Delivery driver class action against Amazon stayed and certification dismissed

July 11, 2023

In *Davis v. Amazon Canada Fulfillment Services ULC, 2023 ONSC 3655*, Justice Perell of the Ontario Superior Court put an end to a proposed class action brought on behalf of over 70,000 delivery drivers who deliver packages for Amazon in Canada.

What you need to know

- In a claim against three Amazon entities, the proposed class encompassed all delivery drivers who used an Amazon app to deliver packages. The proposed class included independent contractor drivers that contracted directly with Amazon, and drivers that were employed by or contracted with third-party delivery companies, who in turn contracted with Amazon.
- The court enforced all the arbitration agreements class members entered into, rejecting the Plaintiff's argument that arbitration agreements in contracts of adhesion are inherently unconscionable for employees or independent contractors. This decision signals that Canadian courts continue to follow the Supreme Court's general favourability to arbitration as a form of dispute resolution.
- For the class members without arbitration agreements – who were all drivers employed by or contracted with third-party delivery companies – the court dismissed the certification motion. These class members alleged that Amazon was a "common employer" with the third-party delivery companies. The court found Amazon could not be a common employer with the delivery companies because they were not engaged in a common enterprise.

Background

In a proposed class action brought on behalf of approximately 73,000 delivery drivers, Amazon was successful in convincing the Ontario Superior Court to: (i) stay the claims of all class members who had entered into an arbitration agreements and (ii) deny certification for the remaining class members.

The Plaintiff sought to certify a class consisting of drivers who worked for 126 different delivery companies that provide delivery services to Amazon, and in some cases other

clients, alleging that Amazon was a “common employer” of the drivers with the delivery company. The Plaintiff also sought to include in the class independent contractor drivers who contract directly with Amazon, alleging that that these individuals had been misclassified and ought to be classified as Amazon employees.

Stay in favour of arbitration

Justice Perell of the Ontario Superior Court of Justice granted Amazon’s motion to stay the action for all drivers who entered into arbitration agreements with Amazon or with their delivery company employers. In doing so, Justice Perell rejected the Plaintiff’s arguments that the arbitration agreements were unconscionable or contrary to public policy for allegedly contracting out of the employment law statutes and for including a class action waiver. As a result, the action for these drivers was stayed in favour of arbitration.

Certification motion dismissed

With respect to the drivers whose claims were not stayed, all of whom were employed by or contracted with delivery companies, Justice Perell held that the Plaintiff failed to satisfy the cause of action, common issues, and preferable procedure criteria required for class certification. On the cause of action criterion, Justice Perell held that the Plaintiff’s common employer claim was “doomed to failure” because, based on the facts plead, Amazon and the 126 delivery companies were not operating together as one seamless business, nor could an intention be inferred for Amazon to be a common employer with the 126 delivery companies, who had not been joined to the action. Justice Perell likewise rejected the Plaintiff’s causes of action for unjust enrichment, negligence, and breach of the duty of good faith.

While the failure of the cause of action criterion alone was fatal to the Plaintiff’s motion, Justice Perell also held that the Plaintiff failed to meet the common issues and preferable procedure requirements. Justice Perell accepted Amazon’s argument that the question of whether Amazon was a common employer could not be decided uniformly for the drivers due to the significant idiosyncrasies between the delivery companies. With respect to the preferable procedure criterion, Justice Perell held that the action on behalf of drivers is “unmanageable”, with or without the 126 delivery companies being joined, that the proposed action was really “126 discrete proposed class actions that have been joined together”, and that the resolution of one class members’ claim would not be determinative for class members employed by a different company. Finally, even if the proposed class action were certifiable, Justice Perell would not have certified aggregate damages as a common issue, because liability could not be determined in common, and there was no viable method to quantify aggregate damages.

BLG and Gowling WLG acted as co-counsel to Amazon.

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