

CITATION: Perrenoud v. eHealth Ontario, 2013 ONSC 1900
 COURT FILE NO.: 11-CV-439656CP
 DATE: April 2, 2013

ONTARIO
 SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
CHARLOTTE PERRENOUD and)	<i>Jacqueline L. King and John De Vellis for</i>
RAJESH BEDI)	<i>the Plaintiffs</i>
)	
Plaintiffs)	
)	
- and -)	
)	
eHEALTH ONTARIO and HER)	<i>Joseph D'Angelo and Christopher Thompson</i>
MAJESTY THE QUEEN in right of)	<i>for the Defendants</i>
Ontario as represented by the)	
MINISTER OF HEALTH AND LONG -)	
TERM CARE)	
)	
Defendants)	
)	
Proposed action under the <i>Class</i>)	HEARD: March 28, 2013
<i>Proceedings Act, 1992</i>)	

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] This is a motion for approval of a settlement in a certified class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C. 6 and for approval of Class Counsel's claim for fees and disbursements.

B. FACTUAL AND PROCEDURAL BACKGROUND

[2] This action was commenced by Charlotte Perrenoud and Rajesh Bedi against their employer, eHealth Ontario and against the Province of Ontario.

[3] Ms. Perrenoud and Mr. Bedi, as proposed representative plaintiffs, sought: (a) bonuses set out in Class Members' Compensation Details Statements for the 2010/2011 fiscal year; (b) compensation for failing to provide reasonable notice prior to rescinding

the merit increases that were to be effective May 1, 2011; (c) compensation for eHealth's share of the Defined Contribution Pension Plan Contribution for those Class Members who elected to pay a portion of their 2010/11 bonus into the Defined Contribution Pension Plan; (d) payment of Class Members' bonus for the 2011/12 fiscal year; (e) pre- and post-judgment interest in accordance with the *Courts of Justice Act*; and; (f) punitive damages against both defendants.

[4] The Statement of Claim was issued on November 16, 2011. It made claims for damages for breach of contract, inducing breach of contract, and punitive damages in relation to bonuses awarded to employees of eHealth for the 2010/2011 fiscal year as well as merit increases that were to take effect April 1, 2011. In July 2012, the Representative Plaintiffs notified the Defendants they intended to amend their Statement of Claim. The nature of the amendment was to add an additional claim for bonuses for the 2011/12 fiscal year.

[5] The action was strongly defended.

[6] The action was brought pursuant to a retainer agreement between Ms. Perrenoud and Mr. Bedi and the law firm, Shibley Righton LLP, which is Class Counsel. Jacqueline L. King, who had carriage of the matter, was initially reluctant to take on the brief because she regarded it as a high risk small class action. Other law firms quoted 40% as the Contingency Fee for taking on the matter.

[7] Under the Retainer Agreement, Shibley Righton LLP is responsible for all the costs of pursuing the litigation, including disbursements and any potential costs awarded to the Defendants. The retainer agreement provides for a 30% contingency fee.

[8] Shibley Righton LLP funded all the disbursements and did not apply to the Law Foundation for funding of the litigation.

[9] In November 2012, after a vigorously contested certification motion, I certified the action as a class proceeding. See *Perrenoud v. eHealth Ontario*, 2012 ONSC 6704.

[10] The class definition is as follows:

Part A Class Members

All past and current full time regular eHealth Ontario employees, and employees on a contract for a term of more than one year, for whom eHealth Ontario completed a Compensation Details Statement in respect of the 2010-2011 fiscal year,

Part B Class Members

All eHealth Ontario employees who received a performance management rating of '2' or greater, or the equivalent rating of 'Developing' or higher, for the 2011/2012 fiscal year and who were actively employed on March 31, 2012; and

Part C Class Members

All eHealth Ontario employees who received a performance management rating of '2' or greater, or the equivalent rating of 'Developing' or higher, for the fiscal year 2011-2012 who were not actively employed on March 31, 2012 by reason only of the exceptions listed at section 3.7 of the Performance Incentive Plan Policy namely, retirement, disability or death.

[11] There are 878 Class Members.

[12] The common issues are as follows:

(1) Are Class Members entitled to the Performance Awards and/or Merit Increases set out in the Compensation Details Statements for the 2010/2011 fiscal year?

(2) If the answer to question (1) is yes, are the Class Members entitled to elect to transfer a portion of their Performance Award into a DCPD and have that portion matched by eHealth Ontario?

(3) Are the proposed Class Members entitled to a Performance Award for the 2011/2012 fiscal year?

(4) Did eHealth Ontario act in bad faith?

[13] After the certification of the action as a class action, the parties engaged in settlement negotiations, and they signed minutes of settlement dated January 24, 2013. The Minutes of Settlement propose to resolve the action as follows:

- eHealth will pay to the Part A Class Members, the Performance Incentive Awards set out in the employee Compensation Details Statements for the fiscal year 2010-2011.
- eHealth will pay to the Part B Class Members, fifty (50%) percent of Performance Incentive Awards based on: (a) the performance management ratings that were determined by eHealth Ontario for the fiscal year 2011-2012; (b) the budget established for such awards; and (c) eHealth Ontario's good faith calculation of the specific amounts for each employee.
- eHealth will pay to the Part C Class Members, fifty (50%) percent of the pro-rated Performance Incentive Awards based on: (a) the performance management ratings that were determined by eHealth Ontario for the fiscal year 2011-2012; (b) the budget established for such awards; and (c) eHealth Ontario's good faith calculation of the specific amounts for each employee.
- The payments are subject to the Class Counsel Fees and HST as may be approved by the court, and requisite withholding deductions as applicable.

[14] The Representative Plaintiffs proposed the following distribution plan:

- Class Counsel shall publish a Notice of Approved Settlement on Class Counsel's website.
- eHealth will by April 15, 2013, provide (either by mail, email, direct deposit or directly) to all Class Members who have not opted out a copy of the Notice along with each Class Member's respective performance incentive award for the 2010/11 and 2011/12 fiscal years, less statutory deduction and less the applicable Class Counsel fee.
- eHealth will by April 10, 2013, provide Class Counsel with a list of all Class Members which list will include the amount of each Class Member's performance incentive award for the year 2010/2011 and 2011/2012.

- Class Members who do not receive a notice from eHealth can submit a claim form by the date as set out in the Judgment, however, submitting a claim form is not a prerequisite to receiving payment.
- Class Counsel remain subject to the supervision of the Court and will report to the court with respect to implementation and administration of the settlement.
- Class Counsel will continue to be available to Class Members to answer questions about the settlement and implementation.
- Class Counsel will be paid their fees directly by eHealth out of the Settlement Proceedings. 30% of each bonus paid will be held back to being paid to the Class Member. Both eHealth and Class Counsel will have a table of the bonus to which each Class Member is entitled and the payments will be made directly to Class Members by eHealth or as this Court advises.

[15] Perrenoud and Rajesh Bedi believe the settlement is an excellent result for Class Members because it achieves the objectives they believe Class Members sought to achieve when they commenced the action. Initially the action sought recovery of the bonuses awarded for 2010/2011. The settlement provides for 100% of that bonus.

[16] As noted above, the claim was amended to also seek recovery of the bonuses for the 2011/2012 year, and under the proposed settlement Class Members will receive 50% of that additional year.

[17] The value of the settlement to the class members is approximately \$7.1 million before any deduction for Class Counsel's legal fees.

[18] Under the proposed settlement, there is no recovery for the value of the Merit Increase for a period of reasonable notice for each Class Member and for the matching pension contributions for the portion of the bonus that Class Members elected to pay to their Defined Contribution Pension Plan. These claims, however, were relatively small amounts for each Class Member.

[19] After the certification of the motion and settlement negotiations, eHealth provided Class Counsel with a list of the names and addresses of Class Members, and on January 31, 2013 and February 1, 2013, Class Counsel mailed Notices to the Class Members about the certification of the action, about the right to opt-out, and about the settlement of the action.

[20] As of March 14, 2013, Class Counsel received five (5) Opt Out Election Forms. There were no objections to the settlement and only one objection to the amount of the counsel fee as excessive.

[21] Class Counsel seeks approval of its fees in accordance with the Retainer as follows: 30% of the gross amount of the 2010/11 and 2011/12 bonuses for those employees who have not opted out plus the costs awarded from the motions and agreed to by eHealth to be \$115,000 inclusive of HST and disbursements.

[22] The value of Class Counsel's docketed time to date is around \$600,000 with some clean-up work left to be done.

C. SETTEMENT APPROVAL

[23] Section 29(2) of the *Class Proceedings Act, 1992* provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 43.

[24] In determining whether a settlement is reasonable and in the best interests of the class the following factors may be considered: (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 litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arms-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*, *supra* at para 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.), at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra* at para. 45.

[25] In my opinion, having regard to the various criteria set out above, the outcome of this class action is fair, reasonable, and in the best interests of the Class Members.

[26] Indeed, the outcome is a very good one for the class members.

[27] The distribution scheme proposed also appears to be a good one.

[28] I approve the settlement.

D. COUNSEL FEE

[29] Turning to the matter of Class Counsel's fee request, the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved: *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 (S.C.J.), at para 13; *Smith v. National Money Mart*, [2010] O.J. No. 873 (S.C.J.), at paras. 19-20; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 (S.C.J.), at para 25.

[30] 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; (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement;

Smith v. National Money Mart, supra, at paras. 19-20; *Fischer v. I.G. Investment Management Ltd., supra*, at para 28.

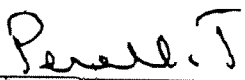
[31] Having regard to these factors, I conclude that Shibley Righton LLP have earned a counsel fee that should contain a significant premium that is consistent with the success achieved and risks undertaken, which were considerable having regard to the strong possibility that the class members' claim would not be resolved short of a trial and a considerable allocation of legal services.

[32] It is commendable that the firm took the brief for a small class in a tough case with a formidable foe. They earned their contingency fee.

[33] In all the circumstances, I think the counsel fee as set out in the retainer agreement is fair and reasonable and I approve it.

E. CONCLUSION

[34] For the above reasons, in accordance with the *Class Proceedings Act, 1992*, I approve the settlement and class counsel's fee request as requested.



Perell, J.

CITATION: Perrenoud v. eHealth Ontario, 2013 ONSC 1900
COURT FILE NO.: 11-CV-439656CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CHARLOTTE PERRENOUD and RAJESH
BEDI**

Plaintiffs

- and -

**eHEALTH ONTARIO and HER MAJESTY
THE QUEEN in right of Ontario as
represented by the MINISTER OF HEALTH
AND LONG -TERM CARE**

Defendants

REASONS FOR DECISION

Perell, J.

Released: April 2, 2013