

AMENDED THIS Feb 11/19 PURSUANT TO
 MODIFIÉ CE CONFORMÉMENT A
 RÈGLE/LA RÈGLE 26.02
 THE ORDER OF Belobaba
 L'ORDONNANCE DE Belobaba
 DATED / FAIT LE Feb 23/19

 REGISTRAR
 SUPERIOR COURT OF JUSTICE
 TRIBUNAL SUPÉRIEUR DE JUSTICE

Court File No. CV-15-00523524-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

TARRIE ALGERNON PHILLIP

Plaintiff

- and -

DELOITTE MANAGEMENT SERVICES LP, DELOITTE & TOUCHE LLP

Defendants

Proceedings commenced under the *Class Proceedings Act, 1992*

SECOND FRESH AS AMENDED
STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$10,000 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for the costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: 9 March, 2015

Issued by: A. Vaiciudenas
Local Registrar

Address of Court Office:
393 University Avenue
Toronto, ON M5G 1E6

TO: **DELOITTE MANAGEMENT SERVICES LP,
DELOITTE & TOUCHE LLP**
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I – RELIEF CLAIMED

1. The Proposed Representative Plaintiff claims the following on his behalf, and on behalf of members of the Class:
 - a) an order certifying this action as a class proceeding and appointing Tarrie Phillip as Representative Plaintiff of the Class;
 - b) a declaration that the members of the Class were employees of the Defendant(s);
 - c) the sum of \$2,000,000.00 for unpaid overtime;
 - d) the sum of \$2,000,000.00 for unpaid Public Holiday pay;
 - e) the sum of \$2,000,000.00 for unpaid Vacation Pay;
 - f) the sum of \$1,000,000.00 for improperly removed statutory deductions;
 - g) the sum of \$12,000,000.00 for failure to remove statutory deductions and lost employment insurance benefits;
 - h) pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
 - i) post-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
 - j) any goods and services tax or harmonized sales tax which may be payable on any amounts pursuant to Bill C-62, the *Excise Tax Act*, R.S.C. 1985, as amended or any other legislation enacted by the Government of Canada or Ontario;
 - k) the costs of this action on a substantial indemnity basis; and
 - l) such further and other relief as counsel may advise and this Honourable Court permits.

II – BACKGROUND

A – The Parties & Class

(i) The Defendant

2. The Defendants, Deloitte Management Services LP and Deloitte & Touche LLP (collectively “Deloitte”) is an independent member firm of Deloitte Touche Tohmatsu Limited, a company based in the United Kingdom. Deloitte provides a range of services to clients, predominantly focused on audit, consulting, financial, advisory, risk management, and tax-related services. Deloitte also provides e-discovery services to law firms.

(ii) The Class

3. This action is brought on behalf of a class of persons, defined as:

All persons having performed or currently performing Document Review and/or e-discovery services at Deloitte, pursuant to an independent contractor agreement since January 16, 2014 to the date of certification (January 16, 2018), exclusive of any person who has only ever performed the duties of a Project Manager;

(iii) The Proposed Representative Plaintiff

4. The proposed Representative Plaintiff is Tarrie Phillip (“Tarrie”). Tarrie resides in the Province of Ontario, and is a lawyer licensed by the Law Society of Upper Canada (“LSUC”). Tarrie worked for Deloitte as a Document Reviewer. Tarrie also accepted Deloitte’s offer of work at a rate of \$47.00 per hour, sent via email on January 14, 2015.
5. Tarrie is representative of all individuals who worked while classified as independent contractors at Deloitte providing documentary review services. Tarrie seeks an order that he be authorized by the Court to seek damages on behalf or for the benefit of all individuals described in paragraph 3 above (herein collectively referred to as “the Class”, “Class Members” and “Members of the Class”).

(iv) Document Review

6. “E-discovery services” or “Document Review” in this claim refers to work outsourced by law firms to Deloitte. In particular, it involves the review and analysis of documents relevant to a legal case. “Document Reviewers” are briefed on the issues, and then review source documents for privilege, confidentiality, and relevance to the legal issue. Document Reviewers use software to tag documents to specifications pre-determined by Deloitte’s client.

B – The Proposed Representative Plaintiff’s Employment with Deloitte

7. Tarrie worked as a Document Reviewer with Deloitte from June of 2015 until September of 2016.
8. Tarrie was informed that he would be paid \$47.00 per hour for time worked on projects, and would be added to Deloitte’s “roster” of lawyers. Although it was not discussed at the time, Tarrie learned later that he would earn no vacation pay, receive no paid breaks, and would not be eligible for an overtime rate.
9. Tarrie was trained on how to review documents. He was then directed to an individual who would provide him with a batch of documents to review. He was to complete his batch and then request that his supervisor assign him with a new batch to review. On some occasions Tarrie would start on a new batch without having to check with his supervisor. Tarrie’s understanding was that there was an approximate “quota” of batches that Class Members were expected to meet each day and they were informed at varying points that their pace was being monitored. Once Tarrie completed reviewing a batch of documents the batch was re-reviewed by a member of the Quality Control Team (“QC”), assessing for the accuracy with which the documents had been tagged.
10. The above hiring, training, and working process was the standard procedure, and generally describes the experience for all Class Members and projects at Deloitte. Document Reviewers were required to sign in to a monitored time sheet, and use provided login information for access to Deloitte computers. Work was only to be done at Deloitte offices with Deloitte tools and software, and no materials relating to the project in any way could be removed from the premises. During a Document Review project, speed and quality were monitored, and Document Reviewers were always under the supervision of a Project Manager.

III – CAUSES OF ACTION

11. There are two causes of action in this proceeding:
 - a. that Class Members were misclassified as independent contractors when in fact they were employees of Deloitte, which resulted in Class Members suffering damages for unpaid overtime, unpaid vacation pay and unpaid Public Holiday pay; and
 - b. that Class Members suffered financial damages as a result of Deloitte improperly making deductions from Class Members’ wages in order to avoid its obligations to remit employer-side contributions for both Employment Insurance (“EI”) and Canada Pension Plan (“CPP”).

A - The Class Members were Employees of Deloitte

12. Tarrie, as Proposed Representative Plaintiff, pleads that Class Members were independent contractors in name only, and are properly classified as employees of the Defendant Deloitte. Tarrie pleads that notwithstanding any contracts signed between the parties, it is

the character of his employment, rather than its classification, which ought to determine whether he is an employee or an independent contractor.

13. **Tarrie pleads and relies upon the *Employment Standards Act, 2000* (the “*ESA*”) – specifically Section 5 – which states that employees are not able to contract out of their statutory entitlements. Tarrie pleads that any contract limiting entitlements or purporting to classify him or the Class as independent contractors are void as per the *ESA* and that therefore only the implied terms of his true employment contract ought to be enforced.**

14. **The contracts signed by Class Members to perform Document Review services were, in their form and function, contracts *of* service, rather than contracts *for* service. The actual conduct of the parties indicates the true nature of the relationship between Class Members and the Defendants. During the course of their work for Deloitte, Class Members:**
 - (a) **were not permitted to work from home or their own offices, but required to work on Deloitte premises at all times;**
 - (b) **were not permitted to determine their own hours freely, but informed what the next day’s hours were to be based on the number of batches of documents available, and were unable to work beyond the time chosen by a Deloitte appointed supervisor;**
 - (c) **were not permitted to use their own tools or software to complete work, instead being assigned a specific computer and provided with an access code to software purchased and licensed by Deloitte;**
 - (d) **were not permitted to have mobile devices, smart phones, or personal laptops at their work station for any purpose, and specifically the purpose of conducting any business outside of their document review duties for Deloitte;**
 - (e) **were not permitted to determine the manner in which the work was performed;**
 - (f) **were not permitted to remove any materials from Deloitte’s offices that were related to the case, including any documents, training manuals, contracts, or even their own hand-written notes;**
 - (g) **were not permitted to hire any assistants, associates, or other employees to assist with the completion of the work;**
 - (h) **were not permitted to outsource work to any third parties;**
 - (i) **were not permitted to work unless they were supervised by an Deloitte appointed supervisor at all times;**
 - (j) **were required to review documents under strict guidelines established by Deloitte that allowed for minimal discretion;**

- (k) were to seek guidance and assistance from Deloitte appointed supervisors in connection with the work being performed;
 - (l) were specifically required in their contracts to "...report directly to Shelby Austin or any other party designated...";
 - (m) were unable to negotiate their hourly rate, which was unilaterally decided upon by Deloitte without consultation with Members of the Class;
 - (n) had no chance of profit or risk of loss associated with the work done or projects of Deloitte;
 - (o) were subject to monitoring of both their work speed and their work accuracy;
 - (p) were required to login to a Deloitte managed timesheet;
 - (q) were subject to a seniority system, in which more senior reviewers were given priority over those with less seniority;
 - (r) were subject to Deloitte's dress code when required (for instance, business attire was required during client meetings); and
 - (s) were subject to policies in the workplace, including a "scent-free" policy, a "nut-free" policy and policies regarding the use of the kitchen.
15. Tarrie further pleads that Class Members were at all times employees of Deloitte, rather than independent contractors placed by Procom, for the following reasons:
- (a) Class Members applied to join Deloitte's roster of lawyers directly;
 - (b) Class Members were vetted and hired to Deloitte's roster of lawyers by Deloitte Partners and Associates directly;
 - (c) Class Members were trained directly by Deloitte's staff and attended staff meetings with Deloitte;
 - (d) Class Members continue to be advised of new projects and work opportunities by Deloitte partners and employees directly;
 - (e) Class Members continue to accept these temporary employment offers by communicating their agreement directly to a Deloitte partner or employee;
 - (f) Procom is a placement agency for computer professionals, to which none of the Class Members applied for placement;
 - (g) Procom was introduced to Class Members by Deloitte, rather than vice versa;

- (h) Procom was represented to Class Members as a contract administrator, rather than an intermediary or agency;
 - (i) Procom had no involvement in the recruiting, vetting, or hiring of Class Members; and,
 - (j) Class Members have never rarely, if at all, attended at Procom's offices, or personally met with Procom representatives.
16. Tarrie submits that Deloitte would therefore be liable for employee benefits pursuant to the *ESA*, and compensation for improper remittances.
17. Tarrie pleads that he and his fellow Class Members are owed Employee benefits pursuant to the *ESA*, including unpaid overtime unpaid vacation pay, and unpaid Public Holiday pay.
18. The Class, as employees, are entitled to statutory benefits despite being lawyers.
19. Tarrie pleads that the work done by the Class does not constitute legal services, and therefore does not fall under the exemptions enumerated under O. Reg. 285/01 to the *ESA*.
20. O. Reg. 285/01 to the *Employment Standards Act, 2000* states:
- Exemptions from Parts VII to XI of Act
- 2(1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,
- (a) as a duly qualified practitioner of,
- (ii) law...
21. Parts VII, VIII, IX, X and XI refer to the following sections of the *ESA*:
- Part VII: Hours of Work and Eating periods
Part VIII: Overtime Pay
Part IX: Minimum Wage
Part X: Public Holidays
Part XI: Vacation with Pay
22. As employees, not providing legal services, Class Members do not fall under the exception O. Reg. 285/01 s. 2 (1)(a)(ii).
23. Pursuant to the By-Laws of the Law Society, lawyers who do not practice or provide legal services are required to change their status, are eligible for reduced Law Society fees, and may apply for an exemption from the LawPRO requirement. These changes are permitted because an individual who is not providing legal services or working in a legal role is not considered a practitioner of law.

24. Tarrie pleads that since Class Members were not providing legal services or working in a legal role, Class Members did not qualify as practitioners of law in their roles at Deloitte.
25. The Members of the Class were not provided with the benefits outlined in Parts VIII, X, and XI of the *ESA*.

Part VIII - Overtime Pay

26. As the work done by the Class does not constitute legal services, Class Members would not be exempt from the overtime provision of the *ESA*. For every hour worked in excess of 44 hours per week, Class Members are owed 1.5 times their hourly wage, per both the *ESA* and the principle of *Quantum Meruit*.
27. Since both the Defendant(s) and the Class kept meticulous, to-the-minute records of time spent by Class Members on each project, it would be a simple calculation to determine how much overtime would be owed to any particular Class Member.

Part X - Public Holidays

28. Part X of the *ESA* mandates that employers must pay their employees Public Holiday pay. Class Members were not paid wages for Public Holidays.
29. As employees, each Class Member ought to be compensated for unpaid Public Holiday pay, as per the *ESA* and related regulations. As irregular working employees, Class Members would be eligible for an averaged wage on each Public Holiday, as per s. 24 (1)(a) of the *ESA*.
30. There are nine (9) Public Holidays in Ontario each year. The Proposed Representative Plaintiff pleads that every Class Member is entitled to remuneration for Public Holidays which occurred during their tenure with Deloitte.
31. Since both the Defendants and Members of the Class tracked their employment, it should be simple to determine which Public Holidays passed during each individual Class Members' tenure, and how much is therefore owed.

Part XI - Vacation with Pay

32. Part XI of the *ESA* provides that employees are entitled to vacation time and pay. The Proposed Representative Plaintiff pleads that the Defendant(s) denied the Class Members their Vacation Pay, properly owed under Section 35.2.
33. The amount of vacation pay is set at 4% of wages for the time worked as per Section 35.2. Therefore, each Class Member is entitled to be compensated an additional 4% for each hour that they worked, as compensation for their denied Vacation Pay.

34. Since the Defendant(s) kept meticulous records of the hours and minutes worked by each individual Member of the Class, it would be easy to determine how much is owed to each Class Member for Vacation Pay.

B – Deloitte’s Improper Deductions from Document Reviewer Wages

35. Tarrie pleads that Deloitte, through its contract administrator, Procom, improperly deducted the employer side statutory remittances and corporate EI and CPP contributions from the wages of the Class Members.
36. Tarrie pleads that Deloitte recognized that the true nature of the relationship between Class Members was one of employer-employee. Recognizing the potential liability of such a relationship, Deloitte sought to minimize their own liability to Class Members by unilaterally introducing Procom as a third party between themselves and the Class Members to “administer contracts”.
37. The basis on which Procom claimed to be properly removing statutory deductions from Class Members was pursuant to the Canada Revenue Agency (“CRA”) produced *Employers’ Guide Payroll Deductions and Remittances* (“*Employers’ Guide*”). Procom informed the Class in the email of January 28, 2014 sent by Kendra, a representative of Procom, that the CRA defined their engagement as one of a contract of service, and that placement agencies placing individuals into such a role are responsible for the removal and remittance of statutory deductions.
38. Tarrie pleads that as no binding agreements were made between Procom and the Class, and because Procom’s role was that of a contract administrator rather than a placement agency, that Procom was not responsible for the removal of statutory deductions from those wages. Instead, Deloitte, as the employer of the Class, was responsible for the remittances to the CRA.
39. Similarly, Procom’s removal of employer deductions from the agreed upon wage of the Class Members was improper in this instance. Corporate taxes are not levied on either employees or independent contractors. Rather, where a contract is found to be a contract of service, corporate taxes are levied against the employer or placement agency. The unilateral removal of a tax or remittance owed by Deloitte from the \$47.00 hourly wage accepted by the Class was in clear breach of the terms of the contract.
40. Tarrie pleads that since Class Members were employees of Deloitte, corporate remittances ought not to have been removed from their wages, and should be returned to the Class.
41. In the alternative, Tarrie pleads that should the Court find that the Class are properly classified as independent contractors, that the Class therefore had no contract with Procom as a placement agency. As such, the removal of any statutory deductions and corporate taxes was improper, and should be returned to the Class.

42. Tarrie understands that at the time of this fresh as amended claim the statutory deductions have, in fact, been returned (or attempted to be returned) to the class, and therefore seeks costs associated with seeking the remedy and behavior modification elements of the claim.

IV – AGGREGATE DAMAGES

43. Tarrie also pleads that the trial judge ought to make an award of aggregate damages in this case since the records kept by Deloitte of the time worked by document reviewers should allow for the damages of each Class Member to be calculated without the need for resort to individual assessments or mini-trials.

V – LOCATION

44. Tarrie proposes this action be tried at the City of Toronto, in the Province of Ontario.

Date of Issue: 9 March, 2015

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DEFENDANTS**

Court File No.: CV-15-00523524-00CP

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