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• APPELLATE COURT ALLOWS APPEAL OF STAY IN UBER DRIVER CLASS ACTION •

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The Ontario Court of Appeal has allowed an appeal of a lower court decision which had stayed a class action filed by the plaintiff (appellant) on behalf of his fellow class members, Uber drivers, against Uber and its affiliates. The lower court had ruled that an arbitration clause (Clause) embedded in the Services Agreement (Agreement) signed by Uber drivers required a stay of the action. An article summarizing the lower court's decision can be found at https://hicksmorley.com/2018/02/14/uber-driver-class-action-stayed-due-to-arbitration-clause/.

In *Heller v. Uber Technologies Inc.*, [2019] O.J. No. 1, 2019 ONCA 1, the Court of Appeal reviewed the Clause which states that all disputes arising from the Agreement must be resolved through a mediation and/or arbitration process in Amsterdam, where portions of Uber are incorporated. It found that the Clause was invalid for two reasons:

1. it amounted to an illegal contracting out of the *Employment Standards Act, 2000* (ESA); and
2. it was unconscionable.

Notably, the Court did not comment on the issue of whether the appellant or others like him were employees or independent contractors. Rather, the Court noted that for the purposes of the appeal, it was required to presume that the appellant could prove his claim.

THE CLAUSE ILLEGALLY CONTRACTED OUT OF THE ESA

First and foremost, the Court was tasked with answering " … if the appellant (and those like him) is an employee of Uber, does the Arbitration Clause constitute a prohibited contracting out the ESA?" (at para. 28).

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The Court first took note of section 1(1) of the ESA which defines "employment standard" as well as section 5 which states:

> (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.
>
> (2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

The Court stated that if Uber drivers are employees, they would be afforded the protection provided by the ESA: in other words, an inability to contract out of the ESA. Similarly, the Court noted section 96 of the ESA, which provides employees with the opportunity to make a complaint to the Ministry of Labour.

The Court then looked to specific restrictions of this right in the ESA found in sections 98 and 99(2). Section 98 provides that an employee who commences a civil proceeding may not concurrently make a complaint that raises the same issue as the civil proceeding. Section 99(2) precludes an employee who is a member of a trade union from making a complaint.

While Uber argued that an "arbitration" fell within the meaning of "civil proceeding" in section 98, the Court disagreed. It concluded that the Clause eliminates the right of the drivers to make a complaint to the Ministry of Labour and as such, contracts out of the ESA in violation of section 5.

THE CLAUSE WAS UNCONSCIONABLE

The Court noted that up-front administrative/filing-related costs for an Uber driver to participate in the process could amount to $14,500 and that there was no dispute resolution mechanism either in Ontario, or elsewhere, short of the Clause.

The Court then outlined two competing tests to be applied with respect to determining the unconscionability of a contractual provision: the four-part test set out by the Ontario Court of Appeal in *Titus v. William F. Cooke Enterprises Inc.*, [2007] O.J. No. 3148, 2007 ONCA 573, and the two-part test set out by the British Columbia Court of Appeal in *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178, 55 D.L.R. (2d) 710 (B.C.).

While the Court did not resolve the question of which test was to be applied, it did note that under either test, the Clause would be unconscionable.

With respect to the four-part test, the Court concluded:

1. the Clause represented a substantially improvident or unfair bargain;
2. there was no evidence that the appellant had any legal or other advice prior to entering into the Agreement;
3. there was significant inequality of bargaining power between the appellant and Uber; and
4. Uber chose this Clause in order to favour itself and thus take advantage of its drivers. (at para. 68)

NEXT STEPS

Subject to any appeal to the Supreme Court of Canada, the appellant must now attempt to certify a class action. This is done through a motion for certification where, among other things, a court must appoint a representative plaintiff and certify common issues to be determined at trial before a case can proceed as a class action.

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