

## Endorsement

Before Justice Glustein

Action # CV 20-00634668-00CP

Tom Rallis  
(Plaintiff)

v

Approval Team et al  
(Defendants)

Counsel:

Andrew Monkhouse  
Ashlee Hudie  
(Plaintiff)

Diana Saturno  
(Defendants)

### Nature of motion and overview

The representative plaintiff, Tom Rallis, brings this motion for (i) certification of the extended class to include claims not only by those salespersons and sales managers who were classified as independent contractors, but also to include sales managers and salespersons who were classified as employees but did not receive the ESA benefits claimed (the Extended Class), (ii) approval of the settlement agreement finalized on October 15, 2021 (the Settlement Agreement), (iii) declaring that the Settlement Agreement is binding on Rallis, all class members who do not opt out before the deadline, and the defendants, (iv) approving distribution and the notice plan and approving the defendant, Approval Team Inc., as the administrator of the proposed settlement and the dissemination of the notice, (v) approving the retainer agreement between Rallis and Class Counsel (Monkhouse Law) dated October 17, 2019 (Retainer Agreement) and the fees and disbursements incurred by Class Counsel, and (vi) approving an honorarium to be paid to Rallis in the amount of \$10,000, to be paid out of the settlement funds.

For the reasons I follow, I grant the relief sought, except for the honorarium to be paid out of settlement funds. Class Counsel asked the court to approve the payment of the honorarium, at the discretion of Class Counsel, from Class Counsel's fees. I do not agree with that alternative request.

### Background to the action

The action arises from claims for vacation pay, holiday pay, minimum wage top-up, and overtime pay for the Extended Class all who worked for the used car dealerships who are the subject of the action. The initial claim sought damages for all employees of Approval Team Inc. (AT), but the class definition was amended at certification to include (i) only sales managers and salespersons and (ii) who were classified by AT as independent contractors (the Original Class). Upon settlement discussions, evidence was introduced to demonstrate that there were salespersons and sales managers who were classified as employees who also had similar ESA claims, so the present

motion seeks consent certification of the Extended Class. Other employees referred to in the claim, but not in the Original Class or the Extended Class (e.g. drivers, etc.) were excluded on consent from certification as there were concerns about whether those employees could be part of the class action, given the potential of individual trials to determine employment responsibilities and/or the merits of whether such employees were independent contractors rather than employees.

### Settlement negotiations and agreement

The parties attended mediation with an experienced mediator, Michel Silver, on March 2, 2021. The parties exchanged detailed mediation briefs, including detailed information from AT as to amounts paid to class members from 2018 to 2020. The plaintiff delivered an expert report on damages prior to the March 2021 mediation and a second round of mediation was agreed between the parties, in part to allow the defendants to prepare their own expert report.

In effect, the experts differed on overtime claim calculations, since the plaintiff's expert assumed 5 hours of overtime per week while the defendants' expert assumed 0 hours of overtime per week. Consequently, for the Original Class, the plaintiff's expert calculated damages at \$965,296.70 while the defendants' expert calculated damages at \$400,000. Damages for the additional employees (now part of the Extended Class) was calculated by the defendants' expert at \$147,297.00. Consequently, the plaintiff's expert calculated total damages at \$1,132,591.70 while the defendant's expert calculated total damages at approximately \$550,000.

Based on the newly discovered evidence that AT had advertised employment opportunities which emphasized that employees were required to work over 50 hours a week, the defendants agreed after mediation that there was sufficient evidence to certify the larger class. The parties reached a settlement on the Extended Class after the second round of mediation, based on an agreement in principle at the conclusion of the mediation session. The proposed settlement is recommended by both parties and the mediator.

The proposed settlement agreement defines common issues for both (i) all class members classified as independent contractors (for minimum wage, vacation pay, and public holiday and premium pay claims) and (ii) all salespersons (for overtime claims).

The opt-out deadline for the Original Class was November 25, 2020, and two opt-outs were received. The proposed addition of members of the Extended Class were notified of the present hearing by the court order of November 1, 2021 for dissemination of notice of settlement and fee approval hearing, and may opt out by sending written notice within 60 days of the order on this motion.

Under the Settlement Agreement, the defendants will pay \$850,000 (all inclusive) with the amount after fees, HST, and disbursements (and the honorarium if ordered to be paid from settlement funds) to be paid by the defendants to the Extended Class under a distribution plan to be administered by the defendants at their cost. AT will determine entitlement based on its records, with (i) all engaged as independent contractors entitled to vacation pay, holiday pay, and minimum wage top-up and overtime and (ii) employees (salespersons only and not sales managers) entitled to minimum wage top-up and overtime.

If total claims exceed the amount allocated, each individual claim will be proportionally reduced by the ratio of the value of a class member's claim to the total value of all claims. The overtime claims are based on 3 hours of overtime per week, with the amount per member (179 class members in total) after fees, disbursements, taxes, and the honorarium (if it had been ordered from the settlement funds) being \$2,803.40 assuming a 100% take-up and \$4,312.93 assuming a 65% take-up. Put differently, the balance to be distributed (approximately \$500,000) is approximately 44% of the total damages estimated by plaintiff's expert of \$1,137,593.70, and almost 100% of the damages as estimated by the defendants' expert. Michael Silver will act as referee on any disputes.

### Retainer Agreement and Fees/Disbursements

Rallis read and understood the Retainer Agreement when he signed it. He supports the settlement and the requests for fees, disbursement, and HST.

Under the Retainer Agreement, Class Counsel is entitled to, *inter alia*, 33% of total proceeds up to and including trial or paid in settlement. Consequently, Class Counsel seeks legal fees of \$280,500 plus HST of \$36,465 on legal fees and \$21,225.96 for disbursements, for a total of \$338,190.96.

Actual legal fees incurred to date total approximately \$252,865 plus HST, and it is estimated that completing all required follow-up work will result in additional fees and disbursements that would exceed the amount sought under the Retainer Agreement and on this motion.

### Evidence relevant to honorarium

Rallis provided the following evidence relevant to Class Counsel's request for an honorarium of \$10,000 to be paid out of the settlement funds:

- (i) He spent about 100 hours on the class action;
- (ii) His name has been publicized in connection with this action, as shown by a Google search;
- (iii) "Details of this class action were spread widely within the car dealership network and on social media" and "as such potential employers have seen my name associated with it";
- (iv) "I believe having commenced this action will make it challenging for me to find employment with other car dealers";
- (v) "[F]or example, my current employer inquired about the action";
- (vi) "I did not expect to receive an honorarium when I commenced this action, but if approved it would partially compensate the employment challenges resulting from my role";
- (vii) Rallis understands that "commencing and leading this action will result in a total resolution of all my claims against the defendants and will implicitly mean that I will not be allowed to pursue [any] individual claim that I may have had".

## Release of claims

Under the Settlement Agreement, the “Released Claims” are defined as any claims “related to statutory minimum employment standards for the misclassification and employment of Class Members, specifically any past or future claims for minimum employment standards such as minimum wage, overtime pay, vacation pay, public holiday pay or premium pay”.

## Analysis

### 1. Certification of the Extended Class

The Parties consent to the amendment of the class definition and to certification of the claim for the Extended Class. The requirements under s. 5(1) of the *Class Proceedings Act*, 1992 S.O. 1992, c. 6, are met:

- (i) The pleadings disclose a cause of action for breach of employment standards (s. 5(1)(a));
- (ii) The Extended Class is identifiable with reference to objective criteria such that a person can be identified as a class member without reference to the merits. The class is connected to the common issue of underpayment of minimum employment standards (s.5(1)(b));
- (iii) The proposed common issues as set out in the Settlement Agreement all seek to determine whether class members were underpaid under Ontario minimum standard entitlements, including failure to pay overtime and minimum wage. All of the issues would significantly advance the action (s. 5(1)(c));
- (iv) A class proceeding is the preferable procedure to determine whether class members were underpaid on employment standard entitlements. The small monetary amount would otherwise discourage individual litigation. Thus, judicial economy is promoted through common resolution, small as well as behaviour modification (s. 5(1)(d)); and
- (v) Rallis is an adequate representative plaintiff who has undertaken all the essential steps of a class action representative, including retaining and instructing Class Counsel, attending multiple mediation sessions, participating in the settlement process, and providing evidence (s. 5(1)(e)).

For the above reasons, I certify the class action on the basis of the Extended Class definition.

### 2. Settlement Approval / 3. Declaration of binding effect of settlement

The settlement is fair, reasonable, and in the best interest of the class. I rely on the following factors:

- (i) The settlement provides for payments of the vacation pay, public holiday pay, and minimum wage as required under *ESA* standards;
- (ii) The settlement provides for 3 hours of overtime for every week of employment, calculated at 1.5x the hourly or the minimum wage for every week of employment,

- which is a reasonable amount of overtime based on the evidence and avoids significant difficulties of proof on an individual basis;
- (iii) Sales managers are excluded from overtime pay, which is within the zone of reasonableness given the managerial exemption under the *ESA* regulations;
  - (iv) Payment will be made forthwith and avoid lengthy trials and a possible appeal process;
  - (v) Damages will be paid according to the records provided by AT;
  - (vi) The approximately \$500,000 balance remaining to be distributed constitutes between approximately 44% to 100% of the total recovery available, establishing a substantial recovery (without even taking account the total of \$850,000 paid in total by the defendants); and
  - (vii) The settlement avoids the risk of potential bankruptcy.

For the above reasons, I approve the Settlement Agreement and order that it is binding upon Rallis, all of the class members who do not validly opt out by the deadline, and the defendants.

#### 4. Distribution and notice plan approved

The distribution plan is fair, reasonable, and in the best interests of the class. The plan is straightforward. The class members are limited (179 in total). Each will receive an email and be asked to provide a claims form to Class Counsel who will centralize the forms and deliver them to AT once the claims deadline expires. AT will use their records to confirm class member eligibility and confirm total potential damages in the "First Notification Letter". After all appeals are settled, the relative share of all class members will be determined and each class member will receive a "Payment Notification Letter". Payments will be issued to class members by cheque to the address in the claim form. AT will issue T4s and withhold appropriate CPP, EI, and income tax deductions for all class members classified as employees, with no deductions for those classified as independent contractors (payment to be classified as damages).

The proposed distribution plan strikes a fair balance between individual compensation and efficient and expeditious distribution. AT will distribute the proceeds at no cost to the class. Class Counsel will oversee the notice plan.

Both the proposed short form and long form notice clearly set out the proposed settlement and the method of distribution. Notices are to be provided by last known email address and by posting on Class Counsel's website, which is an adequate process. The notice for opting out to the Extended Class are also clear.

Consequently, I approve the Distribution and Notice Plan, appoint the defendant AT as the administrator of the proposed settlement and approve the dissemination of the notice, all to be done by AT at no charge for fees and disbursements.

#### 5. Retainer Agreement/Fee Approval

The Retainer Agreement is approved. It complies with s. 32 of the *CPA*. It is in writing and (a) states the terms under which fees and disbursements shall be paid, (b) explains the estimate of the

expected fee, based on contingency, and (c) states the method by which payment is to be made. Rallis read the Retainer Agreement and understood its terms.

The fees, HST, and disbursements requested are fair and reasonable. The contingency agreement is presumptively valid and there is no basis to set it aside that presumption under the settled law in *Canon v Funds for Canada Foundation*, 2013 ONSC 7686. Class Counsel assumed risks that the matter might not be certified for at least part of the class and achieved strong success with the settlement. Class Counsel demonstrated skill and competence, and incurred actual and anticipated fees which will likely exceed the fees sought. There have been no objections to the fees sought. The disbursements claimed are reasonable, especially given the retention of an expert, which was almost 80% of the disbursements claimed.

For the above reasons, I approve the fees, HST, and disbursements sought.

## 6. Honorarium

In *Park v Nongshim Co*, 2019 ONSC 1997, I reviewed the applicable law on granting an honorarium to a representative plaintiff. I cited and relied upon the decision of Strathy J. (as he then was) in *Baker Estate v Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at paras 93-95 and the decision of Strathy J. (as he then was) in *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911. I adopted the principle that payment of honorarium to representative plaintiffs in Ontario for class actions is “exceptional and rarely done” *Park*, at para 84.

As in *Baker Estate*, at para 95, the involvement of Rallis in the litigation as an “involved plaintiff who will be familiar with the proceedings, instruct counsel, monitor settlement discussions, and generally act as any private client would in supervising his or her own litigation” are “contributions the Court expects a representative plaintiff to make”.

As Hoy J. (as she then was) held in *Bellaire v Daya*, 2007 OJ No. 4819 (SCJ), at para 71, compensation should not be awarded simply because “the representative plaintiff did what is expected of representative plaintiffs”.

Consequently, I do not find that Rallis’ involvement in the class action supports an honorarium.

Rallis then seeks to rely on two class action decisions relating to *ESA* claims: *Aps v Flight Centre Travel Group (Canada) Inc.*, 2020 ONSC 6779, and *Eklund v Goodlife Fitness Centres Inc*, 2018 ONSC 4146, in which both courts ordered the payment of honorarium to the respective representative plaintiffs. In *Eklund*, payment was sought in addition to the settlement fund (at para 22). It is not stated in *Aps* if the honorarium payment was sought from, or in addition to the settlement fund.

In any event, the \$10,000 honorarium sought by Rallis, which is sought from the settlement funds, does not present the same exceptional basis as in *Aps* or *Eklund*. In *Aps*, there was evidence that the representative plaintiff could not find employment in the travel industry because he was the representative plaintiff. His evidence was that he applied for more than 85 different jobs and could not secure employment. Prior to that time, the representative plaintiff had “never experienced

similar difficulty securing employment during my career” and on the contrary had been “sought-after” by employers, at para 44. The representative plaintiff had even been told he had been “let go” from another job he had obtained from an insurance company because of his involvement as a representative plaintiff, at para 44.

Consequently, the evidence before Belobaba J. in *Aps*, supported his conclusion “certain players in the travel and insurance industry decided to punish the representative plaintiff for simply exercising his legal rights”, and as such the honorarium was justified, at para 45-46.

Similarly, in *Eklund*, Morgan J. granted the honorarium when the representative plaintiff’s exposure “to the prejudicial ramification of being the named plaintiff ... materialized when she was turned down for a new job after the perspective employer questioned her about her role in suing her previous employer”, at para 49.

In the present case, there is no evidence of any repercussions on Rallis’ employment. He continues to work in the used car industry, and his current employer never suggested any ramifications arising from Rallis’ involvement as a representative plaintiff. Consequently, there is no evidence to support Rallis’ “belief” that his further employment in the used car industry would be “challenging”. Given the exceptional nature of granting an honorarium, it cannot be granted based on an unsupported assertion of belief. Consequently, an honorarium is not appropriate to “partially compensate the employment challenges resulting from [Rallis’] role” as representative plaintiff, contrary to his assertion in his affidavit.

In his affidavit, Rallis led no evidence that he had a constructive dismissal claim which he abandoned in order to serve as a representative plaintiff. He only states the general comment that the resolution of the action “will result in a total resolution of all my claims against the defendants and will implicitly mean I will not be allowed to pursue [any] individual claims that I may have had”.

At the hearing, Class Counsel submitted that Rallis had a constructive dismissal claim available and chose not to pursue it in favour of serving as a representative plaintiff. However, even if there had been such evidence, I would not find this to be a basis for the extraordinary relief of an honorarium.

The release for all class members to claims is based on *ESA* standards. Rallis was always capable of bringing any constructive dismissal claim he thought could succeed, although such a claim could have put him conflict with his role as a representative plaintiff. The court has full confidence that Class Counsel would have explained Rallis’ options to him and/or advised him to obtain independent legal advice, if he had a potential constructive dismissal claim that could have affected his suitability as a potential representative plaintiff.

It is not for the court on a settlement motion to speculate on the strength of a potential constructive dismissal claim. A person who decides to act as a representative plaintiff may need to make a choice between that role and a constructive dismissal claim due to potential conflict issues, even if the release does not preclude such a claim. I make no finding whether Rallis could still bring his constructive dismissal claim (subject to limitations) after settlement, given the language of the

release, just as any class member would have been free to do if constructively dismissed. However, by deciding to act as representative plaintiff, a party should not then be able to seek compensation for that choice. Acting as a representative plaintiff should not serve as a substitute method of compensation. If a person seeks to forgo a constructive dismissal claim it is not appropriate to ask the court to indirectly reward the representative plaintiff for that choice.

Consequently, I do not find, on the evidence before me, that Rallis has satisfied the evidentiary burden to obtain the exceptional relief of an honorarium payment.

During the hearing, Class Counsel proposed an alternative order permitting Class Counsel to pay the honorarium from Class Counsel's fees. During the hearing, I considered this novel argument and commented that it seemed appropriate to permit such an order. However, on considering the issue in more detail, I deny the request for such an honorarium.

The difficulty with the position of Class Counsel is that it leads to the same concerns as set out in *Baker Estate* and *Robinson*. Enabling a representative plaintiff to be paid for doing "what is expected of representative plaintiffs" (*Bellaire*) is contrary to the role of a representative plaintiff who should not be "receiving an amount that is in excess of what will be received by any other member of the class", since "compensation should not be awarded simply because the representative plaintiff has done what is expected of him or her", *Baker Estate* at para 93, and 95. Honorariums are to be limited to situations "where the contribution of the representative plaintiff has gone well above and beyond the call of duty", *Baker Estate* at para 95. Under the alternative approach proposed by Class Counsel, a representative plaintiff would receive additional compensation just for assuming that role, which is inconsistent with the case law cited above and risks putting the integrity of a representative plaintiff into question as an instructing client who is to act in the best interests of the class, yet still wishes to maintain the role of representative plaintiff in order to obtain honorarium compensation.

For the above reasons I dismiss the alternative relief sought of making an order permitting Class Counsel to pay the honorarium from its own fees.

#### Order

Counsel may provide me with a draft order to reflect the above reasons. I grant all of the relief sought, except payment of the honorarium.

JUSTICE GLUSTEIN