# IS *HELLER v UBER TECHNOLOGIES* A TURNING POINT IN ARBITRATION?

Earlier this year, the Ontario Court of Appeal permitted a proposed class action by David Heller, an Ontario resident, to proceed against Uber Technologies. Heller was one of a number of drivers who had signed a commercial arbitration agreement with Uber that provided for disputes to be arbitrated in the Netherlands. The Court of Appeal gave two very different reasons for doing so. It is the second reason, involving the parties' power imbalance that may have narrowed the scope of deference usually paid to private arbitration, including employer-employee arbitration.

In a unanimous judgment, the Court of Appeal held firstly that the arbitration agreement was invalid under section 7 of the Ontario Arbitration Act because it contracted out potential, employee rights that cannot be waived under section 5 of Ontario's Employment Standards Act [ESA] preventing enforcement as a matter of good conscience. The Court expressed its concern that the rights of proposed class members such as Heller might be compromised if the arbitration agreement did not meet the minimum standards imposed under the ESA.

More importantly, the Court ruled that the agreement was unenforceable at common law because of a series of four major power imbalances. While reaffirming its own decisions and those of the Supreme Court of Canada regarding deference to arbitration, it held that this arbitration agreement was wholly unacceptable and unenforceable under section 7(2) of the Ontario Arbitration Act. Every Canadian province has this provision in its arbitration statute. So this decision does not merely affect Ontario.

The Court rested its decision on the following four power imbalances. Firstly, it held that the agreement was grossly unfair and one-sided. This finding reflected the fact that Uber drivers, who claimed to be employees, generally earn between $400.00 and $600.00 per week, and compared their income to the cost of simply initiating the Netherlands arbitration application of $14,500.00, without taking into account counsel fees, travel, and accommodation. Secondly, the Court found that the drivers lacked

independent legal advice or other suitable advice. Thirdly, it found that there was an overwhelming imbalance in bargaining power due to ignorance of business principles and illiteracy. Lastly, the Court found that Uber had taken advantage of this vulnerability.

However, in making these four fact findings, the Court went further and found that the arbitration clause which both sides agreed to is typical of the type used in commercial contracts where the parties generally are equally sophisticated and financially powerful. Given these imbalances, the Court examined the issue as to whether the drivers were really independent contractors or merely employees. Since all but the smallest businesses are likely to employ staff who lack sophistication and financial strength, does this mean that arbitration agreements between them will also be looked at in a different light? And is this decision a new point of departure for the courts, making the stakes higher for employer-employee arbitration?

If the Ontario Court of Appeal in exercising its equitable jurisdiction is warning parties that deference to private arbitration agreements is not a given, does it follow that lawyers representing employers and employees alike must advise their clients about the risk of resorting to arbitration whenever there is an undeniable power imbalance? An additional concern is whether arbitrators themselves have a duty to provide any kind of early warning to the parties before moving ahead with employer-employee arbitration?

While there are no available Canadian statistics dealing with the use of arbitration, on October 15, 2015, *The New York Times* ran a lengthy, three part series entitled *Arbitration Everywhere, Stacking the Deck of Justice*. According to the first part of this series, *The Times* examined court records dating back to 2010. During that period US lower courts ruled in favour of arbitration four times out of five in cases where consumer class actions were dismissed. According to the *Times*, in 2011 and again in 2013 the US Supreme Court validated class action bans in consumer credit agreements which contained arbitration clauses.

None of the American cases involved employers and employees. However, the trend line in the US clearly has favoured large business over the consumer. The reliance of the Ontario Court of Appeal in *Heller v Uber Technologies* upon the concept of good conscience seems to be diametrically opposite. It is not difficult to foresee an

increasing number of employee challenges to any arbitration agreements that may appear one sided.

The problem posed by *Heller v Uber Technologies* is how lawyers acting for employers go about getting their clients to ensure that their employees are sufficiently competent and literate, are capable of understanding their employment agreements, and do in fact understand them. In addition, what steps do employers have to take to ensure that the terms of an employment contract are not one sided, or unfair, or that the employee is not being intentionally disadvantaged?

We do not yet know whether *Heller* v *Uber Technologies* will be appealed to the Supreme Court of Canada. However, the seventy six paragraph ruling of the Ontario Court of Appeal set out in the strongest possible language may well be a harbinger of the future, and a cause for concern for employers who want to avoid litigation in favour of arbitration.

JACK ZWICKER
June 3, 2019