

Need an Uber? Yes – to the Netherlands

Employment Law | Employment Standards Act | Litigation | Uber

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Uber is certainly no stranger to Canadian court rooms. In its latest tussle, a \$400 million dollar proposed class action in Ontario by Uber “drivers” alleging they are employees of Uber and entitled to the benefits of the *Employment Standards Act, 2000*, Uber succeeded on its pre-certification motion to stay the proposed class action in favour of arbitration in the Netherlands. The proposed class action (with a class of approximately 20,000 drivers) was motivated by driver pay cuts in late 2016 which are alleged to be upwards of 30-40%.

This decision is one in an increasingly long line of cases that underscores the limited jurisdiction of the courts to disregard agreements to arbitrate absent a statutory exception. Despite involving a potential employment relationship between the parties, this case is no different and highlights the modern view that arbitration clauses are presumptively valid and enforceable.

Background

Although “Uber” has not yet been added to the official scrabble dictionary, it has become common parlance amongst virtually all generations of urban dwellers. I will therefore refrain from attempting to explain the various iterations of the ride sharing service. Suffice it to say, Uber offers a variety of services including food delivery (UberEats).

In 2016, the class plaintiff, David Heller, entered into various “service agreements” with Raisier Operations B.V. and UberPortier B.V., both Netherlands companies with offices in Amsterdam. Heller was a driver for UberEats. The service agreements, which are essentially license agreements for the use (by the driver) of the “Driver App” owned by Uber, contained an arbitration clause that requires resolution of certain disputes “arising out of or broadly in connection with or relating to” the service agreements to be submitted first to mediation followed by arbitration (if necessary) in Amsterdam.

There was no issue as to whether Heller (or any of the proposed class) entered into the arbitration agreement. Rather, Heller, for the class, argued that (i) the arbitrator did not have jurisdiction over the dispute because it involved an alleged employment relationship, and (ii) that the agreement to arbitrate was illegal on the basis that it was unconscionable and violated section 3(1) of the *Employment Standards Act, 2000* which precludes contracting out of the legislated standards contained in the statute.

The motion

Uber’s motion to stay the proposed class action was heard by the Honourable Mr. Justice Perell who released his reasons on 30 January 2018. On the first issue, Justice Perell relied on the fundamental principle espoused by the Supreme Court of Canada in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, that courts must enforce arbitration agreements unless (i) prohibited by legislation, or (ii) it is clear that the dispute falls outside the arbitration agreement. There is no such prohibition in the *Employment Standards Act, 2000*. In any event, whether employment claims were indeed arbitrable was a threshold issue which, based on the “competence-competence principal”, was for the arbitrator to determine whether it should be excluded from their jurisdiction. Any such challenge should be first resolved by the arbitrator, not the courts, unless the challenge is a pure question of law. In this case, Justice Perell found that it was a complex question of mixed fact and law.

In regard to Heller’s second argument, while Justice Perell found that there was “undoubtedly” an inequality of bargaining power between Uber and the drivers, Uber did not exploit its position to obtain an improvident bargain nor did the agreement to arbitrate violate section 3(1) of the *Employment Standards Act, 2000*. As well, Justice Perell did not find the arbitration agreement to be unconscionable.

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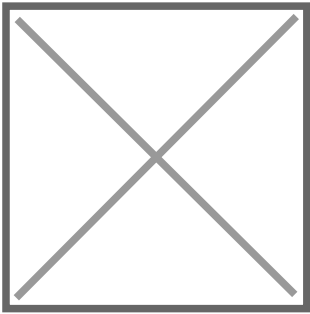
There was a related issue as to whether the *Arbitration Act, 1991* or the *International Commercial Arbitration Act, 2017* applied to this dispute. Ultimately, Justice Perell determined that the relationship between the parties may be commercial in nature and was akin to a commercial contract for the use of intellectual property (the Driver App). Accordingly, the *International Commercial Arbitration Act, 2017* applied. However, Justice Perell noted that regardless of which Act applied, it had no bearing on the outcome of the motion as the language of either Act supported the decision reached.

Off to the Netherlands...

Heller is not left without a remedy and can challenge the arbitrator's jurisdiction as a preliminary issue in the arbitration. However, given the economic reality of an arbitration in Amsterdam it seems somewhat unlikely that this dispute will ever cross the Atlantic. Nevertheless, this decision is important and is one in a long line of cases where courts are increasingly willing to uphold arbitration clauses, even in an alleged employment contract, unless precluded by statute. Quite frankly, this makes sense in the modern age of alternative dispute resolution and is unlikely to have a chilling effect on the enforcement of statutory employment rights as Heller's position on the pre-certification motion suggested. As Justice Perell noted, it is not for the courts to enact legislation, they merely interpret it. The provincial legislature has restricted the use of arbitration in other contexts (consumer contracts for instance) and presumably if a similar prohibition was meant to apply to all employment contracts, the statute would so provide. Until then, we can expect to see continued reliance on arbitration clauses to limit exposure to class proceedings and individual claims alike.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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