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Docket: CI18-01-15851
(Winnipeg Centre)
Indexed as: Pokornik v. SkipTheDishes Restaurant Services Inc.
Cited as: 2022 MBKB 178

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CHARLEEN POKORNIK,	)	Appearances:
	)	
plaintiff,	)	SABRINA LOMBARDI
	)	PAUL D. EDWARDS
- and -	)	EVAN L.M. EDWARDS
	)	CHELSEA SMITH
SKIPTHEDISHES RESTAURANT SERVICES INC.	)	JONATHAN BRADFORD
	)	for the plaintiff
	)	
defendant.	)	ERIC C. LEFEBVRE
	)	TED BROOK
	)	JOHN B. MARTENS
	)	JENNIFER A. SOKAL
	)	for the defendant
	)	
	)	JUDGMENT DELIVERED:
	)	September 12, 2022

CHARTIER J.

INTRODUCTION

[1] The plaintiff, Charleen Pokornik, filed an action against SkipTheDishes Restaurant Services Inc. ("Skip") on July 25, 2018 seeking various heads of relief including amongst other things, a declaration that she is an employee of Skip and not an independent contractor, and also an order certifying this proceeding as a class action proceeding. The

defendant Skip has moved for an order staying the action commenced by the plaintiff in favour of arbitration.

[2] The defendant submits that the parties had an agreement to arbitrate the issue in dispute between them that, pursuant to statute, deprives this Court of jurisdiction. Section 7(1) of ***The Arbitration Act***, C.C.S.M. c. A120 (the "***Act***"), requires the court to stay a proceeding involving a dispute the parties have agreed to resolve through arbitration subject to certain exceptions which are set out in s. 7(2) of the ***Act***. The plaintiff submits that there is no agreement between the parties to arbitrate the issue such that this action ought to be stayed pursuant to s. 7(1) of the ***Act*** or alternatively, that the agreement is invalid pursuant to s. 7(2)(b) of the ***Act*** or that the subject matter in dispute is a proper one for summary judgment under s. 7(2)(e) of the ***Act***.

FACTS

[3] The defendant is a large corporation with operations in more than 100 cities across Canada. It is owned by a publicly traded European company. The defendant connects customers to couriers like the plaintiff, who complete food delivery orders through an internet application, (the "App"). The plaintiff alleges that the defendant determines the amount paid to the courier and exercises significant control and oversight over their work schedules, methods, practices and performance.

[4] The plaintiff resides in Manitoba. She is a single mother with a high school education, graduating from the Brandon Adult Learning Centre in 1997. In addition to making deliveries for the defendant, she was previously employed as a waitress and is currently employed as a rental coordinator for a truck leasing company. Between 2012

and 2019 she and her now ex-husband owned and operated an unprofitable martial arts fitness gym. The plaintiff has been licensed to use the App since 2014 and has earned a total of approximately $9,000.00 from the defendant.

[5] The plaintiff and the defendant entered into the original courier agreement in 2014. The original courier agreement contained no arbitration agreement. In the original courier agreement, the parties agreed to the jurisdiction of the Manitoba Court of Queen's Bench. Clause 11 of the original courier agreement states:

> This Agreement shall be construed and interpreted in accordance with the laws of the Province of Manitoba, Canada. The parties hereto hereby irrevocably attorn to the jurisdiction of the courts in the province of Manitoba, Canada with respect to any and all issues arising from this Agreement….

[6] The plaintiff first spoke with counsel on or about July 4, 2018 regarding this action. She could not afford legal counsel, and would not have retained legal counsel, but for this action being a class action and counsel agreeing to be paid on a contingency basis.

[7] The defendant first notified the plaintiff on July 19, 2018 by email that it was implementing a new courier agreement which would take effect a week later, on July 26, 2018. This email included highlights of the new courier agreement, and made clear if she did not agree to it she would not be allowed to continue working. The new courier agreement contained an arbitration agreement. The July 19, 2018 email stated in part:

> Update Highlights include:
>
> . . .
>
> - Update to the governing law provision.
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> . . .
>
> - The requirement for disputes to be resolved through arbitration in an individualized manner.

. . .

> These changes will take effect on July 26, 2018, and as we seek to treat all couriers who contract with Skip equally, some terms retroactively apply. You will see a notification in the Courier App requiring you to confirm and agree to the new terms as of July 26, 2018 in order to continuing offering your services through our platform…

[8] On July 20, 2018, the plaintiff forwarded an electronic copy of the new courier agreement to her lawyers for consideration. Three days later, on July 23, 2018, the plaintiff spoke with her counsel, Paul Edwards, about the courier agreement.

[9] The discussions between the plaintiff and her counsel regarded what strategy she should adopt regarding the new courier agreement in terms of the proposed class action. (The plaintiff waived privilege regarding those discussions.)

[10] On July 25, 2018, Mr. Edwards explained to the plaintiff what the arbitration agreement meant and what its implications may be for the proposed class action. The plaintiff filed and served the Statement of Claim in this matter on July 25, 2018, before the coming into force of the new courier agreement.

[11] The parties are at odds as to whether the plaintiff agreed to the new courier agreement. The defendant says she did by clicking "I Agree" on the Skip platform and by acknowledging that by checking a clause that indicated if she did not "…accept the updated terms as set out herein…" that she would not be able to continue providing her services via the Skip platform. The plaintiff says she signed under protest and therefore did not agree to the terms of the new courier agreement.

[12] On July 30, 2018 the plaintiff wrote the defendant seeking confirmation she was required to agree to the new courier agreement if she wanted to keep working:

> I submitted my availability last week and was scheduled for two shifts. When I updated the app, a new agreement came up. I would like to keep my shifts and this job. Am I able to be scheduled shifts if I don't agree with the new terms?

[13] The defendant responded confirming the plaintiff would not be able to continue working if she did not agree:

> In order to continue to have access to Skip's network, all users are required to agree to the updated terms….

[14] On July 31, 2018, the plaintiff emailed the defendant stating:

> …I do not agree with the new terms, but will indicate "Agree" so I can continue to get shifts because I want to work. I am doing this under protest.

[15] On July 31, 2018 the plaintiff clicked "I Agree" in the App under protest so she could continue to work. There was no response from Skip to the July 31, 2018 email, but only an internal company note indicating "No reply is needed". The plaintiff continued to work.

[16] The new courier agreement contains arbitrational clauses at paras. 17–22. Paragraphs 17, 18, 20, 21 and 22 are reproduced below:

> 17 If there is any dispute or controversy between (1) You or any of Your Personnel and (2) the Company or any related entity, including any dispute or controversy arising out of or relating to this Agreement, any Services, any interactions or transactions between (1) You or any of Your Personnel and (2) the Company or any related entity, or in respect of any legal relationship associated with or derived from this Agreement, including this Agreement's negotiation, validity, existence, breach, termination, construction or application, or the rights, duties or obligations of any party to this Agreement (each, a "Dispute"), any party will serve any notice on the other party and each party must use good faith efforts to resolve the Dispute informally.
>
> 18 If the Dispute is not resolved after twenty (20) business days of a party serving notice on the other party that there is a Dispute, the parties agree that the Dispute will be finally resolved by confidential arbitration before a single arbitrator

> in accordance with the Arbitration Rules of the ADR Institute of Canada, Inc. The parties agree that the arbitration will be conducted by the parties on an ad hoc basis and will not be administered by the ADR Institute of Canada, Inc.
>
> . . .
>
> 20 If You are a resident of a province other than Quebec, the seat of the arbitration will be Ontario or such other location as agreed to by the parties acting reasonably. The language of the arbitration will be English.
>
> 21 The Company will pay the reasonable arbitration costs. There will be no appeals from any question of fact or law, or any other issue.
>
> 22 The parties will resolve any Dispute on an individual basis. Any claim you may have must be brought individually, in Your individual capacity and not as a representative plaintiff or class member, and you will not join such claim with claims of any other person or entity, or bring, join or participate in a class action lawsuit, collective or representative proceeding of any kind (existing or future) against the Company or any related entity.

[17] Paragraph 26 of the new courier agreement states that the new agreement replaces and supersedes any previous agreement. That paragraph reads as follows:

> 26 This Agreement represents the full and final understandings between the parties, and supersedes any and all previous understandings, commitments, and agreements, oral or written, pertaining to the Services. Without limiting the generality of the foregoing, the parties agree that this Agreement replaces and supersedes any previous agreement between You and us, and governs the legal relationship and all legal issues between You and us, including but not limited to any Dispute arising from or related to this Agreement or any previous agreement between You and us.

SUBMISSIONS OF THE PARTIES

[18] The defendant says that as the parties' agreement provides that any disputes regarding their relationship must be resolved by way of private arbitration and following the analytical framework in the Supreme Court of Canada's decision in ***Dell Computer Corp. v. Union des consommateurs***, 2007 SCC 34 (CanLII), the Court must stay the plaintiff's action under s. 7(1) of the ***Act***. The defendant further says that none of the enumerated exceptions in s. 7(2) of the ***Act*** apply. Unlike the arbitration agreement in

Uber Technologies Inc. v. Heller, 2020 SCC 16 (CanLII), the arbitration clause does not pose a barrier to access to justice, but in fact facilitates it. The defendant further says that pursuant to the ***Dell*** framework, the Court can only undertake an analysis of a challenge to the validity of an arbitration agreement under s. 7(2)(b) of the ***Act*** where the challenge turns on a pure question of law, or where the challenge raises a mixed question of fact and law that can be resolved with a superficial review of the record, neither of which obtain here. The defendant further says that the arbitration agreement at issue here is clearly distinguishable from the ***Uber*** case and the arbitration clause is not invalid for unconscionability.

[19] The plaintiff says that the defendant has not met its onus under s. 7(1) of the ***Act*** because there is no arbitration agreement as the parties are governed by the terms of the original courier agreement. In the alternative, the plaintiff submits if there is an arbitration agreement, this Court should refuse to stay the claim under s. 7(2) of the ***Act*** because the arbitration provisions are invalid. The plaintiff says they are invalid because they are contrary to ***The Employment Standards Code***, C.C.S.M. c. E110 (the "***Code***"), are unconscionable, and are contrary to public policy and also because there was no consideration for the new courier agreement. Finally, the plaintiff says that the claim is a proper one for summary judgment, a further exception under s. 7(2)(e) of the ***Act***.

ISSUES

[20] The issues on this motion are:

1) Pursuant to s. 7(1) of the ***Act***, which agreement governs the relationship between the parties, the original courier agreement or the new courier agreement?

2) If the arbitration clauses of the new courier agreement apply, should this Court refuse to stay the proceeding because the arbitration agreement is invalid by virtue of either unconscionability or lack of consideration, or on the basis of public policy, or because the agreement is contrary to the ***Code***, or because the matter in dispute is a proper one for default or summary judgment?

APPLICABLE LEGAL PRINCIPLES

[21] Section 7(1) and 7(2) of the ***Act*** read as follows:

> **Stay**
>
> 7(1) Subject to subsection (2), if a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> **Refusal to stay**
>
> 7(2) The court may refuse to stay the proceeding in only the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Manitoba law;
>
> (d) the motion was brought with undue delay;

> (e) the matter in dispute is a proper one for default or summary judgment.

[22] Section 7(1) of the ***Act*** does not give the court discretion to deny a motion to stay in favour of arbitration. It provides that, when a party to an arbitration agreement commences a proceeding in respect of a dispute that the parties have agreed to submit to arbitration, the court must stay the proceeding in favour of arbitration, unless one of the prescribed exceptions in s. 7(2) of the ***Act*** applies. The onus under s. 7(1) of the ***Act*** lies with the defendant. The test is whether it is arguable the dispute falls within the terms of the arbitration agreement. The onus under s. 7(2) of the ***Act*** lies with the plaintiff. (See ***Hopkins v. Ventura Custom Homes Ltd.***, 2013 MBCA 67 (CanLII), at para. 25.)

[23] Also of relevance is s. 17(1) of the ***Act*** which states:

> **Ruling on jurisdiction and objections**
>
> 17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

[24] The Manitoba Court of Appeal in ***Hopkins*** noted the increasing deference to administration tribunals shown by the courts including on the issue of jurisdiction, and in this regard cites s. 17(1) of the ***Act***, as well as the ***Dell*** case and other jurisprudence.

[25] The Manitoba Court of Appeal describes in ***Hopkins*** how courts are to determine whether or not an action should be stayed under the ***Act***:

> [53] Section 7 of the *Act*, as it now appears, requires a two-step analysis:
>
> - the court must first determine whether the court proceeding is "in respect of a matter in dispute to be submitted to arbitration under the agreement" (s. 7(1) of the *Act*);

> - if the answer is no, then the court will not grant a stay;
>
> - if the answer is yes, then the court must proceed to consider s. 7(2) of the *Act* and whether any of the five cases in (a) to (e) therein applies to permit the court to refuse to stay the court proceedings.
>
> [citations omitted]

[26] Both parties referred extensively to the ***Uber*** decision. The case has many factual similarities to this case although the arbitration clauses are different. The following paragraphs of that decision provide useful guidance:

> [32] Under the *Dell* framework, the degree to which courts are permitted to analyse the evidentiary record depends on the nature of the jurisdictional challenge. Where pure questions of law are in dispute, the court is free to resolve the issue of jurisdiction (para. 84). Where questions of fact alone are in dispute, the court must "normally" refer the case to arbitration (para. 85). Where questions of mixed fact and law are in dispute, the court must refer the case to arbitration unless the relevant factual questions require "only superficial consideration of the documentary evidence in the record" (para. 85).
>
> . . .
>
> [34] The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 (CanLII), [2007] 2 S.C.R. 921, at para. 11:
>
> > The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.
>
> . . .
>
> [36] Neither *Dell* nor *Seidel* fully defined what is meant by a "superficial" review. The essential question, in our view, is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (see *Trainor v. Fundstream Inc.*, 2091 ABQB 800, at para. 23

> (CanLII); see also *Alberta Medical Association v. Alberta*, 2012 ABQB 113, 537 A.R. 75, at para. 26).
>
> [37] Although it is possible to resolve the validity of Uber's arbitration agreement through a superficial review of the record, we are of the view that this case also raises an issue of accessibility that was not raised on the facts in *Dell* and justifies departing from the general rule of arbitral referral. As *Dell* itself acknowledged, the rule of systematic referral of challenges to jurisdiction requiring a review of factual evidence applies "normally" (para. 85; see also *Muroff*, at para. 11). This is one of those abnormal times.

ANALYSIS

Issue 1 – Pursuant to s. 7(1) of the *Act* which agreement governs the relationship between the parties, the original courier agreement or the new courier agreement?

Is there an arbitration agreement between the parties?

[27] In the circumstances of this case there was no arbitration agreement in place when this action was commenced on July 25, 2018, because at that time it was the original courier agreement that was in force. Section 7(1) of the ***Act*** therefore does not apply as this action was commenced in the courts prior to the coming into force of the new courier agreement. The original courier agreement, at clause 11, states that the parties "…irrevocably attorn to the jurisdiction of the courts in the province of Manitoba…".

[28] Moreover, the arbitration clauses at paras. 17 and 18 of the new courier agreement cannot be construed as applying retroactively to an earlier period. It is true that clause 26 includes disputes "…arising from or related to this Agreement or any previous agreement…". However, it does not refer to previously initiated and existing actions as we have in this case. Clause 26 does not by its terms purport to extend to pre-existing actions.

[29] This action was commenced before the arbitration clause came into effect on July 26, 2018. The arbitration provisions do not, on their face, apply retroactively. I do not find that the dispute falls within the scope of the arbitration agreement because the claim was commenced in this Court under the original courier agreement, and the arbitration provisions in the new courier agreement are forward looking, and do not encompass, by their terms, a pre-existing court action.

[30] There is a further reason why there is no arbitration agreement between the parties. I find the plaintiff did not accept the terms of the new courier agreement, and therefore the relationship is governed by the original agreement. The plaintiff initially emailed the defendant and was told she had to sign the new agreement to keep working. She then wrote another email to the defendant before clicking the "I Agree" button, stating that she did not agree with the new terms but would indicate "Agree" so she could continue to work. She further indicated she was doing this under protest. The plaintiff indicated to the defendant that she was rejecting the new terms. Although the defendant had previously responded to the plaintiff's July 30, 2018 email, the defendant did not respond to her July 31, 2018 email that she did not agree to the terms but was clicking "I Agree" under protest so she could continue to work. The defendant received the plaintiff's response, made note of it and made the decision not to reply. The plaintiff then continued to work.

[31] The defendant initially responded to the plaintiff by way of email dated July 30, 2018, but then decided not to respond to the plaintiff's subsequent July 31, 2018 email. The defendant, therefore, can be said to have acquiesced to the plaintiff's position,

whether as an employer or as a party to a contract with an independent contractor. (See ***Wronko v. Western Inventory Service Ltd.***, 2008 ONCA 327 (CanLII), at para. 36 in the context of an employment relationship.)

Issue 2 - If the arbitration clauses of the new courier agreement apply, should this Court refuse to stay the proceeding because the arbitration agreement is invalid by virtue of either unconscionability or lack of consideration, or on the basis of public policy, or because they are contrary to the *Code*, or because the matter in dispute is a proper one for default or summary judgment?

[32] If I am wrong in my analysis under s. 7(1) of the ***Act*** and the new courier agreement applies and the arbitration agreement contained within the new courier agreement is binding on the parties, I find that the arbitration agreement is invalid on grounds of unconscionability and because of an absence of consideration. Given my finding on these two issues, there is no need for me to consider the issue regarding whether the arbitration agreement is contrary to the ***Code***, or is invalid on public policy grounds, or whether the matter in dispute is one that is proper for default or summary judgment under s. 7(2)(e) of the ***Act***.

[33] As in the ***Uber*** case, I find that it is possible to resolve the validity of the arbitration agreement through a superficial review of the record under the ***Dell*** framework (see ***Uber*** at paras. 32 and 37) on the issues of unconscionability and lack of consideration.

> The arbitration agreement is invalid under s. 7(2)(b) of the ***Act*** because it is unconscionable.

[34] Based on the evidence that was adduced on the motion, I am satisfied that the arbitration agreement is unconscionable as I am satisfied that there is a clear inequality of bargaining power on the facts in evidence and that in the circumstances the arbitration agreement constitutes an improvident bargain.

[35] As I noted earlier, the factual matrix in this case has many similarities to the ***Uber*** decision, although the arbitration agreement is different. I agree with the defendant that the arbitration agreement in this case does not make the substantive rights given by the contract unenforceable as was the case in ***Uber*** (at para. 95). The ***Uber*** decision sets out the applicable principles regarding unconscionability at paras. 54 - 91 of that decision.

Inequality of bargaining power

[36] Regarding the inequality of bargaining power, I find that this is a contract of adhesion and for the same reasons found by the Court in ***Uber***, the plaintiff had to agree to the terms of the agreement or be terminated. Even though the plaintiff had independent legal advice, that advice did not result in a change in the inequality of bargaining power. It did not ameliorate it (see ***Uber*** at para. 83). The plaintiff was powerless to negotiate any of the terms. She could only accept the new courier agreement and could not negotiate any terms. When she attempted to do so by saying she was accepting the terms under protest, she did not even receive an answer from the defendant, which underlines the unilateral nature of this agreement. There is a significant difference in sophistication between the two parties. I do not find that the plaintiff is particularly sophisticated. Like a growing number of individuals today, she worked at two jobs in order to make ends meet.

[37] The defendant submitted that the plaintiff was not dependent on the defendant and in the absence of such dependence, there could be no unconscionability, and cited in support of that proposition, a passage from the dissenting reasons in ***Douez v. Facebook, Inc.***, 2017 SCC 33 (CanLII), at para 145. However, isolating the factor of

dependence takes too narrow a view of the matter. The passage merely mentions a relation of dependence as a possible factor. In any case, the Supreme Court's analysis in ***Uber*** is now the governing law on unconscionability.

Is the new courier agreement an improvident bargain?

[38] The Supreme Court set out the principles for determining an improvident bargain at paras. 74 - 91 of the ***Uber*** decision. It stated the following at paras. 75 and 89:

> [75] Improvidence must be assessed contextually…In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties…
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> . . .
>
> [89] Our point is simply that unconscionability has a meaningful role to play in examining the conditions behind consent to contracts or adhesion, as it does work with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented…The potential for such contracts to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconsionability doctrine is meant to apply.

[39] I find that it is an improvident bargain because in this case the plaintiff had already initiated an action which is barred by the new courier agreement. Her action is rendered nugatory after the fact by the new arbitration agreement. She signed the new courier agreement under protest and after having initiated her action before the coming into force of the new agreement. In these circumstances, the new courier agreement was an improvident bargain. The new courier agreement benefits the defendant at the expense of the plaintiff by retroactively removing her ability to access the courts.

[40] I find that the defendant would obtain an unfair advantage if the arbitration provisions were found to be valid. The arbitration clause inserted into the new courier agreement was, in part, for the specific purpose of preventing any putative class action proceedings. I infer this from the wording of the arbitration clause (at para. 22) and because of what is stated in the defendant's 2020 Annual Report that the arbitration clause could "…significantly reduc[e] the size of any class action and the related risks". The plaintiff had to sign the new courier agreement or face termination.

[41] In the Ontario Court of Appeal decision of ***Griffin v. Dell Canada Inc.***, 2010 ONCA 29 (CanLII), the Court remarked that in that case the arbitration clause not only required all claims to be arbitrated, but also precluded arbitration of claims on a group or class basis, which is the case here. The issue in that action had to do with alleged defective notebook computers and involved consumer protection legislation. While the fact that this claim is framed as a potential class action proceeding cannot have the effect of conferring jurisdiction on this Court over a case that would otherwise fall within the subject matter within the jurisdiction of an arbitrator, (see ***Briones v. National Money***, 2013 MBQB 168 (CanLII), at para. 24), I nonetheless note that there are also access to justice benefits to such actions. The Supreme Court in ***Uber*** remarked that "[r]espect for arbitration is based on it being a cost-effective and efficient method of resolving disputes…." (para. 97). However, clauses inserted into arbitration agreements that preclude the possibility of class arbitration undermine that principle of efficient adjudication of claims on a class basis.

> The arbitration agreement is invalid under s. 7(2)(b) of the ***Act*** because there was no consideration to the plaintiff for entering into the new courier agreement.

[42] I also accept the plaintiff's submission that the new courier agreement was not supported by consideration to the plaintiff. The Ontario Court of Appeal stated in ***Techform Products Ltd. v. Wolda***, 2001 CanLII 8604 (ON CA), [2001] OJ No 3822 (QL):

> [24] …It is…consistent with the principle fundamental to consideration in the context of an employment contract amendment – that in return for the new promise received by the employer something must pass to the employee, beyond that to which the employee is entitled under the original contract. Continued employment represents nothing more of value flowing to the employee than under the original contract.

See also ***Hobbs v. TDI Canada Ltd.***, 2004 CanLII 44783 (ON CA).

[43] I agree that the ability to provide courier services via other platforms was not new consideration as the original courier agreement referred to the relationship as non-exclusive.

[44] I disagree that the mandatory arbitration provision constitutes consideration. The removal of the right to sue is not a benefit to a party nor is the elimination of the right to participate in a class action. In the circumstances here, this is a particular detriment as the plaintiff had filed a pre-existing action. The removal of a class action proceeding enures to the defendant, not the plaintiff. The mandatory arbitration provision precludes class arbitration.

CONCLUSION

[45] I find that the defendant has not met its onus under s. 7(1) of the ***Act*** to satisfy me that this Court should stay this action.

[46] I further find that the arbitration clause contained in the new courier agreement is invalid under s. 7(2)(b) of the ***Act*** because it is unconscionable and because it is also invalid for want of consideration.

[47] The defendant's motion for a stay of the action commenced by the plaintiff is dismissed with costs.

_____ J.