



NO. S-210614
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ROMUEL ESCOBAR

PLAINTIFF

AND:

OCEAN PACIFIC HOTELS LTD.

DEFENDANT

RESPONSE TO CIVIL CLAIM

Filed by: Ocean Pacific Hotels Ltd. (the "Defendant")

PART 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in paragraphs 3 and 22 of Part 1 of the Notice of Civil Claim are admitted.
2. The facts alleged in paragraphs 1, 2, 4-21 and 23-26 of Part 1 of the Notice of Civil Claim are denied.

Division 2 – Defendant's Version of Facts

3. The Defendant is a corporation incorporated pursuant to the laws of British Columbia and operates the Pan Pacific Hotel (the "**Pan Pacific**"), a hotel located in downtown Vancouver.
4. The Plaintiff's employment with the Defendant was governed by:
 - (a) the terms of a written employment agreement with the Defendant dated September 11, 2008 (the "**Employment Agreement**"); and
 - (b) the Defendant's employment and other policies.

5. The Employment Agreement between the Plaintiff and the Defendant dated September 11, 2008, contained the following provision:

“Termination Without Cause

The Associate’s employment may be terminated at any time without cause by the Employer giving the Associate the minimum amount of notice or compensation in lieu of notice, or a combination of compensation and notice, prescribed by the *Employment Standards Act of British Columbia* and the Associate agrees that such notice or compensation, or combination of notice and compensation, shall be full and adequate compensation notwithstanding any factor in the relationship between the Employer and the Associate including, without limitation, length of service, age, and the prospects for re-employment, and the Associate hereby waives any right that the Associate may now or hereafter have to claim further compensation from the Employer in an action for wrongful dismissal or otherwise.”

6. The Employment Agreement also contained a provision with respect to the Plaintiff’s position as the Senior Concierge that stated, *inter alia*:

“...Note: Assignment of hours will be subject to business demand, and may be increased or reduced due to seasonal fluctuations.”

The COVID-19 Pandemic

7. In late 2019, the disease now known as COVID-19 began to spread around the world.
8. On or about March 11, 2020, the World Health Organization designated COVID-19 as a “pandemic” (the “Pandemic”).
9. On or about March 17, 2020, British Columbia’s Provincial Health Officer (the “BC PHO”) declared a public health emergency under the *Public Health Act*, SBC 2008, c. 28. At and after this time, the BC PHO made a variety of orders including, *inter alia*, orders impacting the operation of hospitality and other businesses, including the business of the Pan Pacific (the “PHO Orders”).
10. On or around March 18, 2020, in response to the Pandemic, the Government of British Columbia declared a state of emergency (the “State of Emergency”) under the *Emergency*

Program Act, RSBC 1996, c. 111. The State of Emergency was declared without warning and, as of the time of filing, remains in force (the declaration has been subject to regular renewals).

11. Around the time and after the issuance of the State of Emergency and PHO Orders, the Government of British Columbia recognized the severity of the financial impact of the Pandemic, particularly on the tourism sector.
12. The impact on the business of the Pan Pacific was, and remains, unprecedented and unforeseeable. It was beyond the reasonable contemplation of the Plaintiff and the Defendant.
13. Since March 2020, the Pandemic has devastated the business of the Pan Pacific.
14. Given the unprecedented challenges to the operation of the Pan Pacific as a result of the unforeseen impact of COVID 19, the Defendant, regarding the Plaintiff as a valued employee and desiring to keep and maintain his employment in those difficult times, despite not having the pre-existing volume of work, proposed an agreement with the Plaintiff, described below.
15. In the first 10 days of July 2020, the Plaintiff was offered an agreement (the “Casual Agreement”), the essential terms of which involved a replacement of his existing terms and conditions of employment and an offer to become a casual employee whereby, *inter alia*, he would agree to perform duties reasonably assigned that were within his skills and capability; his hours of work and schedule would vary depending on the needs of the employer; there would be no obligation on the employer to provide shifts and no obligation on the Plaintiff to accept any shifts offered; the Plaintiff’s benefits would continue; his employment could be terminated by providing the minimum entitlement required (if any) by applicable employment standards legislation; as the business of the Pan Pacific resumed, the Plaintiff would be considered before any other applicants for any suitable full or part time positions.
16. At a meeting of employees of the Pan Pacific in early July 2020 to discuss the proposal for the Casual Agreement, the Plaintiff and other employees were advised, *inter alia*, that

although the Defendant wished to retain as many of its employees as it could to get through the Pandemic, the employees were encouraged to find other employment and doing so would not affect their status as employees of the Defendant.

17. The Plaintiff declined to enter into the Casual Agreement.
18. On August 28, 2020, in the circumstances described above, the Defendant provided the Plaintiff with notice in writing, pursuant to the Employment Agreement, that, due to the unforeseeable, devastating impact of the COVID-19 pandemic, the Plaintiff's employment was terminated without cause effective August 28, 2020 and the Plaintiff was paid 8 weeks of pay in lieu of notice of termination in accordance with the Employment Agreement.
19. Prior to the cessation of his employment, the Plaintiff held the position of Senior Concierge and was:
 - (a) receiving an hourly wage of \$24.40; and
 - (b) eligible to participate in certain group benefit plans offered by the Defendant.
20. The Defendant has provided the Plaintiff with:
 - (a) all wages earned up to and including the end of his employment;
 - (b) all earned and unused vacation pay; and
 - (c) benefits during his employment in accordance with the group benefit plans of which he was a beneficiary.
21. The Defendant denies that the Plaintiff was wrongfully dismissed.
22. In response to the claim of constructive dismissal, the Defendant says that the Plaintiff did not accept the alleged constructive dismissal. To the contrary, from March 2020 to August 28, 2020 the Plaintiff's conduct recognized the continuing employment relationship with the Defendant.
23. In the alternative, the Defendant says that if the Plaintiff has suffered loss or damage, which is denied, he failed to mitigate any such loss or damage.

The Alleged Breaches of the Duty of Good Faith and Honest Performance

24. In response to paragraphs 16-17 of the Notice of Civil Claim, the Defendant denies that the employment of the Plaintiff, or that of any employee, was terminated on August 28, 2020 because of his or her support for the Union.
25. In response to paragraphs 18, 19 and 31 of the Notice of Civil Claim, the Defendant denies that it misled the Plaintiff, or any employee, about his or her employment security.
26. In the circumstances existing at all relevant times, referred to in paragraphs 8-14 herein, there was no representation by the Defendant to any employee, including the Plaintiff, of continued employment or of their security of employment. The devastating impact of COVID 19 on the hotel industry in Vancouver and British Columbia, including the business of the Defendant's hotel, were well known to the Plaintiff and the Defendant's employees.
27. These circumstances are recognized in the Notice of Civil Claim and were reflected in communications to the Plaintiff and its employees by the Defendant.
28. Examples of such communications include, but are not limited to, advice to the employees on March 13, 2020 of the very difficult operational environment for the Pan Pacific Hotel in the coming months and that it was important for the employees "to understand that hard decisions will have to be made". In meetings with the employees between July 7-10, 2020, the employees were encouraged to seek other employment if it was available while maintaining their employment relationship with the Defendant.
29. Although the Defendant believed at all relevant times that the severe impact of COVID-19 on the operations of the Pan Pacific Hotel would continue for some considerable time, its intention, when the operations could return to normal, was to seek to re-employ the Plaintiff and other employees whose employment had been terminated as a consequence of the impact of COVID 19. This expectation was shared by the Plaintiff and the other employees of the Defendant.

30. In further response to paragraph 31 of the Notice of Civil Claim, the Defendant did not intentionally deny the Plaintiff or any other employee of notice of his or her impending termination thereby diminishing their ability to secure replacement employment.
31. In response to paragraphs 11, 29(d) and 32, the Defendant says that it complied with the *Employment Standards Act*, RSBC 1996, c. 113, and, in doing so, did not breach any duty to the Plaintiff or any of its employees.

The Plaintiff's Claim for an Order Certifying this Action as a Class Proceeding

32. The Defendant says that this action does not meet the requirements for certification as a class proceeding. In particular, as will be developed in response to an application for certification, the factual circumstances do not support a finding that a class proceeding is the preferable procedure for the resolution of any claims advanced by the proposed class nor any other class.

Division 3 – Additional Facts

33. N/A

PART 2: RESPONSE TO RELIEF SOUGHT

1. The Defendant submits that the Plaintiff's action be dismissed with costs.

PART 3: LEGAL BASIS

1. In answer to the whole of the Notice of Civil Claim, the Defendant denies that it breached the Plaintiff's contract of employment or wrongfully dismissed the Plaintiff. The Defendant did not engage in any conduct towards the Plaintiff or its other employees, in bad faith or dishonestly, that would entitle him or them to damages for breach of contract, nor punitive or aggravated damages.

Defendant's address for service:

Address for service:

Nathanson Schachter & Thompson LLP
Barristers & Solicitors
750-900 Howe Street
Vancouver BC V6Z 2M4

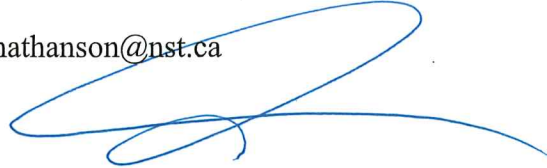
Attention: Irwin G. Nathanson, Q.C.

Fax number for service (if any):

n/a

Email address for service (if any):

inathanson@nst.ca



DATED: February 26, 2021

IRWIN G. NATHANSON, Q.C.
Counsel for the Defendant

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.