

CITATION: Somani v. International Financial Group Ltd., 2022 ONSC 7032
COURT FILE NO.: CV-22-00676280-00CP
DATE: 20221213

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BINDIYA SOMANI, KENNETH SUGAR, and ASIF MUNIR BASHIR, Plaintiffs

– and –

INTERNATIONAL FINANCIAL GROUP, LTD., Defendant

BEFORE: Justice E.M. Morgan

COUNSEL: *Darryl Singer, Kristina Olivo, Mathura Santhirasegaram, and Andrew Eckart*, for the Plaintiffs

Mike Eizenga and Nina Butz, for the Defendant

HEARD: December 13, 2022

MOTION TO DISCONTINUE CLASS ACTION

[1] This motion is brought by the Plaintiffs to discontinue the proposed class action. The case is at an early, pre-certification stage. The Defendant has agreed for it to be discontinued without costs.

[2] The claim relates to employees of the Defendant, with the proposed class defined as:

- i. All employees who, since 2004, worked or continue to work for International Financial Group, Ltd. in Ontario and were not paid Overtime Pay, Vacation Pay, Public Holiday and Premium Pay; and
- ii. All assignment workers placed on assignment or assigned to work on contract by the Defendant since 2004, who were classified as independent contractors.

[3] The action was commenced by Statement of Claim issued February 3, 2022. Pursuant to section 28 of the *Class Proceedings Act*, the commencement of the action suspended the running of the limitation period for claims by putative class members.

[4] Following the issuance of the Statement of Claim, it was discovered that some of the proposed representative Plaintiffs' connections to the allegations against the Defendant were not

as strong as originally contemplated. It was also discovered by Plaintiffs' counsel that one or more of the named Plaintiffs were in a potential conflict with the class.

[5] Because none of the current representative Plaintiffs are suited to move the litigation forward, it has become apparent to class counsel that the proposed class action, as presently constituted, is unlikely to be certified. Counsel for the Plaintiffs advises that a search has been conducted among potential class members for new representative plaintiffs to take the place of the current Plaintiffs, but that search has not produced any results.

[6] The Plaintiffs have concluded that proceeding any further with this action would not be in the best interest of the class or in the best interest of the administration of justice. Under the circumstances, the Plaintiffs determined that a discontinuance without prejudice to alternative representative plaintiffs commencing litigation is in the best interest of the putative class.

[7] I see no prejudice imposed on putative class members who might wish to commence a new class action if different representative plaintiffs are found. Since the limitation period tolled with the commencement of this action, the class would be in no different position once the action is discontinued than they were the day it was commenced. There still appears to be ample time to commence a new action based on the same claim if any putative class member decides to do so.

[8] It should be mentioning that to date, the Defendant has not delivered a Statement of Defence or otherwise pleaded to this action. Accordingly, the Defendant will also not be prejudiced by the discontinuance.

[9] Section 29(1) of the *Class Proceedings Act* states: "A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate." In considering a motion for discontinuance, the court should have regard to: a) whether the proceeding was commenced for an improper purpose, b) whether, if necessary, there is a viable replacement party so that putative class members are not prejudiced, or c) whether the Defendant will be prejudiced: *Johnson v. North American Palladium Ltd.*, 2021 ONSC 3346, at para 14.

[10] In *Duong v. Stork Craft Manufacturing Inc.*, 2011 ONSC 2534, at para 54, the court indicated that if a discontinuance might cause substantial prejudice to class members, then reasonable notice is to be given to class members. In the case at bar, there is no prejudice imposed on putative class members as the discontinuance will be on a without prejudice basis to alternative representative plaintiffs. Moreover, no similar action based on the same claim has been commenced in any other province that would pre-empt a new claim by serving as a national class action: *Winter v. CR Bard*, 2020 ONSC 3532.

[11] In general, it is up to the court's discretion as to whether putative class members should be given notice of the discontinuance: *Smith v. Crown Life Insurance Company*, [2002] OJ No 5539 at para. 31. In the present case, Plaintiffs' counsel advise that only a small handful of potential class members have come forward. They will be notified of the discontinuance. In addition, class counsel will post this endorsement and the discontinuance Order on its class action website page.

[12] Given the lack of prejudice to any party or to the putative class, the Plaintiff's motion is granted. The action shall be discontinued, without costs and without prejudice to its being reconstituted with new plaintiffs.

[13] There will be an Order to go as submitted by Plaintiffs' counsel.

[14] There will be no costs of this motion payable for or against any party.

A handwritten signature in blue ink, appearing to read "Morgan J.", is centered on a light blue rectangular background.

Date: December 13, 2022

Morgan J.