

Court File No.: CV-11-439656-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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 DEFENCE

1. eHealth Ontario ("eHealth) and Her Majesty the Queen in right of Ontario as represented by the Minister of Health and Long-Term Care ("HMQ"; collectively, the "defendants") admit the allegations at paragraphs 5, 7, 11, 12, 13, and 27 of the statement of claim.
2. The defendants have no knowledge of the allegation at paragraph 30 of the statement of claim.
3. The defendants deny the allegations in the remaining paragraphs of the statement of claim and put the plaintiffs to the strict proof thereof.

eHealth

4. In 2008, Ontario Regulation 43/02 (the "Regulation") under the *Development Corporations Act*, R.S.O. 1990, c. D.10 was amended to continue the corporation known as Smart Systems for Health Agency under the name eHealth Ontario. eHealth is a non-profit corporation without share capital, and is an agent of Her Majesty within the meaning of the *Crown Agency Act*.

5. The Regulation establishes the following three objects of eHealth:

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. O. Reg. 339/08, s. 4.

6. The powers of eHealth are set out by the Regulation. Contrary to the assertions in paragraph 10 the statement of claim, the Minister of Health and Long-Term Care (the "Minister") does not "preside over" or have "charge" of eHealth and its functions. The Regulation gives to eHealth the capacity, rights, powers and privileges of a natural person for carrying out its objects, except as limited by the Regulation.

7. Pursuant to sections 2(2) and 6(1) of the Regulation, eHealth is composed of the members of its board of directors (the "Board"), which must not number more than 12 and are appointed by the Lieutenant Governor in Council on the recommendation of the Minister. The Board must include one member from the Ministry of Health and Long-Term Care.

8. Section 7 of the Regulation provides that the affairs of eHealth are under the management and control of the Board, subject to any policy directions given to the Board by the Minister. The Board may pass by-laws and resolutions for the conduct and management of the affairs of the Agency.

9. The Chief Executive Officer of eHealth (the "CEO") is appointed by the Lieutenant Governor in Council. Pursuant to section 9(3) of the Regulation, the CEO is responsible for the management and administration of eHealth's affairs, subject to the supervision and direction of the Board.

No Breach of Contract

10. eHealth denies that its decision on or about May 20, 2011 not to pay bonuses and merit increases breached the contracts of employment with the plaintiffs or any other eHealth employees described within the statement of claim as proposed class members.

(a) Bonuses

11. The plaintiffs purportedly base their entitlement to the bonus for 2010 – 2011 on eHealth's "Performance Incentive Plan Policy", which was in effect at the material time (the "Incentive Plan").

12. The Incentive Plan provides that specified employees who meet their performance objectives for the year and receive a rating of "2" or higher are eligible for a one-time payment ranging from 0 to 15% of their base salary.

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13. Critically, the Incentive Plan provides at paragraph 3.8 that the Board, the Board's Human Resources Sub-Committee, or the CEO may "terminate, suspend, or amend the Performance Incentive Plan, in whole or in part, *at any time and at their sole discretion, without any liability*" [emphasis added].

14. eHealth denies that the compensation statements given to the plaintiffs and some other members of the proposed class in or around mid-May 2011, providing notice of any bonus, gave rise to an enforceable right to the bonus. Nor were bonuses "deferred compensation" wherein employees were entitled to receipt of a bonus following an evaluation of their performance. Any bonus available pursuant to the Incentive Plan for the 2010 – 2011 year was at all times subject to the terms of the Incentive Plan, including paragraph 3.8 above.

15. eHealth ultimately determined not to provide bonuses for the year 2010 – 2011. In a public statement released May 20, 2011, eHealth's CEO Mr. Greg Reed set out the reasons for eHealth's decision as follows, in part:

...[W]hen placed in the context of the hard work eHealth Ontario still has to do in overcoming past challenges, and in light of the pressing financial circumstances that all Ontarians face, it is clear that this decision [to award bonuses and merit increases] needs to be revisited. Indeed, it threatens to obscure the genuine progress agency employees are making to help deliver a stronger, more responsive health care system.

Accordingly, 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.

16. eHealth pleads that its decision not to pay the bonuses was made in good faith and was reasonable.

(b) Merit Increases

17. A merit increase is the percentage increase an eligible eHealth employee may receive in the coming fiscal year, based on the employee's performance in the previous fiscal year. A merit increase is entirely discretionary.

18. eHealth pleads that the compensation statements provided to the plaintiffs and some other members of the proposed class in or around mid-May 2011 indicating a merit increase were statements of intent or gratuitous promises, without consideration, and did not give rise to any enforceable rights.

The Minister did not induce breach of contract

19. As pleaded above, eHealth did not breach the plaintiffs' or proposed class members' contracts of employment. Accordingly, the Minister is not liable for inducing breaches of contract by eHealth.

20. HMQ pleads that paragraphs 22 – 25 of the statement of claim in support of the inducing breach of contract claim are evidence and improper. In any event, even if eHealth is liable for breach of contract, which is expressly denied, the alleged conduct of the Minister as set out in the statement of claim does not satisfy the required elements of the tort of inducing breach of contract. Specifically, while the Minister was disappointed with the awarding of bonuses and merit increases, asking eHealth to reconsider its decision in the context of the spirit and letter of the public restraint legislation was not intended to induce a

breach of contract. Nor did the Minister know that her actions would cause a breach of contract, and such causation is denied.

21. Furthermore, HMQ pleads that even if the Minister's request to eHealth that it reconsider its decision to award bonuses and merit increases amounts to inducing breach of contract, no liability would flow because the Minister was at all times acting in good faith, within the scope of her legal authority, and in the best interests of eHealth.

22. In the further alternative, HMQ pleads that the Minister's request of eHealth to reconsider its decision, if it amounts to inducing breach of contract, was justified.

23. The defendants deny that a duty of good faith to the plaintiffs or proposed class members exists at law, as alleged at paragraphs 35 – 37 of the statement of claim. However, even if any such duty exists, which is denied, the defendants state that at all times they acted in good faith.

24. The defendants deny that the plaintiffs or proposed class members have suffered any damages for which the defendants are responsible. If the plaintiffs or proposed class members have suffered damages for which the defendants are liable, which is not admitted but is expressly denied, such damages are excessive, exaggerated and remote.

25. The defendants deny that there was anything in their conduct entitling the plaintiffs or proposed class members to an award of punitive damages.

26. For the reasons above, the defendants deny that the plaintiffs or proposed class members are entitled to the relief claimed in paragraph 1 of the statement of claim or any

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other relief, and submit that this action should be dismissed with costs on a substantial indemnity basis.

Date: February 1, 2011

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Proceeding commenced at Toronto

STATEMENT OF DEFENCE

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