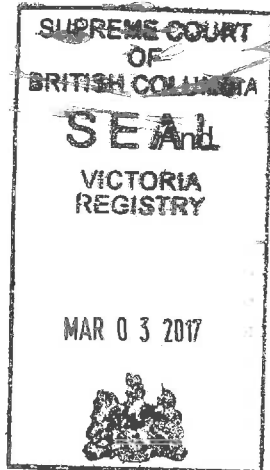


IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:



Susan Service

Plaintiff

University of Victoria

Defendant

Brought under the Class Proceedings Act

AMENDED NOTICE OF CIVIL CLAIM

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 a 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(s),

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, 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, SUSAN SERVICE (“Ms. Service”) resides at 2065 Leal Road, North Saanich, British Columbia and is a Management Excluded employee of the University of Victoria.
2. The Defendant, UNIVERSITY OF VICTORIA (the “University”), is a university incorporated under the *University Act*, R.S.B.C. 1996, c. 468.
3. Ms. Service began her career at the Pension Corporation of British Columbia in 1980. In 1998, she transferred to work at the University as a member of the Professional Employees Association and was therefore included in membership in the collective bargaining unit.
4. In late 2004, Ms. Service’s position was reclassified to be a Management Excluded employee and was therefore excluded from membership in a collective bargaining unit (“Excluded”). Ms. Service has been working as a Excluded employee of the University ever since.
5. The University ~~periodically publishes~~ has published to its Excluded employees its employment terms and conditions for Excluded employees in documents called *Management Excluded Terms and Conditions of Employment*, the *Grading Structure* and the *Salary Structure* (hereinafter referred to as “Terms and Conditions”). The last time the terms and conditions were updated was effective on January 1, 2012. That version of those three documents together with any other express or implied terms and conditions of employment agreed to between the University and its Excluded employees is hereinafter collectively referred to as the “Terms and Conditions”.

6. The University circulated the Terms and Conditions to all Excluded employees in or about December, 2011.
7. Ms. Service acknowledged receiving, reading, understanding and accepting the Terms and Conditions on December 19, 2011. All other Excluded employees then in the employ of the University and whose employment continued into 2012 and those hired or reclassified as Management Excluded after December 31, 2011, either expressly or impliedly accepted the offer made by the University of those new Terms and Conditions as the terms and conditions of their continuing employment.
8. The Terms and Conditions document outlines how the parties have agreed Excluded employees will proceed through the salary range as applicable to each individual employee. Each Excluded employee was assigned to a Grade under the Grading Structure based on the demands of their position. Each Grade, and so each position assigned to that Grade by the Grading Structure, designates an associated salary amount as its Competitive Midpoint and upper and lower limits in the Salary Structure.
9. Section 3.4 of the Terms and Conditions contains the contractual terms of the automatic incremental pay raise review process. In that section, wages are defined as being part of a “salary plan” and this salary plan, which applies to all Excluded positions, “establishes a salary range for each position and a mechanism for salary progression within the salary range.” There are three salary ranges. They are called the “development”, “competitive” and “performance” ranges. Most Excluded employees fall into the “competitive” range. An employee is in a range based on the salary they are being paid before their annual review. The Salary Structure defines the Development salary range as from 80% of the Competitive Midpoint to just under 90%. The Competitive range is from 90% of that Competitive Midpoint to 110%. The Performance range is above 110% to a maximum of 115% of the Competitive Midpoint.
- 9A. Most Excluded employees fall into the “Competitive” range. The Competitive range is defined as those who demonstrate full competence in their role. Those new to the position and still mastering it may be assigned a salary in the Development range. Those who excel rather than merely demonstrate competence could be assigned a salary in the Performance range.
10. Section 4.1 of the Terms and Conditions contains a chart which shows how employees shall be automatically given annual performance reviews which will form the primary basis for their eligibility for annual raises according to their performance level

attained and their individual salary and where that salary fits within the salary ranges. An employee's automatic raises are determined by an employee's salary range. If the employee partially achieves their performance level, they are entitled to a raise but the actual amount of the raise depends upon the discretion of the employer. If the employee is in the "development" or "competitive" salary ranges and "fully" achieves their performance level, they are automatically entitled to a 3% or 2.5% raise, respectively, and there is no discretion on the employer's part as to the granting of the increase for those in the "development" and "competitive" ranges.

10A. If the employee has "not achieved" the demands of their position on a review by their employer, they are not entitled to any annual increase..

10B. If the employee only "partially achieves" their performance level, they are entitled to be considered for a raise, but the actual amount of the raise depends upon the discretion of the employer. Such an evaluation indicates that that an employee has not displayed full competence in their role.

10C. If the employee is in the "Development" or "Competitive" salary ranges and "fully" achieves their performance level, they are automatically entitled to a 3% or 2.5% raise, respectively, and there is no discretion on the employer's part as to the granting of the increase.

10D. If the employee is already in the "performance" salary range, their raise is only available if they "fully achieve" or "exceed" the demands of their position and the raise is both a maximum of 2% and discretionary. It is an express or implied term of the Terms and Conditions that the discretion will be exercised equitably and reasonably primarily based on job performance considering the individual performance and contribution to organizational goals.

10E. If the employee achieves an evaluation on review of "Exceeded" then:

- a) there is a discretionary raise of up to 5% if they are in the development range;
- b) a non-discretionary raise of 3% if they are in the competitive range; or
- c) a discretionary increase of up to 2.5% if they are in the performance range.

10F. Despite the defined raise mechanisms, some or possibly all promised salary increases in the performance range require approval of the appropriate Vice President. It is an implied term that Vice Presidents shall not unreasonably withhold approval.

11. Both the University and the individual Excluded employees intended the employer would use its discretion, where applicable, by only considering relevant employment performance issues and standards.
12. Section 4.2 of the Terms and Conditions provides that salary adjustments will be made annually on July 1.
13. Ms. Service is in the “competitive” range and meets her performance level.
14. On July 1, 2012, pursuant to the Terms and Conditions agreed by the University and Ms. Service, the University automatically adjusted Ms. Service’s pay by 2.5%.
15. On September 13, 2012, the *Public Sector Management & Executive Compensation Freeze Policy* (hereinafter referred to as the “Policy”) was ~~made effective~~ announced. The Policy, as distributed by the Public Sector Employers’ Council Secretariat states that:

...Managers and Executives may not receive any increases in cash compensation, including increase based on length of service, merit, increments or progression through salary ranges.

- 15A. However, the policy also acknowledged that the legislative authority for it was the *Public Sector Employers Act* and that:

... Managers and Executives may also receive Compensation increases that are specified by time and amount in legally binding contracts and approved compensation plans.

- 15B. The plaintiff says that the Terms and Conditions were an approved compensation plan and any increases contained therein are legally binding. Additionally, the Terms and Conditions were agreed to before any directive was issued to the University or its employer’s association under section 14.3 of the *Public Sector Employers Act* and the increases in compensation were agreed to before the date on which the minister issued a direction and are or would have been consistent with the applicable employment compensation standard under s.14.3(5).

16. On September 19, 2012, Kane Kilbey (“Mr. Kilbey”), Associate Vice-President of Human Resources for the University, sent an email to all Excluded employees, including Ms. Service, notifying them that the Policy was in effect.
17. On July 1, 2013, the University breached their employment contract with Ms. Service by not automatically adjusting her salary, or properly

exercising their discretion to award all or part of any discretionary increase and by not providing an annual review and considering in accord with that review and in accord with the discretions to be exercised, if any were applicable in the circumstances, under the Terms and Conditions, and adjusting as required, the salary of all Excluded employees as required by the automatic, incremental pay increase consideration provisions contained within the Terms and Conditions.

18. Ms. Service objected to the broad scope of interpretation given to the policy by the University. On July 4, 2013, she pointed out in a letter to Mr. Kilbey that the freeze of her automatic, incremental wage increase of 2.5% as she progresses through her salary wage range was outside the proper scope of any wage freeze policy. Ms. Service also pointed out that she did not agree to a withholding of any automatic incremental raise to her salary. She has not withdrawn her objection.
19. On June 25, 2014, Mr. Kilbey sent an email to all Excluded employees, including Ms. Service, notifying them that there was no approval for University staff to receive a general wage increase and there was no "exit from the freeze policy." Therefore, Ms. Service would not be receiving her automatic incremental wage increase
20. On July 1, 2014, the University again breached it's employment contract with Ms. Service and all Excluded employees by not automatically conducting a review of their performance and considering adjusting her salary and their salaries based on the result thereof as required by the automatic incremental payment increase provisions contained within the Terms and Conditions or by not following the Terms and Conditions and conducting the annual reviews and granting the raises or properly exercising the discretions using the factors dictated by the contract between the parties.
21. Ms. Service brings this action on behalf of herself and all Excluded employees of the University who have suffered damages as a result of the University breaching its contract with them and breaching its promise to conduct annual reviews and to pay or exercise a discretion to pay on the basis of the agreed factors a discretionary or an automatic incremental pay increase as provided within within the Terms and Conditions of their employment contracts. Ms. Service pleads and relies upon the *Class Proceedings Act*, R.S.B.C. 1996 c. 50.
22. The supervisors and Vice Presidents who would be called upon to exercise their discretion and conduct or confirm evaluations and to thereafter exercise their discretion as to any raises or the degree of raises, all of which was to be done in good faith, are now hopelessly conflicted and subject to the oppression and influence of their employer, so that they cannot now be counted upon to fairly exercise that discretion that the University ought to have had them exercise at the time, and the University

ought not benefit from its own breach of contract, so this court should assume that, and order that, damages be calculated as if each Excluded employee would have met the Fully Achieved standard, which is not only the norm but the vast majority and should assume in such calculations that any discretion or discretion to approve which could have been exercised would have been exercised to the advantage of the employees.

23. The Excluded employees have not only suffered lost wages and benefits but have also suffered reduced pensions and will suffer future lost wages based upon all future raises starting from a base which is lower than it would have been had the contract been honoured and performed according to its terms.

Part 2: RELIEF SOUGHT

1. Ms. Service claims on her own behalf and on the behalf of similarly situations persons as follows:
 - a. An order certifying this action as a class proceeding and appointing her as representative plaintiff under the *Class Proceedings Act*, R.S.B.C. 1996 c.50;
 - aa. Aggregate damages;
 - b. General damages for breach of contract including but not limited to:
 - i) past wage loss;
 - ii) future cumulative wage loss;
 - iii) lost pension contributions; and
 - iv) lost pension value.
 - c. Costs;
 - d. Pre- and post-judgment interest pursuant to the *Court Order Interest Act*; and,
 - e. Such further and other relief as this honourable court deems just;

Part 3: LEGAL BASIS

Breach of Contract

1. The Excluded employees' employment contracts with the University, including Ms. Service's, are governed by a combination of statute law, common law and written, oral and implied contractual terms. The

source of law relevant to the issue of whether or not the policy affects the automatic incremental raises promised in the *Terms and Conditions* document is the *Public Sector Employers Act*, RSBC 1996, c. 384.

2. Subsection 14.3(6) of the *Public Sector Employers Act* lists four criteria upon which an Excluded employee may be given an increase in their pay. That subsection states:

(6) On the minister issuing a direction to an employers' association or a public sector employer under subsection (1), no increase in compensation may be provided to employees or persons in positions or occupations in respect of which the direction is issued unless

- a. a compensation plan in respect of those employees or persons is approved by the minister and the increase in compensation is consistent with the applicable employment compensation standard resulting from the operation of subsection (5),
 - b. the increase in compensation was agreed to before the date on which the minister issues the direction and the increase in compensation is consistent with the applicable employment compensation standard, if any, that was in force and effect before the issuance of the direction,
 - c. the increase is the result of a change in an employee's or person's position within a range of positions that was established for the sector, employee or person before the issuance of the direction, or
 - d. the increase is within a range of compensation that was established for the employee's or person's position before the issuance of the direction.
3. The *Terms and Conditions*, meets not just one, but three of the four criteria upon which a public sector employer is permitted to increase an employee's compensation under subsection 14.3(6). Consequently, the *Terms and Conditions* and the automatic reviews and consequent defined or potential incremental increases contained therein are valid and binding contractual terms.
 - a. The *Terms and Conditions* were promulgated as a compensation plan approved by the minister at the time and were acknowledged by Ms. Service and other Excluded employees. As an Approved Compensation Plan, the *Terms*

and Conditions and automatic incremental increases contained therein ~~was~~ were approved by the minister as required by subsection 14.3(5). Consequently, the Terms and Conditions meet the criteria listed in under subsection 14.3(6)(a).

- b. The Terms and Conditions and automatic incremental increases contained therein were made contractually binding upon the Excluded employees, including Ms. Service, and the University of Victoria by their acknowledgement of the grading, salary and conditions effective January 1, 2012. It was not until September 13, 2012 that the Policy was made effective. Consequently, the increase in compensation was agreed to before the date that the Policy was made effective and the Terms and Conditions meet the criteria listed in under subsection 14.3(6)(b)
- c. All of the contractual increases within the Terms and Conditions are within a range of compensation established for each individual employee's position before the issuance of the Policy. Consequently, the Terms and Conditions meet the criteria upon which a public sector employer is permitted to increase an employee's compensation listed in under subsection 14.3(6)(d)

Plaintiff's address for service:	Mulroney & Company 301 – 852 Fort Street Victoria BC V8W 1H8
Fax number address for service (if any):	250-389-6033
E-mail address for service (if any):	csiver@mulroneyco.com
Place of trial:	Victoria BC
The address of the registry is:	Ministry of Attorney General Court Registry PO Box 9248 Stn Prov Govt 2nd Floor 850 Burdett Avenue Victoria BC V8W 9J2

Date:

March 3, 2017



Christopher A. Siver
Solicitor for the Plaintiff

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 end 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:

This is a claim for breach of contract.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investments losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

1. *Class Proceedings Act*, R.S.B.C. 1996 c. 50;
2. *Public Service Employers Act*.

No. VIC-S-S152506
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Susan Service

PLAINTIFF

AND:

University of Victoria

DEFENDANT

AMENDED NOTICE OF CIVIL CLAIM

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Barristers & Solicitors
301 - 852 Fort Street
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