



ONTARIO
SUPERIOR COURT OF JUSTICE

Electronically issued : 09-Sep-2019
Délivré par voie électronique : 09-Sep-2019
Toronto

KELLI HARDING

Plaintiff

– and –

**1513563 ONTARIO LIMITED OPERATING AS ENCORE FOOD WITH
ELEGANCE, APPLAUSE CATERING INC., OPERATING AS APPLAUSE
CATERING, AE HOSPITALITY LTD., OPERATING
AS AE HOSPITALITY, 2354398 ONTARIO LIMITED CARY SILBER,
DAVID SILBER AND RYAN SILBER**

Defendants

Proceedings commenced under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

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

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

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

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$10,000 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for the costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date:

Issued by: _____
Local Registrar

Address of Court Office:
393 University Avenue
Toronto, ON M5G 1E6

TO: **1513563 ONTARIO LIMITED**
5000 Dufferin Street Unit P
Toronto, Ontario, Canada M3H 5T5

AND

TO: **APPLAUSE CATERING INC.**
5000 Dufferin Street Unit P
Toronto, Ontario, Canada M3H 5T5

AND

TO: **AE HOSPITALITY LTD.,**
5000 Dufferin Street Unit P
Toronto, Ontario, Canada M3H 5T5

AND

TO: **2354398 ONTARIO LIMITED**
5000 Dufferin Street Unit P
Toronto, Ontario, Canada M3H 5T5

AND

TO: **CARY SILBER**
5000 Dufferin Street Unit P
Toronto, Ontario, Canada M3H 5T5

AND

TO: **DAVID SILBER**
5000 Dufferin Street Unit P
Toronto, Ontario, Canada M3H 5T5

AND

TO: **RYAN SILBER**
5000 Dufferin Street Unit P
Toronto, Ontario, Canada M3H 5T5

CLAIM

RELIEF CLAIMED

1. The Proposed Representative Plaintiff claims the following on her behalf, and on behalf of members of the Class:
 - a) an order certifying this action as a class proceeding and appointing Kelli Harding as Representative Plaintiff of the Class;
 - b) a declaration that the members of the Class were employees during their work with AE Hospitality Ltd. (“**AE Hospitality**”) and thus are entitled to the employment standards under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“**ESA**”);
 - c) a declaration that the Defendants are jointly liable for the unpaid wages of the Class Members;
 - d) a declaration that the Defendants violated the terms of the ESA or of the applicable provincial employment standards act by:
 - i. failing to ensure that Class Members were properly classified as employees;
 - ii. failing to advise class members of their entitlement to compensation equal to or above the minimum wage as provided by the ESA (the “**Minimum Wage**”);
 - iii. failing to compensate Class Members at their regular rate of pay for hours which were required to be worked, including but not limited to time spent packing up, driving to, unpacking, and driving back from any venue sites;
 - iv. in the alternative to (iii) above, failing to compensate Class Members at a rate equal to or above the Minimum Wage for the hours required to be worked but which were unpaid;
 - v. failing to advise Class members of their entitlement to overtime pay for hours worked in excess of 44 hours per week in accordance with the ESA

- or of the applicable provincial employment standards act (the “**Overtime Threshold**”);
- vi. requiring and/or permitting the Class Members to work overtime hours and failing to compensate the Class Members for hours worked in excess of the Overtime Threshold (“**Overtime Pay**”);
 - vii. failing to ensure that the Class Members' hours of work were monitored and accurately recorded;
 - viii. failing to advise Class Members of their entitlement to vacation pay at a rate of 4 percent or 6 percent of wages, as the case may be, in accordance with the ESA (“**Vacation Pay**”);
 - ix. failing to compensate Class Members for Vacation Pay;
 - x. failing to advise Class Members of their entitlement to public holiday pay and premium pay in accordance with the ESA (the “**Public Holiday and Premium Pay**”);
 - xi. failing to compensate Class Members for Public Holiday and Premium Pay;
 - xii. failing to monitor and record or otherwise track the Class Members hours of work; and,
 - xiii. failing to compensate the Class Members for all hours worked.
- e) damages for compensation below Minimum Wage;
 - f) damages for unpaid Overtime;
 - g) damages for unpaid Vacation Pay;
 - h) damages for unpaid Public Holiday and Premium Pay;

- i) a declaration that the Defendants are liable for any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors;
- j) a declaration that the Defendants are liable for any adverse tax liability sustained by the Class Members resulting from a determination that the Class Members are/were employees of the Defendants and not independent contractors;
- k) a declaration that the Defendants are liable, and must reimburse the Class Members, for any *Canada Pension Plan*, RSC, 1985, c C-8 (“**CPP**”) or *Employment Insurance Act*, SC 1996, c 23 (“**EI**”) contributions which may have been paid or are owed resulting from a determination that the Class Members are/were employees of AE Hospitality and not independent contractors;
- l) the sum of \$1,500,000 for unpaid Overtime Pay;
- m) the sum of \$1,000,000 for unpaid Vacation Pay;
- n) the sum of \$1,000,000 for unpaid Public Holiday Pay;
- o) the sum of \$1,000,000 for unpaid Premium Pay;
- p) the sum of \$500,000 for compensation below the Minimum Wage;
- q) the sum of \$2,000,000 for failure to remove statutory deductions and lost employment insurance benefits;
- r) the sum of \$5,000,000 as punitive damages;
- s) an order, pursuant to s. 24 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“**Class Proceedings Act**”) directing an aggregate assessment of damages;
- t) an order directing the Defendants to preserve and disclose to the Plaintiff all records (in any form) relating to the identification of Class Members and the hours of work performed by the Class Members;

- u) prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- v) postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- w) the costs of this action on a substantial indemnity basis, together with applicable HST, or other applicable taxes, thereon;
- x) the costs of administering the plan of distribution of the recovery in this action; and,
- y) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The Plaintiff, Kelli Harding (“**Kelli**”) was a resident of Ontario during all applicable times. She worked as a chef for AE Hospitality Ltd. (“**AE Hospitality**”), 1513563 Ontario Limited operating as Encore Food with Elegance (“**Encore**”) and Applause Catering Inc. (“**Applause**”) from on or around October 2012 to on or around September 2013.
3. 2354398 Ontario Limited (“**235**”), Applause, and Encore are catering companies (the “**Catering Companies**”) and AE Hospitality is a staffing agency. The Catering Companies and AE Hospitality (collectively, the “**Group**”) are related corporations with directors and shareholders belonging to the same family.

AE Hospitality

4. The Defendant, AE Hospitality, is a staffing agency incorporated on June 28, 2012. Cary Silber is the sole director of AE Hospitality.
5. AE Hospitality hires supervisors, servers, bartenders (“**wait staff**”) and chefs to work at events catered by the Catering Companies. The workers provide services for various types of events, including weddings, funerals, christenings, Bar/Bat Mitzvahs, fundraisers, trade shows, corporate events and other special events. The events range anywhere from two guests to two thousand guests in attendance.

6. AE Hospitality provides workers to the Catering Companies. With respect to wait staff, AE Hospitality establishes a roster of people by receiving resumes.
7. Most of the chefs that work for AE Hospitality are career chefs and are employed by Encore and/or Applause.
8. All of AE Hospitality's workers are classified as independent contractors.
9. AE Hospitality's clerical and accounting work is done for a fee by personnel of the Catering Companies.

Catering Companies

10. Cary Silber manages AE Hospitality and is involved in the day-to-day operations of the Catering Companies. He has sales, administration and financial responsibilities in respect of the Catering Companies. His sales duties involve visiting venues, creating menus, dealing with other logistical issues and dealing with the clients of the Catering Companies (the "**Customers**"). Cary Silber sometimes contracts with the Customers on behalf of the Catering Companies. In carrying out these duties, Cary Silber is also involved in determining how many workers the Catering Companies will require for the event. Cary Silber's administrative duties involve invoicing, checking accounts payable and receivable and dealing with suppliers. His financial duties involve checking bank deposits, bank statements and cash flows.
11. The Catering Companies employ chefs to work in the Encore kitchen or on the Applause premises.

Encore

12. Encore is a catering company that provides food for a variety of events. It was incorporated in 2002. Cary Silber is the director of Encore.
13. Encore has a production kitchen facility where food is prepared for the events. Encore does not have a banquet facility and its workers are required to work offsite at external events.

Applause

14. Applause is a catering company that provides kosher food. Cary Silber and David Silber are the directors of Applause.
15. Applause was incorporated in 2010 to target high-end kosher events. It holds most of its events at the Beth Tzedec synagogue, where its kitchen and commissary are located. Applause also caters external kosher events. AE Hospitality provides workers for Applause for both the onsite and external events.

235

16. During her time working for Applause, Encore and AE Hospitality, Kelli received pay stubs from 235 for her work as a chef. 235 was incorporated in 2012. Ryan Silber was the director of 235.

THE CLASS

17. The Plaintiff brings this action pursuant to the *Class Proceedings Act* on her own behalf and on behalf of the following class of persons (together, the “**Class**” or “**Class Members**”):

All supervisors, servers, bartenders, and chefs who worked for one or multiple companies of the Group since October 1, 2012 to the date of the certification of this action who have not filed a complaint with the Ministry of Labour or signed a release relating to the matters in question.

KELLI’S EXPERIENCE WITH THE GROUP

18. Kelli answered a job add for a chef position and had an interview with a representative of Encore. Following the interview, Kelli started working for the group as a chef. She had the title of “Assistant Chef” while working in the Encore facilities, and the title of “Catering Chef” while working outside the Encore facilities, during catered events.

19. Kelli did not sign an employment or independent contractor agreement with either of the companies in the Group.
20. Kelli was advised that she would be paid \$15 to \$16 per hour while working in the kitchen at either the Encore or Applause locations and \$30 to \$32 per hour while working onsite at events.
21. Kelli was instructed that she was expected to punch out from Encore or Applause while loading up the food to transport it to events. The Defendants would provide Kelli with a cargo van from the Encore fleet to drive to the location of the events. Once she arrived at the event's location, Kelli would be paid for the duration of the event at the higher rate. Once the event was over, Kelli was required to pack up and return the food to the Encore or Applause locations.
22. Kelli was not compensated for her time spent loading up, travelling to the event location or packing up and returning the food items after the event ("**Uncompensated Time**").
23. When Kelli was preparing her tax returns she received T4s from Encore and Applause in 2012 and from Encore, Applause and 235 in 2013. Later, in 2015, following a CRA audit of the AE Hospitality, she received a T4A from AE Hospitality.
24. Kelli stopped working for the Group on or around September 22, 2013.
25. The Group required or permitted Kelli to work at times between approximately 50 to 70 hours per week.
26. Kelli relied in good faith on the Defendants and was unaware while working for AE Hospitality or afterwards that she was an employee and entitled to Minimum Wage for each hour worked, Overtime Pay, Vacation Pay, Public Holiday Pay and Premium Pay. At the time, Kelli relied on the Defendants to properly classify her regarding her status as an employee and her resulting entitlements. Kelli was misled by the Defendants that she was not an employee of AE Hospitality.
27. Kelli did not become aware that she was eligible as an employee for Minimum Wage for each hour worked, Overtime Pay, Vacation Pay, Public Holiday Pay and Premium Pay for

- her work for AE Hospitality because the Defendants had continually misrepresented her actual eligibility and entitlement for such pay.
28. Kelli's relationship with the Catering Companies and AE Hospitality is consistent with the relationship of all Class Members with the Group.
 29. At all material times, Kelli and the Class Members were explicitly directed as to how, where and when they could perform their duties for the Group.
 30. The Defendants required Kelli and the other Class Members to work hours in excess of the Overtime Threshold without Overtime Pay.
 31. The Defendants failed to compensate Kelli and the other Class Members for Vacation Pay for their work for AE Hospitality.
 32. The Defendants failed to compensate Kelli and the other Class Members for Public Holiday and Premium Pay for their work for AE Hospitality.
 33. In or around April 2015, Kelli received a letter from the Canada Revenue Agency (the "CRA") advising her that she was an affected party in an appeal lodged by AE Hospitality for the 2013 taxation year and that the purpose of the review was to determine whether she was an employee working under a contract of service during the relevant time.
 34. Following the CRA letter, Kelli learned that in or around May 17, 2019, the Tax Court of Canada found that AE Hospitality's workers were employees for the purposes of CPP and EI.
 35. Kelli only became aware of her entitlements after meeting with legal counsel on July 29, 2019, following the abovementioned Tax Court judgement.

COMMON EMPLOYER – JOINT LIABILITY

36. Kelli pleads that the Catering Companies and AE Hospitality were her common employers. Each of the companies in the Group exercised control over Kelli and limited what she could

do. Kelli did not understand the hierarchical structure among the Group companies, only that they were all controlled by Cary Silber and had the same management team.

37. Kelli pleads that the Group ought to be jointly liable for the causes of action outlined in Paragraph 1 because they were her common employers.

MISCLASSIFICATION OF AE HOLDINGS WORKERS AS INDEPENDENT CONTRACTORS RATHER THAN EMPLOYEES

38. The duties performed by the Class Members and the supervision and control imposed on the Class Members by the Group created an employment relationship with AE Hospitality and the Catering Companies. Particulars of such an employment relationship include, but are not limited to:

- a) Class Members performed the following duties: waited on the Customers, supervised other workers, oversaw food preparation, oversaw the serving of food, oversaw bartending, helped with set up and clean-up, and handled complaints from the Customers;
- b) The Class Members performed duties at the Customer's location;
- c) AE Hospitality established the Class Members' priorities, deadlines and schedule, for example by either posting the schedule at the Catering Companies' location or by using an app called StaffMate;
- d) AE Hospitality provided the Class Members with specific instructions for each event either verbally or in writing;
- e) AE Hospitality or the Catering Companies would supervise the Class Members;
- f) The Class Members were required to report to AE Hospitality or the Catering Companies at the event;
- g) The Class Members were required to attend meeting set by AE Hospitality;
- h) The Class Members' work hours were determined by the Group;

- i) The Class Members were required to record their hours of work on a timesheet and report to the Defendants;
 - j) The Class Members were paid between \$21 to \$32 per hour depending on the duties they were providing (servers, bartenders or chefs);
 - k) The Group would determine the Class Members' rate of pay;
 - l) The Group determined the frequency and method of payment to the Class Members;
 - m) The Group would provide the Class Members with the tools necessary to perform their duties, including branded outerwear;
 - n) The Group controlled which shifts would be offered to the Class Members;
 - o) The Class Members were required to provide the services personally;
 - p) The Class Members were required to advise AE Hospitality if they were unable to work a shift or an event;
 - q) The Class Members incurred minimal expenses in performance of their work;
 - r) The Group had the right to terminate the Class Members based on their performance issues;
 - s) The Class Members did not advertise their services; and
 - t) The Group was ultimately responsible for resolving Customer complaints resulting from the Class Members' performance.
39. The Defendants had no overtime or public holiday policy in place to monitor, record or compensate overtime or public holiday pay hours.

ESA AND CLASS MEMBERS' CONTRACTS OF EMPLOYMENT

40. The employment standards under the ESA are implied minimum terms of the contracts of employment of the Class Members.
41. At all material times, the Class Members were not and are not exempt from the ESA.
42. As a result, the contracts of employment of the Class Members impliedly provide that Class Members shall be compensated:
 - a. At a rate equal to, or greater than, the Minimum Wage;
 - b. With Overtime Pay for hours worked in excess of the Overtime Threshold;
 - c. With Vacation Pay on all amounts paid, and unpaid; and,
 - d. With Public Holiday and Premium Pay.
43. As vulnerable employees under the direct control and supervision of the Defendants, the Class Members relied on the Defendants to advise them properly regarding their employee status and eligibility for Minimum Wage for each hour worked, Overtime Pay, Vacation Pay, Public Holiday and Premium Pay and to fulfill their contractual and statutory employment responsibilities to keep track of and pay the Class Members at or above the Minimum Wage for each hour worked, Overtime Pay, Vacation Pay and Public Holiday and Premium Pay. The Group was in a position of power and direct control over the Class Members and the Class members were and are in a vulnerable position vis-à-vis the Defendants.

SYSTEMIC UNDERPAYMENT OF HOURS

44. The employment contracts of the Class Members contained an implied term that they would be paid for all hours worked at their regular rate of pay.

45. Contrary to this contractual term the Defendants did not pay the workers for packing up, driving to, unpacking, and driving back from venue locations when they were required to do so. The workers were systemically not paid for this Uncompensated Time.
46. Class Members were instructed to ‘clock out’ from their positions with the Catering Companies, where many of them were employees, work the Uncompensated Time, and then to ‘clock in’ to the second job with AE Hospitality.

SYSTEMIC OVERTIME REQUIRED OF WORKERS

47. The Defendants systematically encouraged the sales representatives to work long hours.
48. Chefs were encouraged and even required to work long hours, often far above the 44 hour limit for overtime in Ontario because they were working for all members of the Group.
49. The Class Members were not compensated with any premium if they worked extra hours. The compensation structure was the same no matter how many, or few hours they worked.
50. The Group systematically forced, or willfully allowed and encouraged, employees to work extra overtime hours to keep their positions and earn more.
51. The workers in question are not exempt from overtime and thus ought to be paid compensation equal to the overtime hours worked.

SYSTEMIC CLASSIFICATION AS “INDEPENDENT CONTRACTORS”

52. AE Hospitality systemically classified the Class Members as “independent contractors” and had some of them sign “Independent Contractor Agreements”.
53. AE Hospitality further required and permitted the Class Members to regularly work hours without receiving the Minimum Wage for each hour worked, Overtime Pay, Vacation Pay or Public Holiday and Premium Pay, under the misrepresentation from AE Hospitality that Class Members were independent contractors.
54. The Defendants were aware that the Class Members relied on the Defendants to advise them properly of their employment status and eligibility for Minimum Wage for each hour

worked, Overtime Pay, Vacation Pay or Public Holiday or Premium Pay, and to fulfill their statutory employment responsibilities to keep track of and pay the Class Members for their hours worked.

55. The Defendants exerted pervasive pressure on the Class Members to work hours in excess of the Overtime Threshold. Particulars of such pressure include the fact that the Class Members were required to drive to the venues, set-up and pack-up without any compensation as well as drive back to their place of work. These tasks could amount to between 1 to 5 hours of unpaid and unrecorded time depending on how far the venue was and how big the event was.

SYSTEMIC BREACH OF THE ESA

56. The Defendants have systematically breached the provisions of the ESA with respect to all Class Members by:
- a. failing to ensure that all Class Members were properly classified as employees;
 - b. failing to ensure that the Class Members hours of work were monitored and accurately recorded;
 - c. requiring and/or permitting the Class Members to work hours for which it failed to compensate at a rate equal to, or above, the Minimum Wage for each hour worked;
 - d. requiring and/or permitting the Class Members to work hours in excess of the Overtime Threshold but failing to ensure that the Class Members were compensated for Overtime Pay;
 - e. failing to compensate Class Members for Vacation Pay; and
 - f. failing to compensate Class Members for Public Holiday and Premium Pay.
57. AE Hospitality's misclassification of the Class Members as purported independent contractors and the denial of their entitlements under the ESA or applicable employment standards act is unlawful.

58. To the extent that any contracts purport to designate the Class Members as independent contractors, such contracts or provisions are void and unenforceable as attempts to contract out of the ESA, contrary to section 5 of the ESA.
59. The Class Members are entitled to unpaid wages.
60. The Group's Directors are personally liable to the Class Members for unpaid wages pursuant to sections 80 and 81 of the ESA, and section 113 of the Ontario *Business Corporations Act*, RSO 1990 c B 16.
61. Such breaches have been and are ongoing and continuous in respect of the Class Members since at least approximately 2012.

AGGREGATE DAMAGES

62. Kelli also pleads that the trial judge ought to make an award of aggregate damages in this case since the records kept by the Group of the time worked by Class Members should allow for the damages of each Class Member to be calculated without the need for resort to individual assessments or mini-trials.

PUNITIVE DAMAGES

63. The conduct of the Defendants is such as to justify an award of punitive, exemplary and aggravated damages. Kelli pleads that the Defendants' conduct has been a breach of the duty of good faith and a separate actionable wrong.
64. The Defendants knowingly failed to provide the basic standards as set out by the ESA, the minimum protection for employees.
65. Employers ought to be properly discouraged from paying their employees less than the minimum standards and the Plaintiff pleads that an award only to pay the minimum standards would not satisfy the requirement for denunciation of the breach of the ESA.
66. The Defendants breached their obligations to Kelli and Class Members because of their desire to maximize profits. The Defendants has shown a callous disregard and complete

lack of care for Kelli and the Class Members and their rights, and ought to be punished and deterred from future misconduct. The Defendants' conduct was sufficiently harsh, vindictive, reprehensible and malicious, so as to justify an award of punitive and exemplary and aggravated damages. The Defendants were, or ought to have been aware of the probable consequences of their conduct and the damage such conduct would cause to Kelli and Class Members.

67. Kelli pleads that an award of punitive damages equal to the amount awarded for breach of the ESA is appropriate, for a 'doubling' of damages in order to create a deterrent effect in the future.

V – LOCATION

68. Kelli proposes this action be tried at the City of Toronto, in the Province of Ontario.

Date of Issue:

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KELLI HARDING
PLAINTIFF

and

AE HOSPITALITY LTD., et al.
DEFENDANTS

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

**Proceedings commenced under the *Class*
*Proceedings Act, 1992***

STATEMENT OF CLAIM

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