Workers' Health and Safety Legal Clinic

Newsletter

August 2020

Annual General Meeting

Date: Wednesday, September 23rd, 2020
Location: Online — via ZOOM
Time: 6:00 pm

AGM Agenda:

1. Welcome and Introductions
2. Approval of the AGM Agenda
3. Approval of the AGM Minutes dated October 9th, 2019
4. Annual Report 2020
5. Annual Audited Financial Statements
6. Board of Directors Election
   Board members who are up for election for two-year terms:
   Oyinkan Akinyele — Hilary Balmer
   Richel Castaneda — Tassia Poynter
   Rocio V. Steeves — Alec Stromdahl
7. Vote of Confidence in the Board of Directors

GUEST SPEAKER – John Oudyk, Occupational Hygienist with the Occupational Health Clinic for Ontario will speak about health care staff and the mental health impact of caring for COVID 19 patients.

Join Zoom Meeting:
https://us02web.zoom.us/j/84675007767?pwd=QVZEOGI5ZGprdkhYL0FVMkVNRzA2QT09

Meeting ID: 846 7500 7767
Passcode: 671072

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Uber v Heller — A Win for The "Gig" Economy Workers

By Kevin Simms, Clinic Lawyer

Introduction

On 26 June 2020, the Supreme Court of Canada (the "Court") issued their decision in the matter of *Uber Technologies Inc. v Heller ("Heller")*. Mr. Heller's law suit proposed a class action against Uber for allegedly failing to pay minimum wage, vacation pay, and otherwise meeting obligations that Uber has toward its workers under the *Employment Standards Act ("ESA")*. As part of this suit, Mr. Heller claimed that, contrary to Uber's stance, he and all of Uber's drivers are workers and have the same rights as all workers in Ontario.

This decision was not about that issue. This decision was about an arbitration agreement that was appended to Ms. Heller's contract with Uber. Uber claimed that the class action could not go ahead because Mr. Heller and all of Uber's drivers agreed to bring any dispute about their contracts to arbitration.

It was revealed in the course of the appeal that Mr. Heller, and any other driver who had a disagreement with Uber about their contract would not only have to submit to arbitration but they would have to pay for that arbitration to the tune of $14,500.00 USD. Additionally, the workers would have to travel to the Netherlands to participate in the arbitration. The $14,500.00 USD did not include accommodation, airfare, or legal representation.

The trial judge determined that they could not decide the issue and that the arbitrator would have to rule on jurisdiction. The Ontario Court of Appeal disagreed and found that the arbitration agreement was unconscionable due to the unequal bargaining power of the parties and the costs associated with the arbitration. The Court of Appeal also found that the arbitration clause amounted to Uber contracting out of the *ESA* by side-stepping the enforcement mechanisms of the *ESA*.

Clinic's Intervention

The Clinic followed this case with a great deal of interest because of the implications it had for employment contracts generally and specifically for enforcing protections for workers' health and safety.

The lawyers at the Clinic decided to intervene because we believed that if the Court upheld this arbitration agreement, it would have opened the door for employers across the province to begin avoiding a wide swath of statutory obligations including health and safety obligations.

At the Supreme Court the Clinic argued that the effect of arbitration agreements like this one would defeat worker's abilities to enforce their rights under the *Workplace Safety and Insurance Act*, the *Occupational Health and Safety Act*, the *Human Rights Code* of Ontario, as well as the *ESA*. The Clinic focused our argument on the fact that the enforcement mechanisms provided to workers in law are meant to provide access to justice. They are low or no-cost alternatives to lengthy court battles, and they provide workers with plain language tools to understand and enforce their rights. We submitted that these arbitration agreements subvert and undermine these tools.

We brought the perspective of the workers that we represent to the Court in an effort to ensure that the Justices understood the potential impact of their decision on the workers that we represent.

The Court's Decision

Seven of the nine Justices agreed with the Court of Appeal that the arbitration clause was "unconscionable". Importantly, the judges' writing for the majority explicitly did not address the issue of whether or not the arbitration clause amounted to a contracting out of the *ESA*. That question rests with the Court of Appeal and the Court of Appeal's decision on that matter is helpful to workers. However, because the Court did not deal with that question in this case, it is open to be decided later.

Justice Brown agreed with the seven justices who found the arbitration clause should not stand, but did so for different reasons. For Justice Brown the clause violated public policy. Specifically, the public policy that people should have access to "civil" justice. He believed that the majority was expanding the meaning of unconscionability too broadly.

Finally, Justice Côté dissented and thought that freedom of contract should have ruled the day in this case, that the arbitration agreement should have been upheld and Mr. Heller's complaints referred to the an arbitrator. She thought that the Court should have taken what is called a "blue pencil" approach to the contract and changed it to allow it to conform to our understanding of what is permissible in contract law.

Implications of this Decision

To understand the implications of the majority's decision it is necessary to understand what the majority means by "unconscionable" and what it meant in other prior to this decision.

The *Heller* decision discusses the origins of unconscionability at length, and highlights that unconscionability, as a doctrine, serves to protect vulnerable persons in transactions with others. Specifically, the Court states that the doctrine is used to protect parties who are vulnerable "in the contracting process" (para. 60 of *Heller*). In order for a party to a contract to prove that the contract or a section of the contract was unconscionable they must show that there existed an inequality of bargaining power and an advantage derived by the stronger party from that inequality.

The Court provides a history of the doctrine and tells us that lower Courts have lacked clarity on what unconscionability means in the contracting process. Court has said that a contracting party could only claim unconscionability if they were somehow incapable of understanding the contract at the time it was formed. In other instances the party claiming that the contract was unconscionable had to show that the party who gained the advantage did so knowingly Heller clarifies that a party need only be unequal to the stronger party, rather than incapable of understanding the contract. The decision also clarified that the stronger party does not need to have known that they would gain an unfair advantage over the weaker party in order for the impugned contract or section of a contract to be considered unconscionable.

The Court specifically says that the inequality does not need to be so extreme that the claimant or worker alleging

unconscionability needs to prove that they were incapable of making a contract at the time that it was signed. The Court explained that the stronger party does not need to have intended to gain the advantage or to have disadvantaged the weaker party in order for the doctrine of unconscionability to apply.

The Court left it open for future claimants to plead different kinds of inequality they suffer vis-à-vis the stronger party. However, they give the example of wealth inequality, which is directly relevant for workers; especially the workers that the Clinic represents.

In terms of the wrong suffered by the weaker party, the Court found that it can take many different forms and must be assessed in the particular context of the case. However, it is important to remember that the unconscionability must have arisen in the contracting process.

In *Heller* specifically, the Court was succinct. They found that the mandatory arbitration clause modified all of Mr. Heller's rights in the contract effectively making them void because the arbitration clause created so many onerous obligations that he had to meet if he wished to make a complaint about Uber's practices.

The lessons from *Heller* for people who represent and advocate for workers are not clear yet. What is clear is that *Heller* has given workers' advocates another potential tool to attack unfair provisions in contracts and in contracting processes. *Heller* has answered one question but created several more about what sorts of contract negotiations and terms will be considered unconscionable.

The case also foreshadows changes by employers to their arbitrations provisions that may allow them to remain enforceable. Each provision will have to be analyzed on a case-by-case basis to assess if it is or is not unconscionable.

Heller enhanced and clarified the doctrine of unconscionability. Perhaps in the future the doctrine can be used to challenge limits on worker's entitlement to common law notice, termination clauses, and the processes by which certain workers, particularly temporary workers, enter into employment contracts. All of these are potential testing grounds for the scope of the unconscionability doctrine. ■

WHSLC

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