September 11, 2019

ADR Case Update 2019 - 18

California

- **ARBITRATION AGREEMENT PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE**

  Oto L.L.C., v. Ken Kho, Respondent, and Julie Su, as Labor Commissioner, Intervener
  2019 WL 4065524
  Supreme Court of California
  August 29, 2019

  Three years after Ken Kho was hired as a service technician for One Toyota, an HR "porter" brought several documents to his workstation, including an arbitration agreement, and asked Kho to sign them right away. Kho did. After Kho's employment ended, he filed a complaint with the Labor Commissioner for unpaid wages. One Toyota petitioned to compel arbitration. When the Labor Commissioner proceeded to the hearing without One Toyota and awarded Kho unpaid wages and damages, One Toyota filed a motion to vacate the award. The court granted the motion to vacate, finding that the hearing should not have been held without One Toyota, and denied the motion to compel arbitration due to procedural and substantive unconscionability. The court of appeal reversed, finding that although the agreement contained a high degree of procedural unconscionability, it was not substantively unconscionable. One Toyota petitioned for review, which was granted.

  The Supreme Court of California reversed and remanded. In this case, the arbitration agreement's execution involved an "extraordinarily high" degree of procedural unconscionability, with the circumstances creating "such oppression or surprise that closer scrutiny of its overall fairness" was required. The agreement was presented to Kho in his workspace, with neither its contents nor significance explained. Kho had to sign the documents to retain his job. A porter delivered the documents, conveying an expectation that Kho would sign immediately. The agreement was written in extremely small font, with complex sentences. The agreement provided that parties to an arbitration would pay their own expenses, unless that approach conflicted with statutory provisions or controlling case law. A layperson would likely be unaware that under controlling case law, One Toyota would, in fact, pay. The Court assessed substantive fairness in terms of what Kho gave up and what he received in return. In signing, Kho surrendered the full panoply of Berman procedures and assistance. (Note: The CA Labor Code provides that an employee with a claim for unpaid wages may file with the Labor Commissioner, who conducts a Berman hearing in which parties present their cases through testimony, witnesses, and

documents.) In return, he got a formal and highly structured arbitration process that closely resembled civil litigation - if he could figure out how to avail himself of its benefits and avoid its pitfalls. Given the unusually coercive setting in which the bargain was entered, the Court found it "sufficiently one-sided as to render the agreement unenforceable."

Texas

- **NO VALID AGREEMENT TO ARBITRATE**

  Aerotek, Inc. and J.R. Butler, Inc. v. Boyd
  2019 WL 4025040
  Court of Appeals of Texas, Dallas
  August 27, 2019

  Contractors filed suit against staffing company Aerotek, alleging race discrimination, harassment, and retaliation pertaining to their employment on a J.R. Butler, Inc. construction project. Aerotek moved to arbitrate, asserting that the contractors agreed to arbitrate claims through digital signatures in the online onboarding process. The contractors contested that they did not see or digitally sign the arbitration agreements. At the hearing on the motion, Aerotek presented testimony of a program manager, who was not in IT, and an administrative assistant. Following the hearing, the court signed an order stating that the parties agreed at the hearing that the contractors' declarations attached to their response to the motion would be considered the same as live testimony and that Aerotek waived any objections to the declarations. The court denied the motion to compel arbitration and Aerotek filed an interlocutory appeal.

  The Court of Appeals of Texas, Dallas, affirmed. Aerotek did not present evidence establishing the opposite of a vital fact, that the contractors' denials of ever seeing the arbitration contracts were physically impossible given Aerotek's computer system. In the face of admitting it had contracted out creation and implementation of the system to another entity altogether, Aerotek chose to bring to the hearing an employee who lacked the IT experience specific to the type of computer system whose technical reliability and security for which she sought to vouch. Left with the contractors' sworn denials, Aerotek's evidence suggesting they electronically signed the arbitration agreements, and the lower court's finding in the contractors' favor, the Court found no basis to disturb the trial court's determination.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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