CITATION: Eklund v. Goodlife Fitness Centres Inc., 2018 ONSC 4146
COURT FILE NO.: CV-16-562080 00CP
DATE: 20180703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
CARRIE EKLUND	)	*Charles Sinclair and Joshua Mandryk*, for the Plaintiff
Plaintiff	)	
– and –	)	
GOODLIFE FITNESS CENTRES INC.	)	*David Di Paola and Nadia Effendi*, for the Defendant
Defendant	)	
	)	**HEARD:** June 20, 2018

E.M. MORGAN J.

I. The action and the settlement

[1] On March 1, 2018, after two days of mediation by the Hon. George Adams, the parties entered into Minutes of Settlement which, if approved, will put an end to this litigation. They now seek, on consent, certification of this matter as a class action, approval of the settlement, approval of class counsel's fees, and an honorarium for the representative plaintiff.

[2] The Statement of Claim was issued on October 12, 2016, and was amended on January 26, 2017 to extend the class across all Canadian provinces excluding Quebec. The claim relates to unpaid hours of work and unpaid overtime for non-managerial and non-unionized employees of the Defendant, GoodLife Fitness Centres Inc. ("GoodLife"), who work at all of GoodLife's clubs in the common law provinces, with the exception of those employees who work at Goodlife's Fit4Less clubs or franchise clubs. It alleges that GoodLife has engaged in breach of contract (with its attendant duty of good faith), unjust enrichment, and negligence toward the employees included in the class.

[3] Within a year of issuing the original Statement of Claim, GoodLife made significant changes to its employment and compensation arrangements. Specifically, it began scheduling paid prospecting hours for personal trainers, it removed the clawback of their commission which had

previously reduced the trainers' earnings, it eliminated the previous disentitlement to a bonus for trainers claiming overtime, it began providing lieu time at time-and-a-half instead of straight time for club opening specialists (and retroactively compensated these specialists for the lost time), and it implemented a new record-keeping system as well as one specifically for club opening team members.

[4] In addition, subsequent to the commencement of the present action GoodLife entered into a first collective agreement with Workers United Canada Council, a union that had been certified to represent personal trainers in Toronto, Ajax and Peterborough in 2016. The collective agreement recognized the entitlement of personal trainers to payment for administrative programming tasks and preparation time which were previously unpaid. The collective agreement also called for trainers to receive an additional 2.5 hours per pay period to compensate for these tasks. GoodLife took the opportunity to recognize the entitlement of non-unionized personal trainers to be paid for such work as well.

[5] These various changes to GoodLife's employment practices reflect a substantial part of the claims put forward in the class action. Much of the action was thereby rendered historic –it now represents a series of claims for past compensation that has been remedied on a go-forward basis. The present settlement embodies a resolution of what was left of the claims.

II. The class and its employment categories

[6] As defined in the settlement agreement, the class comprises approximately 22,000 employees and past employees of GoodLife. The class is defined as follows:

> All current and former non-managerial employees of GoodLife employed at its clubs in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island, for the period from October 12, 2014 to the date certification is granted ("Class Period") in this action, save and except for those employed at its Fit4Less or franchise clubs, and save and except for all personal trainers employed by GoodLife in the Cities of Toronto, Ontario; Ajax, Ontario; and Peterborough, Ontario for the period commencing on December 5, 2017 and ongoing. To the extent any employees had both managerial and non-managerial roles during the Class Period, they will be in the class only in respect of their non-managerial roles.

[7] The settlement sets out a single common issue for certification purposes:

> Whether any Class Member worked hours of work, including overtime hours, during the Class Period, for which they were not paid or otherwise compensated in accordance with the requirements of the applicable.

[8] It then divides the class members into a number of categories, in accordance with their employment function and period of employment at GoodLife. Each category of class members will receive a specified portion of the overall settlement amount of $7,500,000 paid by GoodLife. The payments to the respective categories of employees included in the class are:

- $5,500,000 – for personal trainers, distributed *pro rata* based on the total number of recorded personal training services hours from October 12, 2014 to December 31, 2017;

- $150,000 – for club opening specialists, distributed *pro rata* based on the total number of full weeks worked from October 12, 2014 to March 30, 2017;

- $800,000 – for fitness advisors, to be distributed *pro rata* based on the total number of recorded sales hours worked from October 12, 2014 to February 28, 2018;

- $1,050,000 – for other class members distributed *pro rata* based on the total number of recorded hours worked from October 12, 2014 to February 28, 2018.

[9] As class counsel explains it, the relatively high amount for the personal trainers reflects the prominence of that aspect of the claim. The disclosure showed that there was more unpaid work by personal trainers as compared to other class members. This payment category also takes into account GoodLife's recognition that certain tasks performed by personal trainers that were previously unpaid should properly be characterized as work for which personal trainers were entitled to be paid.

[10] The time period for the personal trainers' payment runs from the commencement of the class period to December 31, 2017. That cut-off date recognizes that as of January 1, 2018, GoodLife began paying personal trainers for their administrative, scheduling, preparation, and programming time. The payment is linked to the time spent actually training clients, in recognition of the fact that individuals who spent more time training clients are likely to have spent more time on these previously unpaid tasks. Class counsel indicates that they anticipate that individuals who worked for GoodLife for longer periods of time will recover more under the proposed settlement than those who only worked for a short period.

[11] The amount allocated for payment to club opening specialists is smaller than for personal trainers and fitness advisers, which is reflective of the small size of the club opening team (estimated at 15-20 members). The payment to each class member who held the position of club opening specialist will therefore be larger. The time period for the personal trainers runs from the date of the commencement of the class period to March 30, 2017. That cut-off date recognizes the significant changes GoodLife made to its practices concerning the recording and compensating of hours worked for these employees. On March 30, 2017, GoodLife introduced a new record-keeping system for the club opening team allowing employees on the club opening team to record their actual hours of work (as opposed to their scheduled hours of work). On that date it also began paying lieu time compensation at the required time-and-a half-rate.

[12] Club opening specialists were paid a salary rather than an hourly wage, and, accordingly, the settlement payment to this group is based on the number of weeks worked during the relevant period. The amount per class member for this group will likely be in the range of $7,500-$10,000 each. This amount was negotiated based on the knowledge of both parties that one of the plaintiff's witnesses, Winta Hagos, had received approximately $12,300 in respect of an unpaid overtime

complaint to the Ministry of Labour. That adjudication required proof of individual damages, and provided a basis for extrapolating the damages for the rest of this group of employees without requiring each claimant to prove individual damages.

[13] Class counsel notes that it is a specific term of the settlement that Ms. Hagos will not be recovering anything in respect of her employment as a club opening specialist since she has already recovered under the Ministry of Labour process. It is possible, however, that Ms. Hagos might recover something under the "other class members" category for her time employed by GoodLife prior to becoming a club opening specialist.

[14] As for the fitness advisors, the $800,000 allocated to them takes into account that there was greater evidence available than for other categories of employees that they were made to engage in unpaid work. This resulted primarily due to the pressures of their sales positions. The time period for the fitness advisors runs from the date of the commencement of the class period to the day prior to the date of the settlement, February 28, 2018. The amount for each individual is based on the number of recorded sales hours worked, and is premised on the estimation that fitness advisors who worked a greater number of recorded hours likely spent more time engaged in unpaid hours of work.

[15] Class counsel indicates that the majority of the class members will fall within the final "other class members" group. For this last group, the evidence of unpaid work and its company-wide causes was more limited than for the other three specific groups of employees. The "other" group includes, *inter alia*, group fitness instructors, who were paid by Goodlife on a flat rate and may not have had any claim to additional compensation. The amount allocated to the "other class members" group therefore takes into account the challenges faced by this class in proving their claims and achieving a damages award. The time period for members of this class runs from the date of the commencement of the class period to the day before the date of the settlement, February 28, 2018.

[16] The settlement agreement also provides that *de minimis* amounts of less than $50 per employee will not be distributed. The funds that would have been payable to those class members will be redistributed to the other class members in each of the defined categories.

[17] The precise amount that each class member receives will depend on the number of class members per category and their relevant hours during the relevant time periods, after subtracting opt-outs and class members with *de minimis* claims. Class counsel estimates that a personal trainer who worked the entire relevant period would receive approximately $2500, while a fitness advisor who worked the entire relevant period would receive approximately $1600. As already indicated, the club opening specialists will receive the highest amount in light of their recognized long hours of overtime, higher wage rates, and taking into account the amount awarded to Ms. Hagos by the Ministry of Labour.

[18] Class counsel further advise that it is more difficult to estimate the amount owing to "other class members". This category encompasses employees with a greater variation in hours worked; however, counsel has provided a rough estimate that a class member who worked on a part-time basis for 20 hours a week for the entire relevant period would receive $150. This, in turn, does not

account for the amounts owing to "other class members" falling below the *de minimis* threshold, which, of course, would result in larger payments to the class members above the *de minimis* threshold.

III. The payment mechanisms

[19] GoodLife will make payments directly to the class members. Since the class is composed of current and former employees, GoodLife has a list of names and addresses (although not all addresses may be current). Where despite efforts by class counsel a class member cannot be found, and in the event of stale-dated cheques, the settlement contemplates the funds being donated to the Canadian Cancer Society.

[20] Every class member who does not opt out of the settlement will, pursuant to the settlement agreement's terms, grant GoodLife a release from any claims in relation to the action and the issues raised or which could have been raised in the action, whether known or unknown.

[21] The settlement provides for a $10,000 honorarium for the representative plaintiff, paid separately from and in addition to the $7.5 being paid to the class. It recognizes that the representative plaintiff devoted considerable time to the action. Her contribution includes communicating with other class members media presentations, meeting with and instructing counsel, reviewing documents, swearing an affidavit, and attending multiple days of mediation. Class counsel advises me that the representative plaintiff suffered personal cost in involving herself in this way, as she was turned down for a job after a potential employer asked her during the interview about the lawsuit against GoodLife. Class counsel supports the payment of an honorarium to the representative plaintiff, and, similarly, no class member has objected to the honorarium.

[22] Finally, the settlement authorizes payment of class counsel fees in the amount of $1,000,000, inclusive of taxes and disbursements. The fee amount was negotiated separately from the amount to be paid to class members. Counsel advise that little time was spent in the mediation on the issue of fees, as the first amount proposed by GoodLife was acceptable to the plaintiff. Class counsel submits that dealing with the fees separately and expeditiously permitted them to focus their efforts at the mediation on ensuring that the amount paid by GoodLife to class members was both generously calculated and fairly distributed.

IV. Notice and class response

[23] The Notice of Certification and Settlement Approval Hearing was widely distributed and, as reported by class counsel, well received by class members. In addition to hundreds of telephone calls from class members supporting the settlement, class counsel received 9 written submissions in support of the settlement. The documentation was distributed by GoodLife through its internal system for current employees, and was mailed to former employees at their last known addresses, as well as posted on class counsel's websites. Class counsel put out a national press release and announced the settlement on Facebook and Twitter. Furthermore, newspaper articles about the settlement appeared in the Toronto Star and London Free Press.

[24] Class counsel has received one written submission opposing the settlement. This submission was from a former GoodLife employee, Katarzyna Nowacka, who appeared in person at the settlement hearing to make submissions to the court. Ms. Nowacka expressed concern about a conspiracy in which she alleged that GoodLife was acting in concert with the CIA. There is no evidentiary basis in the record for this submission; it therefore cannot be verified or taken into account.

V. Certification

[25] In *Osmun v. Cadbury Adams Canada Inc.*, 2009 CanLII 72092, at para 21, Srathy J. (as he then was) observed that, "although the certification requirements are the same in a settlement context as in a litigation context, it is generally accepted that they need not be as rigorously applied in a settlement context." That said, there is little doubt in my mind that the statutory criteria for certifying a class action are met here.

[26] Class actions for unpaid overtime have previously been certified in Ontario on a contested basis: see *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444; *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443. The present claim raises causes of action for breach of contract, unjust enrichment, and negligence, all of which have very reasonable prospects of success. There is an identifiable class composed of some 22,000 people who share an interest in the outcome of the case. There are common issues with respect to GoodLife's employment practices which will substantially advance the class members' claims, all of which makes a class proceeding the preferable procedure for deciding the claims. Ms. Eklund has more than adequately represented the interests of the class and will doubtless continue to do so wherever necessary.

[27] Class counsel submits that the test for certification under section 5 of the *Class Proceedings Act, 1992* ("CPA") is plainly met here. Counsel for GoodLife concurs with that assessment, and so do I.

VI. Settlement approval

[28] Section 29(2) of the CPA requires court approval of a settlement of a class action. That approval can be granted only if it is determined that the proposed settlement is in the best interests of the class.

[29] The settlement must protect the class, but it does not have to measure up to a level of perfection. "All settlements are the product of compromise and a process of give and take": *Dabbs v Sun Life Assurance Company of Canada,* [1998] OJ No 2811 (Gen Div), at para 30. The settlement here was negotiated by experienced counsel on both sides, was at arm's length, and was arrived at through use of an experienced mediator. Under the circumstances, "the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement": *Wein v Rogers Cable Communications*, [2011] .J No 5572, at para 20 (SCJ).

[30] In considering a settlement approval, the court must examine the fairness and reasonableness of the proposed settlement, having regard to the claims and defences and any

objections raised to the settlement: *Baxter v Canada (Attorney General)* (2006), 83 OR (3d) 481, at para 10 (SCJ). As the court explained in *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para 21, the court may take into account, among other things:

> (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) settlement terms and conditions; (d) recommendation and experience of counsel; (e) future expenses and likely duration of litigation and risk; (f) recommendation of neutral parties; (g) if any, the number of objectors and nature of objections; (h) the presence of good faith, arms-length bargaining and the absence of collusion; (i) 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 [citations omitted].

[31] The settlement under consideration covers the categories of previously uncompensated work that GoodLife now recognizes as compensable. According to class counsel, the settlement amount will provide compensation for personal trainers for those categories of unpaid work at roughly the same rate that GoodLife has been paying since entering a collective agreement and implementing a parallel policy for non-unionized employees. The settlement also manages to secure significant compensation for other class members, even though for the other categories of employees GoodLife took the position that they did not work unpaid hours and were treated in accordance with applicable law. The likelihood of success with respect to the claims of those class members was more uncertain and the challenges in proving damages were quite significant; in view of these factors, the compensation achieved through the settlement for the non-personal trainer class members is favourable.

[32] There was no shortage of information available to class counsel in reaching its recommendation to the class to settle. The settlement was achieved following exchange of certification motion records. Accordingly, class counsel was in possession of GoodLife's standard employment policies, contracts, and job descriptions. It had also gathered relevant information from class members who were interviewed by class counsel, or who provided affidavits, or who registered on class counsel's website. Class members and class counsel were also cognizant of the December 2017 changes in GoodLife's compensation practices which mirror many of the claims put forward in the action.

[33] The court is in a position to approve a settlement entered into prior to certification, providing that it is convinced that class counsel "did everything reasonably possible to properly evaluate the claims": *Elliot v Joseph Brant Hospital*, 2013 ONSC 124, at para 19. Given the amount that class counsel knew of GoodLife's employee compensation practices, both historically and going forward, there is little doubt that there was sufficient information available to conclude that the proposed settlement is a fair and reasonable one.

[34] The terms of the settlement appear to me to be fair and reasonable. GoodLife will pay $7,500,000, which will bring the past and present employees up to the level of compensation of the current employees going forward. The amount each class member will receive will depend on their role at GoodLife and the amount of time worked during the relevant period. It is worth noting

that under the settlement class members are eligible to recover without proof of individual damages; in previous cases this feature has been identified as a significant achievement for the class and one that provides an impetus for the settlement to be approved: *Rosen v BMO Nesbitt Burns Inc.*, 2016 ONSC 4752, at para 20. Class counsel submits, and it appears to me to be the case, that the terms of the proposed settlement are designed to ensure the benefits of the settlement flow to those class members with the greatest losses and the strongest cases.

[35] Based on the recent improvements in GoodLife's employee compensation practices, class counsel are satisfied that the proposed settlement is one that it can recommend to class members. That said, class counsel was justified in taking into account that there is no case that specifically requires payment for what counsel refers to as "off the clock" overtime work. Likewise, class counsel was compelled to take into account the difficulties in proving individual damages in a case which was largely historic. Determination of individual damages would have depended on the existence of GoodLife's own records, which put the class in a risky position in terms of the individual damages calculations. A major achievement of this settlement is that it provides for damages to every class member based on readily ascertainable information – the employee's job function and the number of hours worked during the relevant period.

[36] For all of these reasons, class counsel, who are highly experienced in the field of employment law class actions, has recommended the settlement be accepted by the class members. Given the strength of this experience, the recommendation of class counsel deserves substantial regard in the settlement assessment process: *Elliot*, *supra*, at para 38.

[37] There has been substantial communication between class counsel and the representative plaintiff, on one hand, and the rest of the class members on the other. Throughout the litigation, class counsel posted information about this class action on its website. This includes copies of the pleadings and the certification motion record. Class counsel, along with the representative plaintiff, also fielded numerous telephone and email inquiries during the course of the litigation and, especially, following the announcement of the settlement.

[38] Finally, class counsel reports that the settlement negotiations were adversarial and that the parties exchanged a number of different proposals before arriving at the final one. Class counsel was focused on maximizing the settlement amount for the class members and structuring a fair distribution within the class. The representative plaintiff was actively involved in the mediation leading to the proposed settlement; class counsel advise that she supports the settlement, and believes it to be fair and reasonable.

[39] The proposed settlement meets all of the criteria for court approval.

VII. Class counsel fees

[40] In *Lavier v MyTravel Canada Holidays Inc.*, 2011 ONSC 1222, at para 32, Perell J. set out the principles on which class counsel fee approval should be based in the event that fee arrangements are a part of an overall settlement with the defendant: "...the court must decide whether the fee arrangements are fair and reasonable, and this means that counsel are entitled to a fair fee which 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 Members as a whole." There is no one correct level of fees, but rather the fees must be seen to fall within a zone of reasonableness: *Smith v National Money Mart,* 2010 ONSC 1334, at para 19.

[41] Perell J. further elaborated the factors to be examined in the analysis of class counsel fees in *Hamilton v Toyota Motor Sales, USA, Inc.*, 2014 ONSC 785, at para 61:

> (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…

[42] The Court of Appeal has pointed out that the fee approval analysis is based on many of the same principles as the settlement approval analysis. Thus, the question is whether the fees sought by class counsel are in a range that advances the policy goals of the CPA overall. As Goudge JA put it in *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584:

> Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfil its promise, that opportunity must not be a false hope.

[43] With these principles in mind, the court can analyze a multiplier base fee by considering the percentage of gross recovery that it represents. Thus, for example, in a two-stage settlement negotiated in *Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743; 2016 ONSC 1576, Belobaba J. approved multipliers of 2.75 and1.99.

[44] A similar approach can be taken in analyzing a contingency fee based specifically on a percentage of recovery. As a guideline, a contingency fee arrangement of 25% of recovery was characterized by Baltman J. in *Barwin v IKO Industries Ltd.*, 2017 ONSC 3520, at para 58, as "a reasonably standard fee agreement in class proceedings litigation."

[45] The present fee settlement is based on a retainer agreement that called for either a multiplier approach or a contingency fee approach. The level of fees sought by class counsel falls within both of the above parameters.

[46] Class counsel have explained that the retainer with the plaintiff authorized fees to be calculated in the event of a settlement before certification on the basis of a multiple of 2 if calculated based on docketed hours, or 25% of recovery if calculated on a contingency basis. Based on the terms of the settlement, class counsel seeks approval of $1,000,000 in fees (including disbursements and HST). As calculated by counsel, this represents a multiplier of approximately 1.6 - 1.8 on the actual docketed time.

[47] If calculated on a contingency basis, it must be taken into account that the fees are being paid over and above the $7.5 million which GoodLife will pay to the class members. The $1million in fees therefore represent 12.5% of what the class members will be receiving by way of recovery.

[48] The fees sought by class counsel are fair and reasonable given the amount of work and risk that counsel undertook and the level of recovery that they achieved for the class.

VIII. Cass representative honorarium

[49] As indicated earlier, class counsel also seek approval of a modest $10,000 honorarium for Carrie Eklund as representative plaintiff. In *Fulawk*a (2014), *supra*, at para 24, an honorarium was approved where the representative plaintiff had "devoted a great deal of time and effort to this litigation and played a key role throughout." Class counsel advises that the same can be said of Ms. Eklund. She was apparently instrumental in communicating with class members, and willingly exposed herself to the prejudicial ramifications of being the named plaintiff. Indeed, this exposure materialized when she was turned down for a new job after the prospective employer questioned her about her role in suing her previous employer.

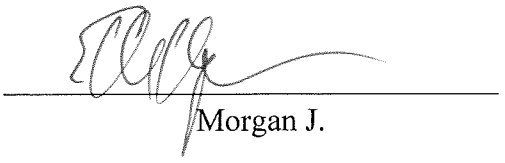
[50] Like other representative plaintiffs who have been awarded honoraria, Ms. Eklund appears to have "participated in every step of the...litigation including settlement discussions, the mediation and the finalization of the settlement agreement": *Rosen*, *supra*, at para 26. She deserves the honorarium that class counsel seeks on her behalf.

IX. Disposition

[51] The proposed settlement is approved.

[52] Class counsels' legal fees in the amount of $1,000,000 (inclusive of disbursements and taxes) are approved.

[53] The payment of an honorarium to the representative plaintiff in the amount of $10,000 is also approved.



Morgan J.

Released: July 3, 2018

CITATION: Eklund v. Goodlife Fitness Centres Inc., 2018 ONSC 4146
COURT FILE NO.: CV-16-562080 00CP
DATE: 20180703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CARRIE EKLUND

Plaintiff

– and –

GOODLIFE FITNESS CENTRES INC.

Defendant

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: July 3, 2018