COURT FILE NO.: 99-CT-000539
DATE: 20000425

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
	)	
CINDY HURAS	)	*Michael D. Wright* for the Plaintiff
	)	
Plaintiff	)	
- and -	)	
	)	
	)	
PRIMERICA FINANCIAL SERVICES LTD.	)	*C. Reeve* and *J. P. Alexandrowicz*
	)	for the Defendant
Defendant	)	
	)	
	)	**HEARD:** April 10, 2000

CUMMING J.

REASONS FOR DECISION

A PROCEEDING UNDER *THE CLASS PROCEEDINGS ACT, 1992*

The Motion

[1] The defendant seeks an order staying this action pursuant to s. 7(1) of the *Arbitration Act, 1991* S.O. 1991, c. 17 which provides:

> If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

The Class Proceeding

[2] The action was commenced as a class proceeding under the *Class Proceedings Act, 1992* S.O. 1992, c. 6 (*"CPA"*). The plaintiff seeks damages on her own behalf and on behalf of all alleged class members who entered into the defendant's training program for

sales representatives between May 19, 1993 and January 1, 1998. The claim for damages alleges that the defendant failed to pay a minimum wage as required by s. 23 of the *Employment Standards Act*, R.S.O. 1990, c. E. 14 ("*ESA*"). Alternatively, the plaintiffs seek damages as a result of alleged unjust enrichment. Punitive and exemplary damages are also claimed.

[3] The defendant submits there is a valid arbitration agreement included as one of the terms in the contract(s) entered into between the plaintiff and the defendant. The plaintiff submits there is not truly an arbitration clause in the contractual arrangements with the defendant. Alternatively, the plaintiff submits the requested stay is properly to be refused because the purported arbitration clause falls within either or both of two exception provisions in s. 7(2) of the *Arbitration Act, 1991*, being:

1. The arbitration agreement is invalid.

2. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

[4] As a matter of public policy, the parties to an arbitration agreement generally should be required to honour the agreement. Freedom of contract emphasizes the need for certainty, predictability and stability. The formation of a contract which includes a provision of an arbitration clause is private law-making. However, "[c]ourts have long exercised an equitable jurisdiction to restrain the continuation of an arbitration proceeding in circumstances where the foundation of the arbitration agreement is under attack": see *Deluce Holdings Inc.* v. *Air Canada* (1992), 12 O.R. (3d) 131 (Gen. Div.) at 148, 151.

Introduction

[5] The defendant, Primerica Financial Services Ltd., carries on business in Ontario in conjunction with Primerica Life Insurance Company of Canada and PSFL Investments Canada Ltd. (the three corporations are collectively referred to herein as "Primerica") selling life insurance and related financial products through a sales force.

[6] The plaintiff, Cindy Huras, entered into Primerica's training program to become a sales representative in May 1996. The plaintiff was not entitled to receive any compensation during the mandatory training period. A main element of the training was that the trainee would find three new persons who would purchase insurance from Primerica.

[7] On August 26, 1996, Ms. Huras signed a document, "Primerica Financial Services Licensing Pak", which states:

> My signature below serves as my agreement to be bound by the "Basic Agreement" with [Primerica] ...and also serves as my acceptance of each of the acknowledgments below.

[8] The Primerica Financial Services Licensing Pak includes as one of the "Acknowledgments":

> Any dispute with [Primerica]... will be settled through Good Faith Negotiation or (if necessary) Arbitration according to the provisions (and subject to its exceptions) in the Basic Agreement and other agreements....

[9] The Basic Agreement provides:

> 15. (a) Except as otherwise provided in this Agreement or another written agreement between you and ...[Primerica], any dispute between you and ...[Primerica], between you and ...[Primerica] affiliate (or any of their past or present officers, directors or employees) or between you and another ...[Primerica] representative (as long as ...[Primerica] or or any of their personnel is also involved as a party to the dispute) will be settled solely through good faith negotiation (as described in the then current Operating Guideline on Good Faith Negotiation) or, if that fails, binding arbitration. "Dispute" means any type of dispute in any way related to your relationship with ...[Primerica] that under law may be submitted by agreement to binding arbitration, including allegations of breach of contract, personal or business injury or property damage, fraud and violation of federal, provincial or local statutes, rules or regulations. [Primerica]... may exercise rights under this Agreement without first being required to enter into good faith negotiations or initiate arbitration for disputes covered by this section.
>
> (b) The arbitration will be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). The arbitration will be held in the metropolitan area nearest where the relevant [Primerica]... has its principal place of business. Each party to the arbitration will select his, her or its arbitrator, and provide the arbitrator's name, address and telephone number to the other party. These arbitrators (who need not be neutral) will appoint a third, neutral arbitrator. If the parties' arbitrators cannot agree on a third arbitrator, the AAA will select the third arbitrator. A transcript of the proceeding will be made, and the arbitrators will state their findings of fact and conclusions of law along with their award. If any court is asked to review the award, the court will review the entire record of the arbitration proceeding. The rules of evidence that would apply in any civil case in the Ontario Court (General Division) will apply in the arbitration. Neither you nor ...[Primerica] will be entitled to consequential or punitive damages in any matter, arbitrated or not. If one party prevails over the other party, the losing party will pay the winning party's expenses (including legal fees) in handling the arbitration or court proceeding to enforce arbitration or the arbitration award. If for any reason there is an actual court case on any matter, you and ...[Primerica] waive the right to a jury trial. ...[Primerica] and their officers, directors or employees and, if named as a party to a dispute with the foregoing, any other [Primerica] representative, is intended to be a third party

> beneficiary of this provision and has the same right to enforce it as do you and [Primerica]. [Primerica] acts as an [sic] representative for each [Primerica] Company, affiliate and their past or present officers, directors and employees for the limited purpose of providing arbitration and good faith negotiation for them for disputes covered by this section.

[10] A "PLICC Representative Agreement" was signed by the President and Chief Executive Officer of Primerica Life Insurance Company of Canada and signed by Ms Huras on August 27, 1996. It includes as a term:

> The definitions and Part II of your Basic Agreement are incorporated by reference into this Agreement and shall have the same effect on this Agreement as if they were actually included in this Agreement.

[11] Primerica submits that all three documents constitute enforceable contracts and that together they set forth the terms and conditions governing the *entire* relationship between Primerica and Ms. Huras.

[12] The defendant asserts that Ms. Huras was an independent contractor with Primerica. The plaintiff submits she was an employee. (This question is not an issue to be dealt with in this motion.)

[13] Ms. Huras successfully completed the Life Underwriters' Association of Canada ("LUAC") examination about August 1, 1996. She was issued her LUAC Life Insurance Agent license on September 11, 1996.

The Issues

Issue #1: Is the arbitration provision a term of the contract(s) of the plaintiff with Primerica?

[14] The plaintiff submits that she is not bound contractually by the purported term in the contract(s) agreeing to arbitrate because she agreed to work for Primerica by entering its training program in May 1996, and there was no real consideration for entering into the later contract(s) signed August 26 and 27, 1996: see *Francis* v. *Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (C.A.) at 83-85.

[15] There is not any affidavit evidence from the plaintiff or otherwise which addresses this issue. The limited evidence establishes there was an oral agreement on the part of Primerica to provide training followed by the later written agreements of August 26 and 27, 1996, whereby the plaintiff would then provide services as part of Primerica's sales staff.

[16] On the face of the documentation, I find there was mutuality of consideration in the August 26, 27, 1996, contract(s). Amongst other things, Ms. Huras was authorized

thereby to sell the products of Primerica, and to use their trademarks. She also became entitled to commissions upon receiving her licence.

Disposition of this Issue

[17] On the basis of the evidence available, I find for the purpose of this motion that the August 26 and 27, 1996, documents constituted a contract(s) between Ms. Huras and Primerica and that the arbitration provision was incorporated as a term of the contract(s).

Issue #2: Do the contract(s) entered into August 26 and 27, 1996 govern the training period prior thereto?

[18] There is a paucity of evidence before me. However, the assumption by both parties in their submissions was that the arbitration clause in the contract(s) of August 26 and 27, 1996, either applies to the entirety of the relationship between the plaintiff and Primerica or does not apply at all.

[19] In my view, the documentation in evidence establishes that there were two distinct relationships between the parties. There was a training period followed by an application by the plaintiff (because the successful plaintiff trainee then chose to apply) to become a regular member of Primerica's sales force. Primerica had the option, of course, of not accepting this application.

[20] In my view, and I so find, the three contractual documents in evidence all relate only to the position (whether being in respect of employment or as an independent contractor) of a successful applicant following the completion of the training period. This documentation cannot properly be construed as then applying retrospectively to the earlier period of training.

[21] The Statement of Claim essentially seeks damages for alleged breach of the statutory requirement to pay a minimum wage during the training period (see paragraphs 1(a), 5, 6, 7, 9 11 and 14 of the Statement of Claim). While there is a blurring of the relationship as a trainee and contracted sales representative in two paragraphs of the Statement of Claim (paragraphs 12 and 15), the overall claim makes it clear that the allegation of unlawful conduct relates simply to the training period.

[22] For the reasons given, I find there were two distinct periods in the relationship between the parties with differing contractual provisions applying to each period. The evidence does not establish that anything other than an oral agreement was entered into for the training of the plaintiff. There is no documentary or other cogent evidence that there was any agreement providing for arbitration in the event of a dispute relating to the relationship of the parties during the training period.

[23] The nature and status of the relationship between the plaintiff and Primerica changed with the August 26 and 27, 1996, agreements to reflect that the plaintiff was now to be a member of the licensed sales force. As a trainee she had been unlicensed and

not entitled to act as a sales representative of Primerica to the public. Even if Ms. Huras is properly regarded as an employee throughout the entire relationship, the evidentiary record establishes that her status, position and role with Primerica changed fundamentally when she became licensed. The written contract(s) of August 26 and 27, 1996, relate to this new position as a licensed member of the sales force.

[24] The subsequent period as a trained, accepted, licensed sales representative, was (as I have said for the purposes of this motion in the disposition of Issue #1 above) subject to the three contractual documents in evidence which include an arbitration clause.

[25] Paragraph 15(b) of the "Basic Agreement" also provides that "Neither [the plaintiff nor Primerica]...will be entitled to consequential or punitive damages in any matter, arbitrated or not". For the reasons given above in respect of the arbitration provision, there is not any evidence to establish that this clause was part of the agreement between the parties for the training period.

Disposition of this Issue

[26] The claim advanced relates only to the training period. For the reasons given, there is no arbitration clause applicable to this time period and the relationship between the parties over this time frame. Hence, the motion is dismissed on this basis.

[27] Given that there were other asserted issues, I shall give further reasons although they are not necessary to the result.

Issue #3: Does the Arbitration Provision contract out of the *Employment Standards Act*?

[28] Section 3(1) of the *ESA* provides that any contracting out or waiver of employment standards mandated by the legislation is null and void: see *Machtinger* v. *HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.) at 505. Section 23 of the *ESA* sets a standard of at least a "minimum wage" being paid for certain work performed or services supplied.

[29] An agreement to train an employee without paying the minimum wage is prohibited: see *Re Haight*, E.S.C. 1249, July 19, 1982 (Rose); *Re Roma Restaurant Supply Ltd.*, E.S.C. 3094, September 25, 1992 (Wacyk); *Re Sherome Enterprises Ltd.*, E.S.C. 93-235, November 15, 1993 (Harris).

[30] The *ESA* provides (ss. 63 to 75.2) for two avenues of redress to an employee complainant. The person may file a complaint which will be investigated by an employment standards officer and adjudicated. An order may issue against the employer for the claimed wages subject to review by an independent referee. Pursuant to section 69(8), the result is binding upon the employer: see generally *Re Downing and Graydon et al.* (1978), 92 D.L.R. (3d) 355 (Ont. C.A.) at 372-73.

[31] Alternatively, pursuant to section 64.4, the aggrieved individual can commence a court action in respect of the claimed wages.

[32] In my view, the arbitration provision in the contract(s) of August 26 and 27, 1996, purports to prevent an employee from filing a complaint under the *ESA*. The definition of "dispute" in paragraph 15(a) of the Basic Agreement is broad and includes alleged breaches of provincial statutes and regulations.

[33] The right of an individual to make a complaint under the *ESA* that she has not received the minimum wage from an employer is predicated upon the public policy of protecting workers with limited means and bargaining power from being taken advantage of unfairly. In my view, the arbitration clause in question, if it were to be enforceable as against a complaint brought under the *ESA*, would defeat the public policy underlying the *ESA*.

[34] However, this issue is moot in the instant situation. In the case at hand, the plaintiff and other alleged class members did not attempt to file a complaint and would now be precluded from doing so by virtue of the two-year limitation period in s. 82.1 of the *ESA*. If this were a live and relevant issue, in my view the arbitration clause would be contrary to public policy and unenforceable to prevent a complaint from proceeding under the *ESA*. Section 3(1) of the *ESA* prohibits any contracting out of employment standards. This implicitly includes any contracting out of the remedy provisions of the *ESA* that enable enforcement of employment standards: see generally S.M. Waddams, *The Law of Conrtacts* 3d ed. (Toronto: Canada Law Book Inc., 1993) at 369 to 391; *The Royal Bank of Canada* v. *Grobman et al.* (1977), 83 D.L.R. (3d) 415 (Ont. H.C.J.) at 432.

[35] It is a moot point as to whether a lay person in the position of the plaintiff might have thought she was precluded from making a complaint under the *ESA* because of the arbitration provision and that this is why there was, in fact, no complaint. There is simply no evidence as to this possibility.

Issue #4: Is the arbitration provision unconscionable?

[36] The plaintiff submits that the arbitration provision is unenforceable because it is unconscionable. The law of contracts involves a balance between competing sets of values: see S. M. Waddams *The Law of Contracts* (above) at 295 to 368. On the one hand is the principle of freedom of contract, with its value of certainty and predictability which is of fundamental importance in a democracy and free market economy. But this value is not absolute. A competing value is to protect the weak and oppressed from the imposition of an unfair contract of adhesion. The doctrine of unconscionability enables a court to refuse to enforce a contract "that is demonstrably improvident and made between the parties with unequal bargaining powers...": see G. England et al., *Employment Law in Canada* 3d ed. (Toronto: Butterworths, 1998), at s. 7.105. In *Harry* v. *Kreutziger* (1978), 95 D.L.R. (3d) 231 (B.C.C.A.), Lambert J.A. stated:

> In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate or bargaining power was grievously impaired ... are really aspects of one single question. That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded.

[37] As I have already stated, there is limited evidence on the return of this motion. However, it is apparent from the documentation filed that the agreement signed by the plaintiff is a standard form contract. The arbitration clause, which purports to limit the plaintiff's rights, is contained in a document (the "Basic Agreement") which is incorporated by reference into the contract(s). There is an obligation upon an employer to draw an employee's attention to provisions which limit rights and to explain such provisions: *Burden* v. *Eastgate Ford Sales & Service (82) Co.*, [1992] O.J. No. 2376 (Gen. Div.) at 3. There is no evidence in this regard.

[38] Moreover, it is apparent that there would be an inequality of bargaining power between Primerica and the plaintiff and putative class members, who inferentially are non-unionized individuals. Notwithstanding the limited evidentiary record, the known circumstances enable the court to take judicial notice of the inequality of bargaining power: *Machtinger* at 507; *Wallace* v. *United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.) at 32-33.

[39] The facts of a standard form contract and inequality of bargaining power are not uncommon. By themselves, they do not render the arbitration provision unconscionable. However, there are further factors to consider.

[40] The arbitration provision is one-sided. Paragraph 15(a) provides that Primerica "may exercise rights under this Agreement without first being required to...initiate arbitration for disputes covered by this section". Thus, it is only an individual in the situation of the plaintiff and putative class members, who is purportedly bound by the arbitration provision.

[41] I infer from the evidentiary record that the individual claims of the plaintiff and similarly-situated class members would be for very small amounts of money, probably of a few hundred dollars each. The plaintiff's individual claim is for payment of the minimum wage over a period of less than four months. R.R.O. 1990, Reg. 325, s. 10(1) established the minimum wage as being $6.85/hr for the relevant time period. The record indicates a trainee did not work on a full-time basis.

[42] Very few, if any, of the putative class members would even consider proceeding to an arbitration of a dispute with Primerica given the cost of paying for one's own arbitrator in the first instance and the risk of substantial costs in the event of failure. The

arbitration clause mandates a three person arbitration panel. There are cost sanctions if the plaintiff is unsuccessful at arbitration.

[43] Two of the normative purposes of an arbitration provision are to expedite the resolution of a dispute and to save costs that would be seen in a court action. The arbitration provision in the case at hand is to the opposite effect. As I have said, someone in the plaintiff's position is not as a practical reality going to seek an arbitration. At the same time, if the arbitration provision is binding, there is not recourse to a court, including Small Claims Court. Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator. Primerica submits that the arbitration clause is enforceable even if utilization of the clause might prove inconvenient or more costly to the plaintiff and similarly-situated persons.

[44] I disagree. The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent any resolution of a dispute other than upon the terms dictated by Primerica. The existence of the arbitration clause is unfair. It would be perverse and in conflict with the normative purposes of an arbitration clause to enforce the one at hand.

[45] The *CPA* has three underlying policy objectives. First, there is a goal of facilitating access to justice for claimants of relatively small amounts of money: *Bendall* v. *McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 (Gen. Div.) at 744. Second, the *CPA* seeks to provide for common issues to be litigated in a single proceeding involving many claimants. This achieves cost efficiencies and economies in the use of resources. Third, by facilitating access to justice, the *CPA* acts to foster deterrence of wrongful conduct. A class proceeding can be a mode of regulating business conduct in aid of public policies through the private sector seeking the remedy.

[46] The arbitration clause in the case at hand, if enforceable, would defeat the public policy inherent in the *CPA*. It is not necessary to decide for the purposes of this case whether this in itself renders the arbitration clause unconscionable. However, I do find that this is one relevant factor in the consideration of the overall evidence as to whether or not the arbitration clause is unconscionable.

[47] In the situation at hand the arbitration provision would require each claimant to pursue her/his own arbitration notwithstanding that the grievance advanced involves issues that *prima facie* are common to all grievors. The central issue in the class proceeding is whether or not Primerica is obliged by statute to pay the minimum wage during the training period of the class members.

[48] Primerica has refused a request by plaintiff's counsel to consider a single arbitration which would determine the claim of the class in respect of common issues determined *through the arbitration.*

[49] I conclude from the evidentiary record that the sole and real purpose of the arbitration clause in the case at hand is to prevent a resolution of disputes with Primerica and its sales representatives other than on terms dictated by Primerica. In my view, and I so find, the arbitration clause is unconscionable and, accordingly, void.

[50] I find that the arbitration clause is invalid within the meaning of s. 7(2) of the *Arbitration Act, 1991* because it is unconscionable. The clause, if enforced, would effectively deny access to justice for individuals in Primerica's sales force with a grievance against Primerica arising from that relationship.

Overall Disposition

[51] For the reasons given, the motion is dismissed. I may be spoken to as to costs.

Peter A. Cumming J.

CUMMING J.

Released: April 25, 2000