Original Filed January 20, 2021

Form 1 (Rule 3-1(1))

No. S-210614
Vancouver Registry

In the Supreme Court of British Columbia

Between

Romuel Escobar

Plaintiff

and

Ocean Pacific Hotels Ltd.

Defendant

AMENDED NOTICE OF CIVIL CLAIM

Brought under the *Class Proceedings Act*, RSBC 1996, c 50

This action has been started by the plaintiff(s) 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 were served with the notice of civil claim anywhere in Canada, within 21 days after that service,

(b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, 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. This action arises from the termination, without cause or notice, of hundreds of employees of the Pan Pacific Hotel in downtown Vancouver during the COVID-19 pandemic.

2. The plaintiff, Romuel Escobar, worked at the Pan Pacific for almost a quarter of a century. He started with the hotel in 1996 as a houseman, was promoted to concierge in 2000, and was promoted again to senior concierge in 2008. He held that position until he was dismissed without cause and without notice on August 28, 2020. His last shift worked was on March 12, 2020. He resides in Burnaby, British Columbia.

3. The defendant, Ocean Pacific Hotels Ltd., owns and operates the Pan Pacific Hotel Vancouver (the "Hotel") where Mr. Escobar worked for most of his adult life. The

defendant is a British Columbia corporation with a registered office at 2300-550 Burrard Street, Box 30, Vancouver.

4. Before the COVID-19 pandemic, the defendant employed approximately 450 employees at and from the Hotel, comprising roughly 63 salaried employees, 254 hourly employees and 126 on-call employees. This claim deals with the termination of regular hourly employees, all of whom were employed pursuant to indefinite- term employment contracts.

5. The plaintiff seeks to represent a class of all current and former hourly employees of the Defendant, working at or from the Pan Pacific Hotel Vancouver, who ceased receiving regular shifts on or after February 20, 2020, whether or not they were issued formal notice of termination (the "Class"). For clarity, the Class does not include on-call nor casual employees.

Impact of COVID-19 and terminations

6. Beginning in March 2020, the defendant, like everyone across the sector, experienced a sharp decline in business. It took steps almost immediately to begin reducing its workforce.

7. The defendants' employment contracts with its salaried employees provided for temporary layoffs, and so on March 13 and 15, 2020 the defendant temporarily laid off many or most of its salaried employees.

8. The defendants' employment contracts with its hourly employees, including the Class members, did not have any provision allowing temporary layoffs so this mechanism was not available to the defendant. Instead of formally laying these employees off, the defendant reduced their hours or stopped providing them with work altogether.

9. By May 2020 the defendant had determined that the Hotel would operate at a reduced level for an indefinite period, and had put in place a plan to transition to a "Reduced Model" on an indefinite basis. The defendant anticipated that it would require 80 of its 450 employees under the Reduced Model. It would have no work available for the remaining 370 employees for the indefinite future.

10. Consistent with its transition to the Reduced Model, beginning in the spring of 2020 the Defendant began terminating employees in batches.

11. The defendant scheduled its terminations in manner that it hoped would minimize its liability for notice or severance pay. Section 64 of the *Employment Standards Act*, RSBC 1996 c 113 (the "*ESA*"), requires enhanced notice periods for group terminations. The threshold triggering that increased notice is 50 employees within any two-month period. Accordingly, the defendant terminated employees in groups of just less than 50, slightly more than two months apart.

12. The defendant acknowledged in each Class member's termination letter that the termination was "without cause". The defendant provided Class members no notice of termination. The defendant paid each Class member the minimum compensation in lieu of notice required by the *ESA* for individual terminations.

13. For example, when the defendant terminated the plaintiff's employment on August 28, 2020, after 24 years' service, in the middle of a global pandemic, it paid him 8 weeks' wages.

14. The defendant also scheduled its terminations such that employees who it expected would be the least costly to terminate were let go first, and employees who would be the most expensive to terminate were kept on longest. It created a detailed plan to stagger terminations in this manner, also taking into account its operational needs.

15. In early July 2020, the defendant offered some of its hourly employees a new contract in which they would convert from regular to casual status, with no entitlement to any guaranteed hours of work, in exchange for consideration of $250 (the "Casual Agreement"). Ninety-three hourly employees accepted the Casual Agreement.

16. Shortly after offering the Casual Agreement to employees, the defendant learned that a union-organizing campaign was under way. It became aware of communications between its employees and a union, UNITE HERE Local 40, that represents the employees of many of its competitors in large hotels in downtown Vancouver. Employees had shared letters offering the Casual Agreement with the union, and the union had posted a statement on its

website about the Casual Agreements. The defendant responded to these communications in two email messages sent to all employees in July 2020.

17. In light of this development, the defendant quickly abandoned the detailed plan it had created to schedule its termination according to its perceived liabilities and operational needs. Instead it terminated 42 people it believed to be union supporters on August 28, the same day that employees were voting whether to join the union. Some of these 42 employees had accepted the Casual Agreement and others had not.

The defendant's dishonest communications with Class members

18. The defendant did not advise employees of its plan to reduce staff indefinitely or to operate based on the "Reduced Model". Instead, throughout the spring and summer of 2020, the defendant repeatedly communicated to its employees that it hoped and intended to bring them back to work. The communications include:

    a. In May 2020, around the time it decided it would eliminate all but 80 of their jobs, the defendant sent all employees a letter informing them about available supports and encouraging them to "feel free to reach out" and "say hopeful".

    b. On July 31, 2020, with its plan to batch-terminate employees well underway, the defendant sent all employees "A Letter of Gratitude". This letter described the defendant as "grounded yet hopeful", "determined to pull through", and hopeful for "an upward surge in business which will create greater work opportunities." The letter encouraged employees to contact the human resources department if they needed any assistance. The letter thanked employees for their "loyalty, understanding and commitment that has allowed us all to carefully navigate ourselves successfully to this current stage." It concluded: "Our journey is one taken together. It may not be over soon but we will continue to be here for you."

19. Class members hung on to hope that they would get their jobs back, rather than understanding that they should move on and look for new work. Many employees at the Hotel (like the plaintiff) had served the defendant loyally for several years, even decades.

They reasonably hoped that even if there was an extended downturn, they could come back to the Hotel rather than having to start over again somewhere else.

Impact on Class members

20. Because the defendant did not tell the Class members that it had no intention of returning them to work – even after it decided in May 2020 that it would move indefinitely to the Reduced Model – Class members did not start the difficult process of looking for new work as early as they could have. The defendant told them that they would get through this difficult time together, and that it hoped to return them to work. It actively misled Class members about its intentions, leading them to delay their efforts to mitigate the impact of the defendant's breach on them.

21. The detrimental impact of the defendant's conduct on the Class was compounded by the impact of the COVID-19 pandemic on the labour market, and particularly the hotel sector.

22. The COVID-19 pandemic caused a significant economic downturn and corresponding job losses across the Province of British Columbia. These factors have resulted in high levels of unemployment and a highly competitive job market across the province.

23. While the pandemic has caused job losses in most industries, its impact on the hospitality sector has been particularly pronounced. In British Columbia, job losses in the hospitality sector reached an estimated 111,900, or 90 per cent of workers, at the height of the pandemic. In addition, many market analysts predict that the hospitality sector will be slow to recover, leading to long-term joblessness for workers in this sector.

24. The COVID-19 pandemic has created challenges for unemployed hospitality industry workers seeking replacement employment. Those who seek employment in the hospitality industry are faced with high, long-term unemployment numbers. Those who seek employment in other industries are faced with a highly competitive job market and competition from workers with more relevant and/or recent experience in those industries.

25. In short, the realities of the COVID-19 pandemic have created conditions where the search for replacement work Class members will take longer than usual.

26. Finally, the defendant's dishonest conduct has caused Class members distress. Class members received compassionate, earnest emails from the defendant's director of human resources, only to learn that in fact there was never a plan to "journey" together and the defendant had decided weeks or months earlier to terminate their employment. This is no way to treat loyal employees. It upset the Class members and undermined their self-worth and emotional well-being.

PART 2: RELIEF REQUESTED

27. The plaintiff seeks:

    a. an order certifying this action as a class proceeding pursuant to s. 4 of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 and appointing the plaintiff as the representative plaintiff for the Class defined herein;

    b. a declaration that the defendant owes the Class members damages for wrongful and/or constructive dismissal;

    c. a declaration that the defendant breached its duty of good faith and honest performance to the Class when it misled them about its intentions regarding their employment security;

    d. a declaration that damages owing to the Class members for wrongful and/or constructive dismissal, being payment in lieu of notice of termination, are increased due to:

        i. the impact of COVID-19 on the hotel sector job market, such that Class members are entitled to an extended notice period to find replacement employment; and

        ii. the defendant's breach of its duty of good faith and honest performance which prevented the Class members from taking prompt action to mitigate their losses.

    e. aggravated and punitive damages;

f. pre- and post-judgment interest pursuant to the *Court Order Interest Act*, RSC 1996 c 79;

g. costs; and

h. such further and other remedy as this Court may deem just.

PART 3: LEGAL BASIS

28. The defendant wrongfully dismissed the class members by terminating their employment without cause and without sufficient notice or pay in lieu thereof, either by directly issuing them notice of termination, or by constructively dismissing them when it stopped giving them shifts, or both.

29. The purpose of notice or pay in lieu thereof is, *inter alia,* to provide time for employees to find alternative employment. As a result of the defendant's conduct and the impact of the COVID-19 pandemic on employment prospects for the Class, Class members require more time to find alternative employment. In this respect, the plaintiff relies on the following:

    a. The COVID-19 pandemic has created well-documented job losses, increased competition, and lack of employment opportunities in the hospitality sector. Class members' ability to find alternative employment following their wrongful dismissal has been diminished by the economic impacts of the covid-19 pandemic.

    b. The defendant denied Class members working notice by waiting until the day on which their termination became effective to notify them of their termination. The defendant did so despite its prior knowledge of its intention to terminate their employment, and its knowledge that Class members' ability to secure replacement employment was severely diminished.

    c. The defendant further denied Class members working notice by intentionally giving them a false sense of security about their future employment with the defendant despite the fact that it had a plan in place that required it to terminate the employment of a significant number of its employees (the Reduced Model), and its

knowledge that Class members' ability to secure replacement employment was severely diminished.

d. Section 64 of the *ESA* represents legislative recognition that group terminations present a particular challenge to affected employees in seeking replacement employment. By strategically staggering class members terminations in an attempt to skirt the application of section 64, the defendant denied Class members who were effectively subject to group terminations the notice that they needed in order to secure alternative employment. Again, the defendant did so with the knowledge that Class members' ability to secure replacement employment was diminished.

30. The defendant breached its duty of good faith and honest performance by misleading Class members about their employment security when it had a plan in place to terminate their employment. The defendant further breached its duty of good faith by intentionally denying Class members notice of their impending terminations when it knew or ought to have known that their ability to secure replacement employment was diminished, and their need for notice was increased.

31. The defendant and the Class members were parties to indefinite-term contracts of mutual cooperation where the Class members were subservient to the defendant. The impact of the COVID-19 pandemic on the labour market in the hospitality industry rendered the class members particularly vulnerable to the pre-existing power imbalance inherent in any employer-employee relationship. The circumstances of the parties' relationship and surrounding circumstances enhance the duty owed to Class members by the defendant.

32. The defendant's breach of its duty of good faith and honest performance caused harm to Class members by denying them valuable notice which they could have used to search to replacement employment and/or pay in lieu of notice.

33. Aggravated and punitive damages are appropriate in this case as the defendant's conduct toward Class members was high-handed, reckless, callous, willful, reprehensible and entirely without care for Class members' precarious position in a sector hard-hit by COVID-19.

34. The defendant was unjustly enriched by not paying Class members group termination payments they were entitled to under section 64 of the *ESA*. Unjust enrichment occurs where there is an enrichment and a corresponding deprivation in the absence of a juristic reason. The defendant was enriched by saving the cost of these payments. The Class members suffered the corresponding deprivation of these payments. There was no juristic reason for the enrichment and the corresponding deprivation, as the defendant was statutorily required to make these payments.

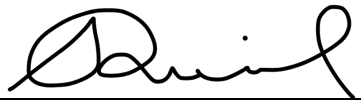
35. The defendant purported to avoid its group termination pay obligations by artificially staggering formal termination dates, so that employees were only expressly dismissed from employment in groups smaller than 50, more than two months apart. However, section 62 of the *ESA* provides that an employee is considered terminated for the purposes of section 64 when the employee earns less than 50% of their regular weekly wages as averaged over the previous 8 weeks. Thus, the defendant was liable to pay group termination pay based on when it stopped providing work to Class members, not based on when it sent them formal notice of termination of employment.

36. Thus there was no juristic reason for the defendant's enrichment, and the Class members' corresponding deprivation, of the amount of the *ESA* group termination pay that the defendant ought to have paid the Class members.

The plaintiff's address for service:	**ALLEVATO QUAIL & ROY** 1943 East Hastings Street Vancouver, BC V5L 1T5 Telephone: (604) 424-8631
Fax number for service:	(604) 424-8632
Email address for service:	saquail@aqrlaw.ca

Place of trial:	Vancouver, British Columbia
The address of the registry is:	800 Smithe Street, Vancouver BC, V6Z 2E1

Dated: ~~January 20, 2021~~ May 11, 2021



Signature of
[✓] lawyer for plaintiff
Susanna Allevato Quail

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:

A claim for damages for breach of contract and breach of the duty of honest performance in an employment context.

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

[ ] investment losses

[ ] the lending of money

[X] an employment relationship

[ ] a will or other issues concerning the probate of an estate

[ ] a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[X] a class action

[ ] maritime law

[ ] aboriginal law

[ ] constitutional law

[ ] conflict of laws

[ ] none of the above

[ ] do not know

Part 4:

Class Proceedings Act, RSBC 1996, c 50.