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COURT OF APPEAL FOR ONTARIO

BORINS, FELDMAN AND MACPHERSON JJ.A.

B E T W E E N:	)	
	)	
CINDY HURAS	)	**Michael D. Wright,**
	)	**Charles M. Wright and**
	)	**Mia London**
	)	**for the Respondent**
Respondent (Plaintiff)	)	
	)	
- and -	)	
	)	
PRIMERICA FINANCIAL SERVICES LTD.	)	**Larry P. Lowenstein and**
	)	**Derek J. Bell**
	)	**for the Appellant**
Appellant (Defendant)	)	
	)	
	)	
	)	**HEARD: June 13, 2001**

On appeal from the judgment of Justice Peter A. Cumming dated April 10, 2000.

BORINS J.A.:

[1] The issue on this appeal is whether an action for damages under the *Employment Standards Act*, R.S.O. 1990, c. E.14 commenced in the Superior Court by the respondent, Cindy Huras, against the appellant, Primerica Financial Services Ltd., should be stayed pursuant to s. 7(1) of the *Arbitration Act, 1991,* S.O. 1991, c. 17. The parties signed an employment contract on August 26, 1996. The contract contains an arbitration clause. The appellant moved for a stay on the ground that the matter in dispute between the

parties falls within the arbitration clause. The motion judge, Cumming J., in reasons reported at [2000] O.J. No. 1474, refused the stay. The respondent contends that the dispute does not fall within the arbitration clause and that the motion judge, rightly refused the stay.

[2] The answer to the question whether a dispute falls within an arbitration clause in a contract depends both on the nature of the dispute and the scope of the arbitration clause. As I will explain, there is no disagreement between the parties concerning the nature of the dispute, which is described in the respondent's statement of claim. However, there is disagreement as to whether the arbitration clause covers the dispute. To decide this question it is necessary to interpret the arbitration clause.

[3] Regarding the nature of the dispute, it arises out of an intended, but as yet uncertified, class proceeding by Huras against Primerica. The proposed class members are all persons who attended a mandatory Primerica training program after May 18, 1993 and prior to January 1, 1998. Huras seeks damages on her own behalf and on behalf of all class members for Primerica's failure to pay a minimum wage pursuant to the *Employment Standards Act* to individuals who participated in a mandatory training program. Each member of the class was required by Primerica to attend the training program in order to become a licensed sales representative for the company.

[4] In the spring of 1996 Huras began her training to become a sales representative for Primerica. Although she spent approximately 30 to 40 hours attending Primerica's training sessions, she received no compensation for her attendance. She claims that under s. 23 of the *Employment Standard Act* Primerica was required to pay her a minimum wage of $6.85 an hour. Based on the time she spent attending training sessions, this would amount to approximately $200 to $275.

[5] Huras successfully completed the training program and secured a licence to become an insurance agent. On August 26, 1996 she signed a standard form contract with Primerica to become a licensed sales representative of that company. The provisions of the contract that are relevant to this appeal read as follows:

> As a member of the Primerica Financial Services sales force, I am an independent contractor, and not an employee of Primerica Financial Services Ltd. ("PFS") or any other PFS Company.
>
> . . . . . .
>
> 15. (a) Except as otherwise provided in this Agreement or another written agreement between you and a PFS Company, any dispute between you and a PFS Company, between you and a PFS Company affiliate (or any of their past or present officers, directors or employees) or between you and another PFS representative (as long as a PFS Company or a PFS Company affiliate 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 a PFS Company 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. A PFS Company 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. [Emphasis added.]

[6] On May 18, 1999 Huras commenced this action. Subsequently, in reliance on s. 7(1) of the *Arbitration Act, 1991* and s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, Primerica moved to stay the action. Primerica moved for a stay on the ground that Huras' claim, to use the language of s. 7(1) of the *Arbitration Act, 1991*, is "in respect of a matter to be submitted to arbitration" under clause 15(a) of the contract of August 26, 1996.

[7] Primerica's motion was dismissed by Cumming J. It is from this order that Primerica appeals. For the reasons that follow, I would dismiss the appeal.

[8] The subject matter of the dispute is clear. It is whether the provisions of the *Employment Standards Act* required Primerica to pay Huras a minimum wage to compensate her for 30 to 40 hours during which she was required to attend Primerica's training program in May, 1996.

[9] The more difficult issue is whether the dispute is covered by the arbitration clause in the contract of August 26, 1996. If it is, the action must be stayed and the dispute must

be submitted to arbitration under s. 7(1) of the *Arbitration Act, 1991*, which reads as follows:

> **7.(1)** 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.

[10] Therefore, it is necessary to interpret the arbitration clause to determine whether the dispute is one which falls within its terms. In doing so it is important to bear in mind the function of an arbitration clause in a contract, which is to embody the agreement of the contracting parties that if any dispute arises which falls within its terms, the dispute shall be settled by arbitration. See: *Heyman v. Darwins, Limited,* [1942] A.C. 356 (H.L.) *per* Lord Macmillan at 373-74. With respect to construing an arbitration clause, Lord Macmillan said at p. 376:

> It is clear that, as the arbitration clause is a matter of agreement, the first thing is to ascertain according to ordinary principles of construction what the parties have actually agreed. . .

[11] Further guidance in interpreting an arbitration clause was given by Viscount Simon L.C. at p. 366:

> An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made.

At p. 368, Viscount Simon L.C. added that "the governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed".

[12] Thus, because the arbitration clause is but part of the contract, it is to be interpreted in the context of that contract and the commercial legal relationship which it creates. That was the approach followed in *Heyman*. It is also the approach followed by the courts of this province, including the court in *T1T2 Limited Partnership v. Canada* (1994), 23 O.R. (3d) 66 (Gen. Div.), which considered *Heyman*.

[13] In interpreting the arbitration clause contained in clause 15(a) of the contract the motion judge looked to the relationship between Huras and Primerica, the nature of their dispute and whether the dispute related to their relationship. He found that there were two distinct relationships between the parties: first, while Huras was a trainee, and second, when she became a licensed sales representative of Primerica, a relationship that was created when the parties entered into the August 26 contract. He further found that the contract "cannot properly be construed as . . . applying retrospectively to the earlier period of training", that is, to the first relationship. Thus, the motion judge concluded that the provisions of the contract related to Huras' relationship as a licensed sales representative of Primerica, and not to her relationship as a trainee. The motion judge stated: