

Court File No.: CV-17-584523CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

KAREN WALMSLEY

Plaintiff

- and -

**2016169 ONTARIO INC. and 2170616 ONTARIO INC., alone or together
o/a BLYTH ACADEMY**

Defendants

STATEMENT OF DEFENCE

Proceeding under the Class Proceedings Act, 1992

1. The defendants, 2016169 Ontario Inc. operating as Blyth Academy and 2170616 Ontario Inc. operating as Blyth Educational Travel, improperly named as 2016169 Ontario Inc. and 2170616 Ontario Inc., alone or together o/a Blyth Academy, admit the allegations contained in paragraphs 2, 3 and 4 of the Statement of Claim.

2. Save as explicitly admitted herein, the defendants deny the balance of the allegations contained in the Statement of Claim and put the plaintiff to the strict proof thereof.

Parties

3. The defendant, 2016169 Ontario Inc. operating as Blyth Academy ("Blyth Academy"), an Ontario corporation, is a private school providing services out of a variety of locations in the

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Greater Toronto Area and southern Ontario. Blyth Academy provides students of a variety of ages the option to take "full time" courses on weekdays during the provincial school year, part-time courses in evenings and on the weekends during the provincial school year, and on weekdays during the summer.

4. The defendant, 2170616 Ontario Inc. operating as Blyth Educational Travel, is also an Ontario corporation. Blyth Educational Travel did not contract with the plaintiff or any of the proposed class members, and otherwise has no involvement with the matters referred to in this action except for the fact that Blyth Academy uses Blyth Educational Travel's account with its payroll processing company to administer the payment of its teachers.

5. The plaintiff, Karen Walmsley, provided teaching services to Blyth Academy pursuant to various course-specific contracts between September 2015 and June 2017, as described further below.

Teaching model of Blyth Academy

6. Blyth Academy was founded in 2002 with the goal of providing a unique and enriching setting for Ontario students to complete their high school education. Blyth Academy's model emphasizes creative teaching methods in small group, private, or semi-private environments.

7. During the provincial school year, Blyth Academy offers "full time" courses over four terms of approximately ten weeks each. In each term, a student can take as few as one or as many as three courses. This format allows a student to take fewer courses over a shorter period of time, compared to what is offered by a traditional public secondary school, reducing the number of subjects a student will need to focus on in a given period of time.

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8. Blyth Academy also offers students evening, weekend, and summer school courses. Evening course classes are held two days a week over a period of sixteen weeks, and summer course classes are held five days a week over a period of four weeks.
9. All courses offered by Blyth Academy provide for 110 hours of instruction time and meet the curriculum requirements set by the Ministry of Education for elementary and high school courses.
10. An important aspect of Blyth Academy's model is that it offers its courses individually, or "a la carte". For example, a student attending Blyth Academy's "full time" program has the option of enrolling in one or up to three ten-week courses in any given term. Students can also tailor the schedule of their academic year by enrolling in summer or evening courses.
11. Another important aspect of Blyth Academy's model is the small class sizes. Classes are much smaller than their counterparts in the traditional public school system. These small class sizes help students focus more during class, while also greatly decreasing the amount of preparation time a teacher would need to spend on any given course.
12. Since Blyth Academy does not provide a traditional academic schedule, it does not have a traditional academic staff or faculty. Teachers are generally engaged on an as-needed basis, for periods of as short as one month or as long as four months. Blyth Academy is thus able to engage teachers based on their expertise in a given field, who are interested in teaching for a short period of time and/or for the purpose of teaching a specific class.
13. As a result, teachers providing services to Blyth Academy come from a wide variety of backgrounds. Some teachers are already full-time employees of public school boards, private

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schools, or other institutions, others are employed with universities, and still others are engaged in other employment or business distinct from teaching or education.

14. Blyth Academy engages some of its teachers on an independent contractor basis (the "Independent Contractor Teachers"). Some Independent Contractor Teachers are engaged in multiple contracts at any given time, while others may only teach one course in a term, a year, or altogether.

15. Blyth Academy also directly employs a number of teachers who work at Blyth Academy on a regular basis and as a result of a common intention are engaged as full time employees (the "Employee Teachers").

16. In 2017, Blyth Academy employed 45 Employee Teachers.

The Independent Contractors Teachers

17. The relationship between Blyth Academy and each Independent Contractor Teacher is and was at all times characteristic of an independent contractor relationship. Particularly:

- a) each teacher provides services to Blyth Academy pursuant to a written and signed contract for services between Blyth Academy and the teacher which expressly creates an independent contractor relationship between the parties;
- b) teachers are contractually required to attend and teach classes for the 110 hours of class stipulated in each contract as well as brief amounts of time before and after class, but are not required to be present at the Blyth Academy location at which the course is offered beyond the requirements of the contract;

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- c) while Blyth Academy requires that course curricula prepared by the teacher be approved by Blyth Academy, it only requires that curricula adhere to the Ministry of Education's curriculum requirements. Teachers are free to otherwise structure daily lessons as they see fit;
- d) if a teacher is unable to fulfill his or her contractual duties, it is the teacher's responsibility to find and hire a suitable replacement. The replacement is engaged by the teacher, not Blyth Academy, and the teacher is responsible for hiring and paying the replacement teacher;
- e) teachers are not prohibited from engaging in other work or employment with other organizations, businesses, school boards, private schools, or any other remunerative activities, and many were and are involved in such other remunerative activities;
- f) teachers must use their own computers, paper, pens, and other stationary to prepare for and carry out coursework;
- g) teachers are not provided a desk, phone line, computer, business cards, or any other tools to use in carrying out their lessons;
- h) teachers are responsible for ensuring the remittance of all their applicable taxes, including federal and provincial sales tax and federal and provincial income tax; and
- i) all amounts earned by teachers who are and were working under contract with Blyth Academy are and were not pensionable and insurable.

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Karen Walmsley's work for Blyth Academy

18. From September 2015 to August of 2017, Ms. Walmsley provided services to Blyth Academy pursuant to various course-specific independent contractor agreements for full time, private, and semi-private courses.

19. Each contract Ms. Walmsley signed with Blyth Academy was to teach one 110 hour course. For each 110 hour course that was not private or semi-private, the contract price ranged from \$2,650 to \$3,200.

20. Ms. Walmsley read, understood, and agreed to each contract, each of which contained provisions stating that it was and is expressly understood by both parties that the teacher is an independent contractor, and nothing in the contract would be construed so as to create or imply an employer-employee relationship between the parties.

21. At no point was Ms. Walmsley contractually required to work up to 60 or 80 hours per week, as pleaded, and the defendants specifically deny that Ms. Walmsley ever worked or was required or permitted to work in excess of 40 hours per week.

22. While there were certain contractual requirements in addition to the 110 hours of class time mandated by the contract and the Ministry of Education, the defendants deny that carrying out these contractual requirements could have reasonably resulted in Ms. Walmsley working in excess of the overtime threshold, or a number of hours such that her remuneration was less than the applicable minimum wage.

23. The defendants also plead that on various occasions Ms. Walmsley provided services to Blyth Academy in addition to her contractual obligations, for which Ms. Walmsley invoiced

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Blyth Academy at a rate of \$25.00/hour. Blyth Academy paid such invoices.

24. The defendants deny that Blyth Academy's relationship with Ms. Walmsley was ever or ever became an employee/employer relationship, and at all material times Ms. Walmsley's status was properly characterized as that of an independent contractor.

Non-Applicability of the ESA

25. The defendants deny that the relationship with any of the Independent Contractor Teachers is anything other than an independent contractor relationship, and therefore those relationships are not regulated by the *Employment Standards Act, 2000*, S.O. 2000 c. 41 ("ESA").

26. The defendants also plead that all the members of the proposed class are all teachers which fall within the definition of "Teacher" as defined in the *Teaching Profession Act*, R.S.O. 1990, c. T. 2., and as such, are exempt from the applicability of Parts VII through XI of the *ESA*, pursuant to O. Reg. 285/01.

No Systemic Negligence

27. The defendants deny that they owed or owe a duty of care to the plaintiff or the any of the proposed class members to properly classify the plaintiff and proposed class members as employees or independent contractors. In any event, the defendants plead that at all material times each proposed class member's relationship with Blyth Academy was properly classified as either an employer/employee relationship or an independent contractor relationship.

28. In the alternative, if the defendants did or do have a duty of care to the plaintiff or any of the proposed class members to properly classify them as employees or independent contractors,

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the defendants plead that they have not breached such a duty because all teachers have been and currently are properly classified.

29. The defendants further deny that that:

- a) they had any duty to monitor or keep track of the hours worked by the plaintiff or any of the proposed class members;
- b) they required or permitted the plaintiff or any of the proposed class member to work hours in excess of the applicable overtime threshold or hours that resulted in average compensation below that of the applicable minimum wage;
- c) they had a duty to ensure that the plaintiff or any of the proposed class members were compensated for vacation pay, public holiday pay, or premium pay, or that the plaintiff or any of the proposed class members were or are entitled to same; or
- d) either defendant stood in a special relationship with any of the proposed class members.

30. The defendants deny that that at any point they misrepresented, or made any representations whatsoever, to the plaintiff or any proposed class member regarding the nature of the labour relationship between each proposed class member and Blyth Academy.

31. The defendants deny that the plaintiff or any of the proposed class members relied on either defendant to advise them properly of their status as either an employee or an independent contractor. The defendants plead that each proposed class member is educated, sophisticated, and fully understood and understands the nature of each contract he or she entered into with

Blyth Academy.

No systemic classification of teachers as independent contractors

32. The defendants deny that the proposed class members were systemically classified as independent contractors. The defendants plead that some members of the proposed class, as defined in paragraph 7 of the Statement of Claim, are in fact engaged as employees.

33. The defendants plead that the classification of Blyth Academy's relationship with each proposed class member is or was done on an individual basis, and was a result of a bilateral understanding between both the class member and Blyth Academy.

No Systemic Breach of ESA

34. The defendants deny that either defendant at any point breached any provision of the *ESA* systematically or otherwise.

35. The defendants repeat their pleading that the classification of each proposed class member's status as either an employee or an independent contractor was determined on an individual basis and was a result of a bilateral understanding of both the class member and Blyth Academy.

36. The defendants deny that they had or have any duty under the *ESA* to ensure that all class members are properly classified as employees or independent contractors. In any event, the defendants plead that all proposed class members are properly classified.

37. The defendants deny that the *ESA* applies in any way to any of the Independent Contractor Teachers, and that parts VII to XI of the *ESA* apply in any way to any of the proposed

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class members. Specifically, the defendants deny that they:

- a) had or have an obligation to monitor or record the proposed class members' hours worked;
- b) had or have an obligation to ensure that the proposed class members did not work hours over any applicable overtime threshold or hours that resulted in average compensation below that of the applicable minimum wage;
- c) had or have an obligation to compensate the proposed class members for vacation pay; and
- d) had or have an obligation to compensate the proposed class members for public holiday, overtime pay or premium pay.

38. The defendants expressly deny that at any point any pressure, pervasive or otherwise, was put on the plaintiff or any of the proposed class members to work hours in excess of the overtime threshold, or to work a number of hours such that their average remuneration was less than minimum wage.

No Breach of any Contractual Duties

39. The defendants deny that Blyth Academy breached any of its contractual obligations to any class member. The defendants state that the contractual obligations of Blyth Academy and the particular teacher with whom it contracted were or are entirely set out in each contract and were satisfied by Blyth Academy.

40. The defendants deny that any provisions of the *ESA* are express or implied terms of any

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contract between Blyth Academy and the Independent Contractor Teachers, and denies that Parts VII to XI of the *ESA* are express or implied terms of any contract between Blyth Academy and any of the proposed class members.

41. The defendants further deny that they owed a contractual duty of good faith to the plaintiff or any of the proposed class members. In the alternative, if a contractual duty of good faith existed in respect of the plaintiff or any of the proposed class members, there was no breach of such duty.

No Unjust Enrichment

42. The defendants plead that there has been no unjust enrichment. Every contract between Blyth Academy and each proposed class member is a valid and enforceable contract. Each proposed class member provided services that he or she agreed to provide, for an amount of compensation specifically agreed upon by the parties.

43. In the alternative, the defendants plead that if this Honourable Court should find that any contract referred to in paragraph 42 above be unenforceable, which is not admitted but is expressly denied, the defendants plead that all proposed class members have been remunerated in accordance with or above the minimum requirements of the *ESA*, and therefore neither defendant has been unjustly enriched and the proposed class members have not been correspondingly deprived of any entitlement.

No Damages

44. The defendants deny that they are liable to the plaintiff or the proposed class members in any way for any amount.

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45. The defendants deny that the *ESA* applies to any of the Independent Contractor Teachers, and further denies that Parts VII to XI of the *ESA* apply to any of the proposed class members; however, Blyth pleads that in any event, no member of the proposed class would be entitled to damages under the *ESA*. Specifically, Blyth denies;

- a) that any member of the proposed class is or was entitled to any amounts in respect of vacation pay, public holiday pay, overtime pay, or premium pay; or
- b) that any member of the proposed class was remunerated at an amount lower than the applicable minimum wage during the period in which services were provided.

46. The defendants further deny that at any point either defendant acted in a high handed or callous manner, or that they acted at any point in bad faith, and deny that the plaintiff or proposed class members are entitled to aggravated or punitive damages.

47. The defendants deny that the plaintiff or any of the proposed class members have suffered damages of any sort. In the alternative, if the plaintiff or any of the proposed class members have suffered any such damages, the defendants deny that those damages were caused or contributed to by any actions or omissions of the defendants, and that in any event, such damages are remote, exaggerated, and not recoverable at law, and that the plaintiff and proposed class members have failed to mitigate those damages.

48. The defendants plead that any damages suffered by the plaintiff or the proposed class members, which are not admitted but expressly denied, are or were a result of the plaintiff and the proposed class members' own negligence, or as a result of contracts, dealings, or relationships entirely separate to the plaintiff and proposed class members' relationship or

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relationships with Blyth Academy and/or a result of the plaintiff and proposed class members' failure to properly manage and file their own finances and taxes, both personal and business related.

49. The defendants deny that any Independent Contractor Teacher, including the plaintiff, was or is required to make Canada Pension Plan and/or Employment Insurance ("CPP/EI") contributions in respect of any amounts earned pursuant to independent contractor teaching contracts with Blyth Academy.

50. The defendants specifically deny that any Independent Contractor Teacher ever made either employee component or employer component CPP/EI contributions. To that effect, the defendants state that every independent contractor contract, read and understood by each Independent Contractor Teacher, specifically states that the teacher is not entitled to Canada Pension Plan or Employment Insurance Benefits.

51. In the alternative, if any Independent Contractor Teacher did in fact make those contributions, those contributions were made voluntarily by the teacher and the defendants are not liable for the return of those premiums.

Claims barred by Limitation Period

52. The defendants state that any claim in respect of any contract entered into, performed, or partially performed prior to October 16, 2015, are barred by operation of the *Limitations Act, 2002*, S.O. 2002, c. 24.

53. The defendants plead that this action should be dismissed, with costs.

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STIEBER BERLACH LLP
130 Adelaide Street West
18th Floor
Toronto Ontario
M5H 3P5

Elizabeth Bowker (47069K)
Thanasi Lampropoulos (70945H)
Tel.: (416) 594-4677
Fax: (416) 366-1466

Lawyers for the defendants

TO: CAVALLUZZO SHILTON McINTYRE
CORNISH LLP
474 Bathurst Street, Suite 300
Toronto, ON M5T 2S6

Stephen J. Moreau (48750Q)
Alex St. John (72406H)
Tel: (416) 964-1115
Fax: (416) 964-5895

Lawyers for the Plaintiff

KAREN WALMSLEY
Plaintiff

BLYTH ACADEMY
and
Defendant

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SUPERIOR COURT OF JUSTICE
Proceeding commenced at **TORONTO**

STATEMENT OF DEFENCE

STIEBER BERLACH LLP
130 Adelaide Street West
18th Floor
Toronto Ontario
M5H 3P5

Elizabeth Bowker (47069K)
Thanasi Lampropoulos (70945H)
Tel.: (416) 594-4677
Fax: (416) 366-1466

Lawyers for the defendants