

CV-20-00641245-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

AMENDED THIS 27 Sep 21 PURSUANT TO  
MODIFIÉ \_\_\_\_\_ CONFORMÉMENT À

[REDACTED] RULE/LA RÉGLE 26.02 ( \_\_\_\_\_ )

IN THE ORDER OF The Honourable Mr. Justice

L'ORDONNANCE DU Plaintiff  
DATED/FAIT LE 25 Aug 21 Glustein

- and -

M. Godin Michelle Godin Digitally signed by Michelle Godin  
DN: cn=Michelle Godin, o=Ontario Court of Justice  
c=CA, email=Michelle.Godin@ontariocourtsofjustice.ca

REGISTRAR GREFFIER  
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

**PROCOM CONSULTANTS GROUP LTD.**

Defendant

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

**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: May 20, 2020

Issued by: "issued electronically"  
Local Registrar

Address of Court Office:  
330 University Avenue  
Toronto, ON M5G 1R8

TO: **PROCOM CONSULTANTS GROUP, LIMITED**  
2200 Yonge Street, Suite 700  
Toronto, Ontario M4S 2C6

## 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 Procom Consultants Group, Ltd. (“**Procom**”) 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 \$400,000,000.00;
- d) Punitive, Aggravated and/or Moral Damages in the amount of \$400,000,000.00;
- e) a declaration that Procom 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. prohibiting the Class members from entering into employment agreements with the companies they were placed with contrary to the ESA;
  - vi. 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**");
  - vii. failing to compensate Class Members for Vacation Pay;
  - viii. 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**");
  - ix. failing to compensate Class Members for Public Holiday and Premium Pay;
  - x. failing to monitor and record or otherwise track the Class Members' hours of work; and,
  - xi. failing to compensate the Class Members for all hours worked.
- f) damages for unpaid Overtime;
  - g) damages for unpaid Vacation Pay;
  - h) damages for unpaid Public Holiday and Premium Pay;
  - i) 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;

- j) 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;
- k) 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 Procom and not independent contractors;
- l) an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("**Class Proceedings Act**") directing an aggregate assessment of damages;
- m) 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;
- n) prejudgment interest in accordance with section 128 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
- o) postjudgment interest in accordance with section 129 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
- p) the costs of this action on a substantial indemnity basis, together with applicable HST, or other applicable taxes, thereon;
- q) the costs of administering the plan of distribution of the recovery in this action;  
and,
- r) 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, Procom, is a lawfully incorporated company based in Toronto, Ontario. Procom is a temporary help services firm that provides workers to client firms, many of them in the information technology field.
4. The activities of Procom 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 persons located in Ontario assigned by Procom as a placement agency since the year 2009 who were classified as Independent Contractors, excluding persons for whom Procom acted solely as a payment processor.

## EMPLOYMENT RELATIONSHIP

6. Section 74.3 of the ESA provides that, where a 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. Procom 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. Procom 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. Procom 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 in business for themselves and were at law employees.
13. Procom 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.

**██████████ WAS PLACED BY PROCOM**

14. Procom assigned ██████████ to work at Tulkita Technologies Inc. ("Tulkita").
15. Procom's contract with ██████████ stated that she would be an "IT Consultant".
16. Procom's contract stated that she would have "duties as assigned by the client."
17. Procom's contract with ██████████ stated that it would run from September 21, 2015, to November 26, 2015.
18. ██████████ worked at Tulkita at a fixed hourly rate of pay of \$42.00 as set out in her contract with Procom.
19. Tulkita told her that she was required to work 36 hours per week, and it assigned her the tasks that she was required to perform during that time. Tulkita had a contract with the Ministry of Transportation ("MOT") and ██████████ was required to perform her work at the MOT offices in downtown Toronto.
20. ██████████ worked side by side with other workers who were full time regular employees of the MOT.

**THE CLASS MEMBERS WERE TREATED AS EMPLOYEES**

21. The duties performed by the Class Members and the supervision and control imposed on the Class Members by Procom's clients creates an employment relationship with Procom. Particulars of such an employment relationship include, but are not limited to:

- a) Class Members have to follow schedules that are determined by Procom'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;
- e) Class Members are required to follow the client firms' policies, guidelines, and instructions when performing their duties;

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

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

24. [REDACTED] did not become aware that she was eligible as an employee for Overtime Pay, Vacation Pay, Public Holiday Pay and Premium Pay because the Defendant had continually misrepresented her actual eligibility and entitlement to such pay.

25. [REDACTED] did not become aware that she was eligible as an employee, for Overtime pay, Vacation Pay, Public Holiday Pay, and Premium Pay until 2020 after speaking with her lawyer.

26. [REDACTED]'s relationship with Procom is consistent with the relationship of all Class Members with Procom.

27. At all material times, [REDACTED] and the Class Members were explicitly directed as to how, where and when they could perform their duties for Procom.
28. At all times, [REDACTED] and the other Class Members were explicitly and incorrectly informed they were not employees of Procom.
29. The Defendant's clients sometimes required Class Members to work hours in excess of the Overtime Threshold without Overtime Pay.
30. The Defendant failed to compensate [REDACTED] and the other Class Members for Vacation Pay.
31. The Defendant failed to compensate [REDACTED] and the other Class Members for Public Holiday and Premium Pay.

#### **ESA AND CLASS MEMBERS' CONTRACTS OF EMPLOYMENT**

32. The employment standards under the ESA are implied minimum terms of the contracts of employment of the Class Members.
33. At all material times, the Class Members were not and are not exempt from the protections of the ESA.
34. 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.

35. 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. Procom is/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 CLASSIFICATION AS “INDEPENDENT CONTRACTORS”**

36. Procom 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.

37. Procom 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 Procom that Class Members were independent contractors.

38. The Defendant was aware that the Class Members relied on the 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.

#### **Indemnity Invalid as Prohibited Reprisal under the ESA**

39. The contract that the Plaintiff and at least some other Class Members contains an indemnity clause that seeks to have the Plaintiff fully indemnify the Defendant. This indemnity clause

is fully invalid as it violates the ESA by way of displacing and waiving all ESA protections that the employee has against the Defendant.

40. The required indemnification from any award based on the ESA is a prohibited reprisal under s. 74 of the ESA. Such an indemnity intimidates Class Members from attempting to exercise rights under the ESA and attempts to penalize Class Members if those rights are proved.

**Systemic Violation of Temporary Help Agency Rules in ESA – Prohibition on Employment**

41. The Plaintiff pleads that the Defendant systemically violated temporary help agency rules contained in the ESA by way of violating the prohibitions set out in s.74.8(1) of the ESA. The Plaintiff seeks to have these sections in all contracts declared void by way of s.74.9(1) of the ESA and a notice to be sent to all present and past employees.

42. The Plaintiff seeks a prohibition on the inclusion of prohibited clauses in contracts going forward by the Defendant.

43. Specifically certain Class Members have clauses the same or similar to the Plaintiff which restrict assignment employees from entering into employment relationships with clients of the temporary help agency where they are placed contrary to s.74.8(1)(4) of the ESA.

**PUNITIVE DAMAGE MORAL AND/OR AGGRAVATED DAMAGES**

44. [REDACTED] 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. Procom failed in their statutory duties including but not limited to collecting government taxes and payroll taxes;

- b. Procom failed to provide minimum employment standards relating to their employees, including but not limited to vacation pay, statutory holiday pay, and overtime pay, thus breaching the *ESA* and disadvantaging their employees;
- c. Procom purposefully misclassified those they placed as contractors which deprived them of many non-monetary protections under the *ESA* for which punitive damages are the appropriate remedy to compensate for the losses of these non-monetary benefits such as 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;
  - iv. Part XIV of the *ESA*: Leaves of Absences;
  - v. The prohibition on being hired by placement agency clients as per s.74.8(1)(4) of the *ESA*.
- d. Procom benefited from their employees being forced to work overtime 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. Procom 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. Procom 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. Procom attempted to reprise against Class Members through the indemnity clause provision.

45. The behavior, if applicable, of the Defendants 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.

46. The principle of deterrence dictates for punitive and aggravated damages to be awarded in order to discourage other companies from short changing their workers as the Defendants have in this case.

#### **SYSTEMIC BREACH OF THE ESA**

47. 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.

48. Procom'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.

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

50. The Class Members are entitled to unpaid wages.

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

#### **AGGREGATE DAMAGES**

52. [REDACTED] also pleads that the trial judge ought to make an award of aggregate damages in this case since the records kept by Procom 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**

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

Date of Issue: May 20, 2020

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Lawyers for the Plaintiff

  
PLAINTIFF

and **PROCOM CONSULTANTS GROUP LTD.**  
DEFENDANT

Court File No.: CV-20-00641245-00CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**AMENDED STATEMENT OF  
CLAIM**

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**Barristers and Solicitors**  
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