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Labour & Employment

ESA, arbitration clauses: Section 96 doesn’t matter

By **Ryan Wozniak**

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(November 8, 2021, 2:01 PM EST) -- The Supreme Court of Canada’s ruling in *Heller v. Uber Technologies Inc.* 2020 SCC 16 sparked a vertiginous debate over the enforceability of arbitration clauses in employment contracts, which debate is still ongoing (see, for example, *Leon v. Dealnet Capital Corp.* 2021 ONSC 3636). In Ontario, much of the argument centres on whether an arbitration clause must preserve an employee’s ability to make a complaint pursuant to section 96 of the *Employment Standards Act*, 2000 (ESA) in order to pass muster.

Somewhat ironically, the Supreme Court of Canada did not explore that question in *Uber*. Rather, in an 8 -1 ruling (Justice Suzanne Côté dissenting), the court found that the arbitration clause in that case was unconscionable because it required the plaintiff, a food deliveryman, to travel to Amsterdam at his own expense to have his claim arbitrated, pay a US$14,500 upfront administrative fee, and have his claims determined under Dutch law. As the court put it, the plaintiff’s ability to seek redress under the clause was “realistically unattainable”.

However, the Court of Appeal for Ontario did rule on the s. 96 issue: *Heller v. Uber Technologies Inc*. [2019] O.J. No. 1. The court found at paragraph 36 that the clause “eliminates the right of the appellant (or any other driver) to make a complaint to the Ministry of Labour regarding the actions of Uber and their possible violation of the requirements of the ESA.” In doing so, “it deprives the appellant of the right to have an [Employment Standards Officer] investigate his complaint.”

Writing for a unanimous court, Justice Ian Nordheimer rejected Uber’s argument that s. 96 is not an “employment standard” within the meaning of the ESA. According to Justice Nordheimer, at paragraph 37, Uber’s argument “invites an unduly narrow interpretation of s. 96 which would, if accepted, authorize employers to contract their employees out of s. 96, and thus … undermine the protective purpose of the ESA.”

While I agree with the result in *Uber*, I disagree with the Court of Appeal’s findings regarding the s. 96 issue. In my view, the findings of Justice Côté at paragraph 299 of her dissent are apposite: “the flaw in this argument is that the ability to file a complaint under s. 96 of [the ESA] is not an employment standard … [section 96] clearly does not require an employer to do — or prohibit an employer from doing — anything. It therefore does not provide for an employment standard.”

An enforcement mechanism laid out in general terms lacks the requisite specificity to qualify as a “standard” within the meaning of s. 1(1) of the ESA. For example, it is easy to see how a provision requiring an employer to pay an employee no less than a set hourly wage constitutes a clearly identifiable “employment standard”: the employer is prohibited from paying the employee anything less than that amount, and it is unequivocally for the benefit of the employee.

On the other hand, the enforcement provisions contained in Part XXII of the ESA (which includes s. 96) do not spell out specific minimum requirements. For example, the Act does not state that an employee’s complaint must be finally determined within a prescribed period of time. Rather, the ESA gives an employment standards officer (ESO) considerable discretion. For instance, section 101.1(2) states that an ESO “may” attempt to effect a settlement, and section 102(1) states that an ESO “may” require a meeting between the employee and employer.

Courts in other provinces have applied Justice Côté's line of reasoning. For example, in *A-Teck Appraisals Ltd. v. Constandinou* 2020 BCSC 135, the plaintiff argued that the arbitration clause in his employment contract was void on that basis that it contracted out of the investigation process contained in British Columbia's *Employment Standards Act*, even though it was governed by British Columbia law.

Justice Mary Humphries ruled that the clause is enforceable. Justice Humphries found at paragraph 37 that while the Court of Appeal's decision in *Uber* had "some superficial application to the present situation" it is "not obvious that a statutory complaint/investigative mechanism becomes an employment standard itself rather than a procedure for enforcing employment standards." Furthermore, Justice Humphries held that, unlike *Uber*, there was no evidence of unconscionability. Constandinou was subsequently followed in *Wilson v. Infracon Construction Inc.* 2020 BCSC 2074.

Christening s. 96 of the ESA as a "minimum standard" creates a harmful double entendre; it swims against the tide not only of the rules of statutory interpretation, but also, in my view, of common sense. To the extent that s. 96 possesses any of the characteristics necessary to qualify it as an "employment standard" as contemplated by the ESA, it is by accident, not by dint of any legislative intent.

However, what is most unfortunate about all the ink lawyers have lost quarrelling over the interpretation of s. 96 is that it is ultimately irrelevant to the analysis of whether a contractually prescribed arbitration process governed by Ontario law contravenes the ESA. This is because a private arbitration does not trigger the operation of s. 98 of the ESA, meaning it does bar an employee from making a s. 96 complaint. In other words, an arbitration clause does not, in and of itself, displace an employee's ability to file a s. 96 complaint.

Section 98 of the ESA states that that an employee who commences a "civil proceeding" for wrongful dismissal, or with respect to an alleged failure to pay wages or preserve benefits, may not file a complaint under s. 96. However, according to the Ontario Court of Appeal in *Uber*, a private arbitration is not a "civil proceeding" within the meaning of s. 98. Regarding this issue, Justice Nordheimer stated at paragraph 33 of his reasons that there "is no reason to interpret the term "civil proceeding" in that fashion. Indeed, the *Courts of Justice Act* … which applies to all civil proceedings in Ontario, defines both actions and applications as civil proceedings." Justice Nordheimer further held at paragraph 34 that "there is nothing in the ESA that suggests that there was any intention to include arbitrations within the usual meaning of the term " 'civil proceeding'."

In any event, s. 96 is a red herring. It is no secret that employee counsel care very little about preserving a client's ability to submit a s. 96 complaint because making one can result in a client forfeiting potentially lucrative common law claims. Practically speaking, disputes over the conservation of s. 96 "rights" are really about lawyers fighting for control of the forum in which their clients' claims will be litigated with a view to gaining a perceived tactical advantage, or at least avoiding a perceived disadvantage.

Attempts to shipwreck reasonable arbitration clauses through the invocation of hollow technicalities are tragically ironic: they delay access to justice for both employees and employers. This is all the more true in the pandemic era, as our courts struggle mightily to tackle the backlog caused by COVID-19.

There is no need for this kind of confusion to continue. Where an arbitration process is reasonably affordable and does not require an employee's rights to be determined by extraprovincial laws, then, in the absence of unconscionability or some demonstrable violation of a bona fide employment standard, it should be upheld, especially when it offers up an expedited alternative dispute resolution process.

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