

CITATION: Phillip v. Deloitte Management Services LLP et al, 2023 ONSC 1210
COURT FILE NO.: CV-15-523524-CP
DATE: 20230223

SUPERIOR COURT OF JUSTICE - ONTARIO

TARRIE ALGERNON PHILLIP

Plaintiff

and

**DELOITTE MANAGEMENT SERVICES LP
and DELOITTE & TOUCHE LLP**

Defendants

Proceedings commenced under the *Class Proceedings Act, 1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Alexandra Monkhouse and Andrew Monkhouse* for the Plaintiff

Sarah Whitmore, Linda Plumpton and Craig Gilchrist for the Defendants

HEARD: February 16, 2023 via Zoom video

Settlement, Legal Fees and Related Approvals

[1] After almost eight years of litigation, including a bumpy certification,¹ this class action alleging employee misclassification and breaches of provincial employment standards has settled for \$2.4 million.

¹ The class action was conditionally approved in 2017 pending approval of a suitable representative plaintiff (*Sondhi v. Deloitte Management Services LP*, 2017 ONSC 2122) and fully approved in 2018 when Ms. Sondhi was replaced with Mr. Phillip (*Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271).

[2] The class action involves some 500 individuals who provided document review and e-discovery services to third parties through independent contractor agreements with the defendants.

[3] The claim seeks damages relating to the defendants' failure to compensate document reviewers for benefits prescribed by the *Employment Standards Act*² including the minimum hourly wage, overtime pay, vacation pay, holiday pay and damages relating to CPP payments and EI payments.

[4] The motion before me asks for court approval of:

- a. the settlement amount of \$2.4 million;
- b. class counsel legal fees, taxes and disbursements of \$966,845.63 all-inclusive;
- c. the payment of \$152,821.43 to the Class Proceedings Fund;
- d. the distribution method and notice documents; and,
- e. an honorarium payment of "no more than \$20,000" for the representative plaintiff.

[5] Except for the honorarium amount which is awarded at \$8000, the items are approved as presented. I will explain each in turn.

Settlement approval

[6] I have no difficulty concluding that the \$2.4 million settlement amount is fair and reasonable and in the best interests of the class.

[7] I rely on the detailed and candid affidavit filed by class counsel about the risks of continued litigation. I focus, in particular, on two key points. One, there is good reason to doubt the recoverability of the CPP and EI payments because these payments have already been refunded. When these payments are deducted from the overall claim, the quantum at issue falls well below the settlement amount. Two, the settlement amount was achieved after two days of mediation before a highly experienced mediator, the mediator recommended the settlement amount and there were no class member objections.

Legal fees

² *Employment Standards Act, 2000*, SO 2000, c. 41.

[8] I also have no difficulty approving class counsels' request for the payment of \$966,845.63 in legal fees, taxes and disbursements — \$792,000 for legal fees, \$102,960 in HST and disbursements in the amount of \$71,885.63.

[9] Based on the retainer agreement, class counsel are entitled to a 33 per cent contingency fee plus disbursements and taxes. As discussed in *Cannon*,³ and as further refined in *Brown*,⁴ this contingency fee amount is presumptively valid on the facts herein and is approved.

Payment to the Class Proceedings Fund

[10] The costs of the class action were supported in part by the Class Proceedings Fund. Under the funding agreement, the Fund is now owed \$142,259.22 in fees based on the statutorily-prescribed levy and \$10,562.21 in disbursements.⁵ The payment of \$152,821.43 is approved.

Distribution and notices

[11] In my view, the distribution plan is fair, reasonable, and in the best interests of the class. I note that class counsel will administer and distribute the settlement and will not seek reimbursement of any additional costs relating to such distribution.

[12] For the benefit of class members, I set out the distribution plan in detail, tracking the language and capitalizations provided by class counsel:

- (a) After settlement approval, each Class Member will receive an email to include a Claims Form;
- (b) The Claim Form will be submitted to Class Counsel who will collect all claim forms. Claims Forms must be received by Class Counsel within 90 days of the Notice of Settlement Approval, or as determined by the Court. Note that an incomplete or improperly completed Claims Form will not be grounds to deny a Class Member compensation;
- (c) Within 60 days of the deadline for Claims, Class Counsel will consult the Claims Form, any other information or documents received from a Class Member with or apart from the Claims Form, the productions exchanged in the litigation, and when the Class member worked for the Defendants;

³ *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

⁴ *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

⁵ O. Reg. 771/92, s. 10 (1).

- (d) Within 90 days of the deadline for Claims, Class Counsel will send each Class Member who delivered a timely Claims Form an individualized Notification Letter listing, for each Class Member, the determination regarding the Class Member's work history and estimated claim based on Class Counsel's review;
- (e) Class Counsel will send each Class Member's Notification Letter using the same email address supplied by the Class Member on the Claims Form or supplied by the Class Member in some other satisfactory manner;
- (f) In the event a Class Member disputes the Class Member's work history or estimated claim amount the Class Member shall complete an Appeal Form, to be filed within 30 days of the date of the Notification Letter, and advise Class Counsel of the claimed work history and provide documentation and/or written reasons in support of their claim;
- (g) Class Counsel may ask the Class Member further questions in their discretion, but the Class Member shall not be subject to cross-examination or inquiries from Deloitte under any circumstances;
- (h) Where a Class Member disputes the Class Member's work history or estimated claim, Class Counsel shall review the information the Class Member provides and make a determination as to the applicable work history and estimated claim amount. The principles of access to justice, expediency and accessibility shall guide all determinations. Class Counsel shall, within a reasonable time frame, advise the Class Member of its determination, by email or letter mail. The determination is final and not subject to appeal by any court or review in any manner by any court, tribunal, board or authority;
- (i) Once all appeals have been resolved and the deadline for all appeals has passed, Class Counsel will calculate the amounts owing to each Class Member who submitted a Claims Form or who otherwise advised Class Counsel of the information set out in the Claims Form or information;
- (j) 60 days after the appeals process is complete, Class Counsel will send each Class member an individualized Payment Notification Letter and either deposit the Class Member's payment into their banking account or deliver, with the individualized Payment Notification Letter, a cheque for amount to be paid, if the Class Member expressly requires the payment to be made by cheque; and
- (k) These payments will be classified as damages and no deductions will be made.

Honorarium

[13] The only item that generated any real discussion at the hearing was class counsels' request that the representative plaintiff be awarded an honorarium in the amount of \$20,000.

[14] I was pleased that Mr. Phillip was at the hearing because I wanted him to understand that my reluctance to award anything close to \$20,000 did not reflect on the good work that he did as representative plaintiff. Indeed, I agreed with class counsel that Mr. Phillip’s contributions were excellent in every respect, including reviewing and drafting material, communicating with other class members, attending the two-day mediation and generally providing valuable and timely input about the litigation and the proposed settlement.

[15] However, as I made clear at the hearing, representative plaintiffs do not receive additional compensation for simply doing their job as class representatives. It is only where the representative plaintiff can demonstrate a level of involvement and effort that goes beyond what is normally expected and is “truly extraordinary”, or where there is evidence that they were financially harmed because they agreed to be the class representative, that the payment of an honorarium may be justified.⁶

[16] I cannot conclude on the evidence before me that Mr. Phillip’s level of involvement and effort was “truly extraordinary”. I can, however, accept that his decision to embrace the role of representative plaintiff came with some personal and financial hardship. I note what Mr. Phillip said in his affidavit:

I experienced significant personal hardship due to my connection with the Class Action. For instance, my involvement as the representative plaintiff in this Class Action affected my employability in an already challenging and competitive job market, as prospective employers are less inclined to hire individuals who are acting as the plaintiff in ongoing litigation against a former employer. I experienced difficulty in securing employment and I expect my involvement in the Class Action played a part.

I have been asked about the Class Action by my subsequent employer. My employer was particularly perplexed by the Class Action, and alarmed by the fact I was involved in an action against a former employer. To alleviate his concerns, I explained to him the circumstances of the Class Action, why my involvement was necessary and important, and explained that I have no intention of similarly bringing an action against his company.

[17] Mr. Phillip was not black-balled by an entire industry and unable to find work; nor did he sustain financial losses in the many thousands of dollars.⁷ However, he did endure some level of

⁶ *Aps v. Flight Centre Travel Group*, 2020 ONSC 6779, at para. 43; *Casseres v. Takeda Pharmaceutical Company*, 2021 ONSC 2846, at para. 10; and *MacDonald et al v. BMO Trust Company et al*, 2021 ONSC 3726 at para. 55.

⁷ As in the cases just cited *supra*, note 6, where this court has awarded \$10,000 to \$50,000 in honorarium payments.

hardship in taking on the role of representative plaintiff. In my view, an award of a \$5000 to \$8000 honorarium is merited. I am prepared to award \$8000.

Extension of class period

[18] There is one final (on consent) matter that requires a brief comment.

[19] Although the initial class period was from January 16, 2014 to January 16, 2018, the plaintiff brought a motion to extend the class period to March 2020. For the purposes of this settlement, the parties have agreed that the claims period will be extended to March 16, 2020. The plaintiff's request for an order extending the class period for the purposes of settlement to cover January 16, 2018 to March 16, 2020 is granted.

Disposition

[20] Except for the honorarium amount which is pegged at \$8000, the approval motion is granted in its entirety.

[21] Order to go as per the draft Order signed on February 16, 2023.

Belobaba J.

Date: February 23, 2023