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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PHILIP ANAGNOS, Plaintiff and Respondent, v. GGW DIRECT, LLC et al., Defendants and Appellants.	B236673 (Los Angeles County Super. Ct. No. BC464017)

APPEAL from an order of the Superior Court of Los Angeles County, Debre Katz Weintraub, Judge. Affirmed.

The Aftergood Law Firm, Aaron D. Aftergood; The Tym Firm and Ronald D. Tym, for Defendants and Appellants.

Alireza Alivandivafa and Morris Nazarian for Plaintiff and Respondent.

GGW Direct, LLC (GGW) and Joe Francis appeal from a superior court order denying their petition to compel arbitration of Philip Anagnos's putative class-action complaint alleging, among other claims, breach of contract and violations of wage and hour laws. We conclude that the arbitration agreement at issue is procedurally and substantively unconscionable, and the trial court did not abuse its discretion in refusing to sever the unconscionable provisions. We therefore affirm.

BACKGROUND

On June 21, 2011, Anagnos filed this putative class-action complaint against GGW, a production company, and Joe Francis (collectively, GGW). The complaint alleged that GGW employed Anagnos as a film editor for "several months" until his termination in 2010. Anagnos was hired under an agreement he negotiated with GGW, under which he was paid as an independent contractor. Anagnos was promised a higher pay rate after three months and classification as an employee, with full benefits. He was paid a flat weekly salary and no overtime, regardless of his work hours. When Anagnos complained that he had not received his contractual raise and had not been classified as an employee, GGW terminated him. On behalf of himself and all others similarly situated, Anagnos's complaint alleged violation of various Labor Code sections and other laws including the overtime law, as well as wrongful termination, breach of contract and of the covenant of good faith and fair dealing, conversion, and unfair competition. Anagnos requested restitution, damages, punitive damages, penalties, injunctive relief, and attorney fees, as well as declaratory and class relief.

GGW filed a petition to compel arbitration on July 28, 2011. The petition alleged that on November 19, 2010, Anagnos signed a "'Binding Arbitration Agreement'" (arbitration agreement, or agreement) with GGW Brands (of which GGW was a subsidiary, and of which Francis was a manager). The petition attached the arbitration agreement as an exhibit, and argued that as the arbitration agreement did not expressly include class claims, Anagnos could arbitrate only his individual claims. Contending that the arbitration agreement was enforceable, GGW asked the court to compel arbitration of Anagnos's individual claims and stay the litigation pending the outcome.

On September 9, 2011, Anagnos filed notice of opposition and an opposition to the petition to compel.[1] On September 15, 2011, GGW filed its reply in support of the petition.

The trial court held a hearing on the petition to compel on October 3, 2011. The court concluded that the arbitration agreement was procedurally and substantively unconscionable and that severance of the unconscionable provisions would not be in the interest of justice. Anagnos filed a notice of ruling on October 7, 2011. GGW filed this timely appeal.

DISCUSSION

We review de novo the trial court's finding of unconscionability, when, as here, the court did not base its conclusion on the resolution of conflicts in the evidence or factual inferences to be drawn therefrom. (*Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1144 (*Samaniego*).) "'The ruling on severance is reviewed for abuse of discretion.' [Citations.]" (*Ibid*.)

"Unconscionable arbitration agreements are not enforceable. [Citation.] To be voided on this ground, the agreement must be both procedurally and substantively unconscionable. [Citation.] '"[T]he former focus[es] on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on '"overly harsh'" or '"one-sided"' results." [Citation.]' [Citation.] But the two elements need not exist to the same degree. The more one is present, the less the other is required. [Citation.]" (*Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1246 (*Wherry*); *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).)

I. Procedural unconscionability

The procedural element of an unconscionable agreement "'generally takes the form of a contract of adhesion,'" imposed and drafted by the party with superior bargaining strength, and allowing the other party only the choice whether to adhere to the

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[1] GGW provided only the notice of opposition in the clerk's transcript on appeal, neglecting to include the accompanying points and authorities and declarations filed by Anagnos in support of the opposition. GGW included its entire reply.

contract or reject it. (*Wherry*, *supra*, 192 Cal.App.4th at p. 1246.) Adhesion, however, does not alone render an arbitration agreement procedurally unconscionable. (*Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 819.)[2]

The arbitration agreement signed by Anagnos and a representative of GGW Brands, three single-spaced pages of text on GGW Brands letterhead with a fourth signature page. We agree with the trial court that the arbitration agreement appears to be a standardized, preprinted form contract drafted by GGW without opportunity for changes by Anagnos, and therefore a contract of adhesion. GGW does not argue otherwise.

In section 3, the arbitration agreement states: "The binding arbitration proceedings will allow for discovery according to the rules set forth by the applicable arbitration association." The agreement is entirely silent on which arbitration rules (or which arbitration association) apply, and no copy of any arbitration rules were included with the agreement. The mere failure to provide a copy of the arbitration rules binding the employee supports a finding of procedural unconscionability. (*Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393.) This arbitration agreement goes further, however, not only failing to provide a copy of the rules but also giving Anagnos no notice of what rules would govern any arbitration. As we describe below, this silence leads to considerable substantive unconscionability.

We conclude that the arbitration agreement presents at least a moderate level of procedural unconscionability.

II. Substantive unconscionability

"'"Substantive unconscionability focuses on the one-sidedness or overly harsh effect of the contract terms or clauses."' [Citation.]" (*Samaniego*, *supra*, 205 Cal.App.4th at p. 1147.)

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[2] Anagnos's brief on appeal states that he was forced to sign the arbitration agreement two business days before he was fired. As the trial court noted, however, there was no indication in the complaint, or any evidence, of the date on which he was hired or fired by GGW.

The arbitration agreement purports to govern all claims under the Labor Code and the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), as well as other state and federal statutes. The agreement's failure to specify at all what arbitration rules would govern discovery leaves wide open the possibility that the arbitration agreement would deny Anagnos discovery he is entitled to under the statutes. "Where, as in this case, arbitration provisions undermine statutory [Labor Code] protections, courts have readily found unconscionability. [Citations.] As noted in *Armendariz*, 'an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA.' (*Armendariz*, *supra*, 24 Cal.4th at p. 101.)" (*Samaniego*, *supra*, 205 Cal.App.4th at p. 1147.)

The arbitration agreement's failure to disclose what rules would apply also runs afoul of other requirements for a valid arbitration agreement. "To be valid, *at minimum* the arbitration agreement must require a neutral arbitrator, sufficient discovery, and a written decision adequate enough to allow judicial review. Further, it must include all remedies available in a judicial action and the employee may not be required to pay unreasonable costs or fees. [Citation.] Elimination of or interference with any of these basic provisions makes an arbitration agreement substantively unconscionable." (*Wherry*, *supra*, 192 Cal.App.4th at p. 1248, italics added.) The agreement does not meet those minimum requirements. Although the agreement provides that the parties agree "any arbitration will be administered [by] a neutral arbitrator," there is no provision for how such a neutral arbitrator would be selected or challenged. There is absolutely no indication of what discovery would be allowed under the arbitration agreement. And although a valid arbitration agreement must require "a written decision adequate enough to allow judicial review," (*ibid.*), the arbitration agreement provides for just the opposite. The agreement states: "Employee or Independent Contractor agrees that the arbitrator will issue a final and binding written decision on the merits, *which shall not be set aside by any court proceedings, including any applicable Appeals.*" (Italics added.) This clause makes no provision for the adequacy of the written decision, and then *prohibits* the

judicial review which an adequate decision would allow, and which our cases require. (*Ibid.*)

There is more. The agreement states: "Employee or Independent Contractor also agrees that the arbitrator shall not award any attorneys' fees and/or costs to either party." "In a FEHA case, unless it would be unjust, a prevailing plaintiff should recover attorney fees, but a prevailing defendant is awarded fees only if the case was frivolous or filed in bad faith." (*Wherry, supra*, 192 Cal.App.4th at p. 1249.) Yet the agreement prevents the award of attorney fees to a plaintiff under FEHA under *any* circumstances. Labor Code section 1194, subdivision (a), provides that "any employee receiving less than the . . . legal overtime compensation applicable to the employee is entitled to recover in a civil action . . . reasonable attorney's fees, and costs of suit." The arbitration agreement purports to eliminate that statutory protection for employees, which further contributes to a finding of substantive unconscionability.

The agreement also provides: "Employee or Independent Contractor understands the Company will pay for any administrative or hearing fees charged by the arbitrator except that with respect to any arbitration initiates [sic], Employee or Independent Contractor will pay the amount Employee or Independent Contractor would have otherwise been required to pay to file a claim in court." "'[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement . . . cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.'" (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1477.) This inartfully drafted provision appears to require any employee who initiates arbitration to pay to GGW an amount tied to court filing fees. This runs afoul of the requirement that "a mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration." (*Armendariz, supra*, 24 Cal.4th at p. 113.) The provision could be interpreted to allow GGW to reduce its obligation to pay "all types of costs unique to arbitration" in an amount equal to court filing fees (when no such fees were incurred). This requirement

that the employee in effect reimburse GGW (in an amount equivalent to court filing fees) for some of the costs unique to arbitration, adds to the substantive unconscionability of the agreement.

The arbitration agreement contains a moderate level of procedural unconscionability, and it is riddled with substantive unconscionability.

III. Severability

Civil Code section 1670.5, subdivision (a) allows the court to choose whether to enforce a contract containing an unconscionable clause or "enforce the remainder of the contract without the unconscionable clause." "In determining whether to sever, the court must consider the interests of justice." (*Wherry*, *supra*, 192 Cal.App.4th at p. 1250.) "When an arbitration agreement is 'permeated' by unconscionability the decision whether to sever the objectionable clauses or refuse to compel arbitration is within the trial court's exercise of discretion." (*Samaniego*, *supra*, 205 Cal.App.4th at p. 1149.)

Although "the general rule does favor arbitration and terms should be interpreted liberally [citation], . . . when the agreement is rife with unconscionability, as here, the overriding policy requires that the arbitration be rejected [citation]." (*Wherry*, *supra*, 194 Cal.App.4th at p. 1250.)

The trial court did not abuse its discretion in refusing to sever the unconscionable provisions and enforce the remainder of the arbitration agreement.[3]

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[3] As we conclude that the arbitration agreement is unenforceable and affirm the trial court's denial of GGW's motion to compel arbitration, we need not address GGW's argument that the agreement precludes class arbitration.

DISPOSITION

The order is affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.