

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

FEB 22 2022



IN THE SUPREME COURT OF BRITISH COLUMBIA

No. VLC-S-S-201733

Vancouver Registry

Original Notice of Civil Claim filed on 11-Feb-2020

BETWEEN:



PLAINTIFF

AND:

BANK OF MONTREAL

DEFENDANT

AMENDED NOTICE OF CIVIL CLAIM

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

This action has been started by the Plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL TO FILE the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the Plaintiff,

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or,
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. The Plaintiff, [REDACTED] (“[REDACTED]” or the “**Plaintiff**”), is an individual residing in the City of Vancouver, in the Province of British Columbia and was, at all material times, employed by the Defendant.
2. The Defendant, the Bank of Montreal (“**BMO**” or the “**Defendant**”), is a federally incorporated and federally regulated company. It is one of Canada’s largest banks and employs approximately 45,000 employees across Canada.
3. On or around May 22, 2012, [REDACTED] transferred to the position of Private Wealth Consultant with the Defendant. He stopped working July 19, 2017.
4. At all times while [REDACTED] was employed by BMO as a Private Wealth Consultant, he was paid a base salary of about \$45,000 per year, plus variable compensation that in some years exceeded \$200,000. Variable compensation paid to [REDACTED] included compensation based on both commissions and bonuses.
5. Variable compensation for BMO employees may include, but is not limited to, commission, individual performance bonuses, referral fees, volume bonuses, incentive pay, and equity awards (“**variable compensation**”). BMO Employees in the roles of Private Wealth Consultants and Mortgage Specialists earned all or a significant portion

of their wages in the form of variable compensation (**Variable Compensation Employees**).

6. Many other individuals, including ██████████, who are currently or have formerly been employed by BMO earn, or earned, a base salary plus variable compensation, including compensation based on both commissions and bonus pay. (**Variable Compensation Employees**). The number of Variable Compensation Employees is unknown to the Plaintiff, but is estimated to be in the tens of thousands.

7. The Variable Compensation Employees were systemically underpaid their vacation and holiday pay. The number of Variable Compensation employees is unknown to the Plaintiff but is estimated to be in the hundreds or thousands.

8. ██████████ raised the issues addressed by this litigation to BMO in November of 2017. However, his claim against BMO was only discoverable on February 26, 2018, when BMO made it clear that it had no intention of paying ██████████ his outstanding vacation pay.

Pay Policyies

9. At all material times BMO has maintained pay policies for Variable Compensation Employees across Canada (**Pay Policyies**). The Pay Policyies governs, among other things, the calculation and payment of compensation each Variable Compensation Employee is entitled to receive in connection with contractually and statutorily owed vacation pay (**Vacation Pay**). Since on or around 2008 2009, BMO has indicated to its

Variable Compensation Employees through the Pay Policies that their compensation is the Pay Policies states that the total compensation of Variable Commissioned Employees is all inclusive of Vacation Pay, statutory holiday pay (“**Holiday Pay**”) and overtime.

10. The requirements to pay Vacation Pay and Holiday Pay under the *Canada Labour Code*, RSC 1985, c L-2 (the “**CLC**”) are part of the employment contracts of Variable Compensation Employees. BMO issues a new Pay Policyies each year. ~~Prior to 2008, In some years,~~ the Pay Policyies included a statement that BMO is committed to ensuring that employees receive their entitlements to vacation pay under the *CLC*. ~~In the following iterations of the Pay Policyies, the reference to the *CLC* was removed.~~

11. The Pay Policy for Mortgage Specialists regularly stated that “BMO FG is committed to ensuring that employees receive no less than their minimum entitlement to vacation pay under the Canada Labour Code” and that “BMO FG is committed to ensuring that employees in the MS role receive their entitlement to statutory holiday pay under the Canada Labour Code.”

12. Since on or around ~~2008~~ 2009 until on or around 2011, the Pay Policy for Private Wealth Consultants stated that "your total cash compensation consisting of Base pay, Commission and BHPB Year-end Performance Bonus includes the statutory holiday pay, overtime pay and vacation pay to which you may be entitled for that period." Following 2011, the Pay Policy makes no mention of Vacation or Holiday Pay.

13. The Pay Policy for Mortgage Specialists regularly stated that Vacation Pay and Holiday Pay are “included in the payout for base pay and the variable incentives” paid to Mortgage Specialists.

Holiday Pay

14. Prior to in or around 2017 2016, BMO treated the variable compensation of Variable Compensation Employees as inclusive of did not identify and did not pay Holiday Pay based on variable compensation to Variable Compensation Employees.

15. In or around 2017 August 2016, for the first time, BMO started specifically identifying and paying Holiday Pay earned as a result of variable compensation on the pay statements of Variable Compensation Employees Private Wealth Consultants, as is now and was required by the CLC at all material times.

16. Until 2016, BMO treated the compensation of Mortgage Specialists as inclusive of holiday pay and designated 4% of their commissions as “holiday pay”. This was instead of paying for a given holiday the equivalent of the wages the employee would have earned at their regular rate of wages for their normal working day. To the extent that Holiday Pay was paid to Mortgage Specialists, it was by returning to the workers 4% of their wages which had been unlawfully deducted.

17. In 2016, BMO implemented a new pay formula for Holiday Pay for those employees who earned commission, including Private Wealth Consultants and Mortgage Specialists.

18. Despite this change, BMO did not pay Holiday Pay in full for Variable Compensation Employees in accordance with its minimum obligations under the CLC.

19. BMO was required to pay [REDACTED] and the other Variable Compensation Employees Holiday Pay based on their total compensation, including commissions, bonuses, and any other variable compensation. During all material times of [REDACTED] [REDACTED]'s and the other Variable Compensation Employees' employment with the Defendant, as a result of BMO creating and implementing the aspects of the Pay Policies governing Holiday Pay, these employees and former employees have been deprived of significant compensation.

Vacation Pay

20. BMO has treated and continues to treat the variable compensation of Private Wealth Consultants and Mortgage Specialists as inclusive of vacation pay.

21. Variable Compensation Employees are paid on a bi-monthly basis and receive a pay statement each time they are paid ("**Pay Statement**"). ~~At all material times, the Pay Statements provided by BMO to Variable Compensation Employees did not show that Vacation Pay was computed on the variable compensation portion of their pay.~~

22. At all material times, the Pay Statements provided by BMO to Private Wealth Consultants did not show that Vacation Pay was computed on the variable compensation portion of their pay. BMO treated variable compensation as inclusive of Vacation Pay for Private Wealth Consultants and paid vacation pay only on their base pay.

23. At all material times, BMO treated the commission earned by Mortgage Specialists as inclusive of Vacation Pay. The Pay Statements provided by BMO to Mortgage Specialists designated 6% of commissions earned as “vacation pay”.

24. To the extent that Vacation Pay was paid to Mortgage Specialists, it was by returning to workers 6% of their wages which had been unlawfully deducted.

25. In effect, at all material times, no Vacation Pay was calculated and actually paid in connection with the variable compensation of the Variable Compensation Employees.

26. Despite the ~~2017~~ 2016 change to the Pay Policyies concerning Holiday Pay, Vacation Pay for Private Wealth Consultants continued to be was not provided on the Variable Compensation Employees’ pay statements, and they only received Vacation Pay calculated on their base salary and not on their total compensation.

27. Despite the 2016 change to the Pay Policies concerning Holiday Pay, Vacation Pay for Mortgage Specialists continued to be treated by BMO as a percentage of commission, as opposed to being paid on top of commission earned.

28. At all relevant times, BMO’s policy regarding the Vacation Pay of Variable Compensation Employees was as follows: to treat variable compensation as inclusive of Vacation Pay. At most, they would receive Vacation Pay at the same rate as their base salary.

- a ~~when a Variable Compensation Employee was on vacation, BMO continued to pay him or her his or her base salary of \$45,000 per year;~~
- b ~~the Variable Compensation Employee's base salary was shown as a separate item on each Pay Statement; and~~
- c ~~the Variable Compensation Employee's base salary remained the same, regardless whether her or she had taken the vacation days owing to him or her.~~

29. At all relevant times, BMO's policy regarding the Vacation Pay of Mortgage Specialists was to designate that 6% of commission earned was Vacation Pay. There is no indication that this changed when the CLC was amended in 2018 to mandate that vacation should be 8% of wages for employees with at least 10 consecutive years of employment.

30. There is similarly no indication that the commissions for Private Wealth Consultants were adjusted upwards after five or ten consecutive years of employment to reflect their entitlement to greater vacation pay under the CLC.

31. At all relevant times, when Variable Compensation Employees were on vacation and did not sell any investment products ~~and~~, they earned no commissions or bonuses. As a result, in any given year of employment with the Defendant, the variable compensation of a Variable Compensation Employee was lower if he or she decided to take the vacation days to which he or she was entitled instead of working during his or her vacation.

32. ██████████ was only paid Vacation Pay in relation to his base salary and never in relation to his variable compensation.

33. BMO was required to pay ██████████ and the other Variable Compensation Employees Vacation Pay based on their total compensation, including commissions, ~~and bonuses, and any other variable compensation.~~ During all material times of ██████████'s and the other Variable Compensation Employees' employment with the Defendant, as a result of BMO creating and implementing the aspects of the Pay Policies governing Vacation Pay, these employees and former employees have been deprived of significant compensation. ~~The Plaintiff is not aware of the total damages but estimates that the damages, collectively, are in the hundreds of millions of dollars.~~

34. The Plaintiff is not aware of the total damages but estimates that the damages, collectively, are in the millions of dollars.

35. At all material times, BMO has maintained and implements an implied or explicit policy of not paying the full statutorily required Vacation Pay to Private Wealth Consultants and Mortgage Specialists, despite a contractual commitment to do so. ~~Variable Compensation Employees including, but not limited to:~~

- a ~~All employees who were provided with a bonus and were not paid Vacation Pay on their bonuses;~~
- b ~~All employees who were paid commission and were not paid Vacation Pay on their commissions; and~~

- c ~~All employees who were paid restricted share units or other stock options and were not paid Vacation Pay on their shares and/or stocks.~~

36. At all material times, in connection with [REDACTED] and the other Variable Compensation Employees, BMO failed to keep any records showing that it paid Vacation Pay with respect to variable compensation for the number of weeks of vacation to which the employee was entitled under section 184 of the *CLC*, as required under section 24 of the *Canada Labour Standards Regulations*, CRC, c 986 ("**CLC Regulations**").

37. At all material times, BMO hid its non-compliance with the *CLC* and contracts of employment and stated to employees that the calculations were correct, and thus the issue was not discoverable.

38. [REDACTED] seeks to be a representative Plaintiff for all Variable Compensation Employees denied such compensation while working for the Defendant.

Part 2: RELIEF SOUGHT

39. The Plaintiff claims the following on his behalf, and on behalf of members of all non-unionized Variable Compensation Employees of BMO within Canada who are ~~eligible for Vacation Pay under section 184.01 of the *CLC* or Holiday Pay under section 196 of the *CLC*~~ federally regulated in the roles of Private Wealth Consultants and Mortgage Specialists (the "**Proposed Class**"):

- a An order certifying this action as a class proceeding and appointing the Plaintiff as representative Plaintiff;
- b A declaration that the members of the Proposed Class are owed Vacation Pay above and beyond the compensation they were paid;
- c A declaration that the members of the Proposed Class were owed Holiday Pay above and beyond the compensation they were paid;
- d A declaration that BMO violated its duty of good faith to the members of the Proposed Class by failing to properly calculate their Vacation Pay, or their Holiday Pay;
- e A declaration that BMO breached the contract of employment with the members of the Proposed Class;
- f That damages be paid to each Proposed Class member equal to the Vacation Pay that they ought to have received during their employment with the Defendant;
- g That damages be paid to each Proposed Class member equal to the Holiday Pay that they ought to have received during their employment with the Defendant;
- h Pre-judgement interest and post-judgement interest according to the *Courts Order Interest Act*, RSBC 1996, c. 79;

- i ~~Punitive and aggravated damages;~~
- j Costs;
- k Such further and other relief this Honourable Court may deem just and equitable in all of the circumstances.

Part 3: LEGAL BASIS

Pay Policy Excludes Variable Compensation in Calculating BMO Systematically does not pay Vacation Pay and Holiday Pay on Variable Compensation

40. Pursuant to section 184.01 of the CLC, employees must be paid additional Vacation Pay above and beyond their regular pay. The Pay Policyies violates this requirement.

41. Pursuant to section 196 of the CLC, employees must be paid additional Holiday Pay above and beyond their regular pay. ~~Prior to in or around 2017 2016, the Pay Policyies violated this requirement.~~ Until at least 2016, if not later, the Pay Policies violated this requirement.

42. No employee may opt out of a benefit of the CLC unless the employee receives greater benefit, pursuant to section 168(1) of the CLC.

43. Furthermore, the requirements to pay Vacation Pay and Holiday Pay under the *Canada Labour Code*, RSC 1985, c L 2 (the "**CLC**") form part of the employment contracts of the Variable Compensation Employees.

The Class

44. Those members of the Proposed Class who were underpaid Vacation Pay under section 184.01 of the *CLC* or Holiday Pay under section 196 of the *CLC* would be owed damages.

45. ██████████ seeks to have the class time period run from January 1, 2010 until when the notice of class action is sent out to class members with the opt-out forms on the basis that BMO hid its non-compliance with the *CLC* and contracts of employment and misrepresented to employees that the calculations were correct, and thus the issue was not discoverable.

~~Punitive, Moral and/or Aggravated Damages~~

46. ~~This case is appropriate for punitive, moral and/or aggravated damages. The non-exclusive reasons for these damages are set out below:~~

- ~~a. BMO failed in its statutory duties including the payment of Vacation Pay and Holiday Pay;~~
- ~~b. BMO failed to provide minimum employment standards relating to its employees, thus breaching the *CLC* and disadvantaging its employees;~~

- c. ~~BMO benefited from its employees not being paid Vacation Pay and Holiday Pay, which constitutes wage theft from said employees, for which there ought to be more of a punishment than merely an obligation to pay the money which was initially owed;~~
- d. ~~BMO acted in a callous manner by not resolving the issue once it learned of it but instead attempting to not pay retroactive Vacation Pay and Holiday Pay to those employees affected;~~
- e. ~~BMO has failed and continues to fail to provide the statutory benefits to employees including up to and at any final hearing of this matter;~~
- f. ~~The behavior, if applicable, of BMO in defending this action which is found to be overly zealous in the face of evidence showing that its employees are owed their statutory benefits and remittances;~~
- g. ~~Punitive damages are reasonable given that BMO did not keep adequate records of Vacation Pay contrary to section 24 of the *CLC Regulations*; and,~~
- h. ~~The principle of deterrence is needed in order to discourage other companies from short changing their employees as BMO has in this case.~~

Costs and Interest

47. Costs are payable pursuant to the *Supreme Court Civil Rules*, BC Reg 168/2009.

48. Interest is payable pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79.

Plaintiff's address for service:

Monkhouse Law
c/o 403-860 Homer St.
Vancouver, BC
V6B 2W5
Attn.: Andrew Monkhouse

Fax number address for service: 888-501-7235

Place of trial:

Vancouver, British Columbia

The address of the Registry is:

800 Smithe Street

Vancouver, British Columbia

V6Z 2E1

Date: ~~February, 2020~~ July 14, 2021



Signature of lawyer for the Plaintiff
Andrew Monkhouse

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the ending of the pleading period,

(a) prepare a list of documents in Form 22 that lists

- (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A claim for damages for breach of contract.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A dispute concerning: an employment relationship

Part 3: THIS CLAIM INVOLVES

a class action

Part 4:

Canada Labour Code, RSC 1985, c L-2

Class Proceedings Act, RSBC 1996, c 50