A Clash Between Class Counsel and his Class Representative

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Plaintiff-side class actions are often – but not always – lawyer driven. Class counsel are increasingly entrepreneurial in seeking out potential class action mandates and identifying putative class members, including a proposed representative plaintiff. But what happens to the class action when the relationship between class counsel and the representative plaintiff falls apart?

A recent Ontario decision, *Azar v. Strada Crush Limited*, provides an illustration. This is a certified class action alleging unpaid overtime and holiday pay pursuant to Ontario's *Employment Standards Act, 2000*. There are approximately 150 class members.

After a successful certification motion, the representative plaintiff and class counsel had a falling out. The representative plaintiff moved to appoint new class counsel; existing class counsel brought a cross-motion to disqualify the representative plaintiff and to grant class counsel time to find a new representative.

The Court approached the resolution of the issue by posing the following question: "what is in the best interests of the class?" In this case, an underlying business dispute between class counsel and a former colleague, Nunes (who had introduced the representative plaintiff to class counsel) appears to have been the catalyst behind the representative plaintiff's request to change class counsel. The new lawyer seeking to become class counsel was also representing Nunes in the business dispute against existing class counsel. The fact that the representative plaintiff was seeking to have this lawyer appointed as new class counsel against the backdrop of the business dispute was not, in the Court's assessment, in the best interests of other class members. Rather, it reflected the representative plaintiff putting "his own interest first in choosing [Nunes'] personal lawyer over the lawyer [*i.e.*, class counsel] who has a proven track record in this very case".

Ultimately, the court gave class counsel 60 days to find a new representative plaintiff, and directed the representative plaintiff to provide class counsel with any names (and contact information) he had of other class members. The court commented that the class deserved to have a representative plaintiff who does not "hire[] and fire[] class counsel based on matters other than class counsel's conduct of the class action

litigation". If, within 60 days, a new representative had not been identified, the Court invited the defendant to bring a motion to de-certify the class action.

The outcome in *Azar* emphasizes the "representative" nature of the representative plaintiff's role. A representative plaintiff must fairly and adequately represent the class without conflict of interest. Similarly, a certified class action gives rise to an obligation for class counsel to act, more broadly, on behalf of the class as a whole rather than just the named plaintiff. Had this been an ordinary piece of litigation and not a class action, no motion would have been required: the plaintiff's lawyer would simply have been fired by the client and replaced, regardless of the reason. *Azar* is a reminder to class counsel to select their proposed class representative wisely.

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