

Schedules in CUPW and Foodora Inc, et al., Unfair Labour Practice Complaint, Ontario Labour Relations Board
(April 29 2020)

SCHEDULE "A"

The Applicant, Canadian Union of Postal Workers (the "Union" or "CUPW") seeks the following relief:

1. A Declaration that Foodora Inc d.b.a. Foodora ("Foodora") and Delivery Hero SE ("Delivery Hero") (collectively the "Corporate Respondents") have violated sections 70, 72, 76 and 86 of the *Labour Relations Act, 1995* (the "*Act*");
2. A Declaration that David Albert and Alex Patterson (the "Individual Respondents") have violated section 70, 72, and 76 of the *Act*;
3. An Order that the Corporate and Individual Respondents immediately cease and desist from violating the *Act*,
4. An Order that the Corporate Respondents forthwith post copies of a notice in the usual form, signed by David Albert, at conspicuous locations at its premises where such notices are likely to come to the attention of employees informing these employees of their rights under the *Act* and of the findings and orders of the Board with respect to this application and to keep such notice posted until the Union's application in this matter and any and all related matters are finally resolved and/or for a reasonable period after the resolution of such matters; and that it take all reasonable steps to ensure that said notices remain posted and/or are replaced and are not altered, defaced or covered by any other material;
5. An Order that the Corporate Respondents and/or the Individual Respondents email copies of the notice described above to all members of the bargaining unit proposed by CUPW who performed work for Foodora in 2019 and 2020;
6. An Order that physical access to any relevant premises be granted to representatives of the Union so that it may satisfy itself that the Corporate Respondents are in compliance with the posting requirements;
7. An Order directing the Corporate Respondents and/or the Individual Respondents to reasonably compensate all affected employees, including dependent contractors, for the infringement of their statutory rights, even if they decline the offer of reinstatement and even if they were otherwise employed throughout the entire period in question;
8. An Order directing the reinstatement of all employees by the Corporate Respondents, including dependent contractors or, should they decline reinstatement, that compensation be provided by the Corporate Respondents and/or Individual Respondents in lieu of reinstatement;

9. An Order directing the Corporate Respondents and/or the Individual Respondents to reasonably compensate all affected employees, including dependent contractors, for the infringement of their statutory rights;
10. An Order directing the Corporate Respondents and/or Individual Respondents to compensate all employees within the bargaining unit, including dependent contractors, for any lost wages or income caused by the breaches of the *Act* committed by Foodora and the other respondents;
11. An Order directing the Corporate Respondents and Individual Respondents to compensate CUPW for any losses caused by the actions of Foodora and the other respondents, including but not limited to organizing costs, lost dues, and legal costs;
12. An Order that all respondents are jointly liable for any compensation, damages or fees awarded by the Board;
13. That the Board remains seized with respect to the interpretation and implementation of these remedies; and
14. Such further and additional remedial relief as the Union may request, and any other remedy that the Board may deem appropriate.

All of Which is Respectfully Submitted

SCHEDULE "B"

Overview and Parties

1. The Canadian Union of Postal Workers ("CUPW" or the "Union") is a trade union for the purposes of the *Labour Relations Act, 1995* (the "Act").
2. Foodora Inc. d.b.a. Foodora ("Foodora") is a food delivery service operating across Canada, including in the Greater Toronto Area ("GTA").
3. Foodora's parent company is Delivery Hero SE ("Delivery Hero"). Delivery Hero is a Berlin-based corporation which generated in excess of \$1.4 billion Euro in revenues in 2019. Delivery Hero owns 100% of Foodora's Canadian business.
4. On July 31, 2019, CUPW filed an application for certification (the "Application") with respect to the following bargaining unit of employees (the "Bargaining Unit"):

All couriers, including all drivers and riders, engaged by Foodora Inc. d.b.a Foodora as direct employees and/or dependent contractors in the City of Toronto and the City of Mississauga, Ontario, save and except any managers, positions above the rank of manager, office staff, marketing and/or sales staff, technical and/or information technology staff, human resources staff, reception and/or administrative staff, and accounting staff.

5. The Application has since been assigned Board File No.1346-19-R.
6. Foodora opposed the Application and took the position that its couriers were independent contractors.
7. Foodora is a registered corporate entity in Ontario. A copy of Foodora's corporate reports are attached hereto as Appendix "A". Foodora's corporate report lists David Albert as its sole director and officer. Mr. Albert is also Foodora's Managing Director in Canada.
8. Alex Paterson is Foodora's Head of Rider Management. Mr. Paterson is responsible for overseeing the work of all couriers across Canada.
9. Mr. Albert and Mr. Paterson are ultimately responsible for all decisions made in respect of Foodora's operations and its employment of couriers (including dependent contractors.) Any decision to close Foodora was made with their input and/or approval.

10. As set out in greater detail below, on April 27, 2020, Foodora announced the closing of its operations. This announcement was made two months after the Ontario Labour Relations Board (the "Board") determined that Foodora's GTA-based couriers were employees under the Act.
11. Prior to April 27, 2020, Foodora actively hired new couriers and took the consistent position that it was a leader in its sector and a healthy and growing company.
12. Foodora's business model (and that of Delivery Hero) is predicated upon the misclassification of much of its workforce as independent contractors. Delivery Hero has previously fled a jurisdiction when steps have been taken to remedy this misclassification, including as set out below.
13. In light of the above, the only reasonable inference to be drawn from Foodora's announcement is that it seeks to frustrate and defeat CUPW's attempts to gain bargaining rights for its GTA-based delivery employees (including dependent contractors).
14. In doing so, Foodora, its parent company, and the Individual Respondents have all breached multiple sections of the Act, including sections 70, 72 and 76. In addition, the Corporate Respondents have breached section 86 of the Act.

Material Facts

15. Foodora is one of the most significant and well-known platform delivery companies in Canada and, in particular, the GTA. Foodora services the public in a number of cities across Canada. Foodora's GTA-based operations are its largest in the Canadian market both by customer base and courier complement.
16. At all times material to this complaint, Foodora has employed roughly 700 to 1,000 couriers within the Bargaining Unit.
17. At all times prior to April 27, 2020, Foodora has portrayed itself publicly and to its employees (including dependent contractors) as a healthy and growing company which was well-placed within the food delivery market in the GTA and, more broadly, Ontario and Canada.

18. For example, on or about August 9, 2019, shortly after the filing of the Application, Mr. Albert issued the following statement to the public:

"We're a growing player in a highly competitive new service industry in Canada. We don't believe that our couriers need a union to affect change."¹

19. As apparent from the quote above, Foodora has at all times opposed unionization.

20. Foodora's open opposition to unionization was detailed in CUPW's pleadings in Board File No. 1376-19-U. CUPW incorporates the allegations contained within Board File No. 1376-19-U into this complaint.

21. Consistent with Mr. Albert's assertion that Foodora was healthy and growing, Foodora hired roughly 140 new couriers in the summer of 2019, mostly in July, with the majority of these couriers starting on or about August 5, 2019.² Notably, the decision to engage in this aggressive hiring was made prior to CUPW submitting the Application for Certification.

22. In September of 2019, Foodora became the first delivery application in Ontario to partner with the Liquor Control Board of Ontario ("LCBO"). In statements to the press made at the time, Mr. Albert described the pilot program with the LCBO as a significant growth opportunity:

Offering on-demand LCBO delivery in Toronto is an important milestone in our partnership with the LCBO and in our growth as a company ...

foodora [sic] understands the increasingly mobile and connected way Torontonians live, work, play and eat and we're committed to providing high-quality service, convenience and thoughtful options for every day. [emphasis added]

23. Following the announcement of the LCBO project Foodora hired a large number a new couriers to service this project. Due to pressure from the LCBO, individuals hired to service the LCBO were all hired as direct employees. This hiring took place throughout October of 2019.

¹ <https://globalnews.ca/news/5746926/foodora-union-drive/> [accessed April 27, 2020]

² The start date relied on by the Union is the date on which couriers had their accounts activated and were permitted to begin accepting shifts.

24. On February 25, 2020, the Board determined that Foodora's couriers are employees pursuant to the *Act*. The Board's decision removed a significant barrier to unionization and was widely reported in the media. The parties are currently engaged in litigation to resolve a large number of status disputes.
25. Demand for Foodora's services have remained robust throughout March and April of 2020. As a result of the COVID-19 pandemic Foodora has offered a broadened range of services, including the delivery of non-food items like pharmaceuticals.
26. In the early weeks of the pandemic, Foodora placed restrictions on its shift-bid system in the GTA. These restrictions were implemented without consulting the Union and were identified by Foodora as an effort aimed at assisting couriers by creating a "more equitable" distribution of shifts during the pandemic.
27. As a result of continued and sustained demand for Foodora's services throughout the pandemic these restrictions were lifted on April 16, 2020. At the time Foodora advised its couriers:

"Thank you for supporting your local communities one delivery at a time. Each order we complete helps bring a little bit of normal back to people's lives. Through the last few weeks, we have received a lot of positive feedback from both customers and vendors about the great service you have all provided. As a result, customer demand has steadily increased allowing us to remove the 30-hour schedule cap during shift release days in Toronto." [emphasis added]

28. A copy of Foodora's April 16, 2020 notice is attached hereto as Appendix "B".
29. Foodora routinely communicates with couriers, its office employees, and the general public about its business. For example, Foodora sends newsletters to couriers on a regular basis. At no time has Foodora raised the spectre of layoffs, service reductions or closure in these newsletters or any other communication with employees and the public.
30. On April 27, 2020, almost exactly two months following the Board's decision, Foodora announced the closure of its Canadian operation by sending a message to all couriers informing them, *inter alia*:

We regret to inform you that we have taken the difficult decision to exit the Canadian market and close down foodora Inc. [sic], the Canadian subsidiary of Delivery Hero SE.

We are immensely proud of what we built together over the last five years. foodora has turned into a popular name, known to offer a great service and with a delivery experience that gained our customers' trust. However, we have not been able to grow our business into a leading position in the highly competitive and saturated Canadian environment.

... foodora [sic] will continue to operate for the next two weeks. The last day of operations will be May 11th, 2020. You should expect to receive an official notice of termination letter today. We appreciate this may be difficult news.

This is a sad day for all of us. Feel free to reach out should you have questions as you digest.

31. A complete copy of the message sent to couriers is attached hereto as Appendix "C". Individualized "End of Engagement" notices were sent to all couriers later that afternoon. A copy of this notice is attached hereto as Appendix "D".

32. This is not the first time that a Delivery Hero subsidiary has fled a jurisdiction in order to evade the consequences of its misclassification of couriers. In May and June 2018, Australia's Fair Work ombudsman commenced proceedings against Delivery Hero's Australian subsidiary ("Foodora (Australia)") in respect of misclassification of couriers in that country. Two months later, as here, Foodora (Australia) fled the Australian market stating that it would:

"... cease operations in response to a shift in focus towards other markets where the company currently sees a higher potential for growth".³

33. Foodora (Australia) subsequently admitted that its business had likely misclassified couriers in Australia as independent contractors.⁴

34. Delivery Hero is a growing company, particularly in the Americas (which includes Canada). In 2019, Delivery Hero's "Americas" portfolio saw a 53% increase in orders and an increase in revenues from \$62 million Euros to \$110 million Euros.

35. In Delivery Hero's 2019 annual report the company's CEO, Niklas Ostberg, proclaimed:

"Our growth accelerated throughout the year and our market share

³<https://www.theguardian.com/business/2020/apr/27/foodora-condemned-for-closing-australian-operation-during-back-pay-dispute> [accessed April 27, 2020]

⁴<https://www.theguardian.com/business/2018/nov/10/foodora-australia-admits-riders-owed-5m-were-more-likely-than-not-employees> [Accessed April 28, 2020]

increased in every region compared to every competitor in the markets we operate." [emphasis added]⁵

36. On April 28, 2020, one day after the announced closure, Delivery Hero released its annual report in which it predicted "accelerated" growth in its Americas portfolio (which includes Canada), increasing from 0.8% in 2019 to 1.8% in 2020.

37. On April 28, 2020, as a part of the release of the annual report, Mr. Ostberg tweeted triumphantly:

"Fantastic delivery by @deliveryhero.com. Grew revenue with 92% to €515mn in Q1 Thanks to everyone for pushing during these challenging times..."

38. A copy of Mr. Ostberg's tweet is attached hereto as Appendix "E".

39. Delivery Hero's annual report was drafted after the COVID-19 pandemic commenced and appears to have accounted for the possible economic effects of the pandemic.'

40. Delivery Hero's report for the first quarter ("Q1") of 2020 stated that the company's "financial outlook for the group [was] unchanged despite costs associated with COVID-19."⁷ Further, the only "costs associated with COVID-19" which were expressly set out in the Q1 flowed from a geographic area other than the Americas. The Q1 also states that:

"[t]he company [Delivery Hero] expects customer acquisition growth to accelerate notably as the pandemic leads to customer expansion beyond typical prior demographic segments."⁸

41. The 2019 annual report and 2020 Q1 report made no mention of Delivery Hero's decision to close its Canadian operations, nor did it highlight any specific challenges facing its Canadian operations. This is particularly noteworthy given the fact that the announcements were released almost simultaneously (separated by less than 24 hours). The 2020 Q1 report did, however, highlight other

⁵<https://ir.deliveryhero.com/download/companies/delivery/Annual%20Reports/DE000A2E4K43-JA-2019-EQ-E-00.pdf> at page 4 [Accessed April 28, 2020]

⁶<https://ir.deliveryhero.com/download/companies/delivery/Annual%20Reports/DE000A2E4K43-JA-2019-EQ-E-00.pdf> at pg. 62 [accessed April 28, 2020]

⁷<https://www.deliveryhero.com/delivery-hero-continues-strong-growth-in-q1-as-orders-and-revenues-nearly-double/> [accessed April 28, 2020]

⁸<https://www.deliveryhero.com/delivery-hero-continues-strong-growth-in-q1-as-orders-and-revenues-nearly-double/> [accessed April 28, 2020]

challenges in the Americas, such as Argentina's classification as a "hyperinflationary" economy.⁹

Submissions

42. The Applicant submits that the following facts are readily apparent:
 - a. Foodora was the subject of an application for certification in its largest Canadian market and in the geographical area in which its largest courier workforce was employed;
 - b. Delivery Hero has a history of taking steps to evade the proper classification of its couriers; and
 - c. Foodora announced its closure only two months after the Board issued a decision holding that its GTA-based couriers were in fact employees for the purposes of the *Act*.

43. Foodora has stated that its closure is due to the poor performance of its Canadian operations. As of April 26, 2020, however, the following conclusions can be drawn about Foodora's business in Canada and, in particular, the GTA:
 - a. Foodora was a leader in the market and was poised for future growth;
 - b. Foodora had engaged in aggressive hiring throughout 2019 and had taken no steps to reduce its workforce or to warn that reductions were possible;
 - c. Foodora was well positioned to weather the 2020 COVID-19 pandemic and had in fact used the pandemic as an opportunity to expand its visibility and portfolio of services; and
 - d. Foodora had made no statements to its employees (including dependent contractors) or the general public that would suggest that the company was in any way facing financial distress.

44. In light of the above, Foodora's stated reasons for closing operations in Canada are not credible. More importantly, the only reasonable inference to be drawn in the circumstances is that Foodora's closure was motivated, in whole or in part, by anti-union animus.

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<https://www.deliveryhero.com/delivery-hero-continues-strong-growth-in-g1-as-orders-and-revenues-nearly-double/> [accessed April 27, 2020]

45. CUPW submits that Foodora's conduct is a breach of sections 70, 72, 76 and 86 of the *Act*. Furthermore, the other respondents all contributed to the decision to close Foodora.
46. CUPW further submits that the relief sought in Schedule "A" is appropriate in the circumstances.

All of Which Is Respectfully Submitted.