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Where to? Another Trip for Uber as the *Heller v Uber Technologies Inc.* Class Action Drives Ahead

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Following the Supreme Court of Canada's highly anticipated decision in *Uber Technologies Inc. v Heller*, 2020 SCC 16, on August 12, 2021, the Ontario Superior Court of Justice certified the class action proceeding against Uber. The certification comes after an almost five-year battle that commenced in January 2017, in which Uber drivers attempted to become recognized as employees of Uber rather than independent contractors.

The Uber Chronology

The Lower Court Decisions

In 2017, Mr. Heller, who worked as a food delivery driver and courier through Uber's app, brought a class proceeding against Uber for violations of Ontario's *Employment Standards Act, 2000,* SO 2000, c 41 [*ESA*]. Among the alleged violations were Uber's failure to provide the minimum wage and vacation pay as mandated under the *ESA*. The proceeding was successfully stayed by Uber in reliance on an arbitration clause in Uber's standard form services agreements that required a driver to participate in an arbitration process in the Netherlands. The lower court found that the clause ousted the jurisdiction of the Ontario courts to hear and resolve Mr. Heller's claim.

The Ontario Court of Appeal subsequently reversed the lower court's decision, finding that the arbitration clause was unconscionable and therefore unenforceable. Uber appealed to the Supreme Court of Canada.

The Supreme Court of Canada Decision

The Supreme Court of Canada upheld the Court of Appeal's decision. The Supreme Court agreed that the Ontario courts could determine the enforceability of the arbitration clause, and ultimately found that the clause was unconscionable and could not be enforced. An important factor in the Supreme Court's decision to assume jurisdiction was that the extensive fees required to arbitrate in the Netherlands were a significant barrier to the plaintiff's ability to have the enforceability of the arbitration agreement determined.

In finding the arbitration clause unconscionable, the Supreme Court emphasized the inequality of bargaining power inherent in the fact that the arbitration clause was part of an unnegotiated standard form contract. There was a significant difference between the sophistication of Uber and the individual workers, which resulted in individual workers failing to appreciate the financial and legal implications of the clause.

Add a Stop – Certified at Last

Following the Supreme Court of Canada's decision, the Ontario Superior Court gave the order for 'full speed ahead' when they certified the class proceeding in *Heller v Uber Technologies Inc.*, 2021 ONSC 5518 . Two key points of interest arise around (i) the unique problems of an employment law class action in the context of the "sharing economy", and (ii) the impact of the "Class Action Waiver" clause on determining the class.

A New Kind of Class Action

Early in the decision, the Court noted that the proposed class action raised "unique problems of how class actions should adopt to what has been called the 'sharing economy', which is animated by information, computer, and Internet technology". In this case, certain Uber drivers felt differently than others about their employment status – some wished to be classified as employees of Uber, while others viewed themselves as being self-employed – resulting in questions around the commonality criteria (the certification requirement that there be common issues among the putative class members). These unique problems were apparent as early as the classification stage, where the Court classified the class action as a "compound classification of employment status class action" rather than a "conventional misclassification of employment" case.

In a conventional misclassification class action, the issue is whether the class members are hired as employees, or dependent or independent contractors. In a compound classification of employment status class action, the threshold issue is whether, in a sharing economy, there is an employment relationship between the company and the class members. If an employment relationship is found to exist, the issue then becomes whether the class members are employees, dependent contractors, or independent contractors.

II.Class Action Waivers

After the Supreme Court of Canada found the arbitration clause in Uber's services agreement unenforceable, Uber updated the clause. The updated clause, referred to as the Arbitration and Class Action Waiver Clause (the "Clause"), had three significant changes from the earlier one. First, disputes would be handled through arbitration in the province or territory where the worker resided. Second, the individual could opt-out of the mandatory arbitration. Third, by agreeing to the Clause, the individual waived their right to participate in a class action proceeding.

As a result of the Clause, the plaintiff class would have excluded every individual who accepted the arbitration clause. While the Court accepted that individuals were likely not given sufficient notice of the Clause, the Court refused to strike it down. The Court noted that the *Class Proceedings Act, 1992*, SO 1992, c 6 is a purely procedural statute, and that it would take a substantive decision not available on certification to strike down a contract term. Those who agreed to the Clause would not be excluded from the class, although they would need to be informed of the legal significance of the Clause so that they could determine whether they would like to opt-in or opt-out of the class.

Key Takeaways

The Uber class action reached the end of one long journey, only to begin another. While it is difficult to anticipate the outcome of the action at this time, the Uber chronology suggests that the courts are well-aware of the shifting employment landscape, and that they will undertake flexible analyses to address these changes when appropriate. This class action is certainly one to watch, as it may have far reaching implications for both workers and businesses who participate in Canada's ever-growing gig-economy.

For more information on this class action or if you have any questions related to your own organization, please feel free to contact WeirFoulds' Employment and Labour Law Group.

situations, the reader should seek professional advice.

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