CITATION: Montaque v. Handa Travel Student Trip Ltd., 2020 ONSC 3821
COURT FILE NO.: CV-18-00598257-CP
DATE: 20220627

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: D'ANDRA MONTAQUE, Plaintiff

– and –

HANDA TRAVEL STUDENT TRIP LTD. o/a I LOVE TRAVEL, CAMPUS VACATIONS HOLDINGS INC., 2504027 ONTARIO INC. o/a S-TRIP! and 2417988 ONTARIO INC. o/a BREAKAWAY TOURS, ALEXANDRE JIT HANDA a.k.a. ALEXANDRE HANDA a.k.a. ALEXANDER HANDA a.k.a. ALEX HANDA, JUSTIN VAN CAMP and EUGENE WINER, Defendants

BEFORE: E.M. Morgan J.

COUNSEL: *Jody Brown and Joshua Mandryk,* for the Plaintiff

David Di Paolo and Lauren Daniel, for the Defendants

HEARD: June 27, 2022

SETTLEMENT APPROVAL

[1] In October 2020, this claim was certified as a class action under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("*CPA*"): *Montaque v. Handa Travel Student Trip Ltd*., 2020 ONSC 6459. The parties now seek approval for a proposed settlement of the action.

[2] As explained in my reasons for certification, the corporate Defendants operate a travel company under several different brand names. They sell vacation tours to student-age travelers. The certified class is composed of individuals that claim to have been misclassified by the corporate Defendants as volunteers when they should have been classified as employees. They claim wages and benefits commensurate with their proper classification. The class members are what the Defendants refer t as "Trip Leaders" on the guided tours for students.

[3] As set out in the reasons for certification, the Trip Leaders' job duties and responsibilities include performing the type of tasks that tour chaperones, organizers and other employees would typically perform. They are required to follow detailed procedures and protocols set out in the Destination Staff Manual provided by the Defendants. These tasks and procedures relate to pre-trip planning and procedures, travel organization, airport and flight procedures, emergency and on-site procedures, briefing sessions, hotel check-ins and check-out, and return trip organization

and procedures. The Defendants pay class members only a small honorarium, which is well under the province's minimum wage. They have never received the benefits that employees are required to receive under the *Employment Standards Act, 2000*, SO 2000, c. 41 ("*ESA*").

[4] The parties have now agreed on a proposed settlement of the Plaintiffs' claims. It is by now well understood that, "the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it": *Dabbs v. Sun Life Assurance Co. of Canada* (1998) 40 OR (3d) 429 (Gen Div), aff'd (1998) 41 OR (3d) 97 (Ont CA). In general, a settlement must fall into the zone of reasonableness, not perfection: *Parsons v Canadian Red Cross Society*, [1999] OJ No 3572, at para 70 (SCJ). Moreover, where the parties are represented by competent and experienced counsel, the court can assume, absent evidence to the contrary, that the proposed settlement is the best that could reasonably have been achieved: *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited,* 2012 ONSC 6626 at para 29.

[5] In assessing the reasonableness of the settlement, the court is to take account of the following factors:

(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 the litigation;

(f) the number of objectors and nature of objections;

(g) the presence of good faith, arm's length bargaining and the absence of collusion;

(h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and

(i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.

See, *Fantl v. Transamerica Life Canada*, [2009] OJ No 3366, at para 59 (SCJ); *Corless v. KPMG LLP*, 2008 CanLII 39784, at para 38 (SCJ).

[6] The total settlement is $450,000, inclusive of all costs and administration expenses. The settlement is non-reversionary. Class counsel submit, and I agree, that the settlement proposal provides the following benefits that underscore its merits:

(a) it avoids delays associated with trial and appeals;

(b) it achieves behaviour modification;

(c) it provides for pro-rata payments without the requirement that individuals prove their damages;

(d) it achieves a benefit for all Class Members regardless of when they took a trip or with which company;

(e) it avoids litigation funding costs;

(f) it avoids the risk that some of the defendants will be unable to satisfy a judgement.

(g) it stipulates that no Class Member will be required to do anything to prove their trips taken or with which company.

[7] I also agree with class counsel's submission that the following factors serve to characterize the proposed settlement as a reasonable one:

(a) The legal risk which existed at the outset of this case was multiplied by solvency concerns regarding the Defendants. It is worth noting that the Defendants are in the travel business which was severely impacted by the COVID-19 pandemic causing at least one of the Defendants' brands to cease all operations as of August 2021;

(b) The Class Members were all engaged on short term trips, usually lasting 4½ to 8½ days. Each of them had signed a volunteer agreement. There was a considerable risk that on the merits the relationship between the parties would be treated as a genuine volunteer relationship and not an employment relationship. The Class Members also risked being found that they are in any case subject to exemptions from minimum wage and overtime pay under the *ESA* that would eliminate their claim to wages under the *ESA*;

(c) The proposed settlement's compensation and distribution protocol is designed to provide Class Members compensation analogous to what they would have received had the common issues been adjudicated in their favour. Class Members who took longer trips will receive more money and Class Members who took trips in the period that is presumptively time barred will receive less money; and

(d) Assuming the take-up rate is 50%, the estimated is that Class Members whose claims are not presumptively time barred will receive a payment equivalent to working 8 hours per day of their trip at the average minimum wage over the class period; and

(e) The Defendants have committed to behaviour modification by reclassifying the Class Members and other destination staff as employees for all future trips.

[8] In addition to the reasonable terms of the proposed settlement, the proposed distribution protocol is well thought-out and is itself within the reasonableness zone. It strikes a balance between individual compensation of Class Members and an efficient and expeditious overall distribution. The protocol provides compensation to all Class Members who submit a claim in a process which is as simple and user-friendly as could be under the circumstances.

[9] More specifically, Class Members need not have kept track of their working hours in order to claim compensation. This is important in a case where the Class Members were labelled volunteers, as they previously had no particular reason to track their own hours. The Defendants will be able to provide the claims administrator with all of the information they need to distribute the settlement funds to the claiming members of the Class.

[10] As already noted, the proposed protocol contemplates discounting trips which would likely be time-barred. This, of course, reflects the enhanced litigation risk for those Class Members who fall into this category. Distinguishing between different Class Members in this way has been found in previous cases to be both legitimate and reasonable: *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192, at para 51.

[11] Class counsel also seek approval of their fees pursuant to section 32 of the *CPA*. Justice Perrel outlined the factors to be considered in evaluating fee approval in *Brazeau v. Attorney General of Canada,* 2019 ONSC 4721, at para 27:

> Factors relevant in assessing the reasonableness of the fees of class counsel include: (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; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[12] Class Counsel are seeking a fee award of $100,000, which amounts 22% of the settlement amount, plus disbursements and HST of $25,431.94. This is considerably less than what would be permitted under the retainer agreement. It is also well within the range of fees approved in other cases under the *CPA*, which more typically approve up to 33% of an award or settlement.

[13] Needless to say, the litigation entailed certain risks for class counsel. The settlement they achieved for the class is a good one, which will put money in the pocket of class members that they would not likely have been able to achieve on their own. Moreover, the case was a novel one and the result somewhat groundbreaking. This is the first volunteer misclassification class action in Canada, and will have a significant impact on employment law going forward.

[14] Finally, class counsel requests approval of a $5,000 honorarium for the representative Plaintiff in recognition of her invaluable services to the Class. In *Eklund v. Goodlife Fitness Centres Inc.*, 2018 ONSC 4146 at para 49, I indicated that the employment context is one in which

a representative plaintiff places themselves in a precarious position by attaching their name to litigation against an employer.

[15] Here, the Plaintiff did just that and put her employment prospects at risk by assuming the lead role for the class. Furthermore, she was instrumental in navigating this claim to a successful settlement. She deserves a modicum of recognition in the form of the honorarium requested on her behalf.

[16] In all, class counsel requests the following Orders:

(a) An Order approving the Settlement Agreement;

(b) An Order approving the Distribution Protocol; the appointment of RicePoint Class Action Services as Settlement Administrator; and, the distribution of the notice of settlement approval in accordance with the Plaintiff's notice plan;

(c) An Order approving the Retainer Agreement; Class Counsel's legal fees in the aggregate amount of $100,000, HST on fees in the amount of $13,000, plus disbursements of $21,514.99 (plus applicable taxes); and notice and administration expenses as incurred; and

(d) An Order approving an honorarium of $5,000 to the Plaintiff.

[17] All of the above Orders are hereby granted.

Morgan J.

Date: June 27, 2022