What's New in HR Law

Beware of Boilerplate Contracts: *Uber Technologies Inc. V. Heller,* 2020 SCC 16

June 30, 2020

BOTTOM LINE

In a highly-anticipated decision, the Supreme Court of Canada ("SCC") ruled in favour of Uber drivers and food delivery personnel, finding that an arbitration clause within an online standard-form "contractor" agreement was invalid because it was unconscionable. This outcome allows Uber drivers and food delivery personnel to commence a class action lawsuit in Ontario that alleges they are "employees" rather than "independent contractors" and thus are entitled to protections under the *Employment Standards Act, 2000 ("ESA").*

Background and Procedural History

Uber and its various corporate entities, with corporate headquarters in the Netherlands, engage individuals as drivers (Uber) and food delivery personnel (UberEats) for short- and long-term commitments across Canada.

In doing so, prior to driving or delivering food, Uber workers must review and accept the terms of an extensive online standard-form contract (the "Agreement"), which governs the terms of the engagement setting out driver compensation and other conditions. Moreover, the Agreement contains an arbitration clause which explicitly states that all disputes about the terms of the Agreement must be resolved through arbitration in the Netherlands.

In 2017, David Heller, a Toronto-based UberEats driver, commenced a class action lawsuit alleging Uber had classified its drivers as "independent contractors" rather than "employees" to avoid complying with the *ESA*. Mr. Heller alleges he is owed damages for Uber's breach of the *ESA*, breach of contract, negligence, and unjust enrichment.

At first instance, Uber successfully relied on the arbitration clause to stay, or stop, the class action lawsuit in Ontario. Mr. Heller appealed.

The Ontario Court of Appeal reversed the lower court's decision in favour of Mr. Heller holding that the arbitration clause was void because it was unconscionable and contracted out of the *ESA*. As such, the class action lawsuit was able to continue in Ontario.

Supreme Court of Canada Declares Arbitration Clause Unconscionable

A majority of the Supreme Court of Canada affirmed the Ontario Court of Appeal's decision addressing several key issues on contractual interpretation.

First, the Court reviewed the doctrine of unconscionability in contractual relations to assess the validity of the arbitration clause. To that end, the Court stated that an "unconscionable" contract or term must have two characteristics: (i) inequality of bargaining power between contracting parties (for example, a weaker and stronger party, or a party that does not appreciate the full importance of the contractual terms); and (ii) a resulting improvident bargain (i.e. a contract resulting in a benefit for a stronger party at the expense of a weaker party).

Second, the Court discussed unconscionability in the context of a standard-form contract. Importantly, the Court rejected the view that every standard-form contract was inherently unconscionable. Instead, the Court indicated that standard-form contracts may be unconscionable where there is inequality in bargaining power between two contracting parties stating:

> [88] **We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power** (Waddams (2017), at p. 240). Standard form contracts are in many instances both necessary and useful. Sophisticated commercial parties, for example, may be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice may offset uncertainty about the terms of a standard form agreement. Some standard form contracts may clearly and effectively communicate the meaning of clauses with unusual or onerous effects (Benson, at p. 234).
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> [89] **Our point is simply that unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented.**

In applying the first prong of its unconscionability test to the instant matter, the Court stated that the bargaining power between Uber and Mr. Heller was unequal. To that end, the Court noted the following inequalities between the two parties: (i) Uber was the more sophisticated party to the Agreement; (ii) Mr. Heller was unable to negotiate any of the terms in the Agreement; (iii) the Agreement did not contain any information about the significant cost of

arbitration in the Netherlands; and (iv) the relevant arbitration rules of procedure were not attached to the Agreement.

Moreover, in applying the second prong of the unconscionability test, the Court stated that an improvident bargain existed between Uber and Mr. Heller because all of the substantive rights Mr. Heller enjoyed under the Agreement were "illusory" and depended on the unfair arbitration clause. Specifically, the Court stated that any dispute under the Agreement between Uber and its drivers and food delivery personnel had to be resolved through costly arbitration in the Netherlands which, ultimately, made arbitration "unattainable" and "out of reach" for Mr. Heller and others in the circumstances.

Accordingly, the Court concluded that the arbitration clause was unconscionable and invalid. This outcome allows Mr. Heller's proposed "misclassification" class action lawsuit to proceed in courts in Ontario rather than through arbitration in the Netherlands.

Check the Box

This decision is part of a broader trend of recent appellate-level decisions where contracts governing workplace relationships have been interpreted in favour of employees.

This case has three important takeaways: (i) standard-form contracts between employers and employees will be scrutinized to determine if terms are unconscionable; (ii) employers who have contractually limited their employees' ability to seek recourse through arbitration (rather than through an employment standards claim or ordinary litigation) may not be able to enforce such terms in certain circumstances; and (iii) "misclassification" class action lawsuits involving members of the "gig economy" seeking statutory employment entitlements may become more common.

In light of this outcome, employers should review and ensure their employment contracts and contractor agreements remain enforceable.

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Forum: Supreme Court of Canada

Citation: *Uber Technologies Inc. v. Heller*, 2020 SCC 16

Need more information?

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