



ONTARIO
SUPERIOR COURT OF JUSTICE

Electronically issued : 17-Aug-2020
Délivré par voie électronique
Toronto



Plaintiff

– and –

T.E.S. CONTRACT SERVICES INC.

Defendant

Proceeding commenced under the *Class Proceedings Act, 1992*

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:

Issued by: _____
Local Registrar

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

TO: **T.E.S. CONTRACT SERVICES INC.**
40 Holly Street, Suite 500
Toronto, Ontario M4S 3C3

CLAIM

RELIEF CLAIMED

1. The Proposed Representative Plaintiff claims the following on her own behalf, and on behalf of members of the Class:
 - a) an order certifying this action as a class proceeding and appointing [REDACTED] as Representative Plaintiff of the Class;
 - b) a declaration that the members of the Class were employees during their work with T.E.S. Contract Services Inc. (“TES”) and thus are entitled to the minimum employment standards set out by the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“ESA”);
 - c) General Damages in the amount of \$72,500,000.00 as compensation to the class;
 - d) Punitive, Aggravated and/or Moral damages in the amount of \$72,500,000.00;
 - e) A declaration that TES violated their fiduciary duties to the class and an order for an accounting of and disgorgement of profits;
 - f) a declaration that TES violated the terms of the ESA by:
 - i. failing to ensure that Class Members were properly classified as employees;
 - ii. failing to advise Class members of their entitlement to overtime pay for hours worked in excess of 44 hours per week in accordance with the ESA (the “Overtime Threshold”);

- iii. requiring and/or permitting the Class Members to work overtime hours and failing to compensate the Class Members for hours worked in excess of the Overtime Threshold (“**Overtime Pay**”);
 - iv. failing to ensure that the Class Members' hours of work were monitored and accurately recorded;
 - v. failing to advise Class Members of their entitlement to vacation pay at a rate of 4 percent of wages in accordance with the ESA (“**Vacation Pay**”);
 - vi. failing to compensate Class Members for Vacation Pay;
 - vii. failing to advise Class Members of their entitlement to public holiday pay and premium pay in accordance with the ESA (the “**Public Holiday and Premium Pay**”);
 - viii. failing to compensate Class Members for Public Holiday and Premium Pay;
 - ix. failing to compensate the Class Members for all hours worked.
- g) a declaration that any prohibition on assignment workers being hired by their clients are invalid under s. 74.8(1)(4) of the *Employment Standards Act, 2000*.
 - h) damages for unpaid Overtime;
 - i) damages for unpaid Vacation Pay;
 - j) damages for unpaid Public Holiday and Premium Pay;
 - k) a declaration that the Defendant is liable for any consequential damages resulting from the determination that the Class Members are/were employees of the Defendant and not independent contractors;

- l) a declaration that the Defendant is liable for any adverse tax liability sustained by the Class Members resulting from a determination that the Class Members are/were employees of the Defendant and not independent contractors;
- m) a declaration that the Defendant is liable, and must reimburse the Class Members, for any Canada Pension Plan ("CPP") or Employment Insurance Act ("EI") contributions which may have been paid or are owed resulting from a determination that the Class Members are/were employees of TES and not independent contractors;
- n) an order, pursuant to section 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("**Class Proceedings Act**") directing an aggregate assessment of damages;
- o) an order directing the Defendant to preserve and disclose to the Plaintiff all records (in any form) relating to the identification of Class Members and the hours of work performed by the Class Members;
- p) prejudgment interest in accordance with section 128 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
- q) postjudgment interest in accordance with section 129 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
- r) the costs of this action on a substantial indemnity basis, together with applicable HST, or other applicable taxes, thereon;
- s) the costs of administering the plan of distribution of the recovery in this action; and,
- t) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The Plaintiff, [REDACTED] was a resident of Ontario during all applicable times.

3. The Defendant, TES, is a lawfully incorporated company based in Toronto, Ontario. TES is a temporary help services firm that provides workers to client firms, many of them in the information technology field.

4. The activities of TES are governed by the ESA.

THE CLASS

5. The Plaintiff brings this action pursuant to the *Class Proceedings Act* on her own behalf and on behalf of the following class of persons (together, the “**Class**” or “**Class Members**”):

All assignment workers placed on assignments or assigned to work on contracts by TES since November 6, 2009 who were classified as independent contractors.

EMPLOYMENT RELATIONSHIP

6. Section 74.3 of the ESA provides that, where a temporary help agency (“**Temporary Help Agency**”) and a person agree that the agency will assign the person to perform work on a temporary basis for clients, the temporary help agency is the person’s employer, and the person is an employee of the temporary help agency.

7. In the alternative to s.74.3 of the ESA the Plaintiff states that the class members would in the alternative be employees of the Defendant under the definitions of the ESA or in the further alternative under common law

8. A person who is an employee of the Temporary Help Agency is entitled to all the minimum standards provided to employees by the ESA, including vacation pay, public holiday pay, and overtime pay.

9. TES assigned [REDACTED] and others like her to work on a temporary basis for its clients, while requiring them to sign contracts that stated they were independent contractors and not employees.

10. TES violated section 5.1 of the ESA, which provides that an employer shall not treat a person who is an employee of the employer as if the person were not an employee for the purposes of entitlements under the Act.

11. Section 5 of the ESA further provides that no person, including no employee, shall contract out of or waive an employment standard and any such contracting out or waiver is void.

12. TES knew or should have known that [REDACTED] and others like her that it was placing in temporary positions under the guise of being independent contractors were not in fact people in business for themselves and were at law employees.

13. TES knew or should have known that [REDACTED] and others like her that it was placing in temporary positions under the guise of being independent contractors were treated in the workplace in the same manner and with the same degree of control as the regular employees of the client firm, with the exception that they were not provided with the employee benefits mandated under the ESA.

[REDACTED]'S EXPERIENCE

14. Following successfully interviewing with Texas Instruments Canada Ltd. (“**Texas Instruments**”), [REDACTED] was offered an independent contractor agreement with TES.

15. TES required [REDACTED] to incorporate a company and execute the independent contractor agreement on behalf of that newly created corporation.

16. TES’s contract with [REDACTED] stated that she would be "Job Title: UX Designer," where UX is industry shorthand for "user experience."

17. TES's contract stated that she would have "duties as assigned by the client."

18. TES’s contract with [REDACTED] stated that it would run from March 4, 2019 to March 4, 2020. TES terminated [REDACTED]’s contract early, on or about February 7, 2020.

19. [REDACTED] worked at Texas Instruments at a fixed hourly rate of pay of \$56 as set out in her contract with TES.

20. TES provided [REDACTED] with sample invoices. [REDACTED] was required to issue invoices to be paid by TES.

21. During her time with TES, [REDACTED] generally worked at Texas Instruments’ headquarters, used Texas Instruments’ computers and software and performed tasks directly assigned by Texas Instruments.

22. [REDACTED] worked side by side with other designers who were full time regular employees, and was doing the same job as them. The only difference was that the latter received employee benefits.

23. The duties performed by the Class Members and the supervision and control imposed on the Class Members by TES's clients creates an employment relationship with TES as expressly provided by section 74.3 of the ESA. Particulars of such an employment relationship include, but are not limited to:

- a) Class Members have to follow schedules that are determined by TES's client;
- b) Class Members are told when and where to perform their work duties;
- c) Class Members are not able to subcontract, assign, or contract out their essential job duties to other workers;
- d) Class Members are required to obey directions from their superiors within the client firm's hierarchy and are penalized if they fail to do so; and,
- e) Class Members are required to follow the client firms' policies, guidelines, and instructions when performing their duties.

24. The Defendant had no overtime or public holiday policy in place to monitor, record or compensate overtime or public holiday pay hours.

25. ██████████ relied in good faith on the Defendant and was unaware while working for TES or afterwards that she was an employee and entitled to Overtime Pay, Vacation Pay, Public Holiday Pay and Premium Pay. At the time, ██████████ relied on the Defendant to properly classify her regarding her status as an employee and her resulting entitlements. ██████████ was misled by the Defendant that she was not an employee of TES.

26. The Defendant refused to provide [REDACTED] with T4s to prove the insurable hours worked for EI purposes.

27. [REDACTED]'s relationship with TES is consistent with the relationship of all Class Members with TES.

28. At all material times, [REDACTED] and the Class Members were explicitly directed as to how, where and when they could perform their duties for TES.

29. At all times, [REDACTED] and the other Class Members were explicitly and incorrectly informed they were not employees of TES.

30. The Defendant's clients sometimes required Class Members to work hours in excess of the Overtime Threshold without Overtime Pay as they are misclassified as independent contractors instead of employees of TES.

31. The Defendant failed to compensate [REDACTED] and the other Class Members for Vacation Pay.

32. The Defendant failed to compensate [REDACTED] and the other Class Members for Public Holiday and Premium Pay.

ESA AND CLASS MEMBERS' CONTRACTS OF EMPLOYMENT

33. The employment standards under the ESA are implied minimum terms of the contracts of employment of the Class Members.

34. At all material times, the Class Members were not and are not exempt from the ESA standards.

35. As a result, the contracts of employment of the Class Members impliedly provide that Class Members shall be compensated:

- a. With Overtime Pay for hours worked in excess of the Overtime Threshold;
- b. With Vacation Pay on all amounts paid, and unpaid; and,
- c. With Public Holiday and Premium Pay.

36. As vulnerable employees under the direct control and supervision of the Defendant, the Class Members relied on the Defendant to advise them properly regarding their employee status and eligibility for Minimum Wage, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members Overtime Pay, Vacation Pay and Public Holiday and Premium Pay. TES is and was in a position of power and direct control over the Class Members and the Class Members were and are in a vulnerable position vis-à-vis the Defendant.

SYSTEMIC PROHIBITION ON EMPLOYMENT WITH PLACED CLIENT

37. ██████████'s contract contains language in paragraph 15 that prevents her from becoming employed with the client of TES where she was placed. ██████████ understands that this is a 'template' requirement for working through TES. However these clauses are a violation of s. 74.8(1)(4) of the ESA.

38. ██████████ seeks a declaration that all of these such clauses prohibiting direct hiring by the client be voided for being an illegal opting out of the ESA as per s.5 of the ESA. ██████████ seeks damages of disgorgement of profits relating to the illegal and unjust benefit that TES gained by way of having employees agree to this invalid term.

SYSTEMIC CLASSIFICATION AS “INDEPENDENT CONTRACTORS”

39. TES systemically classified the Class Members as “independent contractors” and required them to sign formal written agreements that stated they were independent contractors and not employees.

40. TES further required and permitted the Class Members to regularly work hours without receiving Overtime Pay, Vacation Pay or Public Holiday and Premium Pay, under the misrepresentation from TES that Class Members were independent contractors.

41. The Defendant was aware that the Class Members relied on Defendant to advise them properly of their employment status and eligibility for Minimum Wage, Overtime Pay, Vacation Pay or Public Holiday or Premium Pay, and to fulfill its statutory employment responsibilities to keep track of and pay the Class Members for their hours worked.

SYSTEMIC BREACH OF THE *ESA*

42. The Defendant has systemically breached the provisions of the *ESA* with respect to all Class Members by:

- a. failing to ensure that all Class Members were properly classified as employees;

- b. failing to ensure that the Class Members hours of work were monitored and accurately recorded;
- c. requiring and/or permitting the Class Members to work hours in excess of the Overtime Threshold but failing to ensure that the Class Members were compensated for Overtime Pay;
- d. failing to compensate Class Members for Vacation Pay; and,
- e. failing to compensate Class Members for Public Holiday and Premium Pay.

43. TES's misclassification of the Class Members as purported independent contractors and the denial of their entitlements under the ESA or applicable employment standards act is unlawful.

44. To the extent that any contracts purport to designate the Class Members as independent contractors, such contracts or provisions are void and unenforceable.

45. The Class Members are entitled to unpaid wages.

46. Such breaches have been and are ongoing and continuous in respect of the Class Members since at least approximately 2009.

PUNITIVE, AGGRAVATED AND/OR MORAL DAMAGES

47. ■■■ pleads that this case is appropriate for Punitive, Moral and/or Aggravated damages. The non-exclusive reasons for these damages are set out below:

- a. TES misclassified their workers contrary to the ESA which is an act directly contrary to the ESA;
- b. TES failed in their statutory duties including but not limited to collecting government taxes and payroll taxes;
- c. TES failed to provide minimum employment standards relating to their employees, thus breaching the ESA and disadvantaging their employees;
- d. TES benefited from their employees being forced to work overtime which constitutes illegal wage shortchanging from said employees contrary to the ESA for which there ought to be more of a punishment than to merely pay the money which was initially owed.
- e. TES acted in a callous manner by not resolving the issue once they learned of it but instead attempting to not pay back-wages to those employees affected;
- f. TES has failed and continues to fail to provide the statutory benefits to employees including up to and at any final hearing of this matter;
- g. TES exploited employees who were looking for positions and/or jobs and forced them to work as contractors when they were vulnerable; and,
- h. By misclassifying these workers as not being placement workers TES has eliminated many non-monetary rights from the workers including but not limited to:
 - i. Part VII of the ESA: Hours of Work and Eating Periods;

- ii. Part VII.1 of the ESA: Three Hour Rule; iii. Part XIII of the ESA: Benefit Plans;
- iii. Part XIV of the ESA: Leaves of Absences;
- iv. The prohibition on being hired by placement agency clients as per s.74.8(1)(4) of the ESA
- i. TES to date has ignored the Temporary Help Agency provisions of the ESA notwithstanding that these were put in place to provide protection against their very business model and thus extra damages over and above the amount they short-changed their employees for is required for behavior modification of other companies.

48. The behavior, if applicable, of TES in defending this action which is found to be overly zealous in the face of evidence showing their employees are owed their statutory benefits and remittances.

49. The principle of deterrence is needed in order to discourage other companies from misclassifying and short-changing their workers as the Defendants have in this case.

DISGORGEMENT OF PROFITS

50. TES is in a fiduciary position to their employees it places with its client firms. The Class Members relied on TES to properly classify and pay them according to employment standards.

51. TES has not lived up to that fiduciary position by placing their own interest in profit over that of the workers that they place.

52. Thus, any profits made through this breach of fiduciary duty ought to be disgorged.

53. TES benefited by misclassifying the Class Members as contractors and thus gained profits which it re-invested or otherwise benefit from. TES ought to disgorge to the Class Members the profits obtained from breaching the ESA.

54. As noted above TES gained profit by barring their assignment workers from applying for, or working at the company at which they were placed which is illegal and void under s.74.8(1)(4) and caused TES to gain a profit, that profit which ought to be returned to the workers whose rights were violated.

AGGREGATE DAMAGES

55. [REDACTED] also pleads that the trial judge ought to make an award of aggregate damages in this case since the records kept by TES of the earnings of class members should allow for the damages of each Class Member to be calculated without the need for resort to individual assessments or mini-trials.

LOCATION

56. [REDACTED] proposes this action be tried at the City of Toronto, in the Province of Ontario.

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DEFENDANT

ONTARIO
SUPERIOR COURT OF JUSTICE

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Proceedings Act, 1992

STATEMENT OF CLAIM

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