CITATION: Cunningham v. RBC Dominion Securities, 2022 ONSC 5862
COURT FILE NO.: CV-20-643720-CP
DATE: 20221229

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LEIGH CUNNINGHAM

Plaintiff

- and -

RBC DOMINION SECURITIES LIMITED / RBC DOMINION VALEURS MOBILIERES LIMITEE and RBC DOMINION SECURITIES INC. / RBC DOMINION VALEURS MOBILIERES INC.

Defendants

Proceeding Under the Class Proceedings Act, 1992

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David F. O'Connor, Stephen J. Moreau, Daniel Lublin, J. Adam Dewar and Christopher Perri* for the Plaintiff / Moving Party
Jeremy Devereux and Ted Brook for the Defendants / Responding Parties

HEARD: June 20, September 28, October 27 and November 16, 2022 via video

Motion for Certification

[1] This proposed national class action alleges that the defendant brokerage and investment firm failed to provide vacation and public holiday pay to commissioned employees in breach of provincial and territorial employment standard laws.

[2] The class of commissioned employees includes Investment Advisors ("IAs") who worked completely on commission and more junior-level Associates and Assistants who generally worked under an IA and were compensated at least in part by commissions. I will refer to the applicable employment standard laws, which are almost uniformly similar, as ESAs.

[3] The core provisions of the applicable ESAs are not in dispute. The defendant agrees that the ESAs define "wages" to include "commissions" and that the employer is statutorily required to pay its commissioned employees not only their wages (that is their earned commissions) but also a statutorily-prescribed separate and additional amount for vacation and statutory holidays. The defendant also agrees, that the ESAs require that the calculation of these amounts be recorded and provided to the employee.

[4] The problem here is that no such information was ever provided to the (wholly or partly) commissioned employees. The commissioned employees received regular and standardized earnings statements and pay stubs detailing their earnings and deductions — but no information, as statutorily required, about the calculation and amount of the additional vacation or public holiday pay component. The commissioned employees could not determine from their earning statements, pay stubs or any other information provided to them by the defendant whether they were being paid any additional amount for vacation or public holiday pay.

[5] The defendant admits that it may have breached the recording and reporting requirements of the ESAs. Nonetheless, argues the defendant, this motion for certification should be dismissed for at least two reasons:

(i) The onus is on the employee to provide some evidence that she was not paid the statutory entitlement to vacation and public holiday pay, and there is no such evidence here; and,

(ii) In any event, there is no basis for the claim because all commissions continued to be paid in full while the commissioned employee was on vacation or off on a public holiday — without any reduction or adjustment.

[6] There is a short answer to both of these points.

[7] First, the onus is not on the employee to show that she wasn't paid vacation or public holiday pay. The burden is on the employer to prove that these statutorily-required payments were recorded, reported and made.[1] At the hearing, the defendant eventually accepted this obvious proposition and did not try to argue otherwise.

[8] Second, whether or not "all commissions continued to be paid in full while the employee was on vacation or off on a public holiday, without any reduction or adjustment" is at this point of the litigation a baldly-stated assertion with no supporting detail or explication and, in any event, goes to the merits and should not be decided on a certification motion.

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[1] *École Notre-Dame-du-Mont-Carmel, Applicant v. Nadine Thompson and Director of Employment Standards, Responding Parties*, 2019 CanLII 122774 (ONLRB); *Kinch v. Dufferin Communication Inc*. 2015 ONSC 6610 (Div. Ct.)

[9] I therefore have no difficulty concluding, as I explain below, that this proposed class action must be certified. I agree with the plaintiff that the case turns on the systemic employment policies and operations of the defendant employer and does not require an analysis of any individual employee's personal conduct.

[10] Again, the primary basis for this certification is the fact that no information was ever provided to (wholly or partly) commissioned employees in their standardized earning statements or pay stubs about the calculation and payment of vacation or statutory holiday pay. As noted in *Fulawka*,[2] and *Brown*,[3] the absence of a class-wide system to record and report the ESA-required payment obligations is some evidence of a systemic impediment to the ability of every class member to prove that he or she received these additional payments.[4] The systemic nature of the employer's conduct and its class-wide effect on the ability of all members of the class to determine ESA-compliance provides the required degree of commonality.[5]

[11] It is possible that the defendant may prevail when the merits of the claim are adjudicated. For example, the evidence may show on a more complete record that *de facto* the defendant has satisfied or exceeded the ESA vacation and public holiday pay requirements and no further compensation is owing. However, at this stage of the proceedings, for the reasons that follow, the plaintiff has satisfied the requirements for certification as set out in s. 5(1) of the *Class Proceedings Act, 1992* ("CPA").[6]

Background

[12] The plaintiff, Leigh Cunningham, worked as an Investment Advisor ("IA") in the defendant's Winnipeg office for 26 years until she retired in 2017. The defendant RBC Dominion Securities ("RBC DS") is a full-service brokerage and investment management firm headquartered in Toronto with more than 100 offices nation-wide.

[13] As an IA, the plaintiff's compensation was based entirely on commissions. The commissions were generated in three ways: from the fixed account fees paid by clients who preferred to avoid individual transaction charges; the "trailer fees" that continued to come in after a mutual fund was sold; and individual trading charges. These revenues constituted the IA's "gross production". The IA's compensation was a fixed percentage of her overall net production

[2] *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148.

[3] *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677.

[4] *Fulawka, supra*, note 2, at para. 143.

[5] *Brown, supra,* note 3, at para. 39. *Fulawka, supra*, note 2, at para. 149. Discussed in *Baroch v. Canada Cartage*, 2015 ONSC 40, at paras. 31 and 32.

[6] S.O. 1992, c. 6.

(generally ranging from 20 to 50 per cent) and was set out each year in grid form in the *Investment Advisor Compensation Program*.

[14] Like most IAs, the plaintiff headed up a team of one or more Associates and Assistants, who for the most part, were paid at least in part by commissions for the work generated under the IA's account. The team approach meant that client coverage could be maintained when the IA or another team member was away on vacation or otherwise not at work. The team led by the plaintiff generally had four members consisting of herself, two Associates and an Assistant.

[15] As the defendant's Chief Administrative Office explained in his affidavit, the IA's gross production is the result of work carried out by the responsible IA or by the Associates or Assistants on her team and is as calculated on a monthly basis. Each IA receives a Paysheet Detail Report each month that shows the payout from their gross revenue generated in the previous month and the amounts deducted from that payout. The deductions can include the salary of Associates and Assistants who work with the IA; the cost of their employee benefits; the percentage "commission" or "commission override" that the IA had negotiated and had agreed to pay the more junior team members; and any further bonuses that may be paid to Associates or Assistants from the IA's share of gross revenue. The commission override paid to Associates would generally be in the range of 1 to 5 per cent and to Assistants generally in the range of 0.5 to 1 per cent of the IA's share of the production.

[16] The defendant's CAO made two further points that will be addressed in more detail below:

(i) The Investment Advisor Compensation Program provides that vacation and statutory holiday pay is included in all payout rates. "Therefore" adds the CAO, "it is also included in the portion of the payout that is paid to Associates and Assistants as a commission override."

(ii) While an IA is off work for vacation or a statutory holiday, commissions continue to be paid for transactions carried out by other team members in client accounts for which the Investment Advisor is responsible. The Investment Advisor's share of those commissions is not reduced to reflect the fact that he or she was off work for vacation or a statutory holiday.

[17] The plaintiff says that it was in 2020, three years after she retired, that she realized that "none of my RBC DS paystubs made reference to vacation pay." She also noticed that the Investment Advisor Compensation documentation contained the following statements:

- Vacation and statutory holiday pay is included in all payout rates.

- Please be advised that your total renumeration represents the total amount of financial compensation to which you are entitled. For clarity, your vacation and statutory holiday pay are included in, and paid at the same time as, your commissions. While you receive vacation and holiday pay as part of your total

> compensation, you are required to take time off for statutory holidays and vacation.

[18] As the plaintiff further explained in her affidavit, she never noticed these statements before and the issue of vacation or public holiday pay had never been discussed:

> If there were such statements in documentation from prior years while I was employed at RBC DS, no one ever brought these statements or concepts to my attention, nor did anyone ever discuss with me the issue of vacation and public holiday pay. At all times during my employment with RBC DS, I never turned my mind, and I was never asked to turn my attention or mind, to vacation and/or public holiday pay and never received any sort of breakdown or record of any entitlements I had to vacation, and vacation pay or public holidays and public holiday pay.
>
> I certainly did not agree to, or understand that I was being taken by RBC DS to agree to, any arrangement whereby my vacation or public holiday pay was somehow incorporated into the general commission compensation or rates set for all Investment Advisors.

[19] A second affidavit was filed by Janice Ng, a former Associate who had worked for 10 years in one of the defendant's Toronto branches. Like the plaintiff, Ms. Ng expressed her concern that she "may not have been paid vacation and public holiday pay." She said this:

> During my tenure at RBC DS, [my IA] and I agreed to a compensation structure for me that comprised of a base salary plus commission override … based on the net production of [my IA's] book of business.
>
> Each day, RBC DS would publish a document titled Daily Commission Detail Report for each Investment Advisor's book of business. That document was available to Associates and all other team members and contained information with respect to the total gross and net production realized from the Investment Advisor's book of business. During my tenure with RBC DS, I regularly monitored the Daily Commission Detail Reports in order to track my commission override entitlements.
>
> During my time at RBC DS, I expected and assumed that my employer would properly compensate me for all pay, including vacation and public holiday pay, that I was entitled to receive. I relied upon RBC DS to treat and advise me fairly and accurately, and while employed, did not understand that I may not have been paid vacation and public holiday pay. If RBC DS failed to pay me vacation and public holiday pay on my commissions, I would be very disappointed. Such money (four or six percent of my commissions) would have been significant and consequential for me and would have been financially beneficial as I developed my career.

[20] The plaintiff did not file an affidavit from an Assistant. However, there is no suggestion, and certainly no evidence, that the earning statements or pay stubs provided to (partly

commissioned) Assistants were any different from those provided to IAs or Associates — that is, there is no suggestion that vacation or public holiday calculations that were not provided to IAs or Associates were, for some reason, provided to the Assistants. Therefore, as discussed below, I have no difficulty including commissioned Assistants in the proposed class definition.

Two key submissions

[21] As already noted, the defendant makes two substantive submissions about the alleged breaches of the ESAs.

[22] First, that Investment Advisor Compensation brochure provided that "vacation and statutory holiday pay is included in all payout rates" and, as the CAO added, "Therefore it is also included in the portion of the payout that is paid to Associates and Assistants as a commission override",

[23] This first point is a non-starter and, fortunately, was not pursued at the hearing. The case law is clear that an employer cannot rely on a statement in the employment agreement that vacation and public holiday payments are "included in your pay". This is not enough to satisfy the disclosure requirements in the ESAs. The employer is obliged to record and report the calculation and payment of vacation and public holiday pay — otherwise, the employee will have no basis for determining whether or not these statutory entitlements were even provided.[7]

[24] The second point, advanced by the defendant's CAO without any detail or explanation, was this:

> While an IA is off work for vacation ... commissions continue to be paid for transactions carried out by other team members in client accounts for which the Investment Advisor is responsible ... The Investment Advisor's share of those commissions is not reduced to reflect the fact that he or she was off work for vacation or a statutory holiday.

[25] The same point was made about the commissioned Associates and Assistants in an affidavit filed by a former manager of the defendant's Winnipeg office:

> The employees who worked with Ms. Cunningham and received a salary continued to receive their salary while on vacation or off work for a statutory holiday. In addition, for those employees who received a salary and a "commission override" (a percentage of Ms. Cunningham's share of gross revenue), the commission override they received included their percentage of

[7] *Paramount Landscaping Inc. operating as Paramount Landscaping Contractors v. Christopher Farr*, 2019 CanLII 74285 (ON LRB); and similar ESA decisions in the other territories and provinces.

> any revenue generated or received while they were on vacation or off work for a statutory holiday.

[26] These bald assertions, however, are not helpful and require further explication:

- At this point, we don't know if the commissions in question were already earned (the month before) and were simply paid out while the commissioned employee was on vacation. It is beyond dispute that the payment of previously earned commissions (i.e. wages already earned and owing) that happen to be paid while the employee is on holiday cannot also count as additional ESA-required vacation or public holiday pay.

- Or, did the defendant actually calculate and include the ESA vacation and public holiday obligations in advance of the annually fixed or negotiated commission rates? If so, this will require much more evidence that may well be advanced by the defendant when the matter is argued on the merits.

- Or, is this a case where the defendant employer simply decided to bury its ESA obligations under the misguided "included in payout rates" provision, expecting few if any complaints from a high-income-earning work force?

- And/or did the defendant genuinely believe that even though it was breaching the ESA recording and reporting obligations, the extra week or so of paid vacation time that was provided to most of its employees would *de facto* more than satisfy the ESA vacation and public holiday requirements?

[27] At this stage of the proceeding, the most that can be said is: we don't know.

[28] A more complete record is needed. The matter must be resolved on full evidence when the merits are adjudicated. That's why this court has noted in cases like *Fulawka*[8] and *Brown*,[9] as discussed above, that the absence of a class-wide system to record and report the ESA-required payment obligations (as is the case here) is some evidence of a systemic impediment to the ability of every class member to prove that he or she received these additional payments.[10] The

[8] *Fulawka, supra,* note 2.

[9] *Brown, supra,* note 3.

[10] *Fulawka, supra,* note 2, at para. 143.

systemic nature of the employer's conduct and its class-wide effect on the ability of all members of the class to determine ESA-compliance provides the required degree of commonality.[11]

[29] This important judicial observation covers the commonality requirement. Assuming the other requirements set out in s. 5(1) of the *Class Proceedings Act, 1992* are satisfied, the proposed class action must be certified. Here, the other requirements are satisfied.

The certification requirements

Section 5(1)(a): cause of action

[30] The defendant does not take issue with any of the pleaded causes of action namely breach of contract, negligence, breach of fiduciary duty and unjust enrichment. Each of these causes of action have been held to satisfy the reasonable cause of action requirement in numerous class proceedings alleging breaches of the ESAs.[12]

Section 5(1)(b): class definition

[31] The proposed class definition covers Investment Advisors, Associates and Assistants in all provinces and territories (with the exception of B.C. or Alberta[13]) who were paid in whole or in part in commissions. Several thousand potential class members may be impacted. The defendant has indicated that in each of the recent years it has employed between 1,288 and 1,423 Investment Advisors and between 1,845 and 2,090 Associates and Assistants.

[32] As already noted, the absence of a supporting affidavit from an Assistant does not defeat this proposed class definition. There has been no suggestion that the earning statements or pay stubs provided to partly-commissioned Assistants complied with the ESA reporting requirements.

[33] There is, however, one deficiency in the class definition that should be corrected. There is no start date for the plaintiff's claim. The claim as it stands can reach back many decades making the class proceeding "unmanageable".[14] In *Amyotrophic Lateral Sclerosis Society of Essex,*[15] the

[11] *Brown, supra,* note 3, at para. 39; *Fulawka, supra,* note 2, at para. 149. Discussed in *Baroch, supra,* note 5, at paras. 31 and 32.

[12] *Baroch, supra,* note 5. The most recent discussion of the relevant case law can be found in *Curtis v Medcan Curtis v. Medcan Health Management Inc*., 2022 ONSC 5176 (Div. Ct.).

[13] The proposed class action does not include British Columbia or Alberta where the ESAs contain an exemption not requiring vacation and public holiday pay for investment advisors.

[14] *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City),* 2015 ONCA 572, at para. 42.

[15] *Ibid.*

Court of Appeal solved this problem by imposimg a start date based on the 15-year ultimate limitation period in s. 15(2) of the Ontario *Limitations Act, 2002*.[16] I adopt this approach and do the same here. The defendant may certainly advance other and much shorter limitation defences at trial but at this point for the purposes of the notice requirements it is reasonable to base the start date on the various provincial and territorial ultimate limitation periods.

[34] Otherwise, the plaintiff has satisfied the identifiable class requirement set out in s. 5(1)(b) of the CPA. The proposed class definition: i) establishes objective criteria for class membership; ii) is not merit-based; and iii) is not overly-inclusive as it could not be narrowed further without arbitrarily excluding from the class persons who share the same interest in the resolution of the common issues.

[35] The identities of the class members will be known to the defendant. Nothing in the record suggests otherwise. Also, I note that on cross-examination, the defendant's CAO confirmed that they have maintained an electronic database containing information relating to the class members' compensation.

[36] The class definition requirement is satisfied.

Section 5(1)(c): common issues

[37] I have already discussed *Fulawka* and *Brown* and why at a minimum the commonality requirement has been satisfied.

[38] The defendant advanced several "individual" issue submissions but none of them were able to dislodge the systemic commonality observation made in *Fulawka* and *Brown.* In any event, for an issue to be a common issue, it need only be a necessary and substantial ingredient in the resolution of each class member's claim. There can be many individual issues which remain after the determination of the common issues.[17] As the Court of Appeal reaffirmed in *Hodge v. Neinstein*[18]:

> [E]ven a significant level of difference among the class members does not preclude a finding of commonality. If material differences do emerge, the court can deal with them at that time.[19]

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[16] S.O. 2002, c. 24, Sch. B.

[17] *Hollick v. Toronto (City),* 2001 SCC 68, at para. 18.

[18] *Hodge v. Neinstein,* 2017 ONCA 494.

[19] *Ibid.* at para. 114.

[39] It is also important to remember that s. 6 of the CPA provides that the court "shall not refuse to certify a proceeding as a class proceeding" by reason of "a claim for damages that would require individual assessments." This statutory reminder reinforces the oft-repeated proposition in the case law that any individual issues which may remain after the common issues trial need not detract from the core commonality of the action. Here, to repeat, it is the absence of a class-wide system to record and report the ESA-required payment obligations that provides some evidence of a systemic impediment to the ability of every class member to prove that he or she received these additional payments and thus some evidence of commonality.[20]

[40] During the hearing, I suggested that the plaintiff simplify the proposed common issues. The plaintiff did so and has proposed the following for consideration:

1. Did the defendant have a duty (in contract, equity, tort or otherwise) to take reasonable steps to ensure that the class members were properly compensated with vacation and public holiday pay, and to pay vacation and public holiday pay that was owing to the class members?

2. Did the defendant breach those duties?

3. If the answer to any of the foregoing common issues is "yes", what remedies are the class members entitled to? Without limiting the generality of the foregoing, are the class members entitled to an aggregate assessment of damages? If so, in what amount?

[41] I am prepared to certify proposed common issues 1 and 2. The trial judge's decision on these first two questions will go far to determine liability and will significantly advance the litigation. I am not prepared to certify proposed common issue 3. In my view, the judge hearing the merits of this dispute on a more complete record is in a much better position to address and resolve the "remedies" issue, the availability of statistical sampling, and in particular the question of aggregate damages.[21] The damages issues are deferred to the trial judge or the judge hearing a summary judgment motion.

Section 5(1)(d): preferability

[42] This action was filed before October, 2020. Thus, the recent amendments to the "preferability" provision do not apply.

[43] To satisfy the (unamended) preferability requirement, the plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of

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[20] *Brown*, *supra*, note 3, at para. 39. *Fulawka*, *supra*, note 2, at para. 149. Discussed in *Baroch v. Canada Cartage*, 2015 ONSC 40, at paras. 31 and 32.

[21] See the discussion in *Robertson v Ontario*, 2022 ONSC 5127, at para. 92.

advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings, namely access to justice. judicial economy and behaviour modification.

[44] I have already referred to the recent decision of the Divisional Court in *Curtis v. Medcan Health*,[22] that also dealt with an ESA claim for unpaid vacation and public holidays. The Court canvassed the applicable case law and correctly concluded that: "[C]lass proceedings have repeatedly been found to be the preferable procedure for employment and ESA-related cases."[23]

[45] This makes sense. Access to justice is best achieved via a class proceeding in an ESA case because claims may be relatively small, especially those of the partially-commissioned Associates and Assistants. And even where the claims are larger, as in the case of the IAs, they may not be pursued for fear of reprisal. Judicial economy is best achieved when the core liability issues can be litigated and decided, as here, in one proceeding. Behavioural modification — encouraging large financial entities to comply with ESA requirements that were obviously enacted to protect their employees — is a self-evident social benefit and will likely be achieved on the evidence herein. And, in any event, there is no suggestion from the defendant that some other from of proceeding would be preferable.

[46] The preferability requirement is satisfied.

Section 5(1)(e): A suitable representative plaintiff

[47] I am also satisfied that Ms. Cunningham is a suitable representative plaintiff. She will fairly and adequately represent the interests of the class, has no conflicts of interest with other class members and has filed a workable litigation plan.

[48] The defendant pointed out that the plaintiff is intending to pursue a disability claim against RBC Insurance, a separate legal entity. If her disability claim was proceeding as against the defendant, that would indeed raise a serious conflict of interest. The plaintiff however, has assured the court that if the defendant employer is ever added as a party to the disability claim, she would stay the disability claim and continue to devote her complete attention to this class proceeding. I accept this undertaking. There is no reason why the plaintiff cannot be a suitable representative in this proposed class action.

Disposition

[49] The proposed class action is certified as a class proceeding.

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[22] *Supra*, note 12.

[23] *Ibid.*, at para. 54.

[50] Counsel to prepare a draft Order as required under s. 8(1) of the CPA.

[51] The plaintiff is entitled to costs on a partial indemnity basis. If the parties cannot resolve the costs issue, I would be pleased to receive brief submissions within 14 days from the plaintiff and within 14 days thereafter from the defendant. If more time is needed, please advise. If the defendant contests the reasonableness of the plaintiff's costs request, it should file a certified copy of what it would have requested had it prevailed on this motion.

[52] My thanks to counsel on both sides for the quality of their advocacy and their assistance.

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Belobaba J.

Date: December 29, 2022