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ENFORCING ARBITRATION AGREEMENTS: ONTARIO SUPERIOR COURT RAISES A 'CLAUSE' FOR CONCERN

Posted on November 8, 2023

Categories: Insights, Publications

When the Court of Appeal for Ontario held in *Heller v Uber Technologies Inc.* that arbitration clauses are invalid if they purport to contract out of entitlements required by the *Employment Standards Act, 2000* ("***ESA***") – a decision upheld by the Supreme Court of Canada – Ontario employers were left concerned about the enforceability of existing arbitration clauses. In *Nohdomi v. Callidus Capital Corporation*[1], the Ontario Superior Court has provided further guidance on the interpretation of arbitration clauses in employment agreements and confirmed that an arbitration clause is invalid and unenforceable if it contracts out of the *ESA*.

Background Facts

The plaintiff employee and his employer, the Catalyst Capital Group Inc. ("**Catalyst**") entered into an employment agreement that contained an arbitration clause requiring all claims arising from the employment relationship to be settled by way of arbitration in accordance with the Rules for the Conduct of Arbitrations of the Arbitrators' Institute of Canada (the "**Arbitration Clause**"). The Arbitration Clause also stipulated that the arbitrator had the right to determine all questions of jurisdiction.

The plaintiff was terminated by Catalyst and subsequently brought a wrongful dismissal action against both Catalyst and co-defendant Callidus Capital Corporation ("**Callidus**"), alleging that Catalyst and Callidus were common employers. In response, Catalyst brought a motion to stay or dismiss the action because the causes of action pled were required to be settled by arbitration, pursuant to the Arbitration Clause.

On the motion for a stay, the plaintiff employee argued, among other things, that the Arbitration Clause was invalid and unenforceable because it contracted out of the *ESA* by requiring claims to be arbitrated rather than, potentially, resolved by the Complaints provision under s. 96 of the *ESA*.

Decision

The Court dismissed the employer's stay motion, finding that the Arbitration Clause was invalid because it purported to contract out of rights under the *ESA*.

The Court began its analysis by considering whether the Arbitration Clause violated the *ESA*. It noted that the

effect of the Arbitration Clause was to limit the employee's right to make a Ministry of Labour ("**MOL**") complaint under the *ESA*, which is a right or "employment standard" expressly granted by s. 96(1) of the *ESA*.[2] Accordingly, the Court found that the Arbitration Clause constituted a contracting out of the *ESA*, regardless of whether the employee intended to exercise its right to make a MOL complaint, and was invalid on that basis alone.

The employer attempted to argue that the Arbitration Clause did not create an inferior procedural dispute resolution method or provide for a lesser benefit than the *ESA*. The Court swiftly rejected the employer's argument, noting the MOL process would be free of cost to the employee and the burden would be on the MOL to investigate the complaint. Meanwhile, the Arbitration Clause required the employee to pay $7,500 at the outset to commence the arbitration, an indeterminate amount throughout the arbitration process, and legal costs if unsuccessful.

The Court also briefly assessed whether the Arbitration Clause was invalid because the termination provision in the employment agreement violated the *ESA*. The Court summarized the general employment law principle that a termination clause is invalid if any part of the clause conflicts with the minimum standards prescribed by the *ESA*. However, it refused to consider whether a termination clause that violates the *ESA* would result in finding that the Arbitration Clause is also invalid, stating this matter is best left for another day.

Key Takeaways for Employers

This decision is one of many examples of courts taking a highly technical and critical approach to upholding applicable employment standards legislation and rejecting any provision in an employment agreement that contract below the minimum standards.

Drafting an arbitration clause is a delicate art, requiring employers to consider whether there are certain claims that should not be subject to the arbitration clause, such as claims made under the *ESA* or other applicable employment legislation. This decision also leaves open the possibility that an arbitration clause will be invalidated if another unrelated provision in the employment agreement, such as the termination clause, falls below applicable employment standards legislation. This is the case even where the employee has not sought to make use of the affected provisions of applicable employment standards legislation.

Please reach out to McMillan's Employment & Labour Relations Group for guidance in navigating these issues.

[1] *Nohdomi v. Callidus Capital Corporation*, 2023 ONSC 4469.
[2] *Ibid* at para 13.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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