

CITATION: Suzic v. VIB Event Staffing et al., 2022 ONSC 3837
COURT FILE NO.: CV-20-643482-00CP
DATE: 20220628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nenad Suzic

AND:

VIB Event Staffing Inc. and Valerie Sideco

BEFORE: J.T. Akbarali J.

COUNSEL: *Alexandra Monkhouse, Ashlee Hudie and Andrew Monkhouse*, for the plaintiff

Brandon Mattalo and Eric Block, for the defendants

HEARD: June 1, 2022

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] On this motion, the plaintiff seeks an order certifying this action on consent for settlement purposes, approving the proposed settlement, appointing him as representative plaintiff, approving the retainer agreement between the representative plaintiff and class counsel, approving counsel's fees and disbursements, approving an honorarium for the representative plaintiff, and approving the distribution and notice plan.

Background

[2] The corporate defendant, VIB Event Staffing Inc. ("VIB") was formed in 2010. It operated an event staffing business, providing temporary staff for venues that required, for example, wait staff, coat check attendants, greeters, bartenders, dishwashers, kitchen helpers and supervisors. It ceased carrying on business in 2021 and expects to be dissolved by August 2022.

[3] The individual defendant is the sole shareholder, officer and director of the corporate defendant.

[4] The plaintiff originally worked as a server at VIB, and later as a staffing coordinator.

[5] The proposed class action alleges that individuals working for VIB in Ontario were misclassified as independent contractors, when, as a matter of law, they were employees.

[6] The claim seeks damages resulting from the defendants' alleged failure to compensate putative class members for benefits prescribed by the *Employment Standards Act*, S.O. 2000, c. 41, and other employment benefits legislation, including compensation at the prescribed minimum hourly wage, overtime pay, vacation pay, holiday pay, termination pay for employees with more than five years tenure who were terminated without notice, CPP payments, and EI payments.

[7] The certification motion in this action was originally scheduled for September 22-23, 2021, but was rescheduled to March 2022 to allow the parties to pursue mediation. A mediation was held on November 26, 2021. An agreement in principle was reached. A settlement agreement was finalized on April 15, 2022 which, among other things, provides for a global payment of \$105,000, from which class counsel seeks approval of \$50,454.50 in legal fees, HST and disbursements, a \$3,000 payment for the plaintiffs' portion of the mediation fees, and an honorarium for the representative plaintiff of no more than \$6,000.

Issues

[8] The motions before me require me to determine the following issues:

- a. Should this action be certified for the purpose of settlement?
- b. Should the settlement agreement, distribution plan and notice plan be approved?
- c. Should the contingency fee agreement and class counsel's fees and disbursements, be approved?
- d. Should the proposed \$6,000 honoraria to the proposed representative plaintiff be approved?

Certification

[9] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ("CPA") the court shall certify a class proceeding if: (a) the pleadings or the notice of application disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims or defences of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable plan for the proceeding, and does not have an interest in conflict with the interests of other class members.

[10] Where certification is sought for the purposes of settlement, all the criteria for certification must still be met, although compliance with the certification criteria is not as strictly required, because the manageability of the proceeding is not an issue: *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.), at para. 30; *Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128, at para. 14; *Waheed v. Pfizer Canada Inc.*, 2011 ONSC 5057, at para. 26. The representative plaintiff must provide a certain minimum evidentiary basis for a certification order: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 24.

Section 5(1)(a): The pleadings disclose a cause of action.

[11] Certification will not be denied under s. 5(1)(a) unless it is plain and obvious that the pleadings disclose no cause of action: *Hollick*, at para. 25.

[12] In this case, the claim discloses a cause of action for the alleged systemic breach of Ontario employment standards. There is no dispute that putative class members were not paid holiday pay or vacation pay. This criterion is satisfied.

Section 5(1)(b): There is an identifiable class of two or more persons that would be represented by the representative plaintiff.

[13] In determining whether there is an identifiable class, the court asks whether the plaintiff has defined the class by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action. The class must be bounded, and not of unlimited membership or unnecessarily broad. It must also have some rational relationship with the common issues: *Hollick*, at para. 17; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45. The class definition needs to identify all those who may have a claim, will be bound by the result of the litigation, and are entitled to notice: *Bywater Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.). Defining the class is a technical, rather than a substantive challenge: *Waldman v. Thomson Reuters Corp.*, 2012 ONSC 1138, at para. 122.

[14] For purpose of settlement, the plaintiffs seek to certify the following class, which they believe, based on their examination of records provided by the defendants, comprises approximately 1117 class members:

All supervisors, servers, waiters, bartenders identified as independent contractors who worked for VIB Staffing Inc. since the year 2010 to December 31, 2021, who have not filed a complaint with the Ministry of Labour or signed a release relating to the matters in question unless it was properly withdrawn. This definition includes but is not limited to supervisors, bartenders, servers, wait-staff, event staff, and any other individuals providing (or who provided at any point during the Class Period) event staffing services to the Defendant on an independent contractor basis during the Class Period such as coat checkers, greeters, dishwashers, and kitchen helpers.

[15] There is a rational connection between the proposed class definition and the proposed common issues, which relate to the alleged underpayment of minimum employment standards. Moreover, this definition is consistent with those approved in other employment class actions: *Navaratnarajah v. FSB Group*, 2021 ONSC 5418, at para. 11; *Rallis v. Approval Team*, 2020 ONSC 4197, at para. 4(ii); *Morris v. Solar Brokers*, 2019 ONSC 6817, at para. 25.

[16] The proposed class definition is bound temporally. It also excludes those who have no viable claim because they have signed a release that remains binding or have filed a complaint with the Ministry of labour.

[17] This criterion is satisfied.

Section 5(1)(c): The claims raise a common issue.

[18] When considering whether a claim raises a common issue, the court asks whether it is necessary to resolve the issue in order to resolve each class member's claim, and whether the issue is a substantial ingredient of each of the class members' claims. The issue is a substantial ingredient of each claim if its resolution will advance the case or move the litigation forward, and if it is capable of extrapolation to all class members: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46. The common issue criterion represents a "low bar": *Cloud v. Canada (Attorney General)*, 192 O.A.C. 239, at para. 52.

[19] The common issues proposed are set out in Schedule A attached hereto. Among other things, they seek to determine whether class members were wrongly characterized as independent contractors when they were in fact employees, and if so, whether the defendants are liable to the class for employee benefits under the *ESA*. The common issues also seek to determine the express or implied terms of the class members' contracts of employment, if the class members were, in fact, employees, and whether the defendants breached any contractual terms such that the class members are owed damages.

[20] These issues are common to all class members and their resolution would advance the litigation. This is criterion is met.

Section 5(1)(d): A class proceeding is the preferable procedure.

[21] This branch of the test requires that the court be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues. This inquiry is directed at two questions: first, whether the class proceeding would be a fair, efficient, and manageable way to advance the claim, and second, whether the class proceeding would be preferable to other procedures for resolving the common issues.

[22] Where certification is sought for the purposes of settlement, courts have recognized that a class proceeding is a fair, efficient, and manageable method for advancing the class members' claims and is preferable to other procedures. As Perell J. held in *Waheed v. Pfizer Canada Inc.*, 2011 ONSC 5057, at para. 27, where there is a cause of action, an identifiable class, a common issue, and a settlement, there is a strong basis to conclude that a class proceeding is the preferable procedure because certification would serve the primary purposes of the *CPA*: access to justice, behaviour modification, and judicial economy. Certifying this action would be a fair, efficient, and manageable way to advance the claim — in this case, by considering the appropriateness of the settlement.

[23] Moreover, in this case, the alleged wrongs were systemic, rendering them appropriate for determination on a class-wide basis. A class proceeding is also preferable to other procedures. No class member who has been in contact with class counsel has indicated an intention to pursue their own proceedings. The damages each individual has sustained are likely small, and thus unlikely to be advanced in individual litigation.

[24] I conclude that this criterion is made out.

Section 5(1)(e): There is an adequate representative plaintiff.

[25] To be an adequate representative plaintiff, a proposed plaintiff must be able to fairly and adequately represent the class, have developed a plan for proceeding, and not have a conflict with the class. He must be prepared and able to vigorously represent the interests of the class: *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144, at para. 73.

[26] The record indicates that Mr. Suzic has undertaken and discharged his duties responsibly, including by reviewing materials in the action, retaining and instructing class counsel, attending mediation, evaluating offers from opposing counsel and providing evidence, first on the intended opposed certification motion, and more recently on this motion. He is a suitable representative, having worked for VIB in various capacities over many years. There is no conflict of interest between Mr. Suzic and the class members on the common issues.

[27] I conclude that Mr. Suzic can fairly and adequately represent the interests of the class.

Conclusion on Certification

[28] For purposes of settlement, the criteria set out in s. 5(1) of the *CPA* are met. I thus grant the plaintiffs' motion and certify this action as a class proceeding pursuant to the *CPA* for settlement purposes.

[29] Mr. Suzic is appointed as representative plaintiff of the class pursuant to s. 5 of the *CPA*.

Settlement Approval

[30] Notice of the proposed settlement and this approval hearing was provided to the class in accordance with my order dated April 25, 2022. Following dissemination of the notice, class counsel received four emails in support of the proposed settlement. No class member objected. Similarly, no class member attended the hearing to object to any of the settlement, class counsel fees, or the proposed honorarium.

[31] The settlement agreement provides for a settlement payment in the amount of \$105,000.

[32] From the \$105,000, class counsel seek approval for \$50,454.50 payable to them for legal fees, HST and disbursements, a one-time disbursement of \$3,000 for the plaintiff's portion of the mediation fees, and an honorarium for Mr. Suzic of no more than \$6,000.

[33] The settlement agreement contemplates that the remaining \$45,545.50 (assuming the payments above are approved), plus interest, is the net settlement fund and will be divided among class members. The settlement proposes to allocate the amount to which each class member is entitled based on the following calculations:

- a. If the Claimant worked for VIB in the Class Period but was not issued a T4A, their Claim Amount will be assigned as \$50.00;
- b. If the Claimant worked for VIB in the Class Period, was issued a T4A, but 8% of those total earnings is less than \$50.00, their Claim Amount will be assigned as \$50.00;

- c. If the Claimant worked for VIB in the Class Period, was issued a T4A, and 8% of their earnings is greater than \$50.00, 8% of their total earnings will be assigned as their Claim Amount.

[34] If the 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. In other words, if a class member's claim amount is 1% of the total claim value, they will receive 1% of the net settlement fund.

[35] Given the size of the class, believed to be about 1,117 class members, counsel has calculated the likely recovery of each class member. The average income of the class members from the defendants was about \$2,742.99 per year. Claims under \$50 will be rounded up to \$50, while claims over \$50 will not be adjusted. Based on financial data provided by the defendants, counsel believe that 428 class members, or 38%, will have claims that will be rounded up to \$50, while 62% of the class, or about 689 people, will have claims over \$50. The total value of claims calculated on this basis is \$590,174. If each class member were to make a claim, the average recovery would be \$40.77, with a recovery rate of 8%. In class counsel's experience, however, a more realistic uptake rate is 15-30% of class members. In this scenario, class members would recover between \$156.83 to \$271.10, with a recovery range of 26% to 51%.

[36] Class counsel will oversee the distribution of the settlement funds, and will not charge further fees for doing so.

[37] The settlement also provides for a release in favour of the defendants.

[38] Under the settlement, the defendants agree that, if VIB operates in the future, it will treat staff as employees, not as independent contractors.

Legal Principles Applicable to Settlement Approval

[39] Recently, in *Redublo v. CarePartners*, 2022 ONSC 1398, at paras. 53-58, I described the legal principles applicable to settlement approval as follows:

[53] Under s. 27.1(1) of the *CPA*, a proceeding brought under the *CPA* may only be settled with court approval. The court shall not approve a settlement unless it determines that the settlement is fair, reasonable, and in the best interests of the class: s. 27.1(5) of the *CPA*; *Sheridan Chevrolet Cadillac v. T. Rad Co.*, 2018 ONSC 3786, at para. 6. The key question is whether the settlement falls within a zone of reasonableness: *Sheridan*, at para. 6. The burden lies on the party seeking approval: *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 (S.C.) at para. 7.

[54] Settlements need not be perfect; they are compromises: *Bancroft-Snell v. Visa Canada Corporation*, 2015 ONSC 7275, at para. 48; *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447, at para. 71. To find that a settlement is not fair and reasonable, it must fall outside a range of reasonable outcomes: *Nunes*, at para. 7; *Haney Iron Works v. Manufacturers Life Insurance*, (1998), 169 D.L.R. (4th) 565 (Ont. S.C.), at para. 44. An objective and rational assessment of the pros and cons of a settlement is required: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant*

Corporation, 2014 ONSC 5812, at para. 33. There is a strong presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval: *Nunes*, at para. 7.

[55] A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of its litigation rights against the defendants: *Nunes*, at para. 7. However, it is not the court's function to substitute its judgment for that of the parties or attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action, or, on the other hand, to rubber-stamp a settlement: *Nunes*, at para. 7.

[56] When considering whether to approve a negotiated settlement, the court may consider, among other things: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation; (f) the number of objectors and nature of objections, if any; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (i) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Hodge v. Neinstein*, 2019 ONSC 439, at para. 38; *Lozanski*, at para. 73; *Nunes*, at para. 7.

[57] These factors are a guide, and no more. In any given case, one or more of the factors will have greater significance or should be afforded greater weight than the others: *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151, at para. 73.

[58] When analyzing the reasonableness of a settlement, the court engages in two analytical exercises. First, the court compares and contrasts the settlement with what would likely be achieved at trial, without making findings about the actual merits of the claims. In other words, the court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination on the merits. Second, the court undertakes a structural analysis to examine the fairness and reasonableness of the terms of the settlement and the scheme of distribution: *Hodge*, at para. 42.

Is the proposed settlement fair, reasonable, and in the best interests of the class?

[40] Considering the legal principles set out above, I note the following factors.

[41] First, this proceeding comes with significant risk. There is evidence in the record that the corporate defendant is ceasing operations, and the individual defendant has demonstrated an inability to pay. There is thus a significant possibility that class members may not recover any damages that might be awarded to them in an adjudicated resolution of this action. In other words, a bird in the hand is worth two in the bush; the practical likelihood of class members recovering significant damages after a judgment is low.

[42] Second, continuing to an adjudication of this action would require a certification motion, followed by a common issues trial. Given the risk of inability to collect, enforcement proceedings might be necessary. This would cause delay.

[43] Third, the defendants have a reasonable argument that the limitation period would apply to statute bar some of the class members' claims. It is possible that an adjudication would lead to the narrowing of the class period to March 16, 2018, both reducing the defendants' exposure and the number of class members who would be eligible for recovery of any losses that they would actually have suffered.

[44] Fourth, if VIB does, in fact, engage in event staffing services in the future, it has agreed to modify its behaviour to classify its hired workers as employees, not independent contractors.

[45] Fifth, an expert report the plaintiff commissioned for the mediation calculated damages over the entirety of the class period, beginning in 2010, at \$1,162,900. The defendant argued that the report's assumptions were wrong, and adjusting them would lead to damages of approximately \$66,500. Clearly the quantum of the settlement is much closer to the defendant's assessment of damages than the plaintiffs. A significant part of the delta between the parties relates to the operation of the limitation period. As a practical matter, the quantum may be better understood as being driven by the defendants' ability to pay, but there is real risk that the limitation period would operate to exclude a substantial portion of the losses that made up the \$1,162,900 calculated by the expert.

[46] In my view, the settlement is fair and reasonable and in the best interests of the class, considering the risk, both in terms of establishing damages in the range of those calculated by the expert, and in terms of the practical risk of being able to collect on the judgment. The settlement provides the class with early, guaranteed, recovery. It provides for a simple claims process that will enable many class members to recover, even if they no longer have relevant documentation to establish entitlement. The settlement comes at a time before any litigation funding has been sought, and so the full benefit of the net settlement funds (after counsel fees and honorarium, which I address below, have been paid) remains for the class.

[47] Accordingly, I approve the settlement.

The Distribution and Notice Plans

[48] The distribution and notice plan provides that:

- a. After settlement approval, each class member will receive an email including a claim form;
- b. The claim form will be submitted to class counsel who will collect all claim forms;
- c. Once the deadline for claims has passed, class counsel will use the unredacted records provided by the defendants to confirm class member eligibility and confirm their total potential damages in a "first notification letter";

- d. Any class member dissatisfied with the first notification letter may appeal to a referee by completing an appeal form with evidence, at which time a straightforward appeals process will be employed that will allow class counsel and the affected class member to make submissions and provide documents, after which the referee will issue a decision in a “fresh notification letter”. The referee’s fees, costs and expenses shall be paid by class counsel except for a small appeal fee which shall be paid by the class member, and which fee shall be returned to the class member if the appeal is successful.
- e. After all appeals have been settled, the relative share of all class members will be determined, and each class member will receive a “payment notification letter”;
- f. Payments will be issued to class members via cheque to the address provided on their claims form or via electronic funds transfer to the designated bank account; and
- g. These payments will be classified as damages and no deductions will be made.

[49] VIB has completed an extensive review of information in its possession to compile a list of last known contact information for class members. Class counsel propose to communicate with class members by email.

[50] Counsel propose to send a short-form notice of settlement approval to each class member by email to their last known email address. They also propose to post a short-form notice of settlement approval and long-form notice of settlement approval on their website. Counsel will also send the short-form notice of settlement approval to all class members who contacted class counsel about this proceeding using the contact information they provided.

[51] The settlement provides for an opt-out process for any class member who does not wish to participate in the settlement.

[52] The short form and long form notices are clear. The notice plan leads to a significant likelihood that the class members will become aware of the settlement. The distribution plan benefits class members equitably, in proportion to their respective claims, and allows for a straightforward, easy to follow process, which ought to encourage uptake.

[53] I approve the distribution and notice plans.

Counsel Fee and Retainer Agreement Approval

[54] Section 33 of the *CPA* allows class counsel to enter into a contingency fee arrangement for payment of their fees for a class proceeding.

[55] Sections 32(1) and (2) of the *CPA* provide that a retainer agreement must be approved by the court. A retainer agreement must be in writing and must: (i) state the terms under which fees and disbursements shall be paid; (ii) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and (iii) state the method by which payment is to be made, whether by lump sum, salary or otherwise.

[56] Class counsel's retainer agreement satisfies these requirements.

[57] Section 32(2.1) provides that the court shall not approve an agreement respecting fees and disbursements unless it determines that the fees and disbursements required to be paid under the agreement are fair and reasonable, having regard to the following factors set out in the *CPA*:

- a. the results achieved for the class members;
- b. the degree of risk assumed by the solicitor in providing representation;
- c. the proportionality of the fees and disbursements in relation to the amount of any monetary award or settlement funds;
- d. any prescribed matter; and
- e. any other matter the court considers relevant.

[58] In assessing the degree of risk assumed by the solicitor, s. 32(2.2) of the *CPA* directs the court to consider:

- a. the likelihood that the court would refuse to certify the proceeding as a class proceeding;
- b. the likelihood that the class proceeding would not be successful;
- c. the existence of any other factor, including any report, investigation, litigation, initiative or funding arrangement, that affected the degree of risk assumed by the solicitor in providing representation; and
- d. any other prescribed matter.

[59] Section 32(2.3) of the *CPA* allows the court, in determining whether the fees and disbursements are fair and reasonable, to consider different methods by which fees and disbursements could have been structured or determined for comparison.

[60] The basic test is whether class counsel's proposed fees are fair and reasonable in all of the circumstances. Fair and reasonable fees may include a premium for the risk undertaken and the result achieved, but the fees must not bring about a settlement that is in the interests of the lawyers, but not in the best interests of the class as a whole: *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para. 32.

[61] As Morgan J. recently noted in *Austin v. Bell Canada*, 2021 ONSC 5068, at para. 10, generally speaking, when considering whether to approve class counsel fees, "the amount payable under the contract is the starting point for the application of the court's judgment." If approving a fee pursuant to a contingency agreement, the court must consider all the relevant factors and circumstances to determine whether the fee is reasonable and maintains the integrity of the profession: *Hodge*, at para. 46.

[62] A contingency fee of up to 33% is presumptively valid and enforceable provided that the arrangement is fully understood and accepted by the representative plaintiffs: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, at paras. 8-9.

[63] The general principles to apply to the assessment of class counsel's fees were set out by Juriansz J.A. in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 O.R. (3d) 37 (C.A.), at para. 80:

- a. the factual and legal complexities of the matters dealt with;
- b. the risk undertaken, including the risk that the matter might not be certified;
- c. the degree of responsibility assumed by class counsel;
- d. the monetary value of the matters in issue;
- e. the importance of the matter to the class;
- f. the degree of skill and competence demonstrated by class counsel;
- g. the results achieved;
- h. the ability of the class to pay;
- i. the expectations of the class as to the amount of the fees;
- j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[64] In this case, the retainer agreement provides for a 33% contingency fee of the amount recovered, plus taxes and disbursements. The agreement is thus presumptively valid in accordance with the decision in *Cannon*.

[65] Based on counsel's hourly rates, the proposed fees amount to a significant discount. Calculated on the basis of their hourly rates, and before allowing for the time that will be spent to administer the settlement, counsel's fees would total \$143,870 as of April 27, 2022, shortly before this motion was heard.

[66] The representative plaintiff supports counsel's request for fees, noting that he could not have afforded to litigate this case other than on a contingency basis. He agrees with and approves the arrangement regarding fees. He deposes that he understood and agreed with the arrangements when he signed the retainer agreement.

[67] The representative plaintiff also deposes that class counsel pursued this litigation zealously and advocated with professionalism.

[68] No class member has objected to class counsel's proposed fees and disbursements.

[69] Class counsel took on risks associated with this litigation, and notably, the risk that the actual damages for which recovery could be had could be limited in large measure by the operation of the limitation period. Moreover, without class counsel's willingness to prosecute this action on a contingency basis, it is apparent that the class would have had no access to justice, and there would have been nothing to incentivize behaviour modification. However, the most significant risk was that there would be no recovery of a judgment due to the financial circumstances of the defendants.

[70] Another risk borne by class counsel was the risk of funding disbursements and adverse costs awards. No litigation funding was obtained, and pursuant to the retainer agreement, counsel had an obligation to indemnify the representative plaintiff if funding or insurance was not obtained.

[71] Given the risks of non-recovery, the settlement is a good one for the class, who will be in pocket, guaranteed, and early in the proceedings. However, I do note that the legal fees, HST and disbursements are significant in comparison to the net recovery that will be left for the class. In part, this reflects the fact that disbursements on a smaller settlement necessarily form a greater proportion of the settlement. In any event, the only disbursements being sought are \$3,000 for the plaintiff's share of the mediation fee, and the cost of the expert report, both of which were important to reaching a settlement at mediation.

[72] Nonetheless, given the ongoing commitment of class counsel to administer the settlement without charging further fees, and the early and, practically speaking, good result for the class, I am of the view that class counsel's fee request is reasonable. Without their skill and involvement, the class action could not have been brought at all, and this early and advantageous settlement would not have resulted.

[73] Given the significant discount on counsel's fees compared to their hourly rates, I conclude that the fees sought are fair and reasonable.

Honorarium

[74] The representative plaintiff seeks an honorarium of no more than \$6,000.

[75] The law of honoraria is in flux in Ontario. Recently, in *Redublo*, at paras. 95-110, I described the history and current state of the law, and noted that, as it has always been, judges of the Ontario Superior Court of Justice have different approaches with respect to payment of an honorarium.¹ However, I concluded, at para. 111, that the goals of the *CPA* are advanced through the award of honoraria to representative plaintiffs in class proceedings. I then summarized the law on honoraria at para. 114, as follows:

I would award an honorarium where a representative plaintiff, or other involved class member, has provided competent service coupled with positive results to the class.

¹ This state of affairs may finally end, as the Divisional Court has granted leave to appeal in *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 2210.

In assessing the quantum of the honorarium, I would consider the factors laid out in *Hodge*, plus additional factors. For convenience, I set out all of these factors below:

- a. Did the representative plaintiff have active involvement in the initiation of the litigation and retainer of counsel?
- b. Was the representative plaintiff exposed to a real risk of costs?
- c. Did the representative plaintiff suffer significant personal hardship or inconvenience in connection with the litigation?
- d. Did the representative plaintiff suffer direct financial losses or incur out-of-pocket costs that she would not have incurred as an individual litigant?
- e. Did the representative plaintiff take on a role that was extraordinarily onerous, or potentially traumatic, or that put her at risk of suffering additional harms?
- f. How much time did the representative plaintiff spend, and what activities did she undertake in advancing the litigation?
- g. How did the representative plaintiff communicate and interact with other class members?
- h. What was the extent of the representative plaintiff's participation at various stages in the litigation, including discovery, settlement negotiations and trial?
- i. How does the settlement or judgment benefit the class?
- j. Is the proposed honorarium an amount that does not create an actual or perceived conflict with the class?
- k. Are there objectors to the proposed honorarium and if so, what are the nature of their objections?

[76] The evidence before me relating to these factors indicates that the representative plaintiff was actively involved in the initiation of the claim; it was he who approached class counsel. He has maintained regular contact with class counsel throughout. He accepted mediation and participated in the process, which resulted in the early and advantageous settlement.

[77] The representative plaintiff is described by class counsel as "excellent". He became familiar with the issues to be decided, gave evidence on the original, expected to be contested, certification motion and on this motion. He participated in strategizing with class counsel. He reviewed material filed. He acted as a point of contact for class members, and disseminated information about the action to, and otherwise communicated with, potential class members.

[78] The representative plaintiff was not exposed to a real risk or costs, nor did he suffer significant personal hardship or inconvenience, or the risk of trauma, in connection with the litigation.

[79] There are no objectors to the proposed honorarium.

[80] While I am satisfied that the settlement is in the best interests of the class, it remains modest in view of the defendants' ability to fund a settlement. In these circumstances, I am of the view that, to ensure the honoraria does not create an actual or perceived conflict with the class, it should be lower than the \$6,000 maximum sought.

[81] In these circumstances, in recognition of the representative's plaintiff's role in securing access to justice for the class, and promoting behaviour modification, and in light of his competent service to the class, an honorarium of \$4,000 is appropriate. This amount strikes the balance between recognizing Mr. Suzic's contribution and ensuring that his compensation is not disproportionate to the value of the settlement to the class.

Conclusion

[82] In summary, I make the following orders:

- a. This proceeding shall be certified as a class action pursuant to s. 5 of the *CPA* for settlement purposes. The common issues certified are those set out in the attached Schedule A.
- b. Mr Suzic is appointed representative plaintiff for the class.
- c. The settlement of \$105,000 is fair, reasonable, and in the best interests of the class, and such, the settlement and settlement agreement are approved.
- d. The distribution plan and notice plan, and the distribution and notice documents, are approved;
- e. The retainer agreement is approved. Class counsel's legal fees, disbursements, and HST, in the amount of \$50,454.50 all-inclusive, and, separately, the \$3,000 mediation fee disbursement, are approved.
- f. An honorarium payment in the amount of \$4,000 is approved for the representative plaintiff, Mr. Suzic.

[83] Counsel shall provide me with a revised draft order complete with schedules (which may be in word or in PDF), reflecting the orders made herein, for my signature.

J.T. Akbarali J.

Date: June 28, 2022

Schedule “A”

Common Issues

1. Did the actual circumstances of the relationship between the Defendants and the class members constitute an employer/employee relationship, such that the class members were in fact employees of the Defendants and not “independent contractors”?
2. If the answer to (1) is “yes”, are the Defendants liable to the class for employee benefits pursuant to the Employment Standards Act (including unpaid vacation pay and public holiday pay and overtime)?
3. If the answer to (1) is “yes”, what are the terms (express or implied or otherwise) of the class members’ contracts of employment with the Defendant regarding:
 - a. Regular and overtime hours of work;
 - b. Recording of the hours worked by the class members;
 - c. Breaks;
 - d. Payment of hours worked by class members; and,
 - e. Lieu time as purported compensation for overtime hours worked.
4. Whether the Defendant breached any of the contractual terms and if so, how. Without limiting generality of the forgoing, whether the class members are owed damages from the Defendants for:
 - a. Unpaid overtime;
 - b. Compensation below minimum wage;
 - c. Vacation pay; and,
 - d. Public holiday pay and premium pay.
5. Whether the Defendant has a duty (in contract or otherwise) to prevent class members from working, or a duty to not permit or encourage class members to work, overtime hours for which they were not properly compensated or for which the Defendant would not pay.
 - a. If such a duty exists, whether the Defendant breached that duty.
6. Whether the Defendant has a duty (in contract or otherwise) to accurately record and maintain a record of all hours worked by class members to ensure that class members were appropriately compensated for same.

- a. If such a duty exists, whether the Defendant breached that duty.
7. Whether the Defendant has a duty in contract, or otherwise to implement and maintain an effective and reasonable system or procedure which ensured that the duties in Common Issues (4)(d) and 5)(a) were satisfied for all class members.
 - a. If such a duty exists, whether the Defendant breached that duty.
8. Whether the Defendants are liable, and must reimburse the class members, for any Canada Pension Plan or Employment Insurance Act contributions which they may have paid or are owed resulting from the failure of the Defendant to pay statutory contributions.
9. If liability is established, are punitive damages available?

If the answer to Common Issue (8) is yes

10. What is the quantum of punitive damages owed to class members or any part thereof?
11. If liability is established, are aggregate damages available?

If the answer to Common Issue (11) is yes:

12. What is the most efficient method to assess those aggregate damages? Without limiting the generality of the foregoing, can aggregate damages be assessed in whole or in part on the basis of statistical evidence, including statistical evidence based on random sampling?
13. What is the quantum of aggregate damages owed to class members or any part thereof?
14. What is appropriate method or procedure for distributing the aggregate damages award to class members?