

COURT FILE NUMBER 2103 02652
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
PLAINTIFF(S) WADE WILSON
DEFENDANT(S) KMC MINING CORPORATION
DOCUMENT **STATEMENT OF CLAIM BROUGHT UNDER THE CLASS PROCEEDINGS ACT**



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NOTICE TO DEFENDANT

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

The Representative Plaintiff:

1. Plaintiff, WADE WILSON ("**Wade**"), is an individual residing in the Town of Fort McMurray, in the Province of Alberta. At all material times, Wade was an employee of KMC MINING CORPORATION for over Twenty (20) years.

The Class Members:

2. Wade (the "**Representative Plaintiff**") brings this action pursuant to the *Class Proceedings Act*, R.S.A. 2003, c. C.16-5 (the "**CPA**"), on behalf of the following class (the "**Class Members**"):
 - a. All employees and former employees (including their estates, executors, guarantors and personal representatives) whose employment contract or terms of employment or engagement with KMC included, or were otherwise entitled to, the

payment of overtime pay, general holiday pay, general holiday pay when working, vacation pay, vacation pay on termination of employment and/or severance pay that was not calculated and paid in accordance with the *Employment Standards Code* (Alberta) and applicable case law; and

- b. All employees and former employees (including their estates, executors, guarantors and personal representatives) who are beneficiaries of, or otherwise entitled to, KMC's Pension Plan for the Employees of KMC Mining Corporation and were adversely impacted by the underreporting and/or underpayment of KMC's contributions to the Pension Plan for the Employees of KMC Mining Corporation in contravention of the *Canada Income Tax Act*, the *Canada Pension Plan*, the *Alberta Employment Pension Plans Act*, other related statutes and regulations, and applicable case law.

The Defendant:

3. Defendant, KMC MINING CORPORATION ("**KMC**"), is a body corporate incorporated in the Province of Alberta and operating in the Province of Alberta. On the Representative Plaintiff's employment contract, Statements of Earnings and Deductions and T4 Statements of Remuneration Paid filed with the Canada Revenue Agency, KMC is listed as the Representative Plaintiff's employer.

History:

4. KMC is a contract service provider to mining and infrastructure development projects based in Acheson, Alberta, whose project work in northern Alberta alone is measured in the Billions of Dollars.
5. Upon information and belief, KMC has over five hundred (500) employees and over Two Hundred Million Dollars (\$200,000,000.00) of assets.
6. KMC has been extremely lucrative for its private shareholders, with those shareholders having profited from KMC to the tune of Hundreds of Millions of Dollars.

Cause of Action:

I. Selective Adherence to Employment Standards Legislation

7. There would appear to be an underlying theme to KMC's employee relations, in that KMC engages in selective adherence to provincial employment standards legislation where it serves their financial interests, and even seeks to apply the lesser employment standards of other provinces for its employees, as opposed to complying with the *Alberta Employment Standards Code*, R.S.A. 2000, c. E-9 (the "**Code**") and applicable case law (collectively, "**Alberta Law**").
8. Furthermore, KMC would appear willing to forego their adherence to Alberta Law and utilize their financial power to effectuate their preferred employment resolutions and pay structures in direct contravention of Alberta Law.
9. Alberta Law would appear to be an obstacle to KMC's commercial objectives that they seek to overcome by resorting to their sheer financial power and their manipulation of the

power imbalance between employer and employee, with KMC's corporate leadership and shareholders being focused on their highly disproportionate profiteering and personal wealth accumulation.

II. Underpayment of Statutory Pay

10. With labour being one of KMC's most significant costs, KMC's priority appeared to be placed on controlling labour costs and maximizing shareholder returns, as opposed to insuring statutory compliance with the Code.
11. KMC would appear to have shown little, or no, interest in insuring that their payroll methodology was in full compliance with the Code, instead KMC has demonstrated its disdain for the Code and the statutory protections that it provides to its employees.
12. By failing to insure that its payroll practices were in compliance with the Code, KMC has subjected its employees to decades of statutory underpayments, while KMC has improperly retained this employee money without investing the time and effort to insure compliance, or worse yet, knowingly failing to implement the specific Code obligations given the costs and liabilities associated therewith, combined with the belief that KMC would not be challenged on their payroll practices or the costs associated therewith would be offset by the overall savings from continued non-compliance.
13. Many ongoing employee payments are derived from specific calculations drawn from the explicit language of the Code, including but not limited to overtime pay, general holiday pay, general holiday pay when working, vacation pay and vacation pay on termination (collectively, "**Statutory Pay**").
14. With respect to the Representative Plaintiff and other Class Members, each form of Statutory Pay is determined in accordance with a calculation of wages as is prescribed by paragraph 1(1)(x) of the Code.
15. Wages are defined at paragraph 1(1)(x) of the Code as follows:

"wages" includes salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated, but does not include

 - (i) overtime pay, vacation pay, general holiday pay and termination pay,
 - (ii) a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency,
 - (iii) expenses or an allowance provided instead of expenses, or
 - (iv) tips or other gratuities;
16. In each instance, the Code has a clear and discernable methodology for the determination of whether or not a particular payment forms a part of wages, so as to correctly calculate and pay the Statutory Pay due to a company's employees.

17. KMC's practice as to the Representative Plaintiff, and apparently all Class Members, was not to compute wages in accordance with the Code, but instead to simply rely upon the lesser amount that is the regular hourly pay ("**Regular Pay**"), which is designated as R-T on their Statement of Earnings and Deductions (the "**Pay Statements**").
18. KMC's listing of Regular Pay on their Pay Statements however does not suffice to meet the statutory requirements of the Code, which requires the specific inclusion of an employer "wage rate" as per subsection 14(2) of the Code.
19. Regular Pay as designated on the Pay Statements is but a single component necessary for the computation of wages as per the Code, yet as is discernable from the Pay Statements it is not the sole component, with many other items also forming part of the computation of wages per the Code.
20. Among the additional earnings components from the Pay Statements that could or do form part of wages for the Representative Plaintiff and the Class Members are performance incentive, jump, trade premium, resident retention, employer benefit plan payments and employer pension plan payments (the "**Additional Wage Components**").
21. Each of these Additional Wage Components, upon meeting the statutory and case law standards for inclusion, must necessarily be included in the computation of wages and in turn the Statutory Pay.
22. These Additional Wage Components would appear to have been utilized by KMC for purposes of calculating termination pay in lieu of notice, however when undertaking its calculation of other Statutory Pay, which is similarly based on use of the Code's definition of wages, KMC chooses to deny, without any legal basis, the inclusion of any Additional Wage Component. KMC is obligated to include those Additional Wage Components in their wage calculations going forward and retroactively, failing which KMC is in breach of good faith, trust and their fiduciary duty to their employees.
23. The Additional Wage Components cannot be excluded from the calculation of wages, either by contract or for ease in computation of payments that are due to employees, given the Code's clear protections to employees, including but not limited to section 4 of the Code.
24. Similarly, an employer cannot avoid recalculating its employees' wages at a later date such that it might correct the payment of Statutory Pay that had been earned by its employees and was originally underpaid.
25. The result of KMC's failure to include the Additional Wage Components in its calculation of wages for purposes of subsequently calculating Statutory Pay that is directly determined pursuant to the Code, such as overtime pay, general holiday pay, general holiday pay when working, vacation pay and vacation pay on termination of employment, has resulted in the significant underpayment of its employees over the years, even though those amounts have been fully earned and outstanding. Furthermore, the aforementioned earned amounts are held in trust by the KMC (the "**Earnings in Trust**") and the Representative Plaintiff and the other Class Members have a priority security interest over the assets of KMC as to the prescribed statutory limit of the Earnings in Trust, pursuant to subsections 109 (2) and (3) of the Code.

26. The Earnings in Trust at no time reverted back to KMC, instead being held in trust by KMC pursuant to the Code, for years, even decades, until such time as the Earnings in Trust are paid out to their rightful beneficiaries, being the Representative Plaintiff and other Class Members.

III. Reliance Upon Ontario Employment Standards Legislation for Payroll

27. KMC's underpayment of Statutory Pay to the Representative Plaintiff and other Class Members would appear to emanate in large part from KMC's apparent reliance upon payroll systems and practices that were designed for the province of Ontario, as opposed to the province of Alberta.
28. KMC's payroll practices and pay statements for the Representative Plaintiff and other Class Members would appear to have been largely in conformity with the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "**Ontario Act**"), in that:
- a. there is no absolute statutory requirement to set forth the wage rate and the overtime rate on pay statements for Ontario employees [see Ontario Act, section 12(1)(b)];
 - b. furthermore, there is no definition of wage rate in the Ontario Act, which creates the potential for significant ambiguity around the term, such that the term carries limited legal import in the province;
 - c. similarly, there is no definition of overtime rate in the Ontario Act, with overtime pay being a calculation predicated on regular rate, which is substantively different from the concept of wage rate and wages [see Ontario Act, section 22(1) and section 1(1) definition of "regular rate"];
 - d. there is no requirement to include employer contributions to employee benefit plans given that Ontario is the only province that specifically exempted them from wages (but did restore them for purposes of the termination notice period and termination pay in lieu of notice) [see Ontario Act, section 1(1) definition of 'wages' at paragraph (g) and section 61(1)(b)];
 - e. as employer contributions to employee benefit plans do not form part of wages in Ontario, there is no requirement to include them in the payment statement's wage breakdown ('earnings'), such that they are not required to be listed in the pay statements [see Ontario Act, section 12(1)];
 - f. there tends to be little practical need for non-travel allowances, such that Ontario employees tend not to be entitled to such allowances and thereby do not require an adjustment to their wages;
 - g. given that bonuses would not form part of payment in "the employee's usual work week, not counting overtime hours", bonuses would not be included in the calculation of an Ontario employee's overtime pay [see Ontario Act, section 1(1) definition of 'regular rate' and section 22(1)] nor with respect to premium pay where an employee works on a general holiday [see Ontario Act, section 24(2)]; and

IV. Pension Plan Underreporting and Underpayment

32. Furthermore, the Representative Plaintiff and other Class Members partook in KMC's defined contribution pension plan, Pension Plan for the Employees of KMC Mining Corporation (the "**Pension Plan**").
33. The Pension Plan was presented as a defined contribution pension plan that would be funded from contributions of both the employee and the employer, with the respective contribution rates being an employee contribution of Two Percent (2%) of the employee's pensionable earnings and an employer contribution of Five Percent (5%) of the employee's pensionable earnings.
34. However, the pensionable earnings computation that is utilized by KMC lacks any correlation with any legislative methodology for its calculation, even though it seeks to be perceived as such, be it the Canada *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the *Canada Pension Plan*, R.S.C. 1985, c. C-8, the Alberta *Employment Pension Plans Act*, S.A. 2012, c. E-8.1 (the "**Pension Act**") or any other related statute or regulation (collectively, the "**Pension Legislation**").
35. The pensionable earnings computation is an established formula for purposes of calculating an employees' Canada Pension Plan ("**CPP**") and Registered Retirement Savings Plan ("**RRSP**") contributions and entitlements, yet KMC has sought to deviate significantly therefrom when undertaking calculations related to the Pension Plan, without appropriately clarifying the distinction from the established formula.
36. In undertaking their unique calculation of pensionable earnings, KMC excludes many variables that form part of the established formula for pensionable earnings, which is also in contravention of Canadian Association of Pension Supervisory Authorities (CAPSA) Guidelines, and yet persists in characterizing this computation as one and the same with the standard pensionable earnings computation.
37. KMC's distorted lesser computation of pensionable earnings arises from KMC's exclusion of upcharges, benefits and non-expense allowances from its calculations, which are mandated for inclusion in all of the Pension Legislation, and put forth in the Canadian Association of Pension Supervisory Authorities (CAPSA) Guidelines, yet are specifically excluded in KMC's calculations and presentation to its employees.
38. Given KMC's exclusion of both benefits and non-expense allowances from its payroll calculations, in contravention of the Code, and KMC's exclusion in calculating pensionable earnings, in contravention of the methodology established by the Pension Legislation, their inappropriate exclusion from the calculation of contributions to the Pension Plan would appear consistent with KMC's improper employee pay practices.
39. By failing to utilize the established formula for the computation of pensionable earnings, KMC reduced its contributions to the Pension Plan and thereby lessened the retirement savings of the Representative Plaintiff and other Class Members.
40. It was a common term of the employment contracts of the Representative Plaintiff and other Class Members that they would be entitled to a defined contribution pension, with KMC contributing an amount equal to Five Percent (5%) of the employee's pensionable earnings to the Pension Plan. The Representative Plaintiff's and other Class Members'

labour and employment was the consideration for the defined contribution pension that would be payable upon their retirement, or other event triggering entitlement.

41. The Pension Plan was principally funded through contributions made by KMC in lieu of salary or wages throughout the Representative Plaintiff's and other Class Members' employment with KMC. KMC's contribution of Five Percent (5%) of the employee's pensionable earnings towards the Pension Plan constitutes deferred compensation earned by the Representative Plaintiff and other Class Members in the course of their employment.
42. KMC, as the employer of the Representative Plaintiff and other Class Members, had a contractual obligation to the Representative Plaintiff and other Class Members to ensure that KMC contributed a full Five Percent (5%) of the employee's pensionable earnings towards the Pension Plan.
43. As the administrator of the Pension Plan, KMC had a contractual and fiduciary obligation to the Representative Plaintiff and other Class Members to correctly calculate their pension contributions and ensure that the Representative Plaintiff and other Class Members receive the correct pension contribution towards their Pension Plan, in addition to being fully apprised as to all actions and decisions being undertaken by KMC as the administrator of the Pension Plan.
44. By improperly calculating employer's pension contribution by failing to use the established formula for pensionable earnings and thereafter failing to remit the appropriate employer pension contribution to the Representative Plaintiff's and other Class Members' Pension Plan, KMC has not honoured its contractual and fiduciary obligations to the Representative Plaintiff and other Class Members under the Pension Plan.
45. KMC breached the terms of the contract. The particulars of the breach include:
 - a. failing to accurately calculate the employer pension contribution and failing to remit the correct pension contribution owed to the Representative Plaintiff and other Class Members, pursuant to the Pension Plan;
 - b. failing to provide the Representative Plaintiff and other Class Members with accurate and timely administration information regarding their pension contributions;
 - c. failing to ensure that the information and computations of pension contributions provided by KMC, as the administrator, and to ensure the correct amount of pension contributions were paid to the Representative Plaintiff and other Class Members pursuant to the Pension Plan; and
 - d. failing to act in accordance with the spirit, purpose and terms of the Pension Plan.
46. KMC failed to correctly interpret and apply the provisions of the Pension Plan by incorrectly calculating the pension contributions. By failing to use the Pension Legislation and their computation methodology, KMC favoured its own interests and acted contrary to the terms of the Pension Plan. KMC's interpretation and application of the pension computation methodology is inconsistent with a practical and purposive interpretation of the Pension Plan and is incorrect on its face.

47. Alternatively, the doctrine of *contra proferentem* applies to the interpretation of the Pension Plan. The doctrine provides that where a contractual provision is sufficiently ambiguous, it will be construed against the party responsible for drafting and tendering the contract. KMC drafted the terms of the Pension Plan. To the extent that there is any ambiguity in the relevant provisions of the Pension Plan, the ambiguity should be resolved in favour of the Representative Plaintiff and other Class Members.
48. Furthermore, at all material times, the pension funds were to be held in trust by KMC, as the administrator, in favour of the Representative Plaintiff and other Class Members, for whom those pension funds are exclusively held.
49. As the administrator, KMC administered the pension funds as trustee, pursuant to the Pension Plan, the declaration of trust and the Alberta Pension Act, subsection 58(1), and as such its actions represent a breach of trust and fiduciary duty unto the Representative Plaintiff and other Class Members.

IV. Individual Claims - Inadequacy of Severance Pay

50. In addition to KMC's payment of eight (8) weeks of termination in lieu of notice, KMC sought to offer Wade only a further Five Thousand Dollars (\$5,000.00), which apparently represents the amount of severance pay that KMC deemed appropriate for over twenty (20) years of service to the company.
51. This is in stark contrast to the typical severance pay for long serving employees working in and around Fort McMurray for large companies in the petroleum sector, which was made even more acute as a result of the downturn in Alberta petroleum sector and the Covid-19 Coronavirus pandemic.
52. The Covid-19 Coronavirus pandemic in conjunction with current market conditions will invariably make it that much more difficult to find comparable employment such that the significance of severance pay is elevated, and not lessened.
53. As such, the applicable multiplier for calculating severance pay should be not less than one (1) month per year of service, which is the typical severance pay for long serving employees working in and around Fort McMurray for large companies in the petroleum sector, with the multiplicand being Wade's wages for the reasons set forth hereinabove.
54. Given that KMC's severance pay offer is so far outside the norm, especially considering the severance pay amounts that it did pay out after another challenging time, namely the Fort McMurray fires of 2016, the nature of this offer should result in significant punitive and exemplary damages being awarded thereupon.

Damages:

55. As a result of the events described herein, including the failure to pay the full statutory amount of overtime pay, the failure to pay the full statutory amount of general holiday pay, the failure to pay the full statutory amount of general holiday pay when working, the failure to pay the full amount of vacation pay, the failure to pay the full statutory amount of vacation pay on termination of employment, the failure to remit the appropriate employer contribution towards the employees' defined contribution pension plan, and the non-

payment and failure to pay the full amount of severance pay as derived from industry practice, applicable case precedent, the current situation as to the Alberta petroleum industry and the Covid-19 Coronavirus pandemic, the Representative Plaintiff and the Class Members have suffered losses in the Tens of Millions of Dollars, which amounts were fully earned and were either due and payable in accordance with the Code and common law precedent or would have been based on calculations derived from the correct preceding statutory calculations.

56. The Representative Plaintiff and Class Members claim interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1 as amended from time to time.
57. In the opinion of the Representative Plaintiff and Class Members, the trial of the within action will not exceed 25 days.
58. The Representative Plaintiff and Class Members propose that the trial of this action be held at the Law Courts Building, in the City of Edmonton, in the Province of Alberta.
59. The Representative Plaintiff and Class Members plead and rely on the *Class Proceedings Act*, R.S.A. 2003, c. C-16.5, the *Alberta Rules of Court*, Alta. Reg. 124/2010, the *Alberta Employment Standards Code*, R.S.A. 2000, c. E-9, the *Canada Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the *Canada Pension Plan*, R.S.C. 1985, c. C-8, and the *Alberta Employment Pension Plans Act*, R.S.A. 2012, c. E-8.1.

Remedy sought:

60. The Representative Plaintiff and the Class Members seek to have this claim certified as a class proceeding under the CPA and claim the following from KMC:
 - a. Appointment of Wade as the representative plaintiff;
 - b. General and special damages in an amount to be proven at trial;
 - c. Punitive, aggravated and exemplary damages in an amount to be proven at trial;
 - d. An order pursuant to section 30 of the CPA directing an aggregate monetary award, if appropriate, as to the damages pertaining to the Class;
 - e. An order pursuant to section 32 of the CPA allowing for the use of standard claims forms or other documentary evidence or such other procedures as warranted under the circumstances;
 - f. An order directing KMC to preserve and disclose to the Representative Plaintiff or his solicitor all records, in any form, relating to employees' wages, overtime pay, general holiday pay, general holiday pay when working, vacation pay, vacation pay on termination of employment and severance pay of the Class Members, and KMC's contributions to the Pension Plan, together with any communications or discussions relating thereto;
 - g. An order pursuant to section 33 of the CPA that judgment be paid by KMC into a common fund and distributed to the Class Members in an appropriate manner as directed by the Court;

- h. An order directing that KMC specifically perform its calculation of its employees' overtime pay, general holiday pay, general holiday pay when working, vacation pay, vacation pay on termination of employment, termination pay in lieu of notice and severance pay in compliance with the Code and, in particular, that KMC accurately calculate their employees' wages in conformity with the Code, and that KMC perform its Pension Plan contribution calculations in conformity with the Pension Legislation;
- i. An order for KMC to provide a complete and independent audit of all former and current employees' overtime pay, general holiday pay, general holiday pay when working, vacation pay, vacation pay on termination of employment, termination pay in lieu of notice and severance pay, and KMC's contributions to the Pension Plan, including amounts actually paid, amounts due but unpaid pursuant to the Code or the Pension Act, as the case may be, and accrued interest on unpaid amounts;
- j. An order for KMC or their solicitors to not release any asset sale proceeds unless said distribution provides for an appropriate withholding of the estimated damages arising from this Action and free of any supervening priority, whether currently existing or likely contemplated;
- k. A declaration that KMC has breached their contracts of employment with each of the Class Members;
- l. A declaration that KMC has breached their obligation to act in good faith, trust and their fiduciary duty in performance of their contracts with the Class Members;
- m. A declaration that KMC has breached their statutory obligations under the Code and the Pension Legislation;
- n. Costs of this action on a solicitor-client, full indemnity basis, or such other basis as this Honourable Court deems appropriate;
- o. Prejudgment interest pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1, or on such other basis as this Honourable Court may allow;
- p. Costs of administering the plan of distribution of the recovery of this Action; and
- q. Such further and other relief as may be required pursuant to the CPA or otherwise, or as this Honourable Court deems just and proper in the circumstances.

NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Edmonton, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the lawsuit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.