

## File/Direction/Order of Justice Glustein dated May 16, 2023

### Nature of the motion and overview

The plaintiff brings a motion to discontinue the action against the defendants on a without costs and without prejudice basis. Under s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (“CPA”), court approval is required for any discontinuance of a proceeding commenced under the CPA. For the reasons that follow, I grant the motion and order that the action be discontinued.

### Background of the action

The claim is brought on behalf of “shoppers” who receive orders for groceries through the Instacart app on their smartphone, shop for those orders and deliver the orders to the customers’ door. The plaintiff claims that the defendants misclassified full-service shoppers as independent contractors rather than as employees and thus improperly withheld statutory entitlements under employment standards legislation. The plaintiff pleads (i) breach of employment standards legislation as an express or implied term of the employment contracts and (ii) breach of a duty of good faith by the defendants’ alleged failure to provide the plaintiff and class members with minimum statutory entitlements under employment standards legislation.

The defendants have not filed a statement of defence. The defendants brought a motion to stay this proceeding in favour of arbitration, which was scheduled to be heard on May 16 and 17, 2023. The certification record has not been served on the defendants and a certification motion has not been scheduled.

### The applicable law governing discontinuance of a class action

The relevant test on a motion for court approval of a discontinuance requires that there be no prejudice, or that prejudice be mitigated, with respect to the interests of the putative class members. Unlike a settlement, a discontinuance is not required to be beneficial or in the best interests of putative class members: *Winter v. CR Bard*, 2020 ONSC 3532, at para. 20.

Court approval is required to ensure that (i) meritless claims are not brought to abuse the class actions procedure by attempting to extract a payment in exchange for discontinuing a proceeding and (ii) any adverse effect on class members who might be prejudiced by the discontinuance can be ameliorated: *Naylor v. Coloplast Canada Corporation*, 2016 ONSC 1294, at para 24.

Relevant factors for the court to consider include whether there was an improper purpose for commencing a proceeding, viable replacement parties so as to ensure putative class members are not prejudiced, and whether the defendant will be prejudiced: *Barrett v. 390996 Ontario Limited*, 2020 ONSC 740, at para. 7.

### Relevant factors supporting approval of the discontinuance

I summarize the relevant factors supporting approval of the discontinuance as follows:

- (i) Out of the entire possible class, only four putative members initially were prepared to provide affidavits in support of certification. One of these individuals stopped contacting class counsel. Of the remaining three individuals, there was no geographic

- diversity, raising significant concern as to whether sufficient certification evidence could be obtained.
- (ii) There was a lack of interest amongst potential class members. Even those who contacted class counsel were predominantly concerned with issues extraneous to the claims made in the lawsuit and/or were individual in nature. Only 130 registrants signed up on the website, despite significant attempts by class counsel to reach putative members by a press release and a targeted social media advertising campaign.
  - (iii) Given the concerns as to the lack of sufficient evidence to support certification, no funding was sought.
  - (iv) The recent decisions in *Heller v. Uber Technologies Inc.*, another employment standards legislation class action, held that (a) damages in that case, if any, were “to be calculated and assessed on an individual basis”: 2022 ONSC 1996, at para. 23 and (b) the validity of arbitration clauses and class action waivers could not be the subject of a common issue and would need to take place at individual issues hearings: 2022 ONSC 1997, leave to Div. Ct. denied 2022 ONSC 3949 (see also 2023 ONSC 1942). Consequently, while class counsel would have sought to distinguish *Heller* if the certification motion had proceeded (and the defendants would have sought to distinguish *Heller* if the stay motion had proceeded), there was a significant risk that even successful certification would leave individual issues on damages calculation and the validity of the arbitration clause, when there was a very low level of interest from putative class members.
  - (v) The Contingency Fee Retainer Agreement authorizes class counsel, in their discretion, “to seek to discontinue the action if counsel determines that it is unlikely that the action will be successful.”
  - (vi) The defendants have consented to the discontinuance of the proceeding on a without costs and without prejudice basis.
  - (vii) Class Counsel will post notice of the discontinuance and a copy of the court’s order on its website dedicated to the case and will send an email in a form approved by the defendants and the court to all persons who registered on class counsel’s website to inform them of the discontinuance of this action. Given the limited publicity about this case (an initial press release, social media advertising, registration on the Canadian Bar Association’s National Database, and publication on class counsel’s website), such proposed notice is sufficient.
  - (viii) Neither the plaintiff nor class counsel will receive any payment or other consideration in exchange for discontinuing this class proceeding.
  - (ix) The discontinuance of this action does not prejudice the class because the class members’ rights are preserved by a discontinuance on a without prejudice basis.
  - (x) There is no evidence that the proceeding was commenced for any improper purpose.

## **Conclusion**

For the above reasons, I approve the discontinuance. Order to be provided to the court for approval, including approval of the notice(s) to be posted on class counsel’s website, and provided by e-mail to class members who registered on class counsel’s website.

I thank counsel for their co-operative approach to this matter and the assistance of their oral and written advocacy.

I reserve the right to make minor grammatical or typographical changes if required.