Filed 4/21/21 Gregg v. Uber Technologies, Inc. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

JONATHON GREGG, Plaintiff and Respondent, v. UBER TECHNOLOGIES, INC. et al., Defendants and Appellants.	B302925 Los Angeles County Super. Ct. No. BC719085

APPEAL from an order of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

Littler Mendelson, Sophia Behnia and Andrew M. Spurchise for Defendants and Appellants.

Outten & Golden, Jahan C. Sagafi, Rachel W. Dempsey; Merill, Shultz & Bennett, Stephen J. Shultz and Mark T. Bennett for Plaintiff and Respondent.

INTRODUCTION

Jonathon Gregg sued Uber Technologies, Inc. and Raiser-CA, LLC (collectively, "Uber") under the Private Attorneys General Act of 2004 (PAGA), Labor Code section 2698 et. seq.[1] He alleged Uber willfully misclassified him as an independent contractor rather than an employee, which led to numerous other Labor Code violations. In response, Uber filed a motion to compel arbitration under the "Arbitration Provision" in the "Technology Services Agreement" ("TSA") that it had required Gregg to accept in order to use Uber's smartphone application and become an Uber driver.

The trial court denied the motion. In doing so, it rejected Uber's contentions that: (1) the issue of Gregg's misclassification was a "threshold issue" related to whether he had standing to bring a PAGA claim, which was separate and distinct from the PAGA claim itself and therefore subject to arbitration; and (2) the clause in the Arbitration Provision requiring Gregg to waive his right to bring a PAGA claim ("PAGA Waiver") was enforceable. On appeal, Uber largely relies on the same arguments presented in the trial court to contend its motion to compel arbitration should have been granted.

In *Williams v. Superior Court* (2015) 237 Cal.App.4th 642 (*Williams*) we started the "chorus" of California courts holding an employer may not compel an employee to arbitrate whether he or she is an "aggrieved employee" before proceeding with a PAGA claim in Superior Court. (See *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461, 477 (*Contreras*).) Because we continue to sing the same tune, and join a similar chorus of California courts

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1 All statutory references are to the Labor Code.

deeming PAGA waivers unenforceable, we reject Uber's arguments and affirm.

FACTS AND PROCEDURAL BACKGROUND

Uber is a technology company that has developed a smartphone application known as the "Uber App," which connects riders with drivers to arrange transportation services. As of December 11, 2015, drivers wanting to use the Uber App must first enter into the TSA, which contains the Arbitration Provision.

The Arbitration Provision states it is "intended to apply to . . . disputes that otherwise would be resolved in a court of law" and "requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action." (Bolded text omitted.) These disputes include "disputes arising out of or relating to interpretation or application of [the] Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion [thereof]"[2]; "disputes arising out of or related to [the driver's] relationship with [Uber]"; and "disputes regarding any . . . wage-hour law, . . . compensation, breaks and rest periods, . . . [and] termination[.]"

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2 Uber refers to this language in the Arbitration Provision as a "delegation clause" because it "delegate[s] threshold issues of [the Arbitration Provision's] enforceability to arbitration . . . ." Because Gregg does not dispute its use of that term, we use it as well.

The Arbitration Provision also identifies the claims and issues not included in its scope. Of relevance to this appeal, it does not apply to "[a] representative action brought on behalf of others under [PAGA], to the extent waiver of such a claim is deemed unenforceable by a court of competent jurisdiction[.]" The Arbitration Provision also states "the validity of [its] PAGA Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator."

The Arbitration Provision's PAGA Waiver states: "Notwithstanding any other provision of [the TSA] or the Arbitration Provision, to the extent permitted by law, (1) You and [Uber] agree not to bring a representative action on behalf of others under [PAGA] in any court or in arbitration, and (2) for any claim brought on a private attorney general basis—i.e., where you are seeking to pursue a claim on behalf of a government entity—both you and [Uber] agree that any such dispute shall be resolved in arbitration on an individual basis only (i.e., to resolve whether you have personally been aggrieved or subject to any violations of law), and that such an action may not be used to resolve the claims or rights of other individuals in a single or collective proceeding (i.e., to resolve whether other individuals have been aggrieved or subject to any violations of law)[.]" (Bolded text omitted.)

Drivers who did not wish to be bound by the Arbitration Provision could opt out in the 30-day period following their acceptance of the TSA. Those who did not exercise this option in that time were bound by the Arbitration Provision.

Gregg signed up to use the Uber App on October 10, 2016 and accepted the TSA three days later. He did not opt out of the Arbitration Provision in the following 30 days.

In August 2018, Gregg filed a complaint against Uber, asserting a single claim under PAGA on behalf of himself and other current and former employees. He alleged Uber willfully misclassified him and other current and former employees as independent contractors, which led to its violation of California Wage Order 9-2001 and numerous other Labor Code provisions. Gregg's operative complaint only seeks to recover civil penalties for the alleged violations.

Uber filed a motion to compel arbitration,[3] seeking an order enforcing the PAGA Waiver by: (1) requiring Gregg to arbitrate his individual claims; and (2) dismissing and/or striking his representative PAGA claim. In support of this position, Uber contended the trial court was required to enforce the PAGA Waiver under *Epic Sys. Corp. v. Lewis* (2017) 138 S.Ct. 1612 [200 L.Ed.2d 889] (*Epic*), which—in its view— abrogated *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*).

In the alternative, Uber requested an order: (1) "compelling [Gregg] to arbitrate the issue(s) of . . . whether he was properly

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3 The motion at issue on appeal is actually a renewed motion to compel arbitration filed in October 2019. Uber filed its initial motion to compel in November 2018. At the hearing on the initial motion, the trial court stayed the case and continued the hearing to December 5, 2019, pending our Supreme Court's decision in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175 (*ZB*). Following *ZB*'s publication, the trial court approved the parties' stipulation to: (1) permit Gregg to amend his complaint to remove his request for unpaid wages, and thereby conform with *ZB*'s holding that unpaid wages are not recoverable under PAGA (*ZB*, *supra*, 8 Cal.5th at p. 182); and (2) allow Uber's renewed motion to compel to proceed on their proposed briefing schedule.

classified as an independent contractor . . . and/or questions of enforceability or arbitrability"; and (2) staying all judicial proceedings until its motion was resolved and, if arbitration was ordered, extending the stay until its completion. On this point, Uber contended the issue whether Gregg had been misclassified as an independent contractor (the "misclassification issue") was a "threshold issue" governing whether he had standing to bring a PAGA claim, which would determine whether Gregg's claim is arbitrable. Thus, Uber argued, the issue must be arbitrated because the Arbitration Provision delegated issues of arbitrability to an arbitrator.

As noted above, the trial court denied the motion, reasoning that under California law: (1) whether a plaintiff is an "aggrieved employee" within the meaning of PAGA[4] is an essential element of a PAGA claim, not a "separate standing issue" capable of being "parse[d] out" for arbitration; and (2) the PAGA Waiver was not enforceable. Uber timely appealed.

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4 Per section 2699, subdivision (a), "any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . , for a violation of [the Labor Code], may . . . be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees." For purposes of PAGA, an "aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (§ 2699, subd. (c).)

DISCUSSION

I. Standard of Review

Where, as here, the trial court's order denying a motion to compel arbitration "rests solely on a decision of law," the "de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

II. Analysis

Uber contends the order denying its motion to compel must be reversed because the Arbitration Provision is enforceable as written. In support of this position, Uber essentially raises two arguments, which are largely identical to the ones it presented in the trial court. We address each in turn below.

A. Arbitrability of Misclassification Issue

First, Uber contends the trial court should have enforced the Arbitration Provision's delegation clause and "require[d] Gregg to arbitrate the issue of whether his threshold worker classification is arbitrable[.]" In support of this position, Uber contends the misclassification issue is a "threshold issue" separate and distinct from his PAGA claim, which will determine whether he has standing as an "aggrieved employee" under section 2699 to bring such a claim, and therefore will determine whether his claim is arbitrable. Uber therefore argues the misclassification issue's arbitrability must be resolved by arbitration, as the delegation clause requires "disputes arising out of or relating to . . . application of [the] Arbitration Provision

or any portion [thereof] . . . . be decided by an [a]rbitrator and not by a court or judge."

In the alternative, Uber contends the trial court should have required Gregg to arbitrate the misclassification issue. Specifically, after reiterating its contention that the issue is separate from his PAGA claim, Uber contends "Gregg's alleged misclassification . . . is a private dispute between him and Uber regarding the nature of their business relationship," in which the state has no interest, and which the parties expressly agreed to resolve by arbitration.

The crux of both arguments above is Uber's contention that the issue whether Gregg is an "aggrieved employee" under section 2699 is not a part of his PAGA claim at all, and therefore can be arbitrated even if the PAGA claim cannot. As Gregg correctly points out, however, California appellate courts have uniformly rejected this argument, and "consistently . . . [held] that threshold issues involving whether a plaintiff is an 'aggrieved employee' for purposes of a representative PAGA-only action cannot be split into individual arbitrable and representative nonarbitrable components." (*Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 996, rev. denied Jan. 20, 2021 (*Provost*) [citing *Williams, supra,* 23 Cal.App.4th 642 and its progeny].) This is so because "a PAGA-only representative action is *not* an individual action at all, but instead is one that is *indivisible and belongs solely to the state*." (*Id.* at p. 988, second italics added.) Therefore, a plaintiff "cannot [be] require[d] . . . to submit by contract *any part* of his representative PAGA action to arbitration." (*Ibid*, italics added.) Applying these principles, the *Provost* court held a plaintiff's classification as an employee or independent contractor "falls

within the ambit" of the "threshold issues" that cannot be split from the representative PAGA claim. (*Id.* at p. 996.)

Recently, in *Contreras, supra*, 61 Cal.App.5th 461, Division 5 of this court rebuffed an attempt nearly identical to Uber's to "carve out" the issue of the plaintiffs' classification from their PAGA claim as a "gateway issue" of arbitrability within the purview of a delegation clause. (See *id.* at pp. 468, 473.) In so doing, Division 5 relied on—and set forth in detail—the extensive authority demonstrating the "'splitting of the PAGA claim'" sought by the defendants was impermissible, including *Provost, Williams,* and several other Court of Appeal decisions. (See *id.* at pp. 474-477.)

Uber asserts we should not follow *Provost* and *Contreras*[5] because they relied on "the *Williams* line of cases," which is "inapposite." Specifically, Uber emphasizes the defendants in *Williams* and its progeny sought to arbitrate whether the plaintiffs were "aggrieved," whereas here, Uber seeks to arbitrate whether Gregg was an "employee." We are not persuaded, as this is a distinction without a difference. Despite its focus on a different portion of the definition set forth in section 2699, subdivision (c), Uber strives to achieve the exact same outcome sought by the defendants in *Williams* and its progeny through similar means: to avoid litigating a PAGA claim in court by severing a key issue related to whether the plaintiff is an

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5 *Contreras* was published after briefing was completed in this case. Gregg's counsel, however, included a citation to the case in a notice of supplemental authority. And at oral argument, counsel for both parties stated they were familiar with the decision and were allowed to present arguments regarding its applicability to this appeal.

"aggrieved employee" from the PAGA claim itself. Under well-settled California law, this it cannot do.[6] (See *Contreras*, *supra*, 61 Cal.App.5th at pp. 474-477; *Provost*, *supra*, 55 Cal.App.5th at pp. 993-996.)

In sum, we agree with *Provost* and *Contreras*, and conclude the misclassification issue is part and parcel of the "indivisible" representative PAGA claim asserted in this case, which "belongs solely to the state." (*Provost*, *supra*, 55 Cal.App.5th at p. 988.) The record does not demonstrate the state agreed to arbitrate the misclassification issue or delegate the arbitrability of that issue to an arbitrator. Nor does it establish Gregg was acting as an agent of the state when he agreed to the TSA. Accordingly, the trial court correctly determined Gregg cannot be required to resolve those issues through arbitration. (See *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 622 (*Correia*) ["Without the state's consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement."]; see also *Bautista v. Fantasy Activewear, Inc.* (2020) 52 Cal.App.5th 650, 657-658 ["Because [the plaintiffs] were not acting as agents of the state when they entered into the arbitration agreements at issue here, [the defendant] has identified no arbitration agreement

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6 Uber relies on the same federal district court decisions cited by the defendant in *Contreras* to argue the "threshold worker classification issue must be determined by an arbitrator where the arbitration agreement contains a delegation clause." (See *Contreras*, *supra*, 61 Cal.App.5th at p. 477, fn. 8.) Like Division 5, we too "find these cases irrelevant to this appeal" because "[n]one of [them] involve PAGA claims[.]" (*Ibid.*)

that would bind the real party in interest here—the state—to arbitration, even of the question of arbitrability."].)

B. Enforceability of PAGA Waiver

Next, Uber argues that even if the misclassification issue is not separately arbitrable, the trial court should have enforced the Arbitration Provision's PAGA Waiver by "dismissing or striking the representative PAGA claim and compelling arbitration . . . of his PAGA claim on an individual basis[.]" On this point, Uber acknowledges that in *Iskanian*, *supra*, 59 Cal.4th 348, our Supreme Court held "that an employee's right to bring a PAGA action is unwaivable," and that "where . . . an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law." (*Id.* at pp. 383-384.) According to Uber, however, *Iskanian* has since been abrogated by *Epic*, *supra*, 138 S.Ct. 1612.

Numerous Courts of Appeal have rejected the contention that *Iskanian* is no longer good law in the wake of *Epic*. (See, e.g., *Correia*, *supra*, 32 Cal.App.5th at p. 620; *Provost*, *supra*, 55 Cal.App.5th at pp. 997-998; *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862, 864, 872-873; *Collie v. The Icee Co.* (2020) 52 Cal.App.5th 477, 480, rev. denied Nov. 10, 2020.) In the first decision to do so, Division One of the Fourth Appellate District explained: "*Iskanian* held that a ban on bringing PAGA actions in any forum violates public policy and that this rule is not preempted by the FAA because the claim is a governmental claim. [Citation.] *Epic* did not consider this issue and thus did not decide the *same* question differently. [Citation.] *Epic* addressed a

different issue pertaining to the enforceability of an individualized arbitration requirement against challenges that such enforcement violated the [National Labor Relations Act]. [Citation.]" (*Correia*, *supra*, 32 Cal.App.5th p. 619, italics in original.) In *Contreras*, Division 5 of this court "joined [these] Courts of Appeal." (*Contreras*, *supra*, 61 Cal.App.5th at pp. 471-472.) For the reasons stated in *Correia* and the other authorities cited above, we do so as well, and conclude Uber's argument regarding the PAGA Waiver's enforceability is without merit.[7]

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7 We are not persuaded by Uber's argument that *Iskanian* (and *Correia*'s analysis based thereon) are inapplicable because Gregg could have opted out of the Arbitration Provision. "'*Iskanian*'s underlying public policy rationale—that a PAGA waiver circumvents the Legislature's intent to empower employees to enforce the Labor Code as agency representatives and harms the state's interest in enforcing the Labor Code—does not turn on how the employer and employee entered into the agreement, or the mandatory or voluntary nature of the employee's initial consent to the agreement.' [Citation.]" (*Williams*, *supra*, 237 Cal.App.4th at p. 648.)

DISPOSITION

The order denying the motion compel arbitration is affirmed. Respondent shall recover his costs on appeal.

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CURREY, J.

We concur:

MANELLA, P.J.

COLLINS, J.