CASE NO. S244630

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OTO, LLC, AN ARIZONA LIMITED LIABILITY COMPANY, DBA ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND,

Plaintiff and Appellant.

v.

KEN KHO,

Defendant and Respondent, Real Party in Interest,

v.

JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA,

Intervenor and Appellant.

AFTER DECISION BY THE COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION 1 CASE NO. A147564

ON APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF ALAMEDA CASE NUMBER RG15781961 HONORABLE EVELIO GRILLO, PRESIDING

REAL PARTY IN INTEREST'S OPENING BRIEF

DAVID A. ROSENFELD, BAR NO. 058163
CAREN P. SENCER, BAR NO. 233488
CAROLINE N. COHEN, BAR NO. 278154
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Tel: (510) 337-1001
Fax: (510) 337-2013
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
ccohen@unioncounsel.net

Attorneys for *Defendant and Respondent, Real Party in Interest,* **KEN KHO**

CASE NO. S244630

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OTO, LLC, AN ARIZONA LIMITED LIABILITY COMPANY, DBA ONE TOYOTA OF OAKLAND, ONE SCION OF OAKLAND,

Plaintiff and Appellant.

v.

KEN KHO,

Defendant and Respondent, Real Party in Interest,

v.

JULIE A. SU IN HER OFFICIAL CAPACITY AS THE STATE OF CALIFORNIA LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS, STATE OF CALIFORNIA,

Intervenor and Appellant.

AFTER DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION 1
CASE NO. A147564

ON APPEAL FROM THE SUPERIOR COURT
FOR THE COUNTY OF ALAMEDA
CASE NUMBER RG15781961
HONORABLE EVELIO GRILLO, PRESIDING

REAL PARTY IN INTEREST'S OPENING BRIEF

DAVID A. ROSENFELD, BAR NO. 058163
CAREN P. SENCER, BAR NO. 233488
CAROLINE N. COHEN, BAR NO. 278154
WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Tel: (510) 337-1001
Fax: (510) 337-2013
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
ccohen@unioncounsel.net

Attorneys for *Defendant and Respondent, Real Party in Interest,* **KEN KHO**

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutions

Federal Statutes

State Statutes

Federal Regulations

State Regulations

Other Authorities

I. ISSUES PRESENTED

Whether, in light of this Court's decision in *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 (*Sonic II*), holding that any arbitration agreement must be "accessible and affordable," a procedurally unconscionable arbitration provision is also substantively unconscionable where it removes the protections and advantages of the Berman hearings and it also imposes all heightened obligations of civil litigation which significantly burdens individual wage claimants?

The Labor Commissioner has presented a second issue: "[W]hether mere notice of an arbitration agreement on the same day the Berman process is to commence divests the Labor Commissioner's jurisdiction to proceed with the Berman process[?]"

Plaintiff and Appellant OTO, LLC, dba One Toyota of Oakland, One Scion of Oakland ("OTO"), in its Combined Answer to Petitions for Review, has raised the related issue of whether the Labor Commissioner should have proceeded with the Berman hearing when presented with a filed Petition to Compel Arbitration and whether the Labor Commissioner violated OTO's "right to a fair administrative hearing (Berman hearing) ... where the Labor Commissioner conducted the Berman hearing in the absence of the employer ...."

II. INTRODUCTION

California, through its Constitution, statutes, regulations, Industrial Welfare Commission wage orders, and various state agencies, has long protected workers and their wages. It has further tilted enforcement of those provisions so as to advantage the worker over an employer who does

not comply. This Court has repeatedly addressed substantive and procedural enforcement issues under California's wage and hour laws and other laws that are protective of the rights of workers in California. It has repeatedly confirmed that the laws regulating the workplace are to be interpreted liberally in favor of employees.

This case involves the Berman statues, which provide a comprehensive scheme of wage enforcement procedures, described more thoroughly below. Consistent with this Court's nomenclature, we use the term "Berman statutes" to refer to the entire statutory scheme. (See Lab. Code, § 98.[1]) We refer to the administrative hearing before a Deputy Labor Commissioner as the "Berman hearing."

On several occasions, most recently in *Sonic II*, this Court has reaffirmed the importance of the Berman statutes to the long history and purpose of protecting workers' interests. The Court in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348 (*Iskanian*) reinforced this finding by recognizing the Legislature's intent to create additional remedies for the enforcement of many laws found in the Labor Code.

This case again presents to the Court a critical issue impacting the viability of Berman statutes and the Berman hearing. The Court is faced with addressing the extent to which an employer can implement an arbitration procedure that is designed to eliminate employees' access to the Berman hearing and substantially reduce the effectiveness of the Berman

[1] All further statutory references are to the Labor Code unless otherwise indicated.

statutes. The Arbitration Agreement at issue tilts the entire scheme substantially in favor of the employer.

California's wage and hour laws and other provisions of the Labor Code are far too important to permit this effort to undermine those enforcement procedures through eroding employees' access to them. Such an effort contravenes California's long-standing recognition that state employment laws are to be construed in a manner protective to workers. The Legislature has recognized the common problem of Wage Theft[2] and has enacted many provisions to protect workers' wages and other statutory rights in the workplace.

In this brief, we reemphasize this Court's findings in *Sonic II* (relying on many previous cases) as to the importance and value of the Berman statutes, including the Berman hearing. We then describe in detail how, as this case and other sources exemplify, there are numerous pro-employee features of a Berman hearing that protect the Claimant before the Labor Commissioner and safeguard the Claimant's access and ability to enforce his or her rights arising under the Labor Code. This protective treatment extends to the trial de novo and other procedures provided for in the Berman statutes.

We then analyze OTO's Arbitration Agreement to show how it tilts the enforcement procedures dramatically in favor of the employer and against the interests of the Claimant. We then demonstrate how the

---

[2] Section 2810.5. (Assem. Bill No. 469 (2011-2012 Reg. Sess.) § 1 ["Wage Theft Prevention Act of 2011"].)

Arbitration Agreement is substantively unconscionable on additional grounds.

We conclude by showing that the Arbitration Agreement contradicts the very principles of the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) ("FAA"), and that it undermines over 175 years of California law meant to "foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment." (Lab. Code, § 50.5.)

III. APPLICABLE STATUTES

Attached as Appendix A is a copy of Labor Code sections 98, 98.1 and 98.2, which are the primary statutes at issue. The Policies and Procedures for Wage Claim Processing are found at LC165-168 in the Labor Commissioner's Request for Judicial Notice ("RJN"), Exhibit 20 ("Policies and Procedures").[3]

IV. STATEMENT OF THE CASE

There are no factual disputes. The disputed Arbitration Agreement is attached as an exhibit to the Opinion. It is in small font and hard to read. (See *OTO, L.L.C. v. Kho* (2017) 14 Cal.App.5th 691, 717-718.) It is densely written in legalese. This obfuscation was part of OTO's purpose, which rendered the Agreement procedurally unconscionable and contributes to its substantive unconscionability. The following description is adopted largely from the Opinion below.

[3] These are referred to in prior Opinions of this Court as issued by the Department of Labor Standards Enforcement, which is now the Department of Industrial Relations.

Petitioner and Real Party in Interest Ken Kho ("Kho") worked as an auto mechanic for OTO from January 2010 through April 2014, when his employment was summarily terminated. He was employed as a flat rate mechanic, meaning that he was paid for each job based on an estimated number of hours and his wage rate. He was not an hourly employee, and much of his wage claim involved the failure to receive pay for all time worked and overtime. Several months after his discharge, in October 2014, Kho filed a wage claim with the Labor Commissioner. (Clerk's Transcript ("CT") 9.)

In November 2014, Kho and OTO participated in an unsuccessful Settlement Conference initiated by the Labor Commissioner and mediated by a Deputy Labor Commissioner. The parties continued settlement discussions for the following month, until, in mid-December, OTO requested that the Labor Commissioner's office forward a proposed settlement agreement to Kho. After Kho decided not to accept the offer, he requested a statutory "Berman hearing" on his claim.

On January 30, 2015, the Labor Commissioner notified OTO of Kho's request, and in March the hearing was scheduled for August. (CT 8.)

On the morning of the Berman hearing, a Monday, OTO's attorney faxed a letter to the Labor Commissioner's office requesting that the hearing be taken off calendar because OTO had filed a Petition to Compel Arbitration and Stay the Administrative Proceedings ("Petition") on the prior Friday in the Alameda County Superior Court. By return fax, the Labor Commissioner's office informed counsel that the hearing would proceed as scheduled. At the noticed time, counsel for OTO appeared,

served Kho with the Petition, and left. OTO chose not to participate in the hearing. The Hearing Officer proceeded with the hearing in OTO's absence and shortly after issued a detailed "Order, Decision, or Award" ("ODA") finding that Kho was entitled to $102,912 in unpaid wages and $55,634 in liquidated damages, interest, and penalties. (CT 67-76.)

OTO thereafter sought de novo review of the ODA in the trial court pursuant to section 98.2 by filing an appeal and posting the requisite cash bond to secure payment of the award to protect Kho. At the same time, OTO supplemented its Petition with the filing of a motion to vacate the ODA. By stipulation, the Labor Commissioner was allowed to intervene in the trial court proceedings.

The trial court denied the employer's Petition. The trial court found that there was "a high level of procedural unconscionability connected with the execution of the arbitration agreement in this case." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 701.) The trial court also vacated the ODA and remanded to the Labor Commissioner to hold a further hearing on OTO's theory that it was prejudiced because the Hearing Officer went forward in its absence.

The Court of Appeal affirmed the finding of the trial court in strong language that Kho's signing of the Arbitration Agreement was procedurally unconscionable given the forceful manner in which he was required to sign as "a condition of his employment." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 708.) "The circumstances of Kho's execution of the Agreement demonstrated a high degree of oppression." (*Ibid.*) "For these

reasons, we conclude that the degree of procedural unconscionability was extraordinarily high." (*Id.* at p. 709.)

The court below, however, found that the Arbitration Agreement was not substantively unconscionable and reversed the trial court, vacated the ODA and remanded for purposes of compelling arbitration.

V. ARGUMENT

A. THE BERMAN STATUTES PROCESS

The case hinges on whether OTO's Arbitration Agreement respected the command of this Court that an arbitration procedure can supplant the Berman statutes only if it is "accessible and affordable." This Court has addressed this issue now twice within the last seven years. Our brief then relies in part on quotations from this Court's prior Opinions recognizing the value of the Berman statutes.

In *Sonic II*, this Court described the Berman statutes process, quoting in large part from *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659 (*Sonic I*), *judg. vacated and cause remanded* (2011) 565 U.S. 973. This Court summarized the Berman statutes process in these words: "[W]e explained [in *Sonic I*] how Berman hearings and related statutory protections benefit employees with wage claims against their employers ... ." (*Sonic II*, *supra*, 57 Cal.4th at p. 1127.) The Court went on at length to describe the process in its Opinion. This Court enumerated and summarized the major benefits to employees throughout the process established in the Berman statutes. (*Id.* at pp. 1129-1130.) We explain those benefits more fully below, Part D(3), *infra*.

In summary, this Court has forcefully recognized the important features of the Berman statutes that assist wage claimants in bringing their claims to collect unpaid wages.[4]

B. KHO'S USE OF THE BERMAN HEARING PROCESS

When Kho was hired, he signed documents in a hurry, without reading them. He was not provided a copy.[5] He worked as a technician until he was summarily terminated, allegedly because of an issue over a repair order. (CT 120.) When Kho was hired, there was no reference to any arbitration provision until he was forced to summarily sign it. (CT 109.)

Kho has limited English proficiency as a Chinese immigrant whose first language is Chinese. (CT 109.) He had limited opportunity to review those initial documents, and he signed them in less than 10 minutes. (CT 109.)

After working more than three years at the dealership, a "Porter," who was actually a Human Resources Representative, approached Kho at his work station and asked him to sign some additional work-related documents on February 23, 2013. Kho was asked to sign those documents and return them immediately. (CT 109.) One of those documents was the

---

[4] The Labor Commissioner has a broader jurisdiction than wage claims. Kho's case involves only wages and the associated penalties and interest, but this Court's decision will have an effect upon additional matters brought before the Labor Commissioner that may not exclusively involve the payment of wages.

[5] He would have been entitled to a copy under California law if he had known to ask for it. (See § 432.) Section 2810.5 became effective January 1, 2012, after Kho was hired, requiring employers to provide a notice of an employee's employment conditions. Kho would have been entitled to a notice of the implementation of the new compensation plan. (CT 115-116.)

Arbitration Agreement at issue in this case and is in 7-point font. (CT 48-49.)

Kho was not excused from his work, nor was he allowed sufficient time to thoroughly review the small font-sized documents provided to him. He was not given the opportunity to come into the Human Resources office to review the documents or seek an explanation. He was simply told that he had to sign. (CT 109.) Kho was not provided a copy of the documents, and he was not advised in any respect that he was forfeiting his rights to a Berman hearing and agreeing to this arbitration procedure. (CT 109.)

A year-and-a-half later, Kho was summarily terminated on May 2, 2014. (CT 110, 120.) Obviously unaware that he had entered into an arbitration agreement, Kho filed a wage claim at the Labor Commissioner's office against OTO on October 9, 2014. (CT 110.) A blank copy of the current claim form, known as the "Initial Report or Claim," is found in Exhibit 20, LC132-135 of the RJN.[6] Kho had the assistance of the Labor Commissioner in filling out the claim form. (CT 110-111.)[7] Such assistance is available to any claimant filing claims with the Labor Commissioner's office.

Eight days after Kho filed the wage claim, on October 17, 2014, the Labor Commissioner sent a Notice of Claim and Conference to OTO and to Kho, setting a Settlement Conference for November 10, 2014. On that

[6] The record does not contain Kho's claim form. The Complaint, which is issued by the Deputy Labor Commissioner, sets out the issues and the remedy sought. (Cal. Code Regs., tit. 8, § 13501.5; RJN LC187-188.)

[7] As we explain later, and should be obvious, if forced to proceed with arbitration, Kho would not have the assistance of the employer or a retired Superior Court Judge to fill out the claim form or to draft the pleadings that are required by OTO's Arbitration Agreement.

date, both OTO and Kho showed up. OTO was represented by counsel, and Kho represented himself. Through the assistance of the Labor Commissioner, OTO and Kho attempted to resolve the dispute, but they were not successful.

The Labor Commissioner assisted further efforts to resolve the dispute by transmitting to Kho a proposed settlement offer from OTO, which Kho rejected. (CT 110, 123 and 129.)

On March 26, 2015, the Labor Commissioner sent out a Notice of Hearing, notifying OTO and Kho that a hearing would be held before a Hearing Officer on August 17, 2015, at 1:00 p.m. This Notice of Hearing was delivered both to OTO's agent and its counsel. (CT 134 and 136.) OTO did not request any continuance of that hearing. The Notice included the Complaint signed by Kho, which set out the issues for the Berman hearing. (CT 52.)

On the Friday before the Monday hearing date, OTO filed its Petition in Alameda County Superior Court. (CT 1-13.)

Shortly after 9:00 a.m. on Monday, August 17, the date of the scheduled hearing, OTO faxed a letter with a copy of its court filing to the Labor Commissioner and concurrently requested that the hearing scheduled for 1:00 p.m. that day be taken off calendar until completion of the arbitration process. (CT 41 and 124.)

The Labor Commissioner rejected that request and immediately informed OTO that the hearing would not be taken off calendar and would proceed as scheduled at 1:00 p.m. (CT 124 and 146-147.) The Labor

Commissioner also advised OTO that it could raise the issue of the Arbitration Agreement at any trial de novo if it appealed.

The Labor Commissioner then held the scheduled hearing. OTO appeared solely for the purpose of serving Kho with a copy of its filed Petition. The Labor Commissioner informed OTO that there was no order requiring the Labor Commissioner to stay its proceedings before the Hearing Officer. (CT 69, fn. 1.) OTO's counsel left and did not participate.

After hearing evidence, on August 25, 2015, the Hearing Officer issued an ODA that was served on Kho and OTO on August 31, 2015. (CT 66-75.) The Hearing Officer, acting as the Labor Commissioner, determined that the employer did not properly compensate Kho for all hours worked and awarded him $102,912 for wages; $30,208 in liquidated damages; $17,506.21 in interest; and $7,920 in waiting time penalties.

As permitted by the Labor Code, OTO filed a de novo appeal of the Labor Commissioner's ODA on September 15, and on the next day filed a motion to vacate the ODA.

After various hearings, the trial court denied OTO's Petition. (CT 207-223.) The trial court found that the Arbitration Agreement was both procedurally and substantively unconscionable. (CT 222.) On the other hand, the trial court vacated the ODA and remanded the matter to the Labor Commissioner's office for another hearing, finding that OTO had been deprived of a fair hearing because even though it showed up at the hearing and left, the hearing should have been postponed.

The Court of Appeals agreed with the Labor Commissioner with respect to OTO's Arbitration Agreement, "that the degree of procedural unconscionability was extraordinarily high." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 709.) The Court, however, concluded that the Agreement was not substantively unconscionable. (*Ibid.*) This Court then granted review and also granted review in the related Petition for Review of the Labor Commissioner.

C. THE COURT BELOW FOUND THAT THE AGREEMENT WAS PROCEDURALLY UNCONSCIONABLE

The court below found the "circumstances of Kho's execution of the Agreement demonstrated a high degree of oppression." (*OTO, L.L.C. v. Kho*, *supra*, 14 Cal.App.5th at p. 708.) Kho was given limited time to sign (but not even to read) the Arbitration Agreement. This was found to be "highly unconscionable." OTO does not challenge that critical finding

The circumstance underlying Kho's signing of OTO's Arbitration Agreement is also unconscionable for another reason related to Kho's employment as a mechanic. As a flat rate mechanic, his employment agreement provided he would be paid only for each job performed. (CT 115-116.) Thus, any time he took to review the Agreement resulted in unpaid time.[8]

[8] See section 226.2, effective January 1, 2016 (requiring payment for unallocated time for employees paid on a piece rate).