5(1)(a));

(ii) The proposed class identifies class members by objective criteria without reference to the merits. A class of wait staff and chefs during the relevant time period is rationally related to the common issue of ESA entitlement and is neither unnecessarily broad nor arbitrarily under inclusive (s. 5(1)(b));

(iii) The proposed common issue of whether the class members were properly compensated under the ESA for services rendered for AE Hospitality would significantly advance the action (s. 5(1)(c);

(iv) The class action is the preferable procedure. The alleged systemic breaches can be addressed in one proceeding, and class members would not otherwise be able to litigate for the limited individual monetary benefit available. Further, behaviour modification is advanced by the defendants' agreement to treat class members who do not operate through personal services corporations as employees (s. 5(1)(d);

(v) Harding is an adequate representative plaintiff who has undertaken all of the essential steps of this class action. She shares a common interest with the class members (s. 5(1)(e).

For the above reasons, I certify this class action.

Issue 2: Approval of the Settlement Agreement

The Settlement Agreement falls within a range of reasonable outcomes. It advances the likelihood of recovery, avoids further expense and likely duration of the litigation, and is the result of good faith, arm's length bargaining (Loewenthal v Sirius XM Holdings Inc. et al, 2021 ONSC 4482 at paras. 11-13).

While the quantum of the Settlement Amount is well below the plaintiff's maximum damages assessment ($2.42 million) or even the defendants' maximum assessment ($900,000), it provides the critical benefit of guaranteed recovery for class members in circumstances where zero recovery due to insolvency was a real risk, supported by the evidence and public statements. Further, any damages assessment would need to be reduced by the significant risk of limitations periods excluding a large percentage of recovery.

Further, under the Settlement Agreement, payment is available for overtime claims without individual proof, through a streamlined process that only involves completion of a claims form. No litigation funding costs have been, or will be incurred, and the risks of the matter not being certified are avoided.

While the release in the present case relates to all employment claims, any class member who believed that other claims existed (such as a claim for wrongful or constructive dismissal) would have the opportunity to opt out of the settlement.

As I discuss above, the defendants' agreement to treat all class members as employees (unless operating through personal services corporations) is a meaningful change which benefits the class members on an ongoing basis.

Finally, by avoiding delays, Class members will receive immediate compensation, without the risk of lengthy enforcement proceedings, potential asset seizures, and involvement of several different arms of the judicial system, under which all of those consequences could significantly increase the risks of non-recovery. I note that AE ceased operations in 2019 and recovery from the defendants is at serious risk given their financial situation, including the current COVID-19 pandemic closures and outstanding Canada Revenue Agency amounts owed by the defendants.

For the above reason, I approve the Settlement Agreement.

Issue 3: Approval of Harding as representative plaintiff

For the reasons I set out on the certification criteria for s. 5(1)(e) above, I appoint Harding as the representative plaintiff.

Issue 4: Distribution and notice plan approval

At the hearing, I raised concerns that the proposed recipients of any remaining funds from undeliverable or stale dated cheques were not appropriate recipients since those organizations (the UJA Federation of Greater Toronto and the Make-A-Wish Foundation) appeared to be unrelated to any of the issues in the action.

After hearing the submissions of Class Counsel, I am satisfied that the UJA offers employment counselling services and as such is an appropriate recipient. However, I advised Class Counsel that there is no connection between employment issues and the Make-A-Wish Foundation, which counsel acknowledged was included only at the request of the representative plaintiff who

recommended that organization. Consequently, I have modified the order (and any reference in the Distribution Plan) to limit any cy-pres payment to UJA.

As for the other aspect of the distribution protocol and notice approval, I find that they are fair and reasonable. Clear class members will receive an email with a claims form with the defendants using their records to confirm eligibility. An appeal process will be available and after all appeals have been settled, cheques will be mailed to the address on the claim form. The distribution process is straightforward. The proposed notices of certification and settlement approved are clear, with notices to be (i) sent by email to the class members' last known email addresses, (ii) posted on Class Counsel's website, and (iii) sent by Class Counsel to all class members who contacted Class Counsel about the proceeding using the contact information provided by the class member. Consequently, the Notice Plan attempts to reach as many class members as practically possible.

For the above reasons, I approve the distribution and notice plan.

<u>Issue 5: Retainer Agreement and Fee/Disbursement Approval</u>

(i) The Retainer Agreement

The Retainer Agreement meets the requirements under s. 32 of the CPA.

It states the terms under which fees and disbursements shall be paid, provides an estimate of the expected fee and states the method by which payments are to be made. Harding read and understood the Retainer Agreement when she signed it and asks the court to approve it.

For the above reasons, I approve the Retainer Agreement.

(ii) Fees and disbursements

The Retainer Agreement is presumptively valid as a 33% contingency fee is within the accepted range under the case law.

The amount of $82,500 (plus HST) sought for fees is not excessive and, in fact, is less than half of fees incurred to date. Further the fees are reasonable given the risk of non-recovery, the factual and legal complexity of the case, the relatively low monetary value, and the importance of the matter to the class.

Consequently, I approve the fees requested of $82,500 plus $10,725 in HST for legal fees. The disbursements of $38,807.79 (inclusive of HST) are also reasonable, particularly as the vast majority of these disbursements were for mediation fees and the expert report, both of which were essential for settlement and are reasonable fees. The total of the above amounts is $132,632.79, and I approve that amount subject to the discount of $7,032.79 proposed by Class Counsel to arrive at a total approved amount of $125,000 for fees and disbursements (inclusive of HST).

Conclusion:

For the above reasons, I grant the relief sought. Order to go as per attached.