

THE QUEEN'S BENCH

WINNIPEG Centre

BETWEEN:

CHARLEEN POKORNIK

Plaintiff

- and -

SKIPTHEDISHES RESTAURANT SERVICES INC.

Defendant

Proceeding under *The Class Proceedings Act*, CCSM c C130

AMENDED STATEMENT OF CLAIM

MAY 27 2019

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TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Queen's Bench Rules*, serve it on the plaintiff's lawyer or where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$750.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$750.00 for costs and have the costs assessed by the court.

DATE: "July 25, 2018"

Issued by: "C. Dyson"
Deputy Registrar
Court of Queen's Bench
Main Floor - 408 York Avenue
Winnipeg, Manitoba R3C 3L6

TO: SKIPTHEDISHES RESTAURANT SERVICES INC.
136 Market Avenue
Winnipeg, Manitoba R3B 0P4

Amended this 27th day of May
20 19 on requisition dated the 27th
day of May 2019
J. LONSDALE
DEPUTY REGISTRAR
COURT OF QUEEN'S BENCH

CLAIM

1. The plaintiff claims:

- a. An order certifying this proceeding as a class proceeding and appointing the plaintiff as representative plaintiff for each and all of the members of the class (defined below) (the "Class");
- b. Damages in an amount to be determined at trial;
- c. A declaration the provisions of:
 - i. Manitoba's *The Employment Standards Code*, C.C.S.M. c. E110
 - ii. Saskatchewan's *The Saskatchewan Employment Act*, S.S. 2013, S-15.1
 - iii. Alberta's *Employment Standards Code*, R.S.A. 2000 c. E-9
 - iv. British Columbia's *Employment Standards Act*, R.S.B.C. 1996, c. 113
 - v. Ontario's *Employment Standards Act*, 2000 S.O. 2000 c. 41
 - vi. Nova Scotia's *Labour Standards Code*, R.S.N.S. 1989, c. 246
 - vii. Prince Edward Island's *Employment Standards Act*, R.S.P.E.I. 1988, E06-2
 - viii. Newfoundland and Labrador's *Labour Standards Act*, 2018 R.S.N.L. 1990, c. L-2
 - ix. New Brunswick *Employment Standards Act*, SNB 1982, cE-7.2.
(the "Applicable Employment Standards Legislation")are express or implied terms of the contracts of employment of the Class;
- d. A declaration the Class are employees of the defendant for the purposes of the Applicable Employment Standards Legislation;
- e. A declaration the defendant has breached, and continues to breach, the terms of the Applicable Employment Standards Legislation, the contracts of employment and its duty of good faith and/or duty of care owed to the Class by:
 - i. Failing to properly classify Class members as its employees;
 - ii. Failing to ensure the hours of work of Class members were monitored, accurately recorded and appropriately remunerated as employees;
 - iii. Failing to advise Class members of their entitlement to compensation equal to or above the minimum wage as stipulated by the Applicable Employment Standards Legislation ("Minimum Wage");
 - iv. Failing to compensate Class members at a rate equal to or above the Minimum Wage;

- v. Failing to advise Class members of their entitlement to overtime pay in accordance with the Applicable Employment Standards Legislation;
- vi. Requiring and/or permitting Class members to work overtime hours but failing to compensate them as required for hours worked in excess of the overtime threshold ("Overtime Pay");
- vii. Failing to advise Class members of their entitlement to vacation pay in accordance with the Applicable Employment Standards Legislation ("Vacation Pay");
- viii. Failing to compensate Class members for Vacation Pay;
- ix. Failing to advise Class members of their entitlement to holiday pay and premium pay in accordance with the Applicable Employment Standards Legislation ("Holiday Pay and Premium Pay");
- x. Failing to compensate Class members for Holiday Pay and Premium Pay; and,
- xi. Failing to provide and/or compensate the Class for any and all other entitlements provided under the Applicable Employment Standards Legislation ("Other Entitlements").

(Minimum Wage, Overtime Pay, Vacation Pay, Holiday Pay and Premium Pay, and Other Entitlements cumulatively referred to hereinafter as "the Employment Standards Entitlements")

- f. An interlocutory and a final mandatory order for specific performance directing the defendant to comply with the Applicable Employment Standards Legislation and/or contracts of employment of the Class to:
 - i. Ensure Class members are properly classified as employees for all purposes under the Applicable Employment Standards Legislation;
 - ii. Advise Class members of the Employment Standards Entitlements;
 - iii. Ensure Class' members hours of work are monitored, accurately recorded and appropriately remunerated as employees; and,
 - iv. Ensure Class members are appropriately compensated for the Employment Standards Entitlements.
- g. A declaration the provisions of the "Consultant (Courier) Agreement," or any other agreement purporting to exclude the Class from eligibility for the Employment Standards Entitlements, are void and unenforceable;
- h. A declaration the defendant is liable for any consequential damages resulting from a determination the Class are employees of the defendant and not independent contractors;
- i. A declaration the defendant is liable for any adverse tax liability sustained by the Class resulting from a determination its members are employees of the defendant and not independent contractors;
- j. A declaration the defendant is liable for and must reimburse has been and

continues to be unjustly enriched to the deprivation of the Class for any Canada Pension Plan or Employment Insurance contributions and/or benefits which should have been paid on behalf of, or are owed to, the Class resulting from a determination the Class are employees of the defendant and not independent contractors;

- k. A declaration the defendant has been and continues to be unjustly enriched to the deprivation of the Class in that they receive the value of compensating the Class at rates and in amounts below the Employment Standards Entitlements, and an order requiring the defendant to pay the Class all amounts withheld and/or owing by them in respect of such entitlements;
- l. An order pursuant to section 29 of *The Class Proceedings Act*, C.C.S.M. c. C130 directing an aggregate assessment of damages;
- m. An order pursuant to section 30 of *The Class Proceedings Act*, C.C.S.M. c. C130 admitting into evidence statistical information;
- n. An order directing the defendant to preserve and disclose to the plaintiff all records, in any form, relating to the identification of the Class and the hours of work performed by Class members;
- o. Pre-judgment and post-judgment interest;
- p. Punitive, aggravated and exemplary damages in an amount to be determined at trial and which this Honourable Court may deem just;
- q. Costs of this action on a substantial indemnity basis as well as the costs of administering the plan of distribution of the recovery in this action; and,
- r. Such further and other relief as this Honourable Court may deem just.

I. THE PARTIES

- 2. The plaintiff is an individual who resides in Winnipeg, Manitoba. She was hired by the defendant as a driver/delivery person (the "Position") in or around November 2016 to provide delivery and driving services to the defendant's customers in Winnipeg and has done so continuously since that time. At the time of hiring she was required by the defendant to enter into a "Consultant (Courier) Agreement" (the "Agreement").
- 3. The defendant is a corporation incorporated pursuant to the laws of Canada with its registered office located at 800-515 Legget Drive, Kanata, Ontario K2K 3G4. The defendant is also registered to conduct business in the provinces of Manitoba, Saskatchewan, British Columbia and Nova Scotia. The defendant currently conducts business in the provinces of Manitoba, Saskatchewan, British Columbia, Nova Scotia, Alberta, Ontario, Newfoundland and Labrador, New Brunswick and Prince Edward Island (the "Canadian Jurisdictions").

4. The defendant develops, markets, and operates the Skip The Dishes internet application which allows its customers to submit food delivery requests with the use of a smartphone (the "App"). Once a request is made by a customer, the defendant sends a message to one of the Class to pick up the customer's food at a restaurant and deliver it to the customer for a fee determined by the defendant (the "Services").

II. THE CLASS

5. The plaintiff brings this action pursuant to *The Class Proceedings Act*, C.C.S.M. c. C130 on her own behalf and on behalf of the following class of persons:

"Any person who has entered into a 'Consultant (Courier) Agreement', or other similar agreement, with SkiptheDishes Restaurant Services Inc. in the provinces of Manitoba, Saskatchewan, Alberta, British Columbia, Ontario, Nova Scotia, Newfoundland and Labrador and Prince Edward Island Canadian Jurisdictions to provide delivery and/or driving services."

III. JURISDICTION

6. Manitoba is the appropriate jurisdiction in which to hear this claim because:
 - a. The plaintiff and the Class were required by the defendant to enter into the Agreement, or other similar document, in order to provide the Services. The Agreement specifically states the parties "irrevocably attorn to the jurisdiction of the courts in the Province of Manitoba"; and
 - b. The applicable law and facts are the same or substantially similar for the Class throughout the Canadian Jurisdictions.

IV. EMPLOYMENT RELATIONSHIP

7. The plaintiff relied on the defendant in good faith and was unaware until approximately one (1) month prior to the filing of this Claim that she was an employee and entitled to the Employment Standards Entitlements. The plaintiff relied on the defendant to properly classify her regarding her status as an employee and provide her with the Employment Standards Entitlements, and was misled by the defendant that she was not its employee.
8. The Position and the Services are consistent with the terms and conditions of employment of all Class members, as are the operations of the defendant and the controls imposed by it on all Class members.
9. At all material times the plaintiff and other Class members were directed how, when and where they could provide the Services to the defendant's customers.

10. In the Position, the plaintiff and other Class members worked varying numbers of hours each week, including weekends and holidays. The defendant permitted the plaintiff, and other Class members, to work hours for which, as employees, they were entitled to Employment Standards Entitlements but did not receive those entitlements, and the plaintiff and other Class members were explicitly and incorrectly informed they were not employees of the defendant.
11. The Position and the Services, and the supervision and control imposed on the plaintiff and other Class members by the defendant, creates an employment relationship. Particulars include the following:
 - a. The defendant conducts an interview and vetting process of applicants as part of a hiring process in which the defendant describes the work being applied for as a "job" and a "position";
 - b. The defendant trains Class members in their operation of the App and other related software necessary to complete their duties;
 - c. Class members use the defendant's tools to perform the services in the form of delivery bags, data, signs and the App;
 - d. Class members are told the type of vehicle insurance they must have in order to work for the defendant;
 - e. Prices and compensation are determined by the defendant;
 - f. Class members do not solicit or contact customers; all customers contact the defendant directly, at which point their information is provided to a Class member to provide the Services to the defendant's customers;
 - g. The defendant maintains sole discretion whether to accept or reject potential customers;
 - h. All customers serviced by Class members are reported to and tracked by the defendant;
 - i. Class members indicate their availability for and/or apply for "shifts" which are then assigned by the defendant;
 - j. Class members are assessed in their performance and subject to discipline by the defendant, including by a "reliability rating" developed and imposed by the defendant;
 - k. The defendant handles all customer complaints;
 - l. The defendant collects data from customers and other related data on Class members and can suspend or terminate a Class member at any time if the defendant is not satisfied with their performance;
 - m. Class members are prohibited from competing with the defendant;
 - n. Class members cannot sub-contract or independently employ other drivers;
 - o. The Services form a significant portion of the defendant's revenue;

- p. Class members do not receive payment directly from the customers for the majority of their work; the defendant collects payments by customers for services if paying by credit card or other electronic means;
- q. Class members are paid directly by the defendant on specified weekly pay dates;
- r. Class members are subject to a Code of Conduct and/or other specific rules of dress and conduct; and,
- s. Class members have no risk of loss.

V. RESPONSIBILITIES OF THE CLASS

- 12. Class members provide the Services to the defendant's customers, who contact the defendant through the App.
- 13. Class members' duties and responsibilities include:
 - a. Ensuring the vehicle used is safe to operate and meets the defendant's specified requirements;
 - b. Ensuring the App is operational so they can provide services to the defendant's customers;
 - c. Using the App to locate and arrive at restaurants and other food service outlets to pick up orders placed by the defendant's customers;
 - d. Verifying the contents of the food orders made by the defendant's customers;
 - e. Delivering food orders to the defendant's customers in a timely fashion and in bags provided and/or approved by the defendant;
 - f. Verifying the identify and age of the defendant's customer if alcohol is being delivered; and,
 - g. Collecting payment when being made by cash.

VI. BREACH OF APPLICABLE EMPLOYMENT STANDARDS LEGISLATION

- 14. Provisions of the Applicable Employment Standards Legislation are implied and/or express terms of the contracts of employment of the Class.
- 15. Class members regularly work without receiving the Employment Standards Entitlements.
- 16. In particular, the defendant has repeatedly and systematically breached provisions of the Applicable Employment Standards Legislation in respect of the Class by:
 - a. Failing to ensure Class members are properly classified as employees;

- b. Failing to advise Class members of their Employment Standards Entitlements or compensate them accordingly;
 - c. Failing to ensure hours of work are monitored, accurately recorded and appropriately remunerated for Class members; and,
 - d. Requiring and/or permitting Class members to work hours for which it does not compensate them in accordance with the Employment Standards Entitlements.
- 17. To the extent any written contracts purport to designate any Class member(s) as independent contractors and exclude them from eligibility for the Employment Standards Entitlements, such contracts and/or provisions thereof are void and/or unenforceable.
- 18. The breaches as aforesaid are ongoing and continuous.

VII. BREACH OF CONTRACT AND BREACH OF DUTY

- 19. As employees under the direct control and supervision of the defendant, Class members relied on the defendant to advise them properly regarding their employee status and eligibility for the Employment Standards Entitlements and to meet their statutory responsibilities to keep track of and pay Class members at, or above, the Employment Standards Entitlements. The defendant is in a position of power and control over Class members, and Class members are necessarily in a vulnerable position vis-à-vis the defendant.
- 20. The defendant owes a contractual duty to Class members, including a contractual duty of good faith and/or duty of care, which requires the defendant to:
 - a. Ensure Class members are properly classified as employees;
 - b. Advise Class members of their Employment Standards Entitlements;
 - c. Ensure the hours of work of Class members are monitored, accurately recorded and appropriately remunerated; and,
 - d. Ensure Class members are appropriately compensated at, or above, the Employment Standards Entitlements.
- 21. The defendant has breached its contractual duty owed to the Class by:
 - a. Improperly and arbitrarily misclassifying them as independent contractors;
 - b. Misrepresenting to them that they were independent contractors;
 - c. Failing to monitor, accurately record and appropriately remunerate the hours worked by them; and,
 - d. Failing to compensate them as required by the Employment Standards Entitlements.

22. The breaches as aforesaid are ongoing and continuous.

VIII. UNJUST ENRICHMENT

23. The defendant has been unjustly enriched as a result of receiving the benefit of not providing the Class with the Employment Standards Entitlements, and the Class have suffered a corresponding deprivation in the form of unpaid Employment Standards Entitlements.

24. There is no juristic reason for the defendant's unjust enrichment and the Class's corresponding deprivation. The arbitrary and unlawful exclusion of the Class from the Employment Standards Entitlements is inequitable, unconscionable and unjust.

25. The defendant's unjust enrichment as aforesaid is ongoing and continuous.

IX. DAMAGES

26. As a result of the defendant's breaches as aforesaid, Class members have suffered damages and losses, and continue to do so, including any consequential damages resulting from a determination they are employees of the defendant and not independent contractors.

27. The plaintiff therefore claims against the defendant, on her own behalf and on behalf of the Class, the relief more particularly set forth in paragraph 1 above.

July 25th, 2018

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