

Federal Court



Cour fédérale

Date: 20190620

Docket: T-1290-18

Citation: 2019 FC 837

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 20, 2019

PRESENT: The Associate Chief Justice Gagné

CLASS PROCEEDING

BETWEEN:

**TIMOTHY J. BERNLOHR, JOHN C.
CHARLES, EUGENE I. DAVIS, TODD
DILLABOUGH, JOSEPH C. KOLSHAK,
SEAN MENKE, MICHAEL ROUSSEAU AND
DONALD T. THOMAS**

Applicants

and

**FORMER EMPLOYEES OF AVEOS FLEET
PERFORMANCE INC. SUBJECT TO THE
WAGE RECOVERY APPEAL; ABDELAZIZ
AACHATI ET AL.**

Respondents

ORDER AND REASONS

[1] The applicants, all former directors of Aveos Fleet Performance Inc. [Aveos], seek judicial review of a decision made by Pierre Flageole, a referee appointed under the *Canada Labour Code*, RSC 1985, c L-2, by which he confirmed the payment order in the amount of \$3,052,833.13 in favour of 1,691 former Aveos employees, issued by an inspector of the Employment and Social Development Canada Labour Program.

[2] Although the time limit for appearance set by the *Federal Court Rules*, SOR/98-106 [Rules] has now expired, very few respondents have served and filed a notice of appearance. Fewer than twenty respondents appeared personally, while Trudel Johnston & Lespérance appeared for Gilbert McMullen, and Cavalluzzo LLP appeared for Michael Fennessy, John Douglas Foster and Peter Tsoukalas.

[3] By motion by his counsel, Mr. McMullen asked the Court to continue the application for judicial review as a class proceeding. He is seeking to be named as the representative respondent for all former employees of Aveos, with the exception of those who choose to exclude themselves from the class, as well as the three respondents represented by Cavalluzzo.

[4] It is important to note that Trudel Johnston & Lespérance is committed to providing Mr. McMullen and members of the respondent class with pro bono representation.

[5] The applicants, most of the respondents who appeared personally, as well as the three respondents who are represented by Cavalluzzo, consent to Mr. McMullen's motion.

[6] The Court must therefore determine whether the criteria for certifying the proceeding as a class proceeding are met and whether Gilbert McMullen should be appointed as the representative respondent.

I. Rules relating to the certification of a class proceeding

[7] The *Rules* allow me to certify an application for judicial review as a class proceeding (rule 334.12(1)) and allow me to do so at the request of a party where the applicants object to a community of respondents (rule 334.14(2)).

[8] The criteria to be met for the proceeding to continue as a class proceeding are found in rule 334.16:

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

Conditions

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

(e) there is a representative plaintiff or applicant who

e) il existe un représentant demandeur qui :

(i) would fairly and adequately represent the interests of the class,

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[9] I am of the opinion that the motion record raises a valid defense for the former employees of Aveos. Both the Labour Program Inspector and Referee Flageole found in their favour.

[10] There is an identifiable class of 1,691 people, all employees of Aveos at the time of its bankruptcy in 2012, of whom 1,687 are not already represented.

[11] All the questions of fact and of law in dispute before the Court are common to all the respondents, since they are essentially aimed at confirming or reversing Referee Flageole's decision.

[12] I am also of the opinion that the respondent Gilbert McMullen would adequately and fairly represent the interests of the respondent class. In the affidavit in support of his motion, he states that he agrees to be named as the representative respondent and that he is willing to devote all the time and energy necessary to the dispute. He also confirms that he has no conflict of interest with the other members of the class. Mr. McMullen also represents a class of former Air Canada employees (the majority of respondents are members of both classes) in a class action against Air Canada before the Superior Court of Quebec.

[13] Mr. McMullen's counsel have submitted a litigation plan and committed to keeping members of the respondent class informed of developments in the proceedings. To date, more than 1,500 respondents have joined the mailing list on the Trudel Johnston & Lespérance website (<http://tjl.quebec/recours/collectif/aircanada/>).

[14] I am therefore of the opinion that a class proceeding is the best way to resolve the factual and legal issues before the Court and to do justice in the most economical and expeditious manner. This will facilitate communication between the parties and provide the many unrepresented respondents with pro bono representation of their interests.

[15] That being said, at the time of the motion, I asked the respondents' counsel to justify the exclusion, at this stage, of the three respondents represented by Cavalluzzo. They had already

appeared in the Court record at the time the respondent McMullen filed his motion for leave to proceed as a class proceeding, and the Court has no evidence on file that they wish to exclude themselves from the proposed class.

[16] In the absence of a valid justification, I informed the parties that they would be covered by this certification but that they would have the opportunity to opt out of the class within the time limits set out in the notice to members. They will then remain represented by Cavalluzzo and will be able to assert their rights individually.

[17] It was also agreed by all counsel at the motion hearing that respondents who opt out of the class will remain respondents individually and that the applicants will proceed against them in an adversarial or *ex parte* manner, depending on whether they have appeared in the court record or not. In my opinion, this is one of the necessary adaptations when certifying an application for judicial review as a class proceeding against a class of respondents (rule 334.14(3)). Otherwise, it would only be necessary to opt out to continue to benefit from a favourable administrative decision.

[18] For the reasons set out above, respondent Gilbert McMullen's motion is granted. Since the applicants have not contested the motion, no costs will be awarded.

ORDER

THIS COURT ORDERS that:

1. Gilbert McMullen's motion is granted;
2. The case will continue as a class proceeding;
3. Respondent Gilbert McMullen is appointed as the representative respondent on behalf of the class of persons described below:

[TRANSLATION]

“All respondents who are party to this application for judicial review, with the exception of respondents who have opted out under the opt-out procedure described in the notice to members”;

4. The factual and legal issues shared by the respondents' class are as follows:
 - a. Whether Referee Flageole made a correct or reasonable decision in concluding that claims made through payment orders issued according to Part III of the *Canada Labour Code*, RSC 1985, c L-2, were not time-barred or forfeited when the payment orders were issued on April 5, 2017;
 - b. Whether Referee Flageole made a correct or reasonable decision in stating that the notices of investigation, issued by Inspector Amélie Hillman on December 17, 2013, and sent to each of the applicants, have the effect of suspending the limitation period for the benefit of all respondents;
 - c. Whether Referee Flageole made a reasonable decision in stating that the applicants are liable for the payment of amounts that some respondents could have recovered under the *Wage Earner Protection Program Act*, SC 2005, c 47, s 1;
 - d. Whether Referee Flageole made a reasonable decision by confirming in part the calculation method that Inspector Amélie Hillman used to determine the amount due to each employee;

- e. Whether Referee Flageole made a reasonable decision in stating that it is the date, not the time, of the directors' resignation that must be taken into account in determining their liability for the termination of the respondents' employment;
 - f. Whether Referee Flageole made a reasonable decision in stating that the decision to dismiss the respondents was made while they were carrying out their mandate;
 - g. Whether Referee Flageole made a reasonable decision by dismissing in part the applicants' appeal;
5. The class of respondents is seeking the following shared conclusions:
- a. DISMISS the application for judicial review;
 - b. AFFIRM Referee Pierre Flageole's decision rendered on June 7, 2018;
 - c. CONFIRM the final payment orders issued by Inspector Amélie Hillman dated April 5, 2017, and amended by Referee Flageole in his decision dated June 7, 2018, against applicants Timothy J. Bernlohr, John C. Charles, Eugene I. Davis, Todd Dillabough, Joseph C. Kolshak, Sean Menke, Michael Rousseau and Donald E. Thomas, in favour of the respondents;
 - d. With costs;
6. Counsel for Gilbert McMullen must send by email, within 20 days, the notice to the class members in both official languages, a copy of which is attached to this order, in accordance with rule 334.32 of the *Federal Courts Rules*, SOR/98-106;
7. At the end of the opt-out period, 60 days after the date of transmission of the notice to the members, the members of the class who have not exercised the opt-out option will be represented by the lawyers of the representative respondent;
8. The parties have 30 days to submit to the Court a proposed joint timetable for the next steps necessary to perfect the record, for approval;
9. Without costs.

“Jocelyne Gagné”
Associate Chief Justice

Certified true translation
This 2nd day of July, 2019.
Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1290-18

STYLE OF CAUSE : TIMOTHY J. BERNLOHR, JOHN C. CHARLES,
EUGENE I. DAVIS, TODD DILLABOUGH, JOSEPH
C. KOLSHAK, SEAN MENKE, MICHAEL
ROUSSEAU AND DONALD T. THOMAS v FORMER
EMPLOYEES OF AVEOS FLEET PERFORMANCE
INC. SUBJECT TO THE WAGE RECOVERY
APPEAL; ABDELAZIZ AACHATI ET AL.

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JUNE 17, 2019

ORDER AND REASONS: GAGNÉ A.C.J.

DATED: JUNE 20, 2019

APPEARANCES:

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