



ONTARIO  
SUPERIOR COURT OF JUSTICE

Electronically issued  
Délivré par voie électronique : 07-Apr-2020  
Toronto

**NICOLE CURTIS and AMR GALAL**

Plaintiffs

– and –

**MEDCAN HEALTH MANAGEMENT INC.,  
ANDREW CARRAGHER,  
SHAUN C. FRANCIS,  
EDWIN F. HAWKEN,  
URBAN JOSEPH,  
BEAU LASKEY,  
THOMAS P. REEVES,  
OWEN ROGERS,  
CRAIG SHEPHERD**

Defendants

**Proceeding commenced under the *Class Proceedings Act, 1992***

**STATEMENT OF CLAIM**

TO THE DEFENDANTS

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:

Issued by: \_\_\_\_\_  
Local Registrar

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

**TO: Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Andrew Carragher**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Shaun C. Francis**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Edwin F. Hawken**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Urban Joseph**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Beau Laskey**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Thomas P. Reeves**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Owen Rogers**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

**TO: Craig Shepherd**  
**c/o Medcan Health Management Inc.**  
150 York Street, Suite 1500  
Toronto, Ontario M5H 3S5

## RELIEF CLAIMED

1. The Proposed Representative Plaintiff claims the following on her behalf, and on behalf of members of the Class:

- a) The sum of \$5,000,000 as general damages covering the damages to the class;
- b) an order certifying this action as a class proceeding and appointing Nicole Curtis and Amr Galal as Representative Plaintiffs of the Class;
- c) a declaration that the members of the Class are owed public holiday and vacation pay on variable compensation above and beyond the compensation they were paid;
- d) that damages be paid to each class member equal to the public holiday and vacation pay that they ought to have received during their employment with the Defendant;
- e) in the alternative, a declaration that the defendant was unjustly enriched by underpayment or non-payment of vacation pay and public holiday pay to the Class, and must make restitution;
- f) pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
- g) post-judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
- h) 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;
- i) the costs of this action on a substantial indemnity basis; and
- j) such further and other relief as counsel may advise and this Honourable Court permits.

## BACKGROUND

2. Medcan Health Management Inc. (“**Medcan**” or “**the Defendant**”) is a provider of a range of medical, therapeutic, and health enhancement services, provided both through employer benefit programs and directly to individual customers.

3. Medcan’s business model involves employing numerous people who are paid mainly through variable compensation (“**Variable Compensation Employees**”). This variable compensation is often but not exclusively in the form of commissions based on the volume of services they deliver or new customers they attract, but is also done sometimes by way of bonuses or other payments.

4. Medcan’s business includes personal fitness training. Even in the case of a fitness trainer, the majority of the employee’s remuneration is in the form of a commission that is a percentage of the revenue earned for Medcan by the trainer.

5. Nicole Curtis (“**Ms. Curtis**”) is an individual residing in the Province of Ontario. Ms. Curtis was employed by Medcan from October 2011 to May 2016, first as a Client Service Specialist and subsequently as a Corporate Sales Executive.

6. Amr Galal (“**Mr. Galal**”) is an individual residing in the Province of Ontario. Mr. Galal held various positions at Medcan from about June 2008 to May 2019, starting as an Inside Sales Agent and ending as Director, Sales and Partnerships.

7. Throughout their employment with Medcan, Ms. Curtis and Mr. Galal earned their incomes mainly from variable compensation, which was called commissions. Each received a small base salary, but the bulk of their remuneration was in the form of these commission payments.

8. This class action is brought because Ms. Curtis, Mr. Galal and other Variable Compensation Employees working for the Defendant, were systemically denied the minimum standards to which they were entitled under the *Employment Standards Act, 2000*, S.O. 2000 (“**ESA**”).

9. Andrew Carragher, Shaun C. Francis, Edwin F. Hawken, Urban Joseph, Beau Laskey, Thomas P. Reeves, Owen Rogers and Craig Shepherd are Medcan's directors and under section 131 of the *Business Corporations Act*, RSO 1990, c B 16 are liable for unpaid wages and for vacation pay accrued under the *ESA*.

### **The Class**

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

All variable compensation employees of MEDCAN HEALTH MANAGEMENT INC.

11. Ms. Curtis and Mr. Galal seek to have the class time period run from the earliest of,

- a. The start date of employment of the longest-serving current Variable Compensation Employee;
- b. Or the start date of any Variable Compensation Employee who was terminated or resigned within the last two years since this claim was issued;

until the date when the notice of class action is sent out to class members with the opt-out forms.

### **EMPLOYMENT STANDARDS ENTITLEMENTS**

12. Under the *Employment Standards Act, 2000* ("**ESA**") employees must be paid additional public holiday pay above and beyond their regular pay as per sections 24-32 ("**Public Holiday Pay**"). For the vast majority of the class period Public Holiday Pay was calculated per s. 24(1) of the *ESA*, for employees with variable compensation this pay is to be an average of what they earned over the preceding 20 days.

13. Under the *ESA* employees must be paid additional vacation pay above and beyond their regular pay, as per s. 35.2 ("**Vacation Pay**"). This pay must be at least 4 per cent of the wages earned by the employee for those with less than five years seniority and 6 per cent for those with greater than five years seniority.

14. All Vacation Pay that has previously accrued remains owing to an employee, as per s. 38 of the *ESA*.

15. When an employee's employment ends, "the employer shall pay any wages to which the employee is entitled," as per s. 11(5) of the *ESA*.

16. In the *ESA*, wages are defined to include variable compensation (including commission) income.

17. As per s. 5(1) of the *ESA*, no employee may opt out of a benefit of the *ESA* unless the employee receives a greater benefit.

18. Under s. 15.1 of the *ESA* the Defendant was required to keep detailed records of the class members' Vacation Pay, and the Plaintiffs were not provided any such records and are not aware whether such records exist.

19. As per s. 40(1) and (2) of the *ESA*, the Vacation Pay that ought to have been paid has a trust over it and creates a lien upon the assets of the employer in the amount of the monies that ought to have been paid.

#### **COMPENSATION POLICY EXCLUDED VACATION AND PUBLIC HOLIDAY PAY ON VARIABLE COMPENSATION**

20. Ms. Curtis, Mr. Galal, and other Variable Compensation Employees working for the Defendant received Vacation and Public Holiday Pay solely on their base salary, if at all, and not on their total compensation, as required by the *ESA*.

21. The pay stubs of Ms. Curtis and Mr. Galal, reported no Vacation Pay at all.

22. The Defendant failed in its obligations to correctly calculate pay. It failed in its obligations to be transparent and inform employees about the calculation of their pay.

23. The compensation policies applicable to Ms. Curtis, Mr. Galal, and other variable compensation employees violated the *ESA*. They did not provide for Vacation and Statutory Holiday Pay correctly calculated based on their total wages, inclusive of variable compensation. Ms. Curtis and Mr. Galal seek to be Representative Plaintiffs for all persons denied such compensation while working for the Defendant.

## **PARTIAL PAYMENT OF RETROACTIVE PAY ALREADY ADMITTED AND DISCOVERABILITY**

24. In December 2019, the Defendant paid out some variable commissioned persons for vacation and public holiday pay that had been due and owing for the previous two years.

25. In March 2020, Mr. Galal received a notification from the Defendant that some of his Public Holiday Pay entitlements had been miscalculated for 2018 and 2019 and that the Defendant will pay him \$4,903.84 as a result of the error.

26. The Plaintiffs state by the 2019 and 2020 communications and payments, the Defendant admitted that its payroll system has not been adequately compensating the Variable Compensation Employees throughout their employment.

27. Vacation pay and Public Holiday Pay ought to be paid out for the full tenure of the Plaintiffs and of all Variable Compensation Employees with the Defendant for the following non-exclusive reasons:

- a. The deprivation of these benefits was only discoverable to the Plaintiffs, and the other Variable Compensation Employees, once they were made aware of the pay discrepancy by the Defendant at the very earliest in December 2019;
- b. The benefits under the *ESA* roll over and thus the two-year limitation period under the *Limitations Act, 2002*, SO 2002, c24, Sched B properly runs for all benefits owing from 7 days after employment ends as per s.11(5)(a) of the *ESA*.

28. The Plaintiffs further state that in so far as the calculations of what has been paid out to date appear in some circumstances to be incorrect that any Variable Compensation Employee whose payments are not correct ought to be compensated for the difference between the amount paid and the amount owed under the *ESA*.

## **LOCATION**

29. Ms. Curtis and Mr. Galal propose this action be tried at the City of Toronto, in the Province of Ontario.

**Monkhouse Law**  
Barristers & Solicitors  
220 Bay Street, Suite 900  
Toronto, Ontario M5J 2W4

**Andrew H. Monkhouse (64529L)**  
andrew@monkhouselaw.com

**Alexandra Monkhouse (70350L)**  
alexandra@monkhouselaw.com

Tel.: 416-907-9240  
Fax: 888-501-7235

Lawyer for the Plaintiffs, Nicole Curtis and Amr  
Galal

NICOLE CURTIS et al     v.     MEDCAN HEALTH MANAGEMENT INC. et al  
Plaintiffs                   Defendants

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**SUPERIOR COURT OF JUSTICE**

**Proceeding under the *Class*  
*Proceedings Act, 1992***

Proceeding commenced at TORONTO

**STATEMENT OF CLAIM**

**MONKHOUSE LAW**

220 Bay Street, Suite 900  
Toronto, Ontario M5J 2W4

**Andrew Monkhouse (64529L)**  
andrew@monkhouselaw.com

**Alexandra Monkhouse (70390L)**  
alexandra@monkhouselaw.com

Tel: (416) 907-9249  
Fax: (888) 501-7235

Lawyers for the Plaintiffs