IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Escobar v. Ocean Pacific Hotels Ltd.,* 2024 BCSC 1575

Date: 20240827
Docket: S210614
Registry: Vancouver

Between:

Romuel Escobar

Plaintiff

And

Ocean Pacific Hotels Ltd.

Defendant

Brought under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:	S.A. Quail J. Wahba
Counsel for the Defendant:	I.G. Nathanson, K.C. J.K. Lockhart J.P. Parker
Place and Date of Hearing:	Vancouver, B.C. April 15-18 and 22-25, 2024
Place and Date of Judgment:	Vancouver, B.C. August 27, 2024

Table of Contents

Overview

[1] In March 2020 the hotel industry was hit hard by the Covid-19 pandemic including the Pan Pacific Hotel in Vancouver. The regular hourly employees who worked at the Pan Pacific Hotel were caught up in the bewildering and uncertain world, including having their shifts cancelled and not receiving a lot of information about whether and when they might return to work. Ocean Pacific Hotels Ltd. ("Ocean Pacific"), which operates the Pan Pacific Hotel, faced an overnight plummet in business. Over the months that followed the onset of the pandemic, it had to determine how to survive. Employee costs were the largest cost that it could control in the short term and it did so by laying off salaried employees, ceasing scheduling shifts for hourly employees, and ultimately moving to a reduced model of operating where only a small portion of the employees would receive work. This case is about where the legal burden of those decisions fall, including whether Ocean Pacific was entitled to keep certain details of its strategic decisions about its employees to itself until it implemented them.

[2] The representative plaintiff, Romuel Escobar, represents a certified class defined as regular hourly employees of Ocean Pacific working at or from the Pan Pacific Hotel Vancouver as of February 20, 2020, who stopped receiving regular shifts from the defendant on or after February 20, 2020 and never re-commenced receiving regular shifts, whether or not they were issued formal notice of termination but excluding on-call or casual employees or employees who resigned or retired voluntarily.

[3] This trial of common issues is about constructive dismissal, notice periods for wrongful dismissal, communications with class members alleged to be in breach of Ocean Pacific's duty of good faith and honest dealings in contractual performance, damages for any such breach and punitive damages.

[4] Mr. Escobar's position is that Ocean Pacific altered a fundamental term of the class members' employment contracts when it stopped assigning shifts on an indefinite basis and that such conduct meets the test for the first part of constructive

dismissal. Mr. Escobar submits that if the second part of the test is made out at individual issues trials, class members are entitled to a lengthened notice period due to the economic impact of the pandemic. Mr. Escobar asserts that Ocean Pacific misled class members about their prospects for ongoing employment with the Pan Pacific Hotel, and that this conduct amounted to a breach of the duty of good faith and honest performance. He argues that class members are entitled to damages compensating them for lost earnings during the period when the defendant misled them, and that the misleading conduct was reprehensible such that punitive damages are warranted.

[5] Ocean Pacific argues that because class members' employment contracts provided for their hours to be increased or decreased based on the business needs of the hotel, the pandemic-induced reduction of their hours to zero did not fundamentally change the terms of their employment. Ocean Pacific asserts that if any class members were constructively dismissed, most of them had binding termination clauses restricting their compensation to statutory minimums which they have been paid. Ocean Pacific argues that if any class members are entitled to common law damages in lieu of notice, the evidence does not support increasing the notice period due to the Covid-19 pandemic. Ocean Pacific argues that the class members were not intentionally misled about their prospects for future employment and so the claims for breach of the duty of honest performance and punitive damages should be dismissed.

The Issues

[6] The common issues were certified and described in reasons indexed at *Escobar v. Ocean Pacific Ltd.*, 2021 BCSC 2414. They are as follows:

> 1. Did the defendant fundamentally change a term of the Class members' contracts by cancelling their hours due to the impact of the COVID-19 pandemic?
>
> 2. Are Class members' notice entitlements increased because of the lack of alternative employment available to them due to the impact of the COVID-19 pandemic on the hospitality sector and the labour market more generally?
>
> 3. Did the defendant intentionally mislead Class members about their prospects for ongoing employment with it?

> 4. If so, did that conduct amount to a breach of the defendant's duty of good faith and honest performance toward Class members?
>
> 5. If so, are Class members entitled to damages compensating them for lost earnings during the period when the defendant dishonestly misled them into believing they would return to active employment with it (i.e., during which Class members could have sought new work)?
>
> 6. Was the defendant's conduct high-handed, malicious, arbitrary, or reprehensible such that punitive damages are warranted?
>
> 7. If so, and if the aggregate compensatory damages awarded to Class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what is the appropriate quantum of punitive damages in this case?
>
> 8. If the answer to common issue 6 is yes, and for consideration once all other common issues have been decided, can an aggregate award pursuant to s. 29 of the Class Proceedings Act be made as regards punitive damages?

[7] Only common issues one through six are to be determined at this common issues trial. Common issue 7 cannot be decided until compensatory damages have been determined and those will be determined individually. Common issue 8 cannot be determined until the determinations of the other common issues are known.

[8] Before turning to the evidence and analysis of each issue, I will address the class definition in relation to the evidence of the hotel operations and how various types of employees were affected by the pandemic's impact on the Pan Pacific Hotel. Most of this is not controverted.

[9] The class is defined as regular hourly employees who stopped receiving regular shifts from the defendant on or after February 20, 2020 and never re-commenced receiving regular shifts whether or not they were issued formal notice of termination, excluding on-call or casual employees or employees who resigned or retired voluntarily.

[10] Zul Somani is the senior asset manager for Ocean Pacific. He testified that prior to March 2020, Ocean Pacific employed approximately 440 people, comprising of approximately 65 salaried employees, approximately 250 regular hourly employees, and approximately 125 on-call employees at the Pan Pacific Hotel.

[11] By mid-March 2020, Ocean Pacific laid off most salaried employees. They are not members of the class. Ocean Pacific ceased offering shifts to regular hourly employees in approximately mid-March 2020.

[12] One of the class members was dismissed on May 5, 2020. In mid June 2020, Ocean Pacific terminated 42 hourly and 3 salaried employees. The regular hourly employees in this group of terminations are class members, provided they were regular hourly employees as of February 20, 2020.

[13] In late June, Ocean Pacific offered an agreement guaranteeing 24 hours of work per week to 41 regular hourly employees; 40 of whom accepted. These contracts are referred to as 24 hour contracts.

[14] In late June and early July, Ocean Pacific offered casual agreements to the regular hourly employees who were neither terminated on June 18 nor offered the 24 hour agreement. Some employees accepted the casual agreements. Some employees, including Mr. Escobar, did not.

[15] Ocean Pacific dismissed thirty-three employees on August 28, 2020, including Mr. Escobar. Some of the employees in this group had accepted the casual agreements, and some had not. Seven class members were dismissed on December 9, 2020. According to Ocean Pacific, one regularly hourly employee has never been dismissed, but has never been given shifts since March 2020.

Common Issue One: Whether Ocean Pacific Fundamentally Changed the Class Members' Contracts by Reducing Their Work Hours to Zero

[16] Mr. Escobar commenced employment with Ocean Pacific at the Pan Pacific Hotel as a houseman in 1986. He held various positions until 2008, when he was promoted to Senior Concierge. His 2008 employment contract pertaining to his position as Senior Concierge provided that "assignment of hours will be subject to business demand, and may be increased or reduced due to seasonal fluctuations".

[17] The majority of the class members' contracts had an identical or similar provision. There are five whose contract did not contain any provision providing that hours would fluctuate based on the business needs of the hotel.

[18] Mr. Escobar argues that the essence of the employment contract was an exchange of work for money. Mr. Escobar argues that when Ocean Pacific stopped being willing to accept any work from Mr. Escobar and pay him money, that was a fundamental change of the employment, despite the contract providing for fluctuation of hours. In essence, he argues that a fundamental premise was that there would be some hours such that an indefinite cessation of work cannot be considered to be within the four corners of the contract.

[19] Ocean Pacific argues that because the contract has a term providing for fluctuation of hours based on business demand, and the cancellation of hours was due to drastically decreased business demand, no fundamental change to the class members' contracts occurred when their hours were cancelled.

[20] Accordingly, this common issue raises the following questions for resolution:

a) Did Ocean Pacific cease offering shifts to class members on an indefinite basis commencing in March 2020?

b) Is an employment contract that provides for fluctuations in hours due to business demand fundamentally changed by an indefinite cessation of work?

Cessation of Shifts to Class Members

[21] There is no dispute that Ocean Pacific ceased offering shifts to class members commencing in approximately mid-March 2020. The question is whether they were ceased indefinitely.

[22] Mr. Somani testified that prior to the pandemic, the Pan Pacific Hotel enjoyed an 80% or better occupancy rate. He described the travel industry coming to a standstill around March 12 or 13, 2020 and business disappearing overnight with

occupancy falling to 0.27% and 0.89% in April and May 2020, compared to 85% and 92% respectively in the same months in 2019.

[23] The Pan Pacific Hotel experienced drops in revenue which reflected this drastically reduced business. Mr. Somani testified that because the Pan Pacific Hotel had essentially zero business, none of the hourly employees were called in to work, with the exception of two or three hourly employees from the engineering department and a skeleton crew of salaried managerial staff who were necessary to keep the building operating.

[24] Mr. Escobar had his last shift on March 12, 2020. Mr. Escobar testified that he was told by his direct supervisor that his shifts were cancelled as the concierge desk was closed indefinitely.

[25] Mr. Somani testified that, by late May or early June, he determined that the reduction in business would be long-lasting, although he anticipated the summer months would show some return of business. He determined that the best way to move forward was to employ a reduced model that essentially converted the 500-room hotel to one that served about 100 rooms at a time. The reduced model would require fewer staff and would provide limited services to guests.

[26] That decision led to plans to reduce the staff including the terminations described above in June 2020 and August 2020, the offers of 24 hour contracts and the offers to convert to casual work agreements. Mr. Somani testified that he started to conceive the reduced model in May 2020 and then began to develop and implement it. At that time, class members had not had work since mid-March. And at that time, while Mr. Somani hoped that business would pick up in the summer, it was not to the extent that he could hope for any improvement beyond what the reduced model justified. He did not foresee any specific event or time at which Ocean Pacific could scale up from the reduced model.

[27] Occupancy in June, July and August 2020 was slightly higher, ranging from 7%-27%, but in 2019 the occupancy for those months was 96% or 97%.

[28] In July 2020, Eyal Dattel, the director of Human Capital and Development for the Pan Pacific Hotel, told Mr. Escobar and other class members and employees of Ocean Pacific that the concierge desk and certain other departments would remain closed or significantly limited in operation until further notice.

[29] There is no suggestion in any of the evidence that the pandemic-induced cessation of shifts for regularly hour employees, except those who took 24 hour agreements or converted to casual employees, was anything but indefinite.

[30] Mr. Somani testified that he conceived the reduced model in order to attempt to address the drop in business and corresponding drop in revenue. Mr. Somani testified that at the Pan Pacific Hotel, payroll expense is about 30% of revenue. He described how in a 100-room hotel, there is job amalgamation, multitasking, and less specialized job classifications. Mr. Somani testified that there were some ongoing costs of running the Pan Pacific Hotel that Ocean Pacific could not control, such as financing costs, insurance, and property tax. He testified that one aspect that Ocean Pacific could control was payroll.

[31] It is not controverted that the indefinite cessation of shifts was due to the business needs of the hotel at the onset of the COVID-19 pandemic.

Whether the Contracts Allowed for Class Members Shifts to be Cancelled Indefinitely Due to Reduced Business Needs of the Pan Pacific Hotel

[32] The question is whether cessation of hours indefinitely amounts to a breach of a fundamental term of the employment contract as described in *Farber v. Royal Trust Co.,* [1997] 1 S.C.R. 846 at para. 33, 1997 CanLII 387; and *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 34. If it is a fundamental breach, then the first branch of the test for constructive dismissal has been made out.

[33] Even where there is no intention to repudiate an employment contract, a unilateral layoff or cessation of work by an employer is, absent agreement to the contrary, a substantial change in employment: *Nikkel v. VVI Construction Ltd.*, 2021

BCSC 1381 at para. 24. This is so even where it is temporary: *Archibald v. Doman-Marpole Transport Ltd.*, [1983] B.C.J. No. 1284 (S.C.) at para. 4, cited in *Nikkel* at paras. 31–34. Similarly, in *Girling v. Crown Cork & Seal Canada Inc.*, 9 B.C.L.R. (3d) 1, 1995 CanLII 954 (C.A.) at para. 14 the Court of Appeal for British Columbia held that there is no "middle ground between employment and termination" through layoff which results in indefinite loss of employment.

[34] Despite this general rule that an indefinite lay-off or cessation of work will generally be equated with a dismissal from employment, a change to an employee's status or position which is allowed by the contract of employment will not amount to a unilateral change by the employer: *Farber* at para. 25. If an express or implied term of the employment contract gives the employer the authority to make the change, it will not constitute a breach: *Potter* at para. 37.

[35] As noted above, there are five class members whose contracts did not provide for hours to fluctuate based on the business demands of the hotel. They are those class members listed in Schedule D to the Notice to Admit, Exhibit 6. I conclude that for those class members, reducing their hours to zero indefinitely in March 2020 was a fundamental breach of their contracts of employment.

[36] For the remainder of the class, a provision of the contract provided that their employment was full-time and that they were required to have unrestricted availability. The contract also provided that the schedule of work would vary including day or night shifts and working weekends and public holidays. The contract provided that assignment of hours would be subject to business demand and may be increased or decreased due to seasonal fluctuations.

[37] It is necessary to interpret the contract including this term providing for increases or decreases in hours based on business demand. The goal of contractual interpretation is to ascertain the objective intent of the parties: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 49. Justice Rothstein for the Supreme Court of Canada in *Sattva Capital* explained that a court must read the contract as a whole, giving the words their ordinary and grammatical meaning consistent with the

circumstances known to the parties at the time the contract was made. The factual matrix is always relevant because the meaning of words can vary depending on the context in which they are used: *Sattva Capital* at para. 57. See also *Athwal v. Black Top Cabs Ltd.,* 2012 BCCA 107 at paras. 42–47; and *Miller v. Convergys CMG Canada Limited Partnership,* 2014 BCCA 311 at para. 15.

[38] Ocean Pacific argues that based on the term that "assignment of hours will be subject to business demand", which is an express lack of guarantee of hours, there can be no fundamental change to class members' contracts by not calling them for work when there is no work to be performed. It submits that there is no ambiguity in the contract term, but if an ambiguity arises, the way the contract was performed resolves that ambiguity because class members were only scheduled for work in accordance with the business needs of the Pan Pacific Hotel.

[39] Mr. Escobar argues that the language of the employment contracts is not ambiguous because an objective, reasonable bystander would understand the provision to reflect that hours increase or decrease over the seasonal patterns that are well known in the hospitality industry, but not reduced to zero. He submits there is no basis to interpret this provision to mean that hours may be cancelled entirely due to a global pandemic or for any other reason. He submits that if there is an ambiguity, the extrinsic evidence reflects that hours fluctuated according to seasonal variation, not that hours were every cancelled entirely.

[40] Starting with the plain words of the contract, they clearly provide that hours will vary based on the business needs of the hotel. The clause must be interpreted harmoniously with the contract as a whole. The essence of a contract of employment is performing work in exchange for remuneration, relying on *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at para. 15.

[41] In *Hydro-Quebec,* the Supreme Court of Canada held that the concept of undue hardship must take into account that performing work is one of the "basic obligations" associated with the employment relationship: para. 19. While the context

of this case is much different, *Hydro-Quebec* supports the proposition that provision of work, performance of work, and pay for work form the essence of an employment contract. In *Archibald* at para. 4, this principle was applied to determine whether a layoff amounted to a fundamental change.

[42] The context of contracts of employment includes a power imbalance between employers and employees which has been acknowledged and explained in years of jurisprudence starting with the dissent of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 1987 CanLII 88 [*Alberta Reference*] then adopted by the majority in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1989 CanLII 92.

[43] In summary, employment contracts are characterized by an inherent power imbalance in favour of the employer. It is appropriate to consider this imbalance in the development of the law, the interpretation of legislation, the interpretation of collective agreements and even the interpretation of the Constitution: *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 84 citing *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701 and Dickson C.J.C. in dissent in *Alberta Reference.* A governing interpretative principle is to “infuse law into a relation of command and subordination”: *Slaight Communications* at 1052. Private employment contracts must be interpreted with consideration for employment law principles such as the protection of vulnerable employees vis à vis their employers: *Miller* at para. 15.

[44] Most of the class members’ contracts provide that the employees are paid by the hour and describe the work as “full time, hourly (unrestricted availability required)”. The contracts provide that the quantity of shifts will fluctuate, the type of shifts (e.g.: day shifts, graveyard shifts, weekends, public holidays) will be set by Ocean Pacific, and the employee is required to work the shifts assigned to them by Ocean Pacific. The employees are required to be available for whatever shifts are assigned to them. They are not entitled to any advance notice of what shifts they will be working when.

[45] These terms of the contract demonstrate the power imbalance between class members and Ocean Pacific. Given the jurisprudence that such provisions shall be interpreted to address the imbalance, it is not appropriate to interpret the term that hours may be increased or decreased due to business demand to provide that Ocean Pacific can decrease hours to zero indefinitely. That interpretation would amount to requiring the employee to be available for full time employment while Ocean Pacific is not providing any employment or pay indefinitely. That interpretation is not required by the words of the contract, and would exacerbate the power imbalance between the employees and the employers.

[46] Since that interpretation is not called for by the plain meaning of the words and to make it would exacerbate the power imbalance, it should not be made unless that interpretation is compelled by other contract interpretation principles. The ability to decrease hours to some level must have some meaning. One possible meaning is a decrease to zero. Accordingly, there is some ambiguity such that it is appropriate to consider context, including how that provision had been applied in the past.

[47] Ocean Pacific’s witnesses testified that the hours worked by class members varied based on the business needs of the hotel and that the hotel generally scheduled class members in seniority order. During his cross-examination, Mr. Escobar agreed with the proposition that hours scheduled for the hotel's associates were solely dictated by the business needs of the hotel, and that this was common knowledge among the associates of the hotel. When there was not enough work, Ocean Pacific would prioritize scheduling the more senior employees, such that those who did not have sufficient seniority were sometimes not called in to work.

[48] Mr. Somani testified that this approach is an industry standard in Canada and worldwide. Mr. Somani testified that generally, the summer months have higher occupancy than the winter months, although the winter months can also include functions, meetings, and business arising from the hotel’s connection to a convention centre. He testified that the knowledge that there are busy and slow seasons, and general business fluctuations, are generally known to the work force.

[49] Mr. Escobar's contract as Senior Concierge was made in 2008, and he had worked at the Pan Pacific Hotel in other capacities prior to that. The number of hours that Ocean Pacific assigned to Mr. Escobar fluctuated, but not in a manner that supports reading "decrease" to mean "decrease to zero indefinitely". Mr. Escobar testified that prior to the pandemic, there were no extended lengths of time when he received no shifts at all. However, there were periods where he received less than 40 hours per week. He identified 32 hours as the minimum number of hours he would receive per week in slower months with less business.

[50] Witnesses also testified about the impact of previous events that affected the Pan Pacific Hotel's business and hours for hourly associates. Mr. Somani testified that events such as the SARS outbreak, the 2008-2009 financial crisis, and the 9/11 terrorist attack in New York, all affected the Pan Pacific Hotel's business and the hours for hourly associates. Mr. Somani described the 2009 financial crisis as causing a substantial cutdown on travel and tourism, particularly in February 2009. He described that more senior hourly associates may have experienced a ten or twelve percent reduction in hours, and the least senior hourly employees had their hours cut back by as much as fifty percent in or around February 2009. Mr. Escobar was unable to recall any particular impact to his own hours or the hours of other Pan Pacific Hotel employees as a result of these events.

[51] Accordingly, there was evidence of decreases in hours as provided for in the contracts, but no evidence of elimination of hours or decreases of hours to zero indefinitely over the more than twelve years prior to March 2020.

[52] In summary, neither the plain words of the contract nor the context or practice support the proposition that the term of increased or decreasing hours based on business demand included eliminating work by decreasing hours to zero indefinitely.

[53] Mr. Escobar testified that by late March 2020, he understood that the pandemic was an unprecedented situation. He further testified to his general understanding, by July 2020 at the latest, that the hotel and hospitality industry had been gravely impacted by the pandemic to a degree that was not comparable to the

regular peaks and valleys of occupancy that are understood to exist within the industry. Mr. Somani also testified to the unprecedented nature of the pandemic's impacts on the hotel industry. He noted that some departments never reopened due to changed clientele and demand for services, including the concierge department.

[54] The unprecedented COVID-19 pandemic, by definition of "unprecedented", does not assist with determining what the class members and Ocean Pacific intended when they entered into these contracts. The unprecedented nature of the pandemic does not provide a rationale to interpret the contracts in a manner that places the financial burden of the pandemic on the employees and softens the financial impact experienced by the employer when that interpretation is not compelling generally.

[55] Ocean Pacific emphasizes that Mr. Escobar did not say to management at any point that the failure to schedule him for work shifts after mid-March constituted a dismissal from his employment, or that it was a breach of contract to not provide him with regular hours. It emphasizes his testimony that he considered himself to be an employee until he received the letter of termination on August 28, 2020. This may possibly be relevant to whether Mr. Escobar accepted or rejected the fundamental change to his contract, but that is an individual issue that does not affect whether the fundamental change to the contract occurred.

[56] In my opinion, ceasing providing hours to class members for an indefinite, lengthy period of time is a fundamental breach of the contract that is not permitted by the provision that assignment of hours is subject to business needs.

[57] The jurisprudence on layoffs holds that this amounts to a fundamental change as discussed in *Nikkel*, *Girling* and *Archibald*, discussed above. I conclude that the wording of the contract does not create an exception permitting indefinite cessation of work.

[58] The answer to common issue one is yes for all class members.

Common Issue Two: Whether Class Members' Notice Entitlements are Increased Because of the Impact of the COVID-19 Pandemic

[59] Mr. Escobar relies on cases from other jurisdictions, including where courts have taken judicial notice that the Covid-19 pandemic depressed the labour market. He argues that increased damages in lieu of notice are warranted if class members establish they were constructively dismissed after an individual issues trial.

[60] Ocean Pacific asserts that some class members are limited to statutory notice which is fixed, and therefore not subject to increase regardless of the evidence pertaining to the labour market. For the class members that do not have such a clause, Ocean Pacific's position is that the expert evidence it has led establishes that the labour market rebounded very quickly, such that there is no evidentiary basis for increase notice.

[61] The questions that the parties' submissions raise are:

a) Leaving aside whether any class members' contracts preclude a notice period other than statutory minimums, does the evidence in this case justify an increased notice period due to labour market conditions?

b) If the answer to the first question is yes, do class members whose contract provides for statutory minimum notice on dismissal have a claim at law for increased notice due to labour market conditions?

Increased Notice Period due to Labour Market Conditions

[62] Under the common law, a contract for employment for an indefinite period is terminable only if reasonable notice is given: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 997, 1992 CanLII 102. What constitutes reasonable notice will vary with the individual circumstances of any particular case. British Columbia courts apply the factors set out in *Bardal v. Globe & Mail Ltd.*, 24 D.L.R. (2d) 140, 1960 CanLII 294 (Ont. H.C.) to the assessment of reasonable notice.

[63] The purpose of notice is to bridge the gap between dismissal and new employment, and to provide the employee with an opportunity to obtain comparable

employment: *Steven Shinn v. TBC Teletheatre B.C. et al.*, 2001 BCCA 83 at para. 16; and *Hogan v. 1187938 BC Ltd.*, 2021 BCSC 1021 at para. 41.

[64] Determination of notice entitlement in this case, leaving aside the affect a statutory minimum clause has on entitlement, should therefore include an assessment of the prospects for re-employment in the hospitality industry as at the time of constructive termination, i.e., when the class members' shifts were cancelled indefinitely in mid-March 2020.

[65] Courts have recognized that the economic uncertainty caused by the pandemic is a factor that may lengthen an employee's common law notice period: *Kraft v. Firepower Financial Corp.*, 2021 ONSC 4962 at para. 22; *Williams v. Air Canada*, 2022 ONSC 6616 at para. 27; *Chalmers v. Airways Transit Service Ltd. and Badder Capital Group Ltd.*, 2023 ONSC 5725 at paras. 128–129; *Milwid v. IBM Canada Ltd.*, 2023 ONSC 490 at para. 61, aff'd 2023 ONCA 702. In *Kraft*, *Chalmers* and *Milwid*, the courts found it appropriate to award one month more than otherwise would have been awarded to the plaintiff in the circumstances. In *Williams* at para. 27, the court determined that due to the pandemic, it was appropriate to fix the length of notice at the high end of the range.

[66] Some of these cases demonstrate the application of judicial notice that the COVID-19 pandemic had a dampening affect on the labour market in the sectors at issue, for example, *Milwid*. Others, such as *Kraft*, refer to evidence but do not detail what the evidence was. Evidence that was accepted to increase the notice period in other cases is not evidence in this case. I do not accept that the approach taken in other cases on this topic mandates a similar approach in this case.

[67] With regard to judicial notice, in *R. v. Find*, 2001 SCC 32 at para. 48, Chief Justice McLachlin explained that judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute based on a strict application of a threshold test. A court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate

among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[68] Mr. Escobar has not attempted to persuade me that the threshold is met to take judicial notice, but rather points to these other cases that describe increasing notice as an acceptable approach.

[69] Use of judicial notice in other cases does not dispense with the strict threshold requirement. I am of the view that the threshold test for judicial notice is not met. With regard to the first indicator, the cases relied on by Mr. Escobar were decided while the COVID-19 pandemic was ongoing or in its aftermath. In this case, I have the benefit of retrospective expert evidence led on the subject which addresses the depth and nature of the disruption to the labour market in the hospitality sector caused by the COVID-19 pandemic. This evidence also means that the second indicator cannot be met. I decline to apply judicial notice.

[70] I turn to the evidence in this case.

[71] Mr. Escobar testified about his efforts to seek replacement employment. He testified that he applied on July 10 for a position as a receptionist or accounting clerk at a home support facility, but that he made no other job applications until after he received notice of his termination on August 28, 2020. He obtained a position as a residential concierge with Royal Concierge, commencing on September 15, 2020. The position paid approximately seven dollars less per hour than his employment with Ocean Pacific. He was then able to secure a more conveniently located position with FirstService Residential and has been working there since October 28, 2020. He remained at this position at the time of trial, and testified that he was still making less per hour than he did when he worked at Ocean Pacific.

[72] There is evidence, by way of reasons for judgment published at *Nicolas Jr v Ocean Pacific Hotels Ltd*, 2022 BCSC 1052 at para. 18, of another Pan Pacific Hotel employee who commenced an individual action. He was able to find replacement employment in November 2020 at a care home, but also at a lesser rate of pay.

[73] There is also hearsay evidence of a number of employees who were working during the summer of 2020 and communicated that to Mr. Dattel. It is not clear whether all were class members, and there is no evidence as to how this other work compared to the hours and pay of their work at the Pan Pacific Hotel.

[74] Ocean Pacific tendered an expert report by Casey Warman, a professor of economics at Dalhousie University. Dr. Warman has extensively researched the Canadian labour market, including research focusing on the Canadian labour market during the COVID-19 pandemic. His report addresses the impact of the pandemic on the British Columbia and Vancouver labour markets generally, as well as the availability of alternative employment for the positions that class members held.

[75] Mr. Escobar accepts that the Warman report is accurate and relevant. The parties disagree about its implications.

[76] Dr. Warman addressed the following questions in his report:

> 1. What was the impact of the Pandemic on the British Columbia and Greater Vancouver labour markets generally from March 2020 up until March 2022?
>
> 2. What was the availability of alternative employment similar to the Employment Positions from March 2020 to March 2022 in Greater Vancouver?

[77] Ocean Pacific's position is that Dr. Warman's report establishes that the labour market rebounded very quickly, such that there is no evidentiary basis for increased notice. Mr. Escobar's position is that the report confirms that the pandemic caused an acute loss of employment in the local hospitality sector such that it would take a terminated hospitality sector worker much longer to find new work at that time than would otherwise be expected.

[78] In his report, Dr. Warman referred to the employment rate and the unemployment rate. He explained that the employment rate is the fraction of persons who are employed compared to the work-age population as a whole. The unemployment rate is the fraction of persons who are looking for work compared to the labour force. Persons who are unemployed and not looking for work are not part of the unemployment rate. Dr. Warman expresses the opinion that, arguably, the

employment rate provides a better indication of the economy's health than the unemployment rate because while the unemployment rate might drop because people cease looking for work (which does not necessarily provide relevant information about the health of the economy), the employment rate does not change when people stop looking for work.

[79] Dr. Warman's charts show that the employment rate in Vancouver dropped sharply in March 2020 and reached its trough in April and May 2020, at which point it gradually increased and reached average pre-2020 levels in approximately January 2021. The employment rate in British Columbia has a very similar curve with some minor differences. The unemployment rate in Vancouver reached its peak in May 2020, at which point it started generally decreasing with some fluctuations. The unemployment rate in Vancouver remained higher than the 2015-2019 average throughout the first eight months of 2021, and only returned to average pre-2020 levels in January 2022.

[80] Mr. Escobar argues that the general health of the economy is not specifically relevant and so the unemployment rate is the better barometer of how quickly a job search will yield results.

[81] However, Mr. Escobar did not require Dr. Warman to attend court and be cross-examined on this report and so he did not cross examine him on this point. While this does not preclude Mr. Escobar from making this argument, when a party intends to argue that a witness' evidence ought not be accepted on a specific point, it is important that the party disputing the evidence provide the witness with an opportunity to explain or address the evidence when the witness is on the stand. This rule, referred to as the rule in *Browne v. Dunn* (*Browne v. Dunn* (1893), 6 R. 67, 1893 CanLII 65 (H.L.)), is about fairness: *R. v. Podolski*, 2018 BCCA 96 at para. 145. It is not a rule of admissibility, but it does affect the use to which evidence can be put or the arguments that can be made: *Podolski* at para. 161.

[82] I qualified Dr. Warman to give opinion evidence on the basis that his evidence was necessary to assist the court. Mr. Escobar is now asking me to interpret

Dr. Warman's opinion in a manner contrary to how he stated it without asking Dr. Warman his view on that restatement of his opinion or the reason that Mr. Escobar asserts that I should prefer the restatement, despite my conclusion that assistance from an expert was necessary. I do not know what Dr. Warman would say about the proposition of labour market theory that Mr. Escobar advances. Mr. Escobar did not lead any evidence on the subject.

[83] Dr. Warman opined that the nature of the changes in the employment rate after the pandemic commenced suggests that as the labour market improved, people who were unemployed but not counted in the unemployment rate because they were not looking for work, began looking for work, thereby increasing the unemployment rate. This opinion was not challenged on cross-examination and I accept it, leading me to conclude that the employment rate is the better indicator of the relative difficulty of finding work at a given period of time subsequent to the alleged constructive dismissals.

[84] Dr. Warman's key findings are:

- The economy sunk into a severe recession around the second quarter of 2020 with the unemployment rate increasing and the employment rate falling substantially.
- The Canadian economy recovered surprisingly quickly from the recession.
- The results show a similar pattern for BC and Vancouver with the economy making an incredibly fast recovery, with April 2020 being the trough for most economic indicators.
- Job postings decreased during the initial phase of the COVID-19 recession, compared to the beginning of 2020, but recovered quickly after.
- Analyzing job postings back to 2015 for Canada, BC, Vancouver, and various job categories indicates:
    - a decline in postings during the early stages of the COVID-19 recession, with variations across different job types;
    - a significant increase in the general labour market's job postings beginning in mid-2021 that was higher than pre-COVID-19 levels; and
    - total job postings in 2021 and 2022 significantly exceeded those in previous periods for most jobs.

- By mid-2021, some employers were having difficulty filling positions.

[85] Ocean Pacific also points to the data of job postings in positions described in the same manner as class members, i.e.: bellhop/doorman, concierge, line cook, dishwasher, etc. Dr. Warman's data shows that during the period March 2020 to February 2021, there were more job postings in some of those positions than the five year average. For the year March 2021 to February 2022, there were more postings than the five year average in all positions except 2 categories of positions.

[86] I do not find the evidence about the job postings over the period March 2020 to February 2021 helpful for a few reasons.

[87] First, the number of postings is not stratified by month or any periods less than a year. The evidence in this case and the more general labour market evidence opined to by Dr. Warman makes it clear that there were very few or nil postings from February 2020 to at least the fall of 2020. Given that class members' notice periods might start in mid March 2020, the fact that at some time before February 2021 job postings increased is of limited relevance unless we know when they increased.

[88] Second, the evidence of layoffs, terminations and reduced models in this case begs the question of whether the increased postings in these positions could compensate for the large number of persons in this sector who were looking for work. In order to conclude that persons looking for work during this time period had an advantage because the number of postings was greater than average, I would have to also know that the number of people looking for postings in this line of work was less than or equal to the average. There is no evidence of that specific to these job categories. The other evidence in this case goes the other way. The evidence of Mr. Dattel is that his colleagues at other hotels were actively discussing the implications of laying off large number of employees including the deemed termination provisions in the *Employment Standards Act,* R.S.B.C. 1996, c. 113. That evidence, coupled with Mr. Somani's evidence that the COVID-19 pandemic decimated the hotel travel industry over night, leads me to conclude that many hotel employees were laid off or without work when the class members had their shifts

indefinitely cancelled. Together with Dr. Warman's evidence about the employment rate and unemployment rate in 2020, I conclude that even though there were more postings at some period during March 2020 to February 2021, more people were competing for them.

[89] I do not agree with Ocean Pacific's argument that Mr. Escobar's job search experience demonstrates that replacement employment was readily at hand. Mr. Escobar took a job for less pay than his Pan Pacific Hotel job and still earns less pay. The other employee who commenced an individual action found a part time job working in a care home for less pay, and at the time of trial still did not have full time work of equal pay to his employment with Ocean Pacific at the Pan Pacific Hotel. In *Nicolas Jr.*, Justice Ross took the evidence of the replacement employment into account but stopped short of holding that Mr. Nicolas had been able to readily fully mitigate his damages.

[90] I conclude the evidence is that equally remunerative alternate work was challenging to find during 2020.

[91] Based on the employment rate being lower than the 2015-2019 average in Vancouver from mid-February 2020 until January 2021, I conclude that an increase in the notice period due to the impact of the COVID-19 pandemic on the availability of alternate employment as described in these reasons should be taken into account, subject to consideration of the question of whether statutory minimum notice clauses preclude an increase.

Contracts with Statutory Minimum Clauses

[92] The common law presumption of termination on reasonable notice is rebuttable by clear contractual language that expressly or impliedly specifies some other period of notice, so long as that other period of notice does not fall below the minimum notice period set by statute: *Miller* at para. 8; *Machtinger* at 1005. Such a contractual provision may incorporate the notice-related provisions of the *Employment Standards Act*, thus making the language of the *Employment Standards Act* concerning notice or pay in lieu of notice part of the contract: *U.B.C.*

v. The Association of Administrative and Professional Staff on Behalf of Bill Wong, 2006 BCCA 491 at para. 34.

[93] The majority of class members, including Mr. Escobar, have a contract for employment which includes the following language:

> 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 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 prospects for 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.

[94] One class member has an employment contract containing a termination provision providing for notice "based on" the *Employment Standards Act*.

[95] A minority of class members have no clause providing for *Employment Standards Act* minimum notice, or referring to a statutory or other notice period.

[96] Ocean Pacific asserts that class members who have these minimum notice clauses are limited to a fixed amount of statutory notice that is determined by reference to the *Employment Standards Act*. Ocean Pacific argues that it is not open to the class to challenge the enforceability of these clauses as Mr. Escobar has not pleaded that the termination clause in his contract or those of the other class members is unenforceable.

[97] Mr. Escobar submits that this common issue does not address the notice period for any given class member, and at this time, the Court cannot determine whether a given class member has a binding *Employment Standards Act* minimum notice clause. Mr. Escobar asserts that the statutory minimum clauses are not necessarily binding on the class members that they pertain to because of a myriad of factors. For example, Mr. Escobar asserts that if a person commences a position without a written employment agreement, their employment is governed by common

law, unless there is fresh consideration for a contract subsequently entered into, relying on *Singh v. Empire Life Ins. Co.*, 2002 BCCA 452 at paras. 12–15. The law on this point is not absolutely settled, see: *Rosas v. Toca*, 2018 BCCA 191 at para. 183; and *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25 at para. 13.

[98] I agree that for any given class member, I am not, at this common issue trial, examining the employment contract and determining whether it contains a valid and binding statutory minimum notice clause. However, common issue 2 is broad enough to encompass the question of whether a person with a binding statutory minimum clause is entitled to a longer notice period as a general proposition. Addressing this on a class-wide basis, while acknowledging that the question of whether the statutory minimum clause is actually binding on any given class member remains to be addressed, is appropriate given the breadth of the question and the evidence about the different types of contracts that the class members have. As I held at para. 111 of the certification reasons, indexed at *Escobar v. Ocean Pacific Ltd.*, 2021 BCSC 2414, and citing *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45-46, the answer to a common question may vary, or as the Court of Canada explained in *Rumley v. British Columbia*, 2001 SCC 69, sometimes a nuanced answer to a common question may be necessary.

[99] Based on the law reviewed above, I conclude that any class member whose contract is found to contain a binding statutory minimum clause is not entitled to a longer notice period due to the impact of the COVID-19 pandemic on the availability of alternate employment. Whether an individual class member is affected by this finding depends on the application of the law to the circumstances of that class member and the employment contract in issue, a matter that has to be decided.

Conclusion On Common Issue 2

[100] I conclude that the COVID-19 pandemic detrimentally impacted the availability of alternate employment for class members during 2020. My findings are that equally remunerative alternate work was more challenging to find during 2020 than was typical and the employment rate was lower than the 2015-2019 average in

Vancouver from mid-February 2020 until January 2021. These findings should be taken into account when fixing the notice period for class members who establish constructive dismissal, except those who have an employment contract with a binding clause imposing a statutory minimum notice period.

Common Issue Three: Whether Ocean Pacific Intentionally Misled Class Members About Their Prospects for Ongoing Employment

[101] Mr. Escobar asserts that by the end of May 2020, Ocean Pacific had determined to move indefinitely to the reduced model and would not have work for over 200 of its hourly employees at the Pan Pacific Hotel. Mr. Escobar contends that communications were nonetheless sent from representatives of Ocean Pacific that expressed optimism and that Ocean Pacific was committed to the class members, cultivating an impression that the employment relationship would be ongoing, despite that Ocean Pacific had no regular hourly work for class members at the Pan Pacific Hotel in the foreseeable future.

[102] Ocean Pacific's position is that it terminated employees promptly after forming a settled intention to do so, and that its communications honestly reflected its views about class members prospects for ongoing employment. Ocean Pacific submits that while the communications were empathetic and supportive in tone, they also reflected Ocean Pacific's intentions concerning future employment, in particular uncertainty, poor economic conditions and serious risk to its business and the resulting risk to the class members' employment.

[103] Ocean Pacific also argues that it is not open to Mr. Escobar to argue that Ocean Pacific was aware that class members were misled by these communications because it did not put that proposition to Ocean Pacific's witnesses on cross-examination.

[104] Ocean Pacific also submits that since it gave formal notice of termination to class members on different dates, if some of its communications are found to be misleading, subclasses must be created to address the different communications received by different class members.

[105] The evidence and submissions on this common issue raise the following questions:

a) What did Ocean Pacific know about class members' prospects for ongoing employment at the Pan Pacific?

b) What communications were provided to class members about their prospects for ongoing employment?

c) Were any of the communications misleading?

d) Were any misleading communications deliberately or intentionally misleading?

What did Ocean Pacific Know About Class Members' Prospects for Ongoing Employment?

[106] Mr. Escobar argues that Ocean Pacific knew by late May or early June 2020 that the reduced model would only need approximately 41 hourly employees and so Ocean Pacific would not have work for over 200 of its hourly employees for the foreseeable future.

[107] Mr. Somani testified that in late May 2020 he took stock of the situation and began making plans which evolved into the 100-room reduced model for the Pan Pacific Hotel. He testified that in mid-June he sorted employees into lists according to seniority, department and employment contract type to assist in determining who he could use on the reduced model and developed the plan to offer them the 24-hour contracts. That included salaried employees who would be on the management side, and hourly employees who would be working positions such as chamber maid, bell hop, etc.

[108] Mr. Somani testified that prior to June 18, 2020, three different groupings or lists of employees were prepared. There were lists A, B and C. List A was further subdivided into A1 and A2, with A1 being the only group of hourly employees to

whom Mr. Somani thought he could guarantee hours. This was the group of people who were offered the 24-hour agreements.

[109] In the meantime, on June 18, 2020, Mr. Somani directed Mr. Dattel to terminate 45 of the most junior employees. Most of those were regular hourly employees. Mr. Somani testified that at that time, he did not have a settled intention to dismiss further employees. Mr. Somani testified that he did not terminate all the surplus employees in June to avoid group severance liability and because he might actually need some of those employees if business picked up.

[110] The 24-hour agreements were offered to 41 employees on June 29. Mr. Dattel held in person meetings on July 7-10, 2020 at which Ocean Pacific offered casual agreements to the hourly employees who had not received a 24-hour agreement and who had not been terminated on June 18. The purpose of the casual agreements was to avoid deemed terminations that, pursuant to the *Employment Standards Act*, would be triggered on August 30, 2020.

[111] In mid-August 2020, Mr. Somani created a new list of associates to be dismissed. The list included those who had not accepted the casual agreements and would be deemed to be terminated on August 30, 2020, and some who had accepted casual agreements. At the suggestion of Mr. Dattel, before the terminations were made, five employees were removed from that list.

[112] Mr. Escobar asserts that the Court should interpret this evidence to conclude that by late May or early June 2020, the decision to go to the reduced model had been made and that meant that there was no work for any more than 41 regular hourly employees. It follows that Ocean Pacific had determined that everyone other than those 41 employees would eventually be terminated.

[113] Ocean Pacific does not dispute that the reduced model only required 41 regular hourly employees, however it also argues that given the uncertainty of the situation, it does not follow that Ocean Pacific had determined that there was no other work for the other regular hourly employees. It points to Mr. Somani’s evidence

that he did not want to dismiss everyone else because if business picked up, he might need them.

[114] Mr. Somani did not testify about a plan other than to run the hotel at a reduced model for the foreseeable future. It is obvious that Mr. Somani did not know what the future would hold and whether he made the right plan by going to a reduced model, but that is the plan that Ocean Pacific made, and as far as the evidence goes, the only plan.

[115] The other telling evidence is that Ocean Pacific offered casual agreements to those regular hourly associates who would not receive any hours unless business picked up in order to avoid the deemed termination of all of them on August 30. The decision to take that step to protect against deemed termination (which would at the least trigger severance pay and might trigger mass termination penalties), demonstrates that Ocean Pacific was planning to avoid the consequences of not having any work for those employees.

[116] Accordingly, everything that Ocean Pacific did and planned for after Mr. Somani developed the reduced model was consistent with not having any work in the foreseeable future, at least before August 30, 2020, for any regular hourly employees except those to whom it offered 24-hour contracts. I conclude that these plans reflected what Ocean Pacific believed the foreseeable future would hold.

[117] By June 18, 2020, Ocean Pacific knew who the first group of employees to be terminated were. By the same time, it knew which regular hourly employees would be offered 24-hour contracts, and by that process, it knew that it did not have work for the foreseeable future for the others. It then let matters play out by offering casual contracts to avoid deemed terminations, and staging terminations to avoid mass termination penalties.

[118] I accept Ocean Pacific's evidence that while it was making lists, names kept shifting around on the lists and it did not decide who to terminate until immediately before the terminations.

What Communications Were Made to Class Members About Their Prospects for Ongoing Employment?

[119] Mr. Escobar points to communications issued by Ocean Pacific, often by Mr. Dattel, from mid-March 2020 to late July 2020. Mr. Escobar argues these communications created a false impression that the employees would be coming back to work in the foreseeable future, an impression that Ocean Pacific knew had been created and did not correct.

[120] In these communications, class members and other persons who worked at the Pan Pacific Hotel are referred to as associates, the term that Ocean Pacific uses to refer to employees. In these reasons, I usually use the term employees, but there is no difference.

[121] On March 13, 2020, Gary Collinge, the Pan Pacific Hotel General Manager, issued a communication to be distributed to employees which included the following statements:

> As you know, we are currently experiencing a severe economic downturn due to the global COVID-19 outbreak. As a result, our Hotel has experienced a significant decrease in business. Due to the unpredictable nature of the outbreak we are expecting to face a very difficult operating environment over the coming months.
>
> …
>
> The purpose of writing this message is to assure each and every one of you that we are doing absolutely everything to mitigate and minimize the effect of these circumstances on all of us. We will be taking strong measures to drive revenues and control expenses in order to keep the business viable.
>
> To protect the well being of our business and our associates in times like this, it is important that we understand that hard decisions have to be made. As we go through this year, and in particular the next few months, you will notice certain adjustments and changes, which will be designed to ensure a positive long term future for all of us.
>
> Once again, we truly appreciate your understanding and value your contributions to our community. We are all in this together and in the true Pan Pacific Vancouver spirit we will prevail.

[122] Around April 3, Mr. Dattel posted a communication which class members and other employees could see when they logged onto a site where they could see their pay stubs or information of that type. The message including information about

staying safe such as washing hands, information about EI and CERB benefits, medial coverage under the benefits plan, and how to contact hotel personnel for more information. The parts of the message that are relevant to this claim are:

> We are all in this TOGETHER
>
> As we navigate through yet another month of the COVID-19 pandemic, we are all finding ways to cope mentally, physically and financially. Should you have any questions please feel free to contact me by either email [email address] or directly at [telephone number]. Due to the volume of calls and emails please be patient and I promise to response at the earliest opportunity.
>
> Our commitment is to easing your mind during these challenging times.
>
> May you and your family remain safe and healthy – Eyal
>
> …
>
> Remember: Tough people will always outlast the tough times.
>
> Stay Safe, Healthy and Well.

[123] On April 24, 2020, Mr. Dattel sent an email to all of the hourly employees which included the message that Ocean Pacific looked forward to welcoming its associates back to the Pan Pacific Hotel at the earliest opportunity:

> …
>
> Much like you, we are figuring things out on a daily basis based on information and regulations provided to us by the Federal, Provincial and Municipal Governments as well as Health Officials, which up until now have been continuously changing, thus causing much uncertainty and insecurity among many of us.
>
> As a result, we understand how important it may be for you to reach out to us during these challenging and sensitive times. Hence the Human Capital & Development office has and will remain open at all times to assist you should you have any questions. While I may not have all the answers I will certainly be available to hear you out and try to put your mind at ease…
>
> We at the Pan Pacific Vancouver will continue to closely monitor the rapidly changing & developing events and to keep you informed periodically through emails, such as this one, when the messaging is warranted.
>
> We look forward to helping each other emerge from this, stronger together, and to welcoming our associates back to the Pan Pacific Vancouver at the earliest opportunity!

[124] On May 12, 2020, Mr. Dattel sent an update to Pan Pacific Hotel associates providing information about the BC emergency benefit for workers, a link to federal

and provincial financial benefits available, and a link to information about Translink services.

[125] Mr. Dattel held in person meetings in small groups (to accommodate social distancing rules) on July 7-10, 2020 at the Pan Pacific Hotel to make offers of casual agreements to hourly employees. Mr. Dattel used speaking notes to deliver the message to employees, following which there was then a question period.

[126] The speaking notes include the following:

> …
>
> I would like to be very transparent with you.
>
> …fundamental changes occurring everywhere. Unfortunately, many of these changes have already impacted or will continue to impact the business levels of the Hotel industry in a negative way.
>
> …
>
> Our industry, the hotel industry, will be one of the last to come back to a substantial level in the foreseeable future.
>
> …
>
> To keep you healthy and safe, and to remain consistent with WorkSafeBC Hotel Sector guidelines we are currently keeping the following tasks and areas closed or limited for now until further notice:
>
> - Valet parking
> - Luggage handling has been reduced
> - Concierge services (which is currently not required because of the nature or needs of our guests coming through the door which at this time is very different from the past)
> - Dry cleaning and valet services…
> - [more service areas listed] …
> - …
>
> … the pandemic that we are now facing, coupled with the lack of business and no vaccine has forced us to rethink how to best manage the well-being of our associates. Our goal is to retain as many of you as we can and to do our best to help those whom we cannot bring back.
>
> We believe that the best way we can help the most associates is to provide a minimum number of hours per week to as many of you as possible. We hope to help to keep individuals safer through job rotation, multitasking, and staggering shifts over periods and days, whenever possible.
>
> This is the flexibility and commitment we are seeking from each and every one of you to whom we are reaching out to today.

> We are pleased to inform you that you are part of the group of associates that may be needed to operate the hotel under this "next normal" phase. To this effect, we have the letter here for each and every one of you outlining our plan and offer to you. The best thing we can do for you is to offer you casual employment with reduced hours and variable duties, and continue to provide you with benefits.
>
> With these new terms and conditions, you will be called into work when required and the work will be within your ability to perform, not necessarily in your current area of work. But you have the right to refuse as many shifts as you like, or the work itself, and still continue to get your benefits.
>
> By retaining you as a valuable associate today in this manner, you will be amongst those who may be offered additional hours when a vaccine is found, and business volumes begin to return closer to the "old normal".
>
> …
>
> This Offer is a change to the terms of your employment, so please take your time, and obtain independent legal advice if you feel it is required, before returning the letter with your choice of response…

[127] Mr. Somani testified that for the approximately 150 employees who attended these meetings, they were told in the meetings that there were no jobs available for them. Mr. Escobar attended one of the meetings. He testified that Mr. Dattel did not tell class members they should find other jobs, only that it was okay to have other jobs.

[128] On July 22, 2020, apparently in response to questions regarding these casual offers, Mr. Dattel sent an email to all associates which included the following content:

> We have received some questions regarding offers that were made to several associates, and, for your convenience, below are the answers to some of the questions.
>
> …
>
> 1. What are the consequences for an associate who chooses not to sign the new employment Agreement?
>
> The offers are intended to preserve continued employment and provide flexibility for both the Pan Pacific Vancouver and our associates in a time of a dramatically changing business climate, government rules and government benefit programs. As we have repeatedly said, all offers made to associates have been voluntary. All offers made encourage associates to take their time to consider and obtain advice if they wish to do so. If associates decline the offers, their employment terms and conditions remain as before. Whether this is desirable or not is a personal choice.

> 2. Can you guarantee in writing that associates who choose not to sign will not suffer any adverse consequences whatsoever?
>
> The Pan Pacific Vancouver will not take punitive action against associates for declining to sign an offer.

[129] Mr. Dattel caused a communication labelled “A Letter of Gratitude” to be sent to all class members still employed by Ocean Pacific on July 31, 2020. The Letter of Gratitude discussed the challenges of the pandemic in general terms and included the following language:

> Dear Pan Pacific Vancouver Associates,
>
> …
>
> In April we made every possible effort to keep our doors open for the public, even as for the next two months we had the odd few occupied rooms per night. Nonetheless we were determined to pull through.
>
> Later in May and through June, we started to contact our valuable, most senior associates in various departments, in an attempt to guarantee hours and to extend benefits coverage. Additional offers were provided to more associates throughout June and July, in order to retain our associates while honouring the associate’s date of hire, seniority in current designation and rate of pay. Most importantly, with these offers we also extended the benefits status, subject to and in accordance with the terms and conditions of the applicable plans and policies and the continued approval of our carrier. Associates were encouraged to consider these offers carefully, obtain advice and consider whether they deemed them appropriate for their individual needs and to ultimately make a decision without any consequences.
>
> …we are still facing concerning challenges in our food & beverage departments, which has affected our outlets, banquets and kitchens…
>
> To date we sincerely appreciate your loyalty, understanding and commitment that has allowed us all to carefully navigate ourselves successfully to this current stage. We hope to see improvements and an upward surge in business which will create greater work opportunities.
>
> We, ourselves, are committed to you. Should you require any assistance during these challenging times, please reach out to us on an individual basis and let us know how we may be able to help you.
>
> Our journey is one taken together. It may not be over soon but we will continue to be here for you.
>
> Sincerely,
>
> Eyal Dattel
>
> Director, Human Capital & Development

[130] Mr. Escobar submits that the Letter of Gratitude was misleading as Ocean Pacific was not committed to every employee to which it sent that letter and would not continue to be there for everyone of those employees, and was not on the same journey as the employees as they intended to terminate some of them.

[131] On August 24, 2020, a letter was sent to all associates in regards to a union certification vote that told class members that it considered them to be part of a family, that it planned to continue to assist and support the associates during this difficult period, until business levels recovered, and that they should vote to preserve their future:

> …
>
> To: All Associates:
>
> From: Ocean Pacific Hotels Ltd. and Pan Pacific Vancouver
>
> RE: Certification Application by UNITE HERE, Local 40 (the "Union")
>
> Dear Valued Associate,
>
> … As you are aware, the on-going global pandemic has resulted in unprecedented challenges, causing everyone of us into making many difficult decisions over the past five months. At the Hotel, while the business levels have been at an all-time low, we have continued to assist and support our Associates during this difficult period and plan to continue to do so in whichever way we can until business levels recover and are able to resume back to normal.
>
> Should there be certification vote, we encourage you to vote. …
>
> We wish to take this opportunity to remind you of the following:
>
> - We have been together for the past thirty-five years since the Hotel opened under the Pan Pacific banner. Both you and the Pan Pacific brand have stood with us, shoulder to shoulder throughout the decades. You have always been considered as part of our family, through the best and worst of times.
>
> …
>
> - We continuously monitor the wages, benefits and working conditions provided by other similar large hotels in our marketplace, in order to ensure that what we provide is comparable or even better than our competition. We believe that our Associates are aware of this, as our Hotel has some of the longest serving, most loyal Associates in the city.
>
> …
>
> In conclusion, we once again would like to thank you for being a valued Associate and an appreciated part of our family. After many years, you know

> what to expect from us. We would prefer to continue to deal with you as individuals, as we have for the past thirty-five years. Please vote to preserve your future and ensure your decision is heard. It is now more important than ever.

Were Any of the Communications Misleading?

[132] The question of whether the communications were misleading is asked as part of the fact finding to determine whether intentionally misleading communications amount to a breach of the duty of honest performance in contract, as a manifestation of the organizing in principle of good faith, as created in *Bhasin v. Hrynew*, 2014 SCC 71.

[133] The content of the duty of honesty in contractual performance was addressed in *Bhasin* and then again in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at paras. 38 and 89–90. In both cases, the Supreme Court of Canada acknowledged that parties to contracts do not have a positive duty of disclosure and are entitled to keep their business strategies to themselves. Contracting parties do not have a fiduciary duty, nor are they required to subordinate their interests to those of the other party: *Bhasin* at para. 86.

[134] The scope of the duty was explained as to prohibit lying or otherwise knowingly misleading about matters directly linked to the performance of the contract: *Bhasin* at para. 73, *Callow* at paras. 3 and 77. A failure to disclose a material fact is not a breach of the duty of honesty, but active dishonesty is a breach: *Bhasin* at paras. 86–87; and *Callow* at paras. 5 and 38.

[135] Also, in *Callow* at para. 81, the majority held that where “the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed and correcting it does not serve to confer a benefit on the party who has been wronged.” At paras. 89–91, Justice Kasirer for the majority explained that it is wrong to assert that “nothing stands between the outright lie and silence” and that lies, half-truths, omissions, actions, or inactions can be misleading.

[136] In *Callow* at para. 40, the majority stated it was not necessary to extend *Bhasin* to recognize a new duty of good faith relating to “active non-disclosure”.

[137] Accordingly, the communications that Ocean Pacific made must be assessed taking into account that Ocean Pacific had no general duty to disclose nor a duty to subordinate its interests to those of the class members by disclosing its strategic decisions, but if the communications it made, or the context in which they were made, resulted in the communications being actively misleading because of what Ocean Pacific did not disclose or for any other reason, then Ocean Pacific’s duty of honest performance included a requirement to correct any misleading communications.

[138] Mr. Escobar argues that the communications described above cultivated a false impression in class members that there was an ongoing employment relationship and that they would be coming back to work at the Pan Pacific Hotel. He argues that this led to a proactive obligation to dispel this mistaken impression once Ocean Pacific determined that, for an indefinite period, it would not be calling those employees in to work. In my view, if Mr. Escobar is correct that a mistaken impression was created by Ocean Pacific’s communications, then the duty of honest performance required it to be corrected, so long as Ocean Pacific knowingly or intentionally created the mistaken impression.

[139] Ocean Pacific argues that its communications with class members did not imply that jobs were safe, but rather, once Ocean Pacific determined that was not the case, the communications made it clear that there would be employees who would not be brought back. Ocean Pacific argues that a false impression about ongoing employment could not be given by it unless it was given at a time when Ocean Pacific had determined to dismiss specific class members because there is no duty to disclose, only a duty to not actively mislead or lie. Accordingly, Ocean Pacific’s position is that it is not helpful to consider the communications outside the evidence as to when Ocean Pacific made determinations to dismiss specific employees. Only a communication that could give an employee the impression that

his or her job was safe when Ocean Pacific had made a decision to dismiss that employee could possibly be a misleading impression.

[140] Ocean Pacific also argues that any communications were not made in the course of the performance of the contract, because the class members assert they were constructively dismissed when their contracts were cancelled.

[141] I will address the competing submissions about whether the Ocean Pacific's communications, and what it did not communicate, fall within the scope of the duty of honesty in contractual performance, if necessary, under common issue 4, where I consider whether misleading communications result in a breach of the duty of good faith and honest performance of contract. At this juncture, I will address whether any of the communications could be said to be actively misleading as explained in *Bhasin* and *Callow* in a manner that encompasses both parties' view of the law. To capture the broadest end of that spectrum, I will consider whether they conveyed or could create a mistaken impression to the class members that their jobs were safe.

[142] The analysis in *Callow* is consistent with a subjective/objective test: how would a reasonable person in the shoes of the recipient understand the communication, with the caveat that if Ocean Pacific became aware that class members had been misled by its communications, it had a duty to correct them. This test is not easily applied to a class where the court only has the evidence of one class member, Mr. Escobar. In my view, by seeking the resolution of the issue as a common issue, Mr. Escobar has taken a position consistent with subordinating or somewhat obscuring the subjective element because it is the perspective of the class as a whole that must be considered to address the common issue.

[143] It is important to read the communications holistically, both the entire message of each communication, and with the other communications that preceded it. It is also important to read them in the context of the circumstances at the time, i.e.: an unprecedented worldwide pandemic during which individual citizens and businesses alike were significantly curtailed in what they could do and where they

could go. Individuals and businesses were receiving information from public health authorities and government officials about what they could and could not do.

[144] Mr. Escobar submits that at the time the reduced model was developed, Ocean Pacific knew it only had work for 41 regularly hourly employees and at that time, not telling the class members that that became an actionable omission, and in addition, communications that could mislead employees to think there was work for more than 41 regular hourly employees who had been chosen by mid-June, created a misleading impression that had to be corrected.

[145] Regardless of whether I ultimately accept this submission, it allows the court to determine how the timing of various communications could play a role in Mr. Escobar's theory of the case. The communications before the reduced model led to the identification of 41 regular hourly employees who would have future work could not be *per se* misleading, they can only provide context for the communications that came later. The pre-reduced model communications could not be misleading (by commission or omission) about ongoing employment, because the reduced model was not even conceived until late May.

[146] There is no precise date to pin to when the reduced model had concrete implications for ongoing employment of class members. Mr. Somani testified that he began to conceive it in late May. He testified that in June, he discussed it with his directors, and began asking his staff to prepare lists of employees so he could determine what types of roles and who would be suited to work in the reduced model. He testified he asked for that in June and received it in mid-June.

[147] I conclude that the reduced model, while initially conceived in late May 2020, was insufficiently concrete to be associated with misleading communications until June 15, 2020 when Mr. Somani was creating sub-lists of employees and putting them into groups who might be appropriate for the reduced model. Those who were not on reduced model list were further divided into lists as described above. Those for whom Mr. Somani had no hope he decided to terminate quickly and did terminate on June 18, 2020.

[148] Given those precepts, I will address the communications chronologically so that the analysis of any given one can take into account the previous communications.

[149] The communications between March 2020 and late May 2020 do not provide any information or fail to provide any information that could create an impression that jobs were safe. While they included language that would be reasonably perceived to be generally supportive and encouraging, the support and encouragement was in the context of a pandemic threatening health and safety of people, not just their jobs. And while a communication of support and encouragement from one's employer is not divorced from one's job, it is simply not reasonable to read any of these communications as saying that Ocean Pacific was communicating that each person would come back to a job.

[150] The supportive and encouraging communications included statements such as "we are doing absolutely everything to mitigate and minimize the effect of these circumstances on all of us" in the March 13, 2020 statement. When the June 15, 2020 communications were made, a class member who had this statement in mind would reasonably conclude that in March 2020, Ocean Pacific was trying but could not commit to eliminating the negative effects of the circumstances—i.e.: some of "all of us" might not escape the effects of the circumstances. That statement was preceded by the obvious bad news that as a result of the pandemic, "our Hotel has experienced a significant decrease in business. Due to the unpredictable nature of the outbreak we are expecting to face a very difficult operating environment over the coming months." Near the end of the message, Mr. Collinge cautioned that "hard decisions have to be made"…"to ensure a positive long term future for all of us".

[151] The goal of a positive long term future for all of us could be seen to be a reassurance that there could be jobs in the long term for every one, if taken in isolation, but it could not be taken in isolation. When read in the context of the rest of the message and the emerging pandemic, it could not be reasonably be taken to be

a reassurance that all Pan Pacific Hotel employees would come out of the pandemic with their jobs intact.

[152] The April 2020 communication, posted where employees could log in to see their payroll information, encouraged class members to communicate with Mr. Dattel if they had any questions or concerns about "ways to cope mentally, physically and financially". The message contained statements such as "we are all in this together" and "our commitment is to ease your mind during these challenging times". A reasonable class member would read it as conveying that Ocean Pacific knew that its employees were suffering and was offering a line of communication to speak to Ocean Pacific human resources personnel. It ended by encouraging that "tough people will outlast the tough times". Offering support and encouragement is not the same thing as suggesting that their jobs would being guaranteed.

[153] The April 24, 2020 communication conveyed logistical information for class members to contact Mr. Dattel, while cautioning that he might not have all of the information they were looking for. It communicated this in the context of stating that Ocean Pacific, like others, were receiving constantly changing information from public health officials and others that was "causing much uncertainty and insecurity among many of us." It stated that Ocean Pacific looked forward to welcoming back its associates at the "earliest opportunity". In the context of the message as a whole, and by using the word "opportunity" Ocean Pacific was clearly conveying the notion of hope couched by the uncertainty and insecurity that prevailed.

[154] The next communications were made to portions of class members because on May 5, 2020, one class member was terminated.

[155] The May 12, 2020 update sent by Mr. Dattel to Pan Pacific Hotel associates provided information about government pandemic benefits and Translink services. It does not have any content that could relate to ongoing employment.

[156] On June 18, 2020, 42 class members were terminated. Those terminations were made within days of Mr. Somani determining that he needed 41 regularly hourly employees on 24-hour contracts for the reduced model.

[157] Given Mr. Escobar's theory of the case, that the misleading and omissions were with respect to the reduced model and the impact it had on class members' jobs, those terminated on May 5, 2020 and June 18, 2020 could not have received any misleading communications or omissions that had to be corrected including in regard to the reduced model.

[158] I pause to recount that prior to this time, Mr. Escobar sent communications to Ocean Pacific indicating that he was ready to come back to work and offering to do work such as cleaning and sanitizing to prepare the hotel to welcome guests in accordance with the COVID-19 precautions what would be necessary. Mr. Escobar testified that due to his seniority, he was not concerned about his job.

[159] This evidence does not assist with interpreting these communications. Mr. Escobar's belief that due to his seniority he was not concerned about his job is not helpful in determining whether class members were misled by any communications because the class members as a whole did not enjoy Mr. Escobar's seniority and he has sought to represent all of them. In addition, while Mr. Escobar was certainly a loyal employee who demonstrated his loyalty and love of his job through these communications and through his evidence, it is questionable whether his confidence was reasonable. I conclude this absent hindsight because Mr. Escobar was told in March 2020 that the concierge desk was closed indefinitely. He was told in July 2020 that it would remain closed indefinitely. He was not told anything different in between. He was employed as a senior concierge.

[160] The offers of 24-hour contracts were made in late June 2020. They were told that they would be guaranteed 24-hours per week if they agreed to move to a 24 hour contract. Forty accepted.

[161] The remaining group is those who were neither terminated in May or June 2020 nor offered 24-hour contracts. They attended meetings between July 7-10, 2020 at which they were offered casual contracts. The speaking notes at those meetings included these points:

- Fundamental changes had occurred which effected the hotel's business and the hotel industry as a whole would be one of the last to come back to a substantial level in the foreseeable future.
- Certain departments remained closed for the foreseeable future and others' operations were significantly limited.
- Ocean Pacific had been forced to rethink how to best manage the well-being of associates with the goal of retaining as many associates as it could and to do its "best to help those whom it cannot bring back".
- Those at the meetings "may be needed" to operate the hotel in the "next normal" phase and so they were being offered casual employment with reduced hours and variable duties under which they would be called into work when required. They had the right to refuse shifts and still continue to receive benefits.
- Those who accepted the casual contracts would be amongst those who may be offered additional hours when a vaccine was found, and business volumes would begin to return closer to the "old normal".
- They were told it was a change to the terms of their employment and they could seek independent legal advice before responding to it.

[162] Ocean Pacific submits that the July meetings made it clear that not every employee in the room would be able to come back to work, and that for some people there was not work for them at the Pan Pacific Hotel for the foreseeable future.

[163] Mr. Escobar submitted that at the July 7-10 meetings, Ocean Pacific painted the most negative picture that it had to date, but that the level of transparency was insufficient because Ocean Pacific did not actually tell people that their jobs were in jeopardy because they were not part of the reduced model.

[164] I agree with the submission of Ocean Pacific. In my view, the failure to refer to the "reduced model" was not misleading. The class members were told that Ocean Pacific had to rethink how it operated fundamentally due to the pandemic, that it anticipated that the hotel would not be able to "come back" in a substantial way for the foreseeable future, certain departments would remain closed or significantly limited for the foreseeable future, they would not be able to bring all of the employees back and those that signed casual agreements would be offered shifts when a vaccine was found. That information could only be reasonably understood to mean that the hotel would not be operating with all pre-pandemic departments or at

pre-pandemic staffing levels for the foreseeable future, as a result of which some jobs would be permanently lost and other positions would have no work in the foreseeable future. In my view, Ocean Pacific communicated to those present that some jobs would be lost permanently and some would have no work in the foreseeable future despite that Mr. Dattel did not use the words “reduced model”.

[165] The difference between what Ocean Pacific communicated and what Mr. Escobar says it should have communicated is that Ocean Pacific should have said that the employees have been divided into lists, the employees on one list will be terminated in the future and employees who have not been offered 24-hour contracts will not have any work in the future. In other words, because Mr. Escobar was not told that his name was on a list to be terminated, he was misled by these communications.

[166] This would be more specific information, but it in my view it does not differ substantively enough from what was said to be misleading, and some of it would have been inaccurate and so would have been misleading.

[167] To repeat, Ocean Pacific clearly disclosed that some people would be terminated and others would have no work for the foreseeable future. From the evidence of Mr. Escobar and Mr. Dattel, it is apparent that at least some class members knew about 24-hour contracts, if not in those terms, because they asked Mr. Dattel about why some people had been called back to work.

[168] There is nothing about the lists, including the impersonal harshness inherent in their existence, that conveyed more useful information because the lists were not settled. Each class member could not have been accurately told whether their name was on a list for termination. Those who were terminated on August 28, 2020 were not identified with specificity when the July 7-10 communications were made. They were not known because their status depended on who signed the casual agreements offered at the meeting, and because the names moved around before the actual terminations. For example, five persons whose names were on the list of persons to be terminated in mid August 2020 were removed from that list on or

before August 28, 2020. Telling those five that they were on a certain list in July 2020 would have been misleading about their future prospects of maintaining employment with Ocean Pacific. Nevertheless, at the July 7-10 meetings, Mr. Dattel conveyed to those in attendance that the deemed termination date was August 30 and after a deemed termination, they might not have a job (the correctness of that statement is not argued to be misleading and is not a matter that is not before me).

[169] Ocean Pacific was entitled to keep its cards close to its chest so long as it did not actively mislead. The fact of lists of employees in one category or another, from the perspective of the class members like Mr. Escobar, who was clearly a loyal employee who was remaining loyal to the Pan Pacific Hotel, would be devastatingly impersonal and harsh. It was a harsh strategy that Ocean Pacific was entitled to use and to keep to itself given what it had disclosed.

[170] I also conclude that none of the March-May pre-reduced model communications could reasonably affect the interpretation of the clear message given in the July 7-10 meetings that not everyone was going to be coming back to work at the Pan Pacific Hotel and others would not have work for the foreseeable future.

[171] The next communication was sent by Mr. Dattel on July 22, 2020 to provide all employees with responses to questions that Mr. Dattel had received after the July 7-10 meetings. It contained the following:

> - The casual offers were intended to preserve continued employment and provide flexibility for both the Pan Pacific Vancouver and our associates in a time of a dramatically changing business climate, government rules and government benefit programs.
> - Pan Pacific Hotel will not take punitive action against associates who do not accept casual offers. If associates decline the offers, their employment terms and conditions remain as before. Whether this is desirable or not is a personal choice.

[172] I do not find any misleading information in this email in the context in which it was sent. By advising that the casual offers are intended to preserve continued employment, there is an obvious inference that employment might not be preserved as a continuing status, i.e.: in the future. At the same time, it stated that for those

who do not accept the offers, “their employment terms and conditions remain as before”. The present tense in that statement is important. It is conveying that the causal employment offers were not a choice between casual employment or no employment in the immediate term. There could be continued employment under the status quo, which was no hours. And it did not detract from the clear statement made on July 7-10 that Ocean Pacific would not be able to bring everyone back and for some no work would not be available in the foreseeable future.

[173] On July 31, 2020, Mr. Dattel sent the “Letter of Gratitude” to all remaining class members that included the following:

- Information that in May and through June, Ocean Pacific started to contact valuable, most senior associates in various departments, in an attempt to guarantee hours and to extend benefits coverage.
- Information that additional offers were provided to more associates throughout June and July, in order to retain associates while honouring the associate’s date of hire, seniority in current designation and rate of pay.
- Associates were encouraged to consider these offers carefully, obtain advice and consider whether they deemed them appropriate for their individual needs and to ultimately make a decision without any consequences.
- “We sincerely appreciate your loyalty, understanding and commitment that has allowed us all to carefully navigate ourselves successfully to this current stage. We hope to see improvements and an upward surge in business which will create greater work opportunities.”
- “We, ourselves, are committed to you. Should you require any assistance during these challenging times, please reach out to us on an individual basis and let us know how we may be able to help you.”
- “Our journey is one taken together. It may not be over soon but we will continue to be here for you.”

[174] Mr. Escobar argues that Ocean Pacific created a general impression that it simply needed to be more time before welcoming all employees back through its statements that it was committed to the employees, would continue to be here for them, and that the journey of both employee and hotel is taken together. He argues that receiving such a communication cultivated a false impression in the class members that Ocean Pacific intended to continue the employment relationship with each class member. Mr. Escobar asserts that given that Mr. Somani knew there

would be another round of terminations more than 60 days after the June 18, 2020 terminations, and before the August 30, 2020 deemed termination date, it was misleading to convey the sentiments expressed in this letter.

[175] I do not agree that reading this letter could reasonably create the impression that Ocean Pacific intended to continue the relationship with every class member despite what it told them at the July 7-10 meetings. Nothing in this communication expressly or indirectly contradicts the previous communication made at the July 7-10 meetings that Ocean Pacific could not bring all employees back and some employees would not have work for the foreseeable future.

[176] As pointed out by Ocean Pacific, counsel for Mr. Escobar did not cross-examine Mr. Somani or Mr. Dattel on whether they had any information about whether class members were misled by this statement. They were not asked what Ocean Pacific meant by the journey taken together. The “journey taken together” which “may not be over soon” might have been a reference to the journey of the COVID-19 pandemic and the negative impact it had on employment. That was not going to be over soon, and the commitment was to provide support to the employees with regard to that. As in previous communications, Ocean Pacific was offering to be a source of information and to answer questions. The reference to “greater work opportunities” was an expression of hope, not a commitment, and could not be reasonably interpreted to be that there would be no lost jobs.

[177] Mr. Escobar describes the suggestion of a “journey taken together” as creating ambiguity with the prior statements. With respect, that could only be if the class members ignored the previous statements that not all of the jobs were going to survive the pandemic and some would have no hours for the foreseeable future.

[178] With regard to the August 24, 2020 letter regarding union certification, the parts of it that need to be considered to determine if it was misleading are:

- While the business levels have been at an all-time low, we have continued to assist and support our Associates during this difficult period and plan to continue to do so in whichever way we can until business levels recover and are able to resume back to normal.

- You have always been considered as part of our family, through the best and worst of times.
- We once again would like to thank you for being a valued Associate and an appreciated part of our family. After many years, you know what to expect from us. We would prefer to continue to deal with you as individuals, as we have for the past thirty-five years. Please vote to preserve your future …

[179] My analysis of this letter is the same as my analysis of the Letter of Gratitude. There is no contradiction of the information conveyed in the July 7-10 meetings, the commitment of support is "in whichever way we can". It is not reasonable to interpret the request to "vote to preserve your future" as a commitment of job security thereby nullifying what was said during the July 7-10 meetings.

[180] I conclude that the communications did not create a misleading impression that class members' jobs were safe. Having reached that conclusion, it is not necessary to consider whether they were deliberately or intentionally misleading.

Common Issue Four

[181] Having determined that the communications were not misleading, Ocean Pacific's conduct cannot amount to a beach of the duty of good faith and honest performance towards class members. The answer to common issue 4 is no.

Common Issue Five

[182] Having determined that there were no misleading communications pertaining to return to active employment, the question of damages is not applicable, so the answer to common issue 5 is no.

Common Issue Six

[183] The conduct that Mr. Escobar asserted was high-handed, malicious, arbitrary or reprehensible warranting punitive damages is the same conduct it asserts was intentionally or deliberately misleading class members about the prospect of returning to active employment. Having found no misleading conduct in this regard, the answer to common issue 6 is no.

Disposition

[184] The answer to common issue one is yes.

[185] The answer to common issue two is that the COVID-19 pandemic detrimentally impacted the availability of alternate employment for class members during 2020. Specifically, equally remunerative work was more challenging to find during 2020 than was typical and the employment rate was lower than the 2015-2019 average in Vancouver from mid-February 2020 until January 2021. These findings should be taken into account when fixing the notice period for class members who establish constructive dismissal, except those who have an employment contract with a binding statutory minimum notice period clause.

[186] The answer to common issue three is no.

[187] The answer to common issue four is no.

[188] The answer to common issue five is no.

[189] The answer to common issue six is no.

"Matthews J."