S=211969

Form 1 (Rule 3-1(1))

No. _____
Vancouver Registry

In the Supreme Court of British Columbia

Between

Maribeth Sabile

Plaintiff

and

Dexterra Group Inc. and 10647802 Canada Ltd dba Dexterra Integrated Facilities Management

Defendants

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 a group of employees of Dexterra Group Inc. and/or Dexterra Integrated Facilities Management (collectively "Dexterra") working at the Vancouver International Airport ("Airport") during the COVID-19 pandemic.

2. The Plaintiff, Maribeth Sabile, resides in Vancouver, British Columbia.

3. The defendant Dexterra Group Inc. is an Alberta corporation with a registered office at 900, 240 – 4th Avenue SW, Calgary.

4. The defendant Dexterra Integrated Facilities Management, registered address 2500-700 Georgia St W, Vancouver, is a sole proprietorship of the proprietor 10647802 Canada Limited, with a registered address at 95 Wellington Street West, Suite 800, Toronto.

5. Some of Dexterra's communications with its employees come from one of these defendants and some come from the other. The exact business relationship between these entities is unknown to the plaintiff.

6. Dexterra is contracted by the Airport to provide cleaning and other services. In recent years, the company providing services pursuant to this contract has changed names several times as the result of corporate purchases and re-branding. The company now called Dexterra, which employed the plaintiff and her co-workers, has previously done business as Marquies, Compass Canada, Carillon Canada, and Outland Canada/Fairfax.

7. Ms. Sabile, worked as a cleaner for Dexterra or its predecessors from 2011 until her employment was terminated in 2020. She primarily worked in the Airport's housekeeping department on the night shift.

8. In March 2020, Dexterra told Ms. Sabile and most of her coworkers that they would be temporarily laid off due to the lack of work resulting from the COVID-19 pandemic.

9. The *Employment Standards Act*, RSBC 1996 c. 113 ("*ESA*") sets a statutory maximum length for temporary layoffs. In March 2020, the statutory maximum length for a temporary layoff was 13 weeks. In June 2020, the government of British Columbia extended the temporary layoff period to a maximum of 24 weeks, expiring on August 30, 2020.

10. The *ESA* permits employers and employees to jointly apply for authorization to extend the temporary layoff period ("Variance Application"). The deadline to apply to extend a temporary layoff period beyond August 30, 2020 was August 25, 2020.

11. In August 2020, Dexterra notified Ms. Sabile and many of her coworkers that it intended to make a Variance Application. It sought their agreement to do so. It told Ms. Sabile and her coworkers that it anticipated that business might increase in the near term. Ms. Sabile and others agreed to the Variance Application.

12. The Director of Employment Standards approved Dexterra's Variance Application and extended the temporary layoff period to 38 weeks, ending November 30, 2020.

13. On or around October 5, 2020, Dexterra terminated Ms. Sabile's and many of her coworkers' employment. Dexterra sent letters to employees stating that their employment was terminated effective October 5, 2020 without cause, and that they would receive no notice or compensation.

14. In these letters, which were substantively identical, Dexterra asserted that it was free to terminate its employees without compensation because of section 65(1)(d) of the *Employment Standards Act*. That section excuses employers from liability resulting from length of service (i.e. notice or pay in lieu thereof) where the employee's employment contract is "impossible to perform" due to an unforeseeable event or circumstance.

15. Ms. Sabile does not know exactly how many employees were dismissed but does know that it was more than 50, because Dexterra's letters referenced the group termination provisions of the *ESA*, which are triggered where 50 or more employees are terminated within a 2-month period.

16. Ms. Sabile was distraught that she was denied even basic compensation after being a loyal employee for nine years and waiting for her recall for so many months. She sought assistance from the Migrant Workers Centre, a non-profit legal clinic in Vancouver. On December 23, 2020, a staff lawyer at the Migrant Workers Centre sent a demand letter to Dexterra on behalf of Ms. Sabile.

17. On January 4, 2021 Paige Fenske replied to this letter on behalf of Dexterra. Ms. Fenske stated that "Dexterra, along with many others are in an impossible situation due to the unforeseeable event of COVID-19, and had no way to anticipate this change in circumstance that affected Maribeth's employment" and then confirmed no compensation would be paid to Ms. Sabile.

18. The plaintiff seeks to represent a class of all employees of the defendant, working at or from the Vancouver International Airport, who ceased receiving regular shifts during or

after March 2020 and whose employment was subsequently terminated without cause (the "Class").

PART 2: RELIEF REQUESTED

19. The plaintiff seeks:

    a. an order certifying this action as a class proceeding pursuant to section 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 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 job market, such that Class members are entitled to an extended notice period to find replacement employment; and

        ii. the defendant's conduct in misleading the Class members about their employment status and security, which prevented the Class members from taking prompt action to mitigate their losses; and

        iii. the circumstances of a group termination, which increases the difficulty for Class members of obtaining replacement employment;

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

    e. a declaration that the defendant owes the Class members damages for its breach of the duty of good faith and honest performance in the amount of the loss each Class member incurred as a result of this breach;

f. a declaration that the defendant was unjustly enriched by refusing to pay statutory minimum severance entitlements without juristic reason;

g. an order that the defendant disgorge to the Class members the moneys by which it was unjustly enriched;

h. punitive damages;

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

j. costs; and

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

PART 3: LEGAL BASIS

Liability for constructive and/or wrongful dismissal

20. The defendant wrongfully dismissed the class members by terminating their employment without cause and without sufficient notice or pay in lieu thereof.

21. While the defendant purported to terminate class members' employment in October 2020, in fact it had already constructively dismissed them in or after March 2020 when it ceased providing them shifts.

22. The defendant purported to place the Class members on temporary layoff, and relied on the *ESA* to do so. However, there is no common-law right of an employer to temporarily lay off an employee, and the *ESA* does not create a statutory right to do so. The *ESA* establishes a statutory limit on any temporary layoff that is created in an employment contract.

23. The Class members either did not have written contracts of employment at all, or had written employment contracts that did not contain any provision permitting temporary layoff. No Class member had an employment contract that permitted a temporary layoff.

24. In the absence of such a provision, ceasing to provide work to an employee is a breach of a fundamental term of a contract of employment, and thus a constructive dismissal.

25. An employee can consent to an amendment of a fundamental term of a contract of employment, but no Class member gave such consent in this case. The defendant never sought the agreement of Class members to impose temporary layoffs, instead misrepresenting to them that it already had authority to do so. Additionally, the defendant proposed temporary layoffs on the basis of the additional misrepresentation that it expected to return the Class members to active employment by the end of the temporary layoff period. It did not return any of the Class members to active employment, but terminated all of them.

26. The *ESA* only permits temporary layoffs (where the right to temporarily layoff is created contractually) where they are truly intended to be temporary. They are not available as a mechanism for an employer who knows it will terminate employees' employment to simply delay paying its severance obligations.

27. In purporting to place Class members on temporary layoff, Dexterra communicated to the Class members that it had an intention to return them to active employment by the end of the temporary layoff period. To the extent that Class members could be considered to have consented to the amendment to a fundamental term of their employment contract (i.e., to permit temporary layoff), they consented on the basis of Dexterra's misrepresentations that (a) it was already entitled to impose statutory layoffs and thus did not need their consent and (b) it planned to return them to active employment in the foreseeable future.

28. Thus, none of the Class members, neither expressly nor impliedly, consented to the defendant's failure to provide them with shifts. The exchange of work for pay is the fundamental term of any employment contract. By breaching this fundamental term, the defendant constructively dismissed the Class members.

29. An employee's entitlement to damages for wrongful dismissal is the same whether the employee was expressly or constructively dismissed. Even if Dexterra did not

constructively dismiss all of the Class members in March 2020, it expressly dismissed them in or around October 2020 and their entitlement to damages was engaged at that point.

Damages – pay in lieu of notice

30. 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.

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

32. The defendant denied Class members working notice by misleading Class members about their employment status and the possibility of returning to work by intentionally giving them a false sense of security about their future employment with the defendant. Their notice periods should extend beyond the period during which they were misled to believe that they would be recalled, i.e. the purported temporary layoff periods, to the period after which they were finally told that they had no genuine prospect of recall and should look elsewhere for work.

33. Importantly, the Class members were terminated *en masse*. Section 64 of the *ESA*, which provides enhanced notice or compensation when groups of 50 or more employees are terminated, represents legislative recognition that group terminations present a particular challenge to affected employees in seeking replacement employment. Where a large group of workers in the same geographic location and sector lose their jobs at the same time, they become each other's competitors in securing new, comparable employment, making the search for alternative employment all the more difficult.

34. In light of these factors – the impact of the COVID-19 pandemic, the defendant's misleading communications, and the circumstances of a group termination – the Class members' common law notice periods should be increased.

Breach of the duty of good faith and honest performance

35. The defendant breached its duty of good faith and honest performance by misleading Class members about their employment security and prospects for return to active employment.

36. Instead of communicating honestly about the reality that it did not have work for the Class members, the defendant repeatedly told them they were only temporarily laid off. Inherent in a temporary layoff is an intention to return the employee to active employment within the maximum period: by purporting to place Class members on temporary layoff, the defendant communicated an intention to return them to work within a definite period – at first within 13 weeks, and then by the extended end-date of August 30, 2020, and then by the date granted in the Variance Application of November 30, 2020.

37. The defendant had no genuine intention to return the Class members to active employment. It used the ruse of temporary layoffs to delay paying severance entitlements – and then terminated the Class members without notice or compensation anyway.

38. 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 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.

39. The defendant's breach of its duty of good faith and honest performance caused harm to Class members by inducing them to continue to wait for recall to active employment with the defendant, rather than commencing their search for alternative employment promptly.

Unjust enrichment

40. The defendant was unjustly enriched by not paying Class members severance entitlements due under the *ESA*. Unjust enrichment occurs where there is an enrichment and 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 corresponding deprivation, as the defendant was statutorily required to make these payments.

41. The defendant purported to rely on section 65(1)(d) of the *ESA* to relieve it of its obligation to pay statutory minimum severance entitlements. Section 65(1)(d) only applies where work is impossible to perform due to an unforeseeable event. It does not apply where work is unavailable due to a shortage of work or a significant reduction of service. For example, it might apply where a business is shut down entirely due to a public health order: it is impossible to perform work that has been prohibited by public health order. It does not apply where a business sees a reduction in demand due to the COVID-19 pandemic: the work is not impossible to perform; it is simply less profitable to continue to pay employees to perform it.

42. The work performed by Class members was not "impossible to perform" at the time of their termination, and as such the Defendant has no juristic reason for enriching itself by refusing to pay the Class members their statutory entitlements.

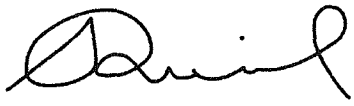
Punitive damages

43. 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.

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: March 2, 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.

Original filed on March 2, 2021

Form 1 (Rule 3-1(1))

No. S-211969
Vancouver Registry

In the Supreme Court of British Columbia

Between

Maribeth Sabile and Ofelia Teano

Plaintiffs

And

Dexterra Group Inc. and 10647802 Canada Ltd dba Dexterra Integrated Facilities Management

Defendants

AMENDED NOTICE OF CIVIL CLAIM

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Time for response to civil claim

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CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. This action arises from the termination, without cause or notice, of a group of employees of Dexterra Group Inc. and/or Dexterra Integrated Facilities Management (collectively "Dexterra") working at the Vancouver International Airport ("Airport") during the COVID-19 pandemic.

2. The Plaintiffs, Maribeth Sabile and Ofelia Teano, resides in Vancouver, British Columbia.

3. The defendant Dexterra Group Inc. is an Alberta corporation with a registered office at 900, 240 – 4th Avenue SW, Calgary.

4. The defendant Dexterra Integrated Facilities Management, registered address 2500-700 Georgia St W, Vancouver, is a sole proprietorship of the proprietor 10647802 Canada Limited, with a registered address at 95 Wellington Street West, Suite 800, Toronto.

5. Some of Dexterra's communications with its employees come from one of these defendants and some come from the other. The exact business relationship between these entities is unknown to the plaintiffs.

6. Dexterra is contracted by the Airport to provide cleaning and other services. In recent years, the company providing services pursuant to this contract has changed names several times as the result of corporate purchases and re-branding. The company now called Dexterra, which employed the plaintiffs and their ~~plaintiff and her~~ co-workers, has previously done business as Marquies, Compass Canada, Carillon Canada, and Outland Canada/Fairfax.

7. Ms. Sabile worked as a cleaner for Dexterra or its predecessors from 2011 until her employment was terminated in 2020. She primarily worked in the Airport's housekeeping department on the night shift. Ms. Teano worked a customer service agent for Dexterra or its predecessors from 2005 until her employment was terminated in 2020.

8. In March 2020, Dexterra told ~~Ms. Sabile and most of her coworkers~~ its employees working at the Airport that they would be temporarily laid off due to the lack of work resulting from the COVID-19 pandemic. Dexterra dealt with these employees in two different ways, described below.

Subclass 1: ESA variance application and termination of employment

9. For one group of employees at the Airport, Dexterra purported to place them on temporary layoff with no fixed end-date, applied to the Employment Standards Branch to extend the temporary layoff period beyond the statutory maximum, and then terminated their employment before the end of that extended period without cause, notice, or

compensation. The *Employment Standards Act*, RSBC 1996 c. 113 ("*ESA*") sets a statutory maximum length for temporary layoffs. In March 2020, the statutory maximum length for a temporary layoff was 13 weeks. In June 2020, the government of British Columbia extended the temporary layoff period to a maximum of 24 weeks, expiring on August 30, 2020.

~~10.~~ 11. The *ESA* permits employers and employees to jointly apply for authorization to extend the temporary layoff period ("Variance Application"). The deadline to apply to extend a temporary layoff period beyond August 30, 2020 was August 25, 2020.

~~11.~~ 12. In August 2020, Dexterra notified Ms. Sabile and many of her coworkers that it intended to make a Variance Application. It sought their agreement to do so. It told Ms. Sabile and her coworkers that it anticipated that business might increase in the near term. Ms. Sabile and others agreed to the Variance Application.

~~12.~~ 13. The Director of Employment Standards approved Dexterra's Variance Application and extended the temporary layoff period to 38 weeks, ending November 30, 2020.

~~13.~~ 14. On or around October 5, 2020, Dexterra terminated Ms. Sabile's and many of her coworkers' employment. Dexterra sent letters to employees stating that their employment was terminated effective October 5, 2020 without cause, and that they would receive no notice or compensation.

~~14.~~ 15. In these letters, which were substantively identical, Dexterra asserted that it was free to terminate its employees without compensation because of section 65(1)(d) of the *Employment Standards Act*. That section excuses employers from liability resulting from length of service (i.e. notice or pay in lieu thereof) where the employee's employment contract is "impossible to perform" due to an unforeseeable event or circumstance.

~~15.~~ 16. Ms. Sabile does not know exactly how many employees were dismissed but does know that it was more than 50, because Dexterra's letters referenced the group termination provisions of the *ESA*, which are triggered where 50 or more employees are terminated within a 2-month period.

~~16.~~ 17. Ms. Sabile was distraught that she was denied even basic compensation after being a loyal employee for nine years and waiting for her recall for so many months. She sought assistance from the Migrant Workers Centre, a non-profit legal clinic in Vancouver. On December 23, 2020, a staff lawyer at the Migrant Workers Centre sent a demand letter to Dexterra on behalf of Ms. Sabile.

~~17.~~ 18. On January 4, 2021 Paige Fenske replied to this letter on behalf of Dexterra. Ms. Fenske stated that "Dexterra, along with many others are in an impossible situation due to the unforeseeable event of COVID-19, and had no way to anticipate this change in circumstance that affected Maribeth's employment" and then confirmed no compensation would be paid to Ms. Sabile.

Subclass 2: purported return to work date and subsequent termination of employment

19. For a second group of employees, Dexterra purported to impose a definite-term temporary layoff with an anticipated date for return to work, but then terminated the employees' employment without cause, notice, or compensation rather than returning them to work.

20. Dexterra told this second group of employees that they were placed on temporary layoff in March 2020, with anticipated return date of June 22, 2020. However, rather than returning these employees to work on June 22, 2020, Dexterra sent them letters telling them that their employment was terminated effective June 18, 2020.

21. These letters were substantively identical and stated that the terminated employees would receive no compensation for length of service nor group termination pay, relying again on section 65(1)(d) of the *ESA*.

22. Ms. Teano was distraught when she received this letter. Ms. Teano had been preparing to return to work on or around the previously communicated anticipated return date.

23. Ms. Teano does not know exactly how many employees were dismissed but, like Ms. Sabile, she does know that it was more than 50 because of Dexterra's reference to group termination under the *ESA*.

The Class and Subclasses

~~18.~~ 24. The plaintiffs seek~~s~~ to represent a class of all employees of the defendant, working at or from the Vancouver International Airport, who ceased receiving regular shifts during or after March 2020 and whose employment was subsequently terminated without cause (the "Class").

25. Ms. Sabile seeks to represent a subclass of Class members on whose behalf the defendant sought and received approval of the Employment Standards Branch to extend a temporary layoff period ("Subclass 1").

26. Ms. Teano seeks to represent a subclass of Class members who were advised of an anticipated recall date but were not recalled to work ("Subclass 2").

PART 2: RELIEF REQUESTED

~~19.~~ 27. The plaintiffs seek ~~plaintiff seeks~~:

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

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

c. 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 job market, such that Class members are entitled to an extended notice period to find replacement employment; and

ii. the defendant's conduct in misleading the Class members about their employment status and security, which prevented the Class members from taking prompt action to mitigate their losses; and

~~iii.~~ the circumstances of a group termination, which increases the difficulty for Class members of obtaining replacement employment;

d. a declaration that the defendant breached its <u>contractual</u> duty of good faith and honest performance to the Class when it misled them about their employment status and security;

e. a declaration that the defendant owes the Class members damages for its breach of the duty of good faith and honest performance in the amount of the loss each Class member incurred as a result of this breach;

f. a declaration that the defendant was unjustly enriched by refusing to pay statutory minimum severance entitlements without juristic reason;

g. an order that the defendant disgorge to the Class members the moneys by which it was unjustly enriched;

h. punitive damages;

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

j. costs; and

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

PART 3: LEGAL BASIS

Liability for constructive and/or wrongful dismissal

~~20.~~ <u>28.</u> The defendant wrongfully dismissed the Class members by terminating their employment without cause and without sufficient notice or pay in lieu thereof.

~~21.~~ 29. While the defendant purported to terminate ~~Class members'~~ Subclass 1 members' employment in October 2020, in fact it had already constructively dismissed them in or after March 2020 when it ceased providing them shifts.

30. While the defendant purported to terminate Subclass 2 members' employment in June 2020, in fact it had already constructively dismissed them in or after March 2020 when it ceased providing them shifts.

~~22.~~ 31. The defendant purported to place the Class members on temporary layoff, and relied on the *ESA* to do so. However, there is no common-law right of an employer to temporarily lay off an employee, and the *ESA* does not create a statutory right to do so. The *ESA* establishes a statutory limit on any temporary layoff that is created in an employment contract.

~~23.~~ 32. The Class members either did not have written contracts of employment at all, or had written employment contracts that did not contain any provision permitting temporary layoff. No Class member had an employment contract that permitted a temporary layoff.

~~24.~~ 33. In the absence of such a provision, ceasing to provide work to an employee is a breach of a fundamental term of a contract of employment, and thus a constructive dismissal.

~~25.~~ 34. An employee can consent to an amendment of a fundamental term of a contract of employment, but no Class member gave such consent in this case. The defendant never sought the agreement of Class members to impose temporary layoffs, instead misrepresenting to them that it already had authority to do so.

35. Additionally, the defendant proposed temporary layoffs of Subclass 1 members on the basis of the additional misrepresentation that it expected to return the Class members to active employment by the end of the temporary layoff period. It did not return any of the Class members to active employment, but terminated all of them.

36. Similarly, the defendant proposed temporary layoffs of Subclass 2 members on the basis of the additional misrepresentation that it expected to return the Subclass members to

active employment in June 2020. It did not return any of the Subclass 2 members to active employment, but terminated all of them.

~~26.~~ 37. The *ESA* only permits temporary layoffs (where the right to temporarily layoff is created contractually) where they are truly intended to be temporary. They are not available as a mechanism for an employer who knows it will terminate employees' employment to simply delay paying its severance obligations.

~~27.~~ 38. In purporting to place ~~Class~~ Subclass 1 members on temporary layoff, Dexterra communicated to the Class members that it had an intention to return them to active employment by the end of the temporary layoff period.

39. In purporting to place Subclass 2 members on temporary layoff and by providing a specific anticipated recall date, Dexterra communicated to the Subclass 2 members that it had an intention to return them to active employment by the stated anticipated recall date.

40. To the extent that Class members could be considered to have consented to the amendment to a fundamental term of their employment contract (i.e., to permit temporary layoff), they consented on the basis of Dexterra's misrepresentations that (a) it was already entitled to impose statutory layoffs and thus did not need their consent and (b) it planned to return them to active employment in the foreseeable future.

~~28.~~ 41. Thus, none of the Class members, neither expressly nor impliedly, consented to the defendant's failure to provide them with shifts. The exchange of work for pay is the fundamental term of any employment contract. By breaching this fundamental term, the defendant constructively dismissed the Class members.

~~29.~~ 42. An employee's entitlement to damages for wrongful dismissal is the same whether the employee was expressly or constructively dismissed. Even if Dexterra did not constructively dismiss all of the Class members in March 2020, it expressly dismissed ~~them~~ Subclass 1 members in or around October 2020 and Subclass 2 members in or around June 2020 and their entitlement to damages was engaged at that point.

Damages – pay in lieu of notice

~~30.~~ 43. 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.

~~31.~~ 44. The COVID-19 pandemic has created well-documented job losses, increased competition, and lack of employment opportunities. Class members' ability to find alternative employment following their wrongful dismissal has been diminished by the economic impacts of the COVID-19 pandemic.

~~32.~~ 45. The defendant denied Class members working notice by misleading Class members about their employment status and the possibility of returning to work by intentionally giving them a false sense of security about their future employment with the defendant. Their notice periods should extend beyond the period during which they were misled to believe that they would be recalled, i.e. the purported temporary layoff periods for Subclass 1 members and the stated anticipated return date for Subclass 2 members, to the period after which they were finally told that they had no genuine prospect of recall and should look elsewhere for work.

~~33.~~ 46. Importantly, the Class members were terminated *en masse*. Section 64 of the *ESA*, which provides enhanced notice or compensation when groups of 50 or more employees are terminated, represents legislative recognition that group terminations present a particular challenge to affected employees in seeking replacement employment. Where a large group of workers in the same geographic location and sector lose their jobs at the same time, they become each other's competitors in securing new, comparable employment, making the search for alternative employment all the more difficult.

~~34.~~ 47. In light of these factors – the impact of the COVID-19 pandemic, the defendant's misleading communications, and the circumstances of a group termination – the Class members' common law notice periods should be increased.

Breach of the duty of good faith and honest performance

~~35.~~ 48. The defendant breached its contractual duty of good faith and honest performance by misleading Class members about their employment security and prospects for return to active employment.

~~36.~~ 49. Instead of communicating honestly about the reality that it did not have work for the Class members, the defendant repeatedly told them they were only temporarily laid off. Inherent in a temporary layoff is an intention to return the employee to active employment within the maximum period: by purporting to place Class members on temporary layoff, the defendant communicated an intention to return them to work within a definite period. For Subclass 1, this intention was at first within 13 weeks, and then by the extended end-date of August 30, 2020, and then by the date granted in the Variance Application of November 30, 2020. For Subclass 2, this was the anticipated recall date in June 2020.

~~37.~~ 50. The defendant had no genuine intention to return the Class members to active employment. It used the ruse of temporary layoffs to delay paying severance entitlements – and then terminated the Class members without notice or compensation anyway.

~~38.~~ 51. 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 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.

~~39.~~ 52. The defendant's breach of its contractual duty of good faith and honest performance caused harm to Class members by inducing them to continue to wait for recall to active employment with the defendant, rather than commencing their search for alternative employment promptly.

Unjust enrichment

~~40.~~ 53. The defendant was unjustly enriched by not paying Class members severance entitlements due under the *ESA*. Unjust enrichment occurs where there is an enrichment and 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 corresponding deprivation, as the defendant was statutorily required to make these payments.

~~41.~~ 54. The defendant purported to rely on section 65(1)(d) of the *ESA* to relieve it of its obligation to pay statutory minimum severance entitlements. Section 65(1)(d) only applies where work is impossible to perform due to an unforeseeable event. It does not apply where work is unavailable due to a shortage of work or a significant reduction of service. For example, it might apply where a business is shut down entirely due to a public health order: it is impossible to perform work that has been prohibited by public health order. It does not apply where a business sees a reduction in demand due to the COVID-19 pandemic: the work is not impossible to perform; it is simply less profitable to continue to pay employees to perform it.

~~42.~~ 55. The work performed by Class members was not "impossible to perform" at the time of their termination, and as such the Defendant has no juristic reason for enriching itself by refusing to pay the Class members their statutory entitlements.

Punitive damages

~~43.~~ 56. 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.

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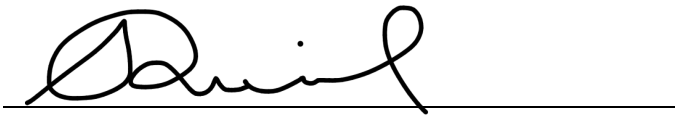
Place of trial:	Vancouver, British Columbia
The address of the registry is:	800 Smithe Street, Vancouver BC, V6Z 2E1

Dated: June 10, 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.