

Precarious Work in the Modern Gig Economy: Charting a Path for Future Class-Action Litigation in Canada

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On February 19, 2021, the Supreme Court of the United Kingdom unanimously decided that Uber drivers are “workers” for the purpose of UK employment law. This follows a recent decision a little closer to home, in which the Supreme Court of Canada cleared the way for future class action law-suits against the ride-hailing firm. Together these decisions, along with a torrent of other high-profile actions taking place across the globe, will have significant ramifications for gig economy giants and their regulators.

Here’s what you need to know.

Uber Technologies Inc. v. Heller, 2020 SCC 16

Last year, the Supreme Court of Canada released its decision in *Uber Technologies Inc. v. Heller, 2020 SCC 16*, in which a majority of the Supreme Court upheld an Ontario Court of Appeal decision that concluded that the arbitration clause in Uber’s service agreement was unconscionable.

Background to the Decision

The case was brought forward by Mr. Heller, an Ontario resident who entered into a standard form service agreement with Uber to deliver food on its platform.

In 2017, Mr. Heller initiated a proposed class action against Uber for violations of the Ontario *Employment Standards Act* (“ESA”). He argued that he was an employee of Uber under the terms of the ESA and therefore, was entitled to the protections afforded by the ESA.

For its part, Uber relied on the wording of its service agreement with Mr. Heller’s to support its position that arbitration, in the Netherlands as per the agreement, was the appropriate venue for Mr. Heller’s dispute.

The Majority Reasons: Uber’s Arbitration Clause is unenforceable

As a preliminary matter, the Supreme Court held that the validity of the arbitration clause should be determined by the Court and not by the arbitrator stipulated in the service agreement. The proposed Netherlands proceeding required an up-front payment of USD \$14,500. Mr. Heller could not afford this amount of money. Thus, he was in effect prevented from initiating the process.

Was the Arbitration Clause Unconscionable?

A bargain is *unconscionable* in the presence of two elements:

1. inequality of bargaining power; and
2. a resulting unfair bargain.

After a review of the Court’s jurisprudence on the subject, as well as academic commentary, the Court concluded that the arbitration agreement was in fact *unconscionable*.

First, the arbitration agreement provided Mr. Heller little to no opportunity to negotiate its terms. The agreement was presented on a standard form, take it or leave it basis.

In addition, one could not reasonably expect someone in Mr. Heller’s position to understand the legal repercussions of executing such a contract. In particular, when the contract neglected to provide critical information on the costs of arbitration in the Netherlands.

The bargain was improvident for many of the same reasons. Mr. Heller could not reasonably avail himself of arbitration in the Netherlands. In consequence, he was deprived of the opportunity to enforce his rights.

In conclusion, the Court opened the door to a potential class-action law suit to determine whether Uber drivers are to be recognized as employees for the purpose of Canadian employment law. The outcome of that forthcoming case remains unknown, of course. But ongoing litigation outside of Canada may provide readers with critical insights.

In this respect, a recent decision of the UK Supreme Court is particularly instructive.

Uber BV and others (Appellants) v. Aslam and others (Respondents) [2021] UKSC 5

As noted, the UK Supreme Court recently decided that Uber drivers are “workers” for the purpose of UK employment law.

Background to the Decision

The original claim was brought by Mr. Aslam and Mr. Farrar, both of whom drove on the Uber app.

The employment tribunal found that Mr. Aslam and Mr. Farrar were workers within the meaning of the *Employment Rights Act 1996* (“ERA”). The Employment Appeal Tribunal and the Court of Appeal dismissed Uber’s appeals. However, leave was granted to the Supreme Court.

Reasons for Judgment

In short, Uber argued that drivers are independent contractors who work under contracts made with customers and do not work for Uber. The Supreme Court disagreed.

The Court grounded its reasons in the purpose of the ERA: specifically, to protect persons who have little say over their working conditions because they are dependent upon persons and organizations which exercise control over their work.

In this regard, the judgment emphasizes five aspects of Uber's relationship with drivers which justified its conclusion that the claimants were workers for the purposes of UK employment law:

- a) Remuneration was effectively set by Uber, not the drivers.
- b) The contractual terms were imposed by Uber.
- c) Once logged into the Uber app, the driver was effectively required to accept requests. If a driver declined too many requests they were automatically logged off the app.
- d) Uber exercised significant control over the way in which drivers delivered the service. In short, if a driver's passenger generated 'rating' fell below the required average for too long, the driver would be banned from the app.
- e) Uber restricted communication between the passenger and driver to the minimum necessary to perform the trip.

Together, these factors demonstrate that drivers remain at the behest of Uber. The services that drivers provide and the manner in which they work is shaped fundamentally by Uber.

What This All Means Going Forward?

Both cases confirm what appears to be a growing inter-jurisdictional consensus: that ultimately it is the substance of any relationship that shapes the legal rights and responsibilities that attach to those relations.

In this regard, the UK Supreme Court's decision in *Uber BV* should remind readers that categorizing a person as an independent contractor is not determinative of their employment status and that substance will trump form.

The Supreme Court of Canada's decision in *Heller*, meanwhile, is notable for many reasons. Perhaps most glaring is the Supreme Court's willingness to overturn decades of jurisprudence that had regarded arbitration agreements as something approaching the quintessence of *freedom of contract*. As Justice Cote observed in her dissenting opinion, her colleagues in the majority had drastically expanded the scope of unconscionability, and created greater uncertainty for contracting commercial parties that can no longer rely on the finality of their agreements.

It remains to be seen how exactly these decisions, and others like it across the globe, will affect pending class-action litigation in Canada. One way or the other, however, the results will dramatically shift the nature of work in our modern economy.