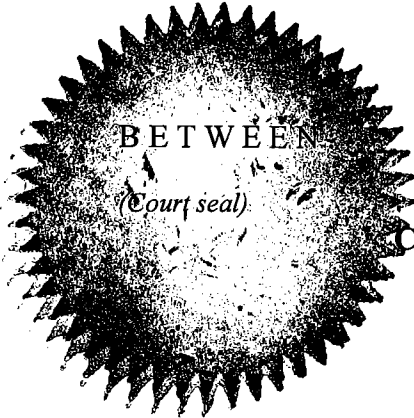


Court File No.

CV-11-439656 -
DCCP

**ONTARIO
SUPERIOR COURT OF JUSTICE**



CHARLOTTE PERRENOUD and RAJESH BEDI

Plaintiffs

- and -

**eHEALTH ONTARIO
and HER MAJESTY THE QUEEN in right of Ontario
as represented by the MINISTER OF HEALTH AND LONG-TERM CARE**
Defendants

PROCEEDINGS UNDER THE *CLASS PROCEEDINGS ACT, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. 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 plaintiffs' lawyer or, where the Plaintiffs do not have a lawyer, serve it on the Plaintiffs, 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.

Date November 16, 2011

Issued by 
Local registrar

Address of court office 393 University Ave. - 10th Fl.
Toronto, Ontario
M5G 1E6

TO: **eHEALTH ONTARIO**
777 Bay St., Suite 701
Toronto, ON M5G 2B3

AND TO: **HER MAJESTY THE QUEEN in right of Ontario as represented by the
MINISTER OF HEALTH AND LONG-TERM CARE**
Hepburn Block
80 Grosvenor St., 10th Floor
Toronto, ON M7A 2C4

AND TO: **ATTORNEY GENERAL FOR ONTARIO
MCMURTRY-SCOTT BUILDING**
720 Bay Street, 11th Floor
Toronto, ON
M7A 2S9

CLAIM

The Claim

1. The plaintiffs, Charlotte Perrenoud and Rajesh Bedi, claim on their own behalf and on behalf of the Class Members:
 - (a) an order certifying this action as a class proceeding under the *Class Proceeding Act, 1992*, S.O. 1992, c. 6, as amended (the "Act") and for the appointment of Charlotte Perrenoud and Rajesh Bedi as the representative plaintiffs;
 - (b) an interim, interlocutory and final mandatory order directing eHealth to disclose to the plaintiff's lawyers the contact information of all Class Members;
 - (c) an order for directions with respect to service on the Class Members pursuant to s. 17 of the Act;
 - (d) damages against eHealth for breach of contract for failing to pay to the plaintiffs and the Class Members the Performance Awards that they were entitled to pursuant to their contract of employment and eHealth's Performance Incentive Plan Policy;
 - (e) damages against eHealth for breach of contract as a result of eHealth having failed to make the matching contributions to the pension plan of the Class Members who filed an election to have a portion of the Performance Award paid into their pension plan account;
 - (f) a declaration and determination that Class Members who did not have an opportunity to file an election to have a portion of their Performance Award paid

to their pension plan account are entitled to do so within 30 days of any declaration or determination made by this Honourable Court, and are entitled to have such portion matched by eHealth;

- (g) damages against eHealth for breach of contract for failing to provide the plaintiffs and the other Class Members with reasonable notice of the retraction of their Merit Increase;
- (h) punitive damages against eHealth in the amount of \$1,000,000;
- (i) damages against the Minister of Health and Long Term Care for inducing eHealth to breach its contract with the Class Members as set out above in (d), (e), and (g);
- (j) punitive damages against the Minister of Health and Long Term Care in the amount of \$1,000,000
- (k) an order pursuant to s. 24 of the Act directing an aggregate assessment of damages, if necessary;
- (l) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended;
- (m) costs of this action on a substantial indemnity basis, plus, pursuant to s. 26(9) of the Act, the costs of notice and of administering the plan and the distribution of the recovery in this action, plus applicable taxes; and
- (n) such further and other relief as required by the Act or as this Honourable Court deems just.

Definitions

2. These terms used throughout this pleading have the following meaning:

- (a) "**Compensation Statement**" means a document which sets out the employee's name, division, manager, and performance management rating, as well as his/her Performance Award percentage and dollar amount, his/her Merit Increase percentage and dollar amount, and new base salary. These statements were personalized for each employee of eHealth and entitled "*2010/2011 Compensation Details Statement*" and were provided to eHealth employees in or around April 2011;
- (b) "**Class Members**" means all eHealth employees as of or about May 20, 2011 who
 - (i) were awarded a Performance Award for the 2010/2011 fiscal year; and/or
 - (ii) were awarded a Merit Increase effective April 1, 2011;
- (c) "**DCPP**" means Defined Contribution Pension Plan;
- (d) "**DCPP Election**" means an election authorizing eHealth to pay a portion of the Performance Award to the employee's DCPP account, which election entitled the employee to receive a DCPP Matching Contribution;
- (e) "**DCPP Matching Contribution**" means a contribution that eHealth is required to make to the employee's DCPP account, which contribution matches contributions made, or directed to be made, by Class Members;

- (f) **"Incentive Policy"** means the eHealth Performance Incentive Plan Policy in force in and before April, 2011;
- (g) **"Merit Increase"** means the base salary increase declared by eHealth to the eHealth employees based on a performance review under the Performance Management Plan and which were effective April 1, 2011;
- (h) **"Minister"** means the Minister of Health and Long Term Care (at all relevant times Deb Matthews);
- (i) **"MOHLTC"** means the Ministry of Health and Long Term Care'
- (j) **"Performance Award"** means the award declared to eHealth employees based on a review of their individual performance during the previous fiscal year and made pursuant to the Performance Incentive Plan;
- (k) **"Performance Management Plan"** or **"PMP"** means the eHealth Performance Management Plan in force in or about April, 2011;
- (l) **"SSHA"** means Smart Systems for Health Agency.

Overview of the Claim

3. This is a proposed class proceeding for damages arising from the actions of eHealth and/or the Minister in awarding Performance Awards and Merit Increases to eHealth employees. The Class Members seek damages from eHealth for breach of contract for the Performance Awards and Merit Increases, which were unilaterally revoked, without notice and in bad faith, by eHealth. The Class Members also seek damages against the

Minister of Health and Long Term Care for inducing eHealth to breach its contract with the Class Members, and acting in bad faith toward the Class Members.

Parties

Rajesh Bedi and Charlotte Perrenoud

4. The Plaintiff Rajesh Bedi ("**Raj**") resides in Ontario and is a Technical Specialist hired by eHealth in August 2004.
5. The Plaintiff Charlotte Perrenoud ("**Charlotte**") resides in Ontario and is a Service Manager hired by eHealth in November 2006.
6. Raj and Charlotte bring this action on behalf of themselves and on behalf of a proposed class of current and former employees of eHealth who were awarded a Performance Award and/or a Merit Increase to their base salary.

eHealth

7. eHealth is a corporation of Her Majesty the Queen in Right of Ontario as established by Ontario Regulation 43/02 of the *Development Corporations Act* ("the **Regulation**"). The objects of eHealth as set out in section 3 of the Regulation are:
 1. To provide eHealth Services and related support for the effective and efficient planning, management and delivery of health care in Ontario.
 2. To develop eHealth Services strategy and operational policy.
 3. To protect the privacy of individuals whose personal information or personal health information is collected, transmitted, stored or exchanged by and through the Agency, in accordance with the *Freedom of Information and Protection of Privacy Act*, the *Personal Health Information Protection Act, 2004* and any other applicable law.

8. eHealth was created in 2008 to take over and replace the Smart Systems for Health Agency (SSHA). Prior to 2008, the SSHA was tasked with creating and connecting the medical community to a secure electronic network. Alongside the SSHA, the MOHLTC was responsible for electronic health records strategy, applications, and databases development. The functions of the Minister as well as the SSHA vested in eHealth upon its creation in 2008.
9. eHealth reports to the Legislature of Ontario through the Minister. Currently, and at all material times, this ministerial position was held by Deb Matthews. All of eHealth's funding comes from the MOHLTC.
10. The Minister presides over and has charge of eHealth and its functions. Subsection 2(3) of the Regulation states:

The Agency is, for all its purposes, an agent of Her Majesty within the meaning of the *Crown Agency Act* and its powers may be exercised only as an agent of Her Majesty.

And further, at subsection 5(1):

The Agency, with the written approval of the Minister, may provide eHealth Services to support the operation of the health care system in Ontario and for other purposes that are consistent with the Agency's objects.

11. eHealth's composition is set out in subsection 2(2) of the Regulation which states: "The Agency is composed of the members of its board of directors." Subsection 6(1) states that there shall be a maximum of 12 directors. This subsection further states that the board members shall be appointed by the Lieutenant Governor in Council "on the recommendation of the Minister". This subsection further requires one director to be from the MOHLTC.

12. e-Health's board of directors exercises powers under the Regulation. Subsection 7(1) states: "The affairs of the Agency are under the management and control of the board of directors, subject to any directions given under section 8." Section 8 allows the Minister to issue binding policy directions to the board of directors when the Minister decides "it is in the public interest to do so". Subsection 7(2) further allows the board to pass by-laws "generally for the conduct and management of the affairs of the Agency."

Facts

13. In or around March 2011, eHealth evaluated Raj and Charlotte as well as the other Class Members based on their performance for the previous fiscal year.
14. The results of the evaluation were set out in a Compensation Statement provided to each employee.
15. Class Members with a specific performance rating were eligible to be awarded a Performance Award and/or a Merit Increase under eHealth's Incentive Policy..
16. The purpose of the Performance Awards as set out in the eHealth Incentive Policy is to *"reward employees for their contributions to the successful achievement of corporate goals and individual objectives and to share in the success of eHealth Ontario."* Merit Increases are evaluated based on *"merit, which includes performance, internal and external equity, and the impact of the position or team on the mission of the department and eHealth Ontario."*

17. Raj's Compensation Statement stated that he was awarded a Performance Award of 12%, in the amount of \$10,658, and a 3% Merit Increase in his base salary, in the amount of \$2,798.
18. Charlotte's Compensation Statement stated that she was awarded a Performance Award of 7.5%, in the amount of \$7,246, and a 1.65% Merit Increase in her base salary, in the amount of \$1,594.
19. eHealth employees are members of a defined contribution pension plan ("**DCPP**"). Pursuant to the Incentive Plan, Class Members were able to elect to have a portion of their Performance Award payable to their pension plan account by filing a **DCPP Election**, and eHealth would make a matching contribution to their pension plan.
20. On May 16, 2011 Raj filed a DCPP Election. Charlotte had intended to file a DCPP Election but before she was able to do so eHealth's CEO Greg Reed announced that eHealth would not be paying either the Merit Increases or the Performance Awards.
21. All of the Class Members received Compensation Statements. The Performance Awards varied by Class Member ranging from 0% to 15% of the Class Member's eligible base earnings, and were to be paid by June 3, 2011. The Merit Increases ranged from 0% to 5% of the Class Member's base salary, and were effective April 1, 2011.

Breach of Contract and Inducement to Breach the Contract

22. On May 18, 2011, the Toronto Star published an article titled "*Hundreds at eHealth Ontario get bonus, raise, despite call for wage freeze*" which was in reference to

- eHealth's decision to award the Class Members Performance Awards and/or Merit Increases (the "**Star Article**").
23. The Star Article asserted that senior officials in the Ontario Government, with an election on the horizon, were "furious" with eHealth's decision to pay the Performance Awards and Merit Increases, with one high ranking Liberal official quoted as saying in reference to eHealth, "These guys just don't get it".
 24. Muriel Deschênes, eHealth's senior director of stakeholder relations, is quoted in the Star Article as stating: "*These payments are in recognition of performance results*". In response to the Ontario Finance Minister's wage freeze initiative, she is recorded in the article as stating that eHealth was in compliance with government legislation, policy, as well as the practice of other government bodies, and that "*incentive compensation linked to individual performance is permitted, as it is a standard means of managing and improving employee performance*".
 25. On the same day, CTV published an article from The Canadian Press titled "*Opposition wants Liberals to axe eHealth staff bonuses*". In this article, the Minister is quoted as publicly stating that she was "*disappointed*" with eHealth's decision to award the Performance Awards and Merit Increases. The CTV article further states that the Minister had directed eHealth's Board of Directors to reconsider the decision to award the Performance Awards and Merit Increases to eHealth employees.
 26. Subsequent to these events, on May 20, 2011, the Class Members were informed of eHealth's decision through an email from Greg Reed, President and CEO of eHealth,

which stated "*I have just issued the following public statement. While I know this will be disappointing, I believe it is the right thing to do.*"

27. The public statement read in part as follows:

...I have advised the Minister that we are reversing the previous decision immediately. Merit Increases and performance-linked incentives will not be paid to employees of the agency this year. In addition, I have advised the board of directors that, as CEO, I am declining the performance payment previously offered to me in recognition of the restructuring and turnaround efforts of the past year.

28. Regardless of whether the Minister's request, comment, or suggestion amounted to a binding policy direction which eHealth was required to follow, the Minister clearly knew that the Performance Awards were already awarded as she requested that eHealth rethink the decision.

29. Considering the Minister's position, authority, and influential relationship with eHealth, this request appears intended to, and in fact did, affect the decision of eHealth to grant the Performance Awards and Merit Increases to the Class Members.

30. Upon learning of eHealth's decision not to pay the Performance Awards and Merit Increases, Raj and Charlotte took action to pursue their legal rights. They organized a group of individuals at eHealth and then engaged legal counsel and coordinated with the Class Members in order to proceed with this action.

Class Members Had Already Earned Performance Awards

31. The Incentive Plan, which formed a part of the Class Members' contract of employment, is a deferred compensation scheme in which employees received a portion of their compensation for the previous year following an evaluation of their performance.

32. eHealth breached its contract with Raj, Charlotte and the Class Members by refusing to pay Performance Awards which were already awarded based on performance in the previous year.

Class Members Were Entitled to DCPP Contributions

33. eHealth breached its contract with Raj, Charlotte and the Class Members who filed, or planned to file, a DCPP Election, by refusing to pay the elected portion of the Performance Award, as well as eHealth's matching contribution, to the electing Class Member's pension plan account.

Merit Increases Could not Be Revoked Without Notice

34. The Compensation Statement set out each Class Member's compensation effective April 1, 2011. The Merit Increases established a new level of base compensation for the Class Members and eHealth was not entitled to unilaterally revoke the Merit Increases without reasonable notice.

eHealth's Duty of Good Faith

35. eHealth owes a duty to the Class Members to act in good faith, which duty includes a duty to honour its contractual obligations to the Class Members and to not act in a manner so as to eviscerate or defeat the objective of the Class Members' contracts of employment, including express and implied terms of remuneration in accordance with eHealth's employment policies and the Incentive Plan.

The Minister's Duty of Good Faith

36. eHealth is an agency of the Ministry of Health and Long Term Care, acts under the authority and direction of the Minister, and is fully funded by the MOHLTC. The

Minister has knowledge of eHealth's Performance Awards policy and has directly or indirectly approved and implemented the Performance Awards in previous years. The Minister, by her comments as reported in the press and referenced herein at paragraph 47, acknowledges her influence over eHealth. The Minister has directly or indirectly exercised her influence in these circumstances.

37. The Minister's authoritative and inextricable relationship with eHealth, as well as her influence over eHealth's decision making process in relation to eHealth employees, created a duty of good faith between the Minister and the Class Members.

Breach of Duty of Good Faith and Punitive Damages

38. The Class Members are in a position of vulnerability in relation to eHealth as a result of the extreme inequality of financial and legal resources between eHealth and individual Class Members. The Class Members' vulnerability is further emphasized by the absence of protection of a union or other means of securing adherence to policies relating to the Class Members.
39. eHealth breached its duty of good faith to the Class Members by failing to pay the Performance Awards and related DCPP Matching Contributions, and unilaterally reducing the Class Members' base salary without notice.
40. It appears that eHealth refused to pay the amounts based solely on the Minister's response to the Star Article and to avoid negative press in the media.
41. In fact, prior to issuing the Compensation Statements to Raj, Charlotte and the Class Members, eHealth held a "town hall " meeting with the employees which included a

video clip of the Minister congratulating and commending the employees for their hard work and contribution towards eHealth's success.

42. eHealth's decision to deny Raj, Charlotte and the Class Members their Performance Awards, which necessitated bringing this action to enforce their legal rights, has led to a media firestorm which has subjected the Class Members of eHealth to negative public criticism.
43. eHealth has clear policies in place in regard to Performance Incentive Awards and Merit Increases, and clearly spent considerable time assessing each employee, budgeting for the Performance Awards and Merit Increases and, in order to avoid negative publicity, simply chose not to pay.
44. The Class Members were forced to initiate this action to recover the compensation for which they had previously qualified and to which eHealth had informed them they were entitled.
45. The actions of eHealth warrant an award of punitive damages as eHealth took advantage of its position of power over the Class Members and acted in a way that is arbitrary and capricious.
46. The Class Members repeat and rely on the content of paragraph 39 of this claim to the extent that it applies to the Minister based on her position of authority and influence over eHealth, as well as her ability to directly and indirectly affect the Class Members.

47. The Minister's response to the notice of this intended class action has contributed to the criticism of eHealth Class Members. In various news stories published in August 2011 about this intended class action, the Minister was quoted as follows:

It's not just unfortunate, it's wrong that they're taking this legal action. We will do everything we need to do to protect the people of Ontario.

48. The clear message by the Minister is that Ontarians need to be protected from the employees of eHealth. The Minister knew, or ought to have known, that her comments in the public media would result in a negative public backlash against the Class Members. Furthermore, the Minister's comments, if accurate as recorded, illustrate that she believes, and in reality does, exercise control over eHealth and its employees.

49. The Minister breached her duty of good faith to the Class Members. The Class Members merely accepted their Performance Awards and Merit Increases. They were then subjected to an embarrassing and unwarranted revocation of their Performance Awards and Merit Increases at the behest of the Minister. The Minister then used this revocation as political leverage in the face of an upcoming election by making unnecessary negative comments about the Class Members to the public.

50. The Class Members were particularly vulnerable as they could not, nor should they have been expected to, publicly defend themselves against the humiliating comments made by the Minister for simply seeking to determine their legal entitlement.

51. On behalf of the Class Members, Raj and Charlotte seek punitive and exemplary damages as against eHealth in the amount of \$1,000,000, and the Minister in the amount of \$1,000,000, or in such amount as this Honourable Court deems appropriate.

Administration Costs

52. Raj, Charlotte and the Class Members are entitled to recover the costs of administering the distribution of any award in this action.

General

53. Raj and Charlotte propose that this action be tried in Toronto.

November 16, 2011

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CHARLOTTE PERRENOUD and RAJESH BEDI
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eHEALTH ONTARIO et al.
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**ONTARIO
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PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

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