

Case In Point

Uber Employment Status Class Action Certified

Date: August 27, 2021

Justice Perell of the Ontario Superior Court of Justice has certified a class action brought by Uber drivers in [Uber Technologies Inc. v. Heller](#), finding that there were certifiable common issues with respect to whether drivers may have been misclassified as independent contractors within the meaning of the Ontario *Employment Standards Act, 2000* (ESA).

The class in this case involved individuals who entered into service agreements with Uber to use Uber Apps to provide ride transportation and food delivery services. The representative plaintiffs brought four causes of action against Uber: breach of employment contract, violations of the ESA as it relates to statutory entitlements such as vacation and overtime pay, unjust enrichment, and negligence. The essence of the representative plaintiffs' position was that the putative class members were employees of Uber and not independent contractors within the meaning of the ESA.

Justice Perell began his analysis by noting that the claim was not a conventional misclassification of employment status class action. There was the additional issue of whether, in a sharing economy, there was any employment relationship between Uber and the drivers at all. However, he proceeded to find that the applicable test for certification set out in section 5 of the *Class Proceedings Act, 1992* was met: (1) the pleadings disclosed a cause of action, (2) there was an identifiable class of two or more persons that would be represented by the representative plaintiff, (3) the claims of the class members raised common issues, (4) a class proceeding would be the preferable procedure for the resolution of the common issues, and (5) there was a representative plaintiff who, among other things, would fairly and adequately represent the interests of the class.

Justice Perell first found that the cause of action criteria was satisfied for the plaintiffs' breach of contract and ESA claims. However, there was no cause of action for unjust enrichment, because the restitutionary relief claimed by the plaintiffs was already captured by their breach of contract claim. Likewise, Justice Perell found that having concurrent tort and contractual liability was not appropriate in the circumstances, so the plaintiffs' negligence claim did not disclose a cause of action.

With respect to commonality, Justice Perell found that there was some basis in fact for a common issue about whether the relationship between Uber and the drivers was that of service provider to customer, employer to employee, or employer to independent contractor. All of the drivers participated in a business model comprised of the functions of the Uber App and non-negotiable, standard-form service agreements. These were common evidentiary factors that formed a common issue, the determination of which could bind all of the putative class members.

In contrast, Justice Perell declined to certify the aggregate damages common issue, finding that Uber's liability remained to be determined and the determination of each class member's damages would need to be an individual assessment, even in light of the Uber App's detailed recordkeeping abilities. Finally, with respect to punitive damages, he found that there was no basis to conclude that Uber's conduct was outrageous on an individual or class-wide basis.

Uber argued that a class action was not the preferable procedure for resolving the issues in light of anticipated legislative action on the sharing economy workplace. Justice Perell disagreed, stating that waiting for legislative reform was "of no use" to class members with present day claims.

This decision is significant for employers facing potential or proposed class actions, especially in the sharing economy workplace.