

**CITATION:** Fulawka v. Bank of Nova Scotia, 2016 ONSC 1576

COURT FILE NO.: 07-CV-345166CP

DATE: 20160318

**SUPERIOR COURT OF JUSTICE - ONTARIO**

RE: Cindy Fulawka / Plaintiff

AND:

The Bank of Nova Scotia / Defendant

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David O'Connor, Adam Dewar, Louis Sokolov, Peter Englemann and George Pakozdi* for the Plaintiff and Class

*James Douglas and David Di Paolo* for the Defendant Bank

HEARD: March 3, 2016

*Proceeding under the Class Proceedings Act, 1992*

**APPROVAL OF REVISED SETTLEMENT**

[1] This “bank overtime” action has settled – for the second time. It was certified as a class proceeding<sup>1</sup> in February, 2010 and settled (for the first time) in August, 2014. In my decision approving the first Settlement,<sup>2</sup> I congratulated the parties and their counsel for achieving a resolution that not only reflected well on the defendant Bank of Nova Scotia (“the Bank”) but was fair and reasonable and in the best interests of the class. The Settlement did not stipulate any final compensation amount – instead, it set out a simple and straightforward claims process.

[2] Unfortunately, as things turned out, the claims process did not go smoothly.

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<sup>1</sup> *Fulawka v. Bank of Nova Scotia*, 2010 ONSC 1148.

<sup>2</sup> *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743.

[3] The claims process, described in more detail in my approval decision,<sup>3</sup> required class members to submit their claims for unpaid overtime by October 15, 2014. The Bank was to respond to the claims by November 28, 2014. Class members who were not satisfied with the Bank's response could appeal the decision to an independent arbitrator. Both sides believed that the claims review process was fair and reasonable.

[4] In early November, however, the representative plaintiff discovered that the Bank was taking steps that appeared to be in breach of the claims process as set out in the Settlement.<sup>4</sup> Class counsel brought a motion to address those concerns. The Bank brought its own motion to extend the November 28<sup>th</sup> deadline for responding to the claims. I ordered that the appeal process set out in the Settlement be suspended until the plaintiff's and the Bank's motions were resolved. In the several case conferences that followed I encouraged both sides to resolve the issues in dispute without any further judicial intervention. To their credit, they did so.

[5] Following months of negotiation and a two day mediation in December 2015 before the Hon. George Adams, the parties agreed to a new and more streamlined payment approach and the terms of the Settlement were revised.

#### **The revised settlement**

[6] Under the Revised Settlement, the Bank has agreed to pay a further \$20.6 million in addition to the \$18.7 million that has been paid out to date. The total payment to the approximately 1600 class member claimants will thus be \$39.3 million.

[7] The Revised Settlement bases the additional payments on the thresholds that the Bank itself had used during the claims process:

- claims under \$20,000 (which attracted little to no scrutiny);
- claims between \$20,000 and \$50,000 (which attracted more scrutiny);
- claims in excess of \$50,000 (which attracted the most scrutiny).

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<sup>3</sup> *Supra*, note 2, at paras. 8-14.

<sup>4</sup> Class counsel criticized the Bank for sending out "template" witness statements; reducing or rejecting claims in the absence of sworn evidence; improperly relying on previous determinations or internal policies; improperly imposing overtime pre-authorization requirements; improperly narrowing the definition of eligible overtime; failing to disclose the documentation that was used by the Bank in reducing or rejecting claims; and rejecting late claims without considering the claimant's reasons for the late submission - all allegedly in violation of the terms of the Settlement agreement.

[8] The claims are divided into two broad categories – those that had been partially reduced and those that had been completely rejected. Under the Revised Settlement, the claimant's total recovery (inclusive of any amounts already paid) is capped at the following percentages:

**Claims that were reduced / the payout percentage:**

|                               |               |
|-------------------------------|---------------|
| Under \$20,000                | 100% of claim |
| Between \$20,000 and \$49,999 | 80% of claim  |
| \$50,000 and above            | 50% of claim  |

**Claims that were rejected / the payout percentage:**

|                               |              |
|-------------------------------|--------------|
| Under \$20,000                | 75% of claim |
| Between \$20,000 and \$49,999 | 50% of claim |
| \$50,000 and above            | 25% of claim |

[9] The other key provisions in the Revised Settlement are these: the deadline for claims consideration is extended from October 15, 2014 to December 31, 2014; no further information needs to be submitted; payments to claimants will be subject to all tax and source deductions, including the 10% levy owing to the Class Proceedings Fund; and the compensation bands and payments as set out above are final – there is no right of appeal or further review.

[10] In addition to the \$20.6 million in additional compensation payable to eligible claimants, the Bank has also agreed to pay \$2.3 million plus HST directly to class counsel for legal fees and disbursements.

**Class members' response**

[11] Only 17 written comments were received from the 1600 or so claimants affected by the Revised Settlement. Six of the comments were generally supportive. Eleven, including those of one claimant who attended court in person, voiced three kinds of objections: (1) that the thresholds or bands (as set out in the chart above) for determining compensation are arbitrary and unfair; (2) that the December 31, 2014 cut-off date should be extended; and (3) that the Bank should be compelled to investigate each claim

individually and pay exactly what's owing rather than using the bands/percentage approach.

[12] Counsel for both the Bank and the class responded to each of these concerns as follows.

[13] The three levels or bands that determine the payouts are not arbitrary – they mirror the very approach that was taken by the Bank in its claims review process and the level of investigation that was conducted. The higher value claims received greater attention and a more comprehensive review and investigation by the Bank; the lowest value claims received little if any review. The resulting compensation bands, negotiated with class counsel, reflect the outcomes and payout experience in the top two bands. While there may be some compensation anomalies (on the borders between the bands) the overall benefit to class members of an immediate and substantial payout, without further delay or uncertainty, is significant and justifies judicial approval.

[14] The December 31, 2014 deadline already represents a two and a half month extension and, in the context of the overall settlement, is a reasonable compromise. There was no guarantee, says class counsel, that any of late claims would have been accepted by an arbitrator. This two and a half month extension was the best that could have been achieved in the circumstances.

[15] As for the third point, that the Bank should be compelled to investigate each claim individually, both the Bank and class counsel reminded the court that this was not the basis of the original Settlement. Rather, the approach was to invite class members' good faith claims that would be rejected only if the Bank had countervailing evidence of its own. Further, given the length of the class period, it is unlikely that comprehensive individual documentation has been retained or can be accessed in any reasonable fashion. Class counsel was adamant that it would not be in the best interests of the class to walk-away from \$20.6 million in additional compensation for the chance to argue that the Bank should be forced to re-investigate each and every individual claim, with the risks and delays that are inherent in this approach.

#### **Settlement approval**

[16] I accept these explanations. During the hearing, I questioned counsel about the payment anomalies that could materialize given the bright-line thresholds: for example, in the "reduced claim" category, Employee A who claimed \$19,999 (and thus falls into the first band) will receive the full amount; Employee B who claimed \$20,001 (and falls into the second band) will only receive \$16,000 (about \$4000 less). Other examples were also discussed. However, after a lengthy exchange with counsel, I was satisfied that no class member is "losing" money that was otherwise hers to receive. Each class member submitted a claim that was subjected to one of the three levels of scrutiny. The bands and payouts within those bands reflect, as already noted, the claims review experience within

each of the bands and in the overall can be justified as fair and reasonable when compared to the alternative of protracted litigation and uncertain recoveries.

[17] In short, given the risks, delays and uncertainties if this Revised Settlement is rejected and given the fact that this settlement was achieved after a mediation before one of the country's most experience mediators, I am satisfied that the Revised Settlement is fair and reasonable and very much in the best interests of the class.

#### Legal fees approval

[18] The Bank's proposal to pay class counsel \$2.3 million in legal fees, separate and apart from the Revised Settlement amount, is also approved. I am satisfied, as I was in the original Settlement, that the additional payment of legal fees is not at the expense of class members.<sup>5</sup>

[19] I am also satisfied that the \$2.3 million amount is fair and reasonable. Class counsel could have requested a 30 per cent contingency recovery as based on the retainer agreement. Class counsel could also have insisted on the 2.75 multiplier that was applied by the arbitrator in setting the legal fees for the original Settlement.<sup>6</sup> Instead, they settled at \$2.3 million which, for the fees portion, reflects only a 1.99 multiplier. The legal fees paid out to Class Counsel out of the total \$52.05 million amount expended by the Bank over the two settlements<sup>7</sup> is \$12.75 million, or about 24 per cent – an amount that I would have readily approved had this been presented as a contingency fee request.<sup>8</sup>

#### Disposition

[20] The Revised Settlement and class counsel's legal fees are therefore approved. Order to go accordingly.

  
Belobaba J.

Date: March 18, 2016

<sup>5</sup> The payment of class counsel's fees was negotiated separately from the balance of the Revised Settlement. Class counsel specifically advised Mr. Adams at the mediation that the settlement for the class was not tied to or conditional in any way on the outcome of the fees request.

<sup>6</sup> *Supra*, note 2, at para. 20.

<sup>7</sup> Compensation paid directly to class members, \$18.7 million plus \$20.6 million, and compensation for legal fees paid directly to class counsel, \$10.45 million plus \$2.3 million, for an overall total of \$52.05 million.

<sup>8</sup> As I explained in *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686, I prefer to award legal fees based on contingency agreements rather than multipliers.