



No. VLC-S-S-201733

Vancouver Registry

Original Notice of CIVIL CLAIM FILED ON 11-Feb-2020

Amended Notice of Civil Claim filed on 22-Feb-2022

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

████████████████████

PLAINTIFF

AND:

BANK OF MONTREAL

DEFENDANT

FRESH AS 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. 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.

7. ██████████ 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 Policies

8. At all material times BMO has maintained pay policies for Variable Compensation Employees across Canada ("**Pay Policies**"). The Pay Policies govern, 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 2009, BMO has indicated to its Variable Compensation Employees through the Pay Policies that their compensation is inclusive of Vacation Pay, statutory holiday pay ("**Holiday Pay**") and overtime.

9. 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 Policies each year. In some years, the Pay Policies included a statement that BMO is committed to ensuring that employees receive their entitlements to vacation pay under the *CLC*.

10. **The overarching principle in the communications sent from time to time by BMO to its employees was that BMO promised that it would pay what was required by the CLC. An email sent to Private Wealth Consultant employees on August 30, 2017, reiterated that BMO had contractually agreed from 2009 onwards that it would abide by the requirements of the CLC in relation to vacation pay.**

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 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 2016, BMO treated the variable compensation of Variable Compensation Employees as inclusive of Holiday Pay.

15. In or around 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 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] 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**").

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 actually paid in connection with the variable compensation of the Variable Compensation Employees.

26. Despite the 2016 change to the Pay Policies concerning Holiday Pay, Vacation Pay for Private Wealth Consultants continued to be 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 to treat variable compensation as inclusive of Vacation Pay. At most, they would receive Vacation Pay at the same rate as their base salary.

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, 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, bonuses, and any other variable compensation. During all material times of ██████████ ██████████ 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.

34. **BMO contracted with the Variable Compensation Employees to comply with the [CLC](#) requirements for vacation pay and holiday pay. BMO from time to time issued statements in its Pay Policies that asserted or re-affirmed its commitment to ensuring compliance with its statutory obligations under the [CLC](#). BMO asserted that the calculations it made for statutory holiday pay and vacation pay were correct, such that BMO had complied with the contractual obligations that it had agreed to fulfill, and the employees were entitled to rely on the assertions by their employer who was a large and respected financial institution and had access to legal resources to understand the correct calculations. When BMO made the assertion that it had correctly calculated the employees' pay, it knew or ought to**

have known that the calculations were incorrect, and therefore was not acting in good faith when it made those assertions.

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

36. 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.

37. 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***").

38. 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.

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

Part 2: RELIEF SOUGHT

40. 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 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 Costs;
- j Such further and other relief this Honourable Court may deem just and equitable in all of the circumstances.

Part 3: LEGAL BASIS

BMO Systematically does not pay Vacation Pay and Holiday Pay on Variable Compensation

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

42. Pursuant to section 196 of the CLC, employees must be paid additional Holiday Pay above and beyond their regular pay. Until at least 2016, if not later, the Pay Policies violated this requirement.

43. 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.

44. Furthermore, the requirements to pay Vacation Pay and Holiday Pay under the *Canada Labour Code*, form part of the employment contracts of the Variable Compensation Employees.

The Class

45. 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.

46. ██████████ 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.

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

March 25, 2024



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: [X] an employment relationship

Part 3: THIS CLAIM INVOLVES

[X] a class action

Part 4:

Canada Labour Code, RSC 1985, c L-2

Class Proceedings Act, RSBC 1996, c 50