NORTON ROSE FULBRIGHT

Legal update

Uber hits a red light with its arbitration provisions in *Heller v Uber Technologies Inc.*

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Employment and labour
Class actions

The first Ontario Court of Appeal decision of 2019 is an important development in the trend of independent contractors in the "gig economy" being treated as "employees," with the various rights and protections that flow from that designation. This decision provides important guidance on employment law, class actions, and arbitration issues.

Background

Heller, an Uber driver, commenced a proposed class action on behalf of certain Uber drivers who provided services using Uber apps. In the proposed class action, Heller sought a declaration that Uber drivers are employees of Uber and therefore governed by the *Employment Standards Act* (*ESA*), that Uber violated the *ESA* and that the mandatory arbitration provisions of the services agreements between Uber and the drivers were void and unenforceable. The drivers also claimed $400 million in damages.

Before the class received certification, Uber moved to stay the action in favour of arbitration based on an arbitration clause in the standard service agreement between the parties. The arbitration clause required the parties to engage in International Chamber of Commerce (ICC) mediation and, failing a resolution, ICC arbitration. The service agreement was governed by Netherlands law, and Amsterdam was designated as the place of arbitration.

Illegal and unconscionable arbitration provisions

The motions judge, Perell J., determined that the arbitration clause was valid and granted Uber's motion to stay the proposed class action. He also decided that the dispute was international and commercial, and the *International Commercial Arbitration Act,* applied as opposed to Ontario's *Arbitration Act*.

Justice Perell decided the arbitration clause was not unconscionable because only "serious" claims were to be taken to ICC mediation and arbitration in Amsterdam, and Ontario drivers had other means of dispute resolution domestically and within Uber's corporate procedure. He also concluded that the arbitrability of employment agreements is a question of mixed fact and law that should be decided by the arbitrator appointed to adjudicate the dispute under the *competence-competence* principle. Justice Perell concluded that courts must enforce arbitration agreements freely entered into, and the *ESA* did not restrict the parties from arbitrating.

The Ontario Court of Appeal unanimously disagreed with the motions judge's conclusions. First, the Court of Appeal held that the invalidity exception in the *Arbitration Act* rendered the arbitration clause invalid because the clause illegally contracted out of the *ESA*. The Court of Appeal also treated Heller's allegation that he was an Uber employee as true, or capable of being proven. As an employee, Heller would be protected by the *ESA* and entitled to its benefits.

An employee who commences a civil proceeding cannot concurrently make a complaint that raises the same issue as the civil proceeding.[1] Based on the language of the *Courts of Justice Act*, the *Rules of Civil Procedure*, and the *ESA* itself, the court did not accept Uber's submission that a "civil proceeding" includes an arbitration.

It further determined that the *ESA*'s required investigative process, triggered by a complaint that the *ESA* was contravened,[2] is an "employment standard" that no employer may contract out of or waive. The arbitration clause would eliminate Heller's, or any driver's, right to make a complaint to the Ministry of Labour regarding the employer and possible *ESA* violations: it would put the entire burden of proving such a claim on Heller. That Heller chose not to make an *ESA* complaint, but instead commenced a proposed class action, was deemed irrelevant to the court's analysis.

Second, the Court of Appeal found that, even if the clause were not invalid for contravening the *ESA*, the clause was still unenforceable as the cost of overseas mediation and arbitration[3], relative to a driver's salary, rendered the clause unconscionable. In applying the test from *Titus v William F Cooke Enterprises Inc.*[4] the court determined that the Uber app's click-through interface, contract of adhesion and drivers' lack of independent legal advice created an overwhelming imbalance in bargaining power. Applying Dutch law to the contract further demonstrated unconscionability: Uber must have known drivers would be unwilling to bring claims under foreign law.

The court briefly addressed the enforceability of the forum selection and choice of laws clauses and found these too to be invalid for unconscionability.[5] Even were the provisions valid, there was a strong case not to enforce them on the basis of the balance between and convenience of the parties.

Nordheimer JA. also opined on the effect of the imbalance in bargaining power on the relationship between Uber and the drivers. Heller had no independent legal advice and no reasonable prospect of negotiating any of the services agreement's terms. Even if drivers are not employees, they are akin to consumers in their bargaining position and "at the mercy of the terms, conditions and rates of service" set by Uber.[6] Perell J.'s fundamental flaw was treating the arbitration clause as one found in normal commercial contracts, with parties of equal sophistication and strength.

Implications

This decision has potentially significant implications for Canada's gig economy. Subject to any further appeal, companies will have to adapt to their respective jurisdictional worker protection laws like the ESA instead of contracting out of them with mandatory arbitration provisions. If Uber drivers are eventually found to be "employees" instead of "contractors," Uber will have to update its employment contracts to reflect each province and territory's employment laws. ICC mediation or arbitration provisions may lose favour because of the disproportionate costs faced by contracting individuals of limited means.

As a case in point, it appears Uber's Ontario arbitration provisions were much stricter than those in other jurisdictions: its various US agreements have opt-out clauses and offer to pay arbitration fees. Other gig economy corporations such as Lyft and Airbnb have similar arbitration provisions, but the choice of law and forum depends on the contractor's place of residence or the parties' choice, which may provide enough flexibility to prevent claims of unconscionability.

Uber is expected to seek leave to appeal the ruling to the Supreme Court, as it has in other jurisdictions where the same employment issue has been litigated. Uber drivers were found to be employees by the Court of Appeal of England and Wales in late December 2018;[7] Uber said it would appeal the decision.

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Footnotes

1 *Employment Standards Act, 2000*, SO 2000, c 41, s 98 [*ESA*].

2 *ESA*, section 96.

3 The Court of Appeal noted at paragraph 15 that beginning a claim under the ICC rules costs approximately $14,500 USD, which does not account for the claimant's travel, accommodation or legal fees, as compared to a driver's average yearly salary of $20,800-$31,200 CAD.

[4] *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, 284 DLR (4th) 734, at para 38.

[5] As per the principles in *Douez v Facebook*, 2017 SCC 33.

[6] *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 at para 71.

[7] [2018] EWCA Civ 2748.

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