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"Coercive" And "Disturbing" Arbitration Agreement Upheld Over Labor Commissioner's Protest

By Geoff Westbrook and David Kadue

Seyfarth Synopsis: *In* OTO, LLC v. Kho*, the California Labor Commissioner challenged a car dealership's mandatory arbitration agreement. The agreement required employment disputes to be arbitrated under normal civil litigation rules, before a retired superior court judge, and waived the right to submit wage claims to the Labor Commissioner. The Court of Appeal upheld the agreement even though the agreement bypassed the Labor Commissioner hearing process, and even though the Court was "disturbed" by the way that the employer had drafted and presented the agreement.*

The Facts

Ken Kho worked as an auto mechanic for a car dealership. Three years into his employment, he was handed a one and one-quarter page agreement entitled, "Employment At-Will and Arbitration." The terms of the agreement, appearing in tiny seven-point font within a one-block paragraph, required Kho and the dealership to arbitrate their disputes before a retired superior court judge. The arbitration would run like an ordinary civil case, with the usual pleading, discovery, and evidence rules. The agreement was silent on who paid for arbitration costs, and it did not specify how to start the process. Kho received the agreement at his desk from an HR employee, who did not explain the agreement's meaning to him. Kho signed the agreement within four minutes.

A year later, Kho filed a wage claim with the Division of Labor Standards Enforcement, which is headed by the Labor Commissioner. The dealership filed a petition in court to compel Kho to arbitrate his wage claim. The Labor Commissioner intervened to oppose the petition and to uphold Kho's right to pursue his wage claim before the DLSE.

The trial court denied the dealership's petition because the arbitration agreement was "highly" unfair and deprived Kho of the special advantages an employee has in an informal hearing before the DLSE. That hearing, called a "Berman Hearing" (after the lawmaker who sponsored the law), allows employees to avoid court proceedings by trying to resolve wage claims in a quick, free process before a DLSE officer. The dealership appealed.

The Court of Appeal's Decision

Written agreements to arbitrate employment disputes are generally valid unless there is something particularly unfair about the agreement's terms and the way they were presented. These two types of unfairness are called substantive unconscionability and procedural unconscionability. If both forms are present to some degree, then a court may call the arbitration agreement unenforceable.

The Court of Appeal aggressively agreed with the trial court that the arbitration agreement was procedurally unconscionable. Kho got the agreement on a take-it-or-leave-it basis; he could not negotiate the terms; and he was presented with it years after he had started working for the dealership. He fairly assumed he had no choice but to sign it or resign. The agreement had legalist terms that appeared in tiny font within a block format. All this made the degree of procedural unconscionability "extraordinarily high."

But the agreement nonetheless passed muster, because it was not substantively unconscionable. In 2013, the California Supreme Court held that an arbitration agreement waiving a Berman hearing is enforceable so long as it provides an "accessible and affordable arbitral forum." The terms of the dealership's agreement passed this test because they were not one-sided and did not overly favor the dealership. All claims between the parties were subject to arbitration, and the proceeding would resemble ordinary litigation. And although the agreement did not expressly say the dealership would have to pay for the arbitration, that is the result under the prevailing law.

Kho likely would have to hire a lawyer to navigate the rules of procedure and evidence in arbitration before a retired judge. The Labor Commissioner argued that this reality made the process unaffordable for Kho. The Court of Appeal disagreed. If Kho prevailed in a Berman hearing, then the dealership could have the case heard over again in superior court. The same litigation rules would then apply as they would in the arbitration, and Kho would have to decide then whether to hire a lawyer. Consequently, the Court of Appeal found the arbitration would be no more complex than a retrial of Kho's wage claim in superior court, and thus the arbitration forum would be just as accessible and affordable as a Berman hearing followed by a court trial.

Thus, although the Court of Appeal was "disturbed" by the way the dealership wrote the arbitration agreement and presented it to Kho for signing, the agreement did allow him to pursue his wage claim in an accessible and affordable forum that mirrored normal civil litigation. Those features made the agreement substantively conscionable, and therefore enforceable.

What *Oto, LLC v. Kho* Means for Employers

We now have an example of an enforceable arbitration agreement that takes wage claims out of the Berman hearing process. And the Court of Appeal noted some areas in which an employer can plan to avoid contentions of procedural unfairness. Employers who desire to arbitrate wage claims should take the lessons of this case to heart.

If you would like additional information, please contact Geoff Westbrook at gwestbrook@seyfarth.com, or David Kadue at dkadue@seyfarth.com.

www.seyfarth.com