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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

SHARI DORFF, Plaintiff and Respondent, v. ROBERT HALF INTERNATIONAL INC., Defendant and Appellant.	B293325 (Los Angeles County Super. Ct. No. BC701329)

APPEAL from an order of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

O'Melveny & Myers, Adam P. KohSweeney and Susannah K. Howard for Defendant and Appellant.

Schimmel & Parks, Alan I. Schimmel, Michael W. Parks, and Arya Rhodes for Plaintiff and Respondent.

Defendant and appellant Robert Half International Inc. (defendant) appeals from the trial court's order denying its motion to compel arbitration of claims brought by plaintiff and respondent Shari Dorff (plaintiff). Plaintiff, defendant's former employee, asserted 18 causes of action, one of which was a claim under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) (PAGA). Defendant moved to compel arbitration of all but the PAGA claim pursuant to an arbitration agreement plaintiff signed when she began her employment.

There are three key sections in the arbitration agreement relevant to this appeal: (1) the "Claims Covered by the Agreement" section identifying claims to which the agreement applies; (2) a provision within the "Claims Covered by the Agreement" section in which plaintiff waived her right to bring claims in a representative capacity; and (3) the "Construction and Severability" section providing that if any part of the "Claims Covered by the Agreement" section is "adjudged" unenforceable, then the Agreement "shall be of no force or effect, because the parties intended to create an agreement to arbitrate individual disputes only." (Underlining omitted.)

The trial court found under the authority of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*) that plaintiff's waiver of claims in her representative capacity was unenforceable as applied to her PAGA cause of action. Because this waiver was contained in the "Claims Covered by the Agreement" section, its unenforceability triggered the nullification provision of the "Construction and Severability" section. Accordingly, the trial court refused to compel arbitration of plaintiff's 17 non-PAGA causes of action.

On appeal, defendant argues that the arbitration agreement by its language applies only to claims belonging to plaintiff, and under *Iskanian* and its progeny, the state, and not plaintiff, owns the PAGA cause of action. Thus, defendant maintains, the arbitration agreement and its waiver provision does not encompass plaintiff's PAGA claim and is not invalid under *Iskanian*. Defendant contends the valid waiver therefore does not trigger the "Construction and Severability" section to void the arbitration agreement.

We conclude that defendant's argument lacks merit. Although the dispute underlying the PAGA claim may be between the employer and the state, it is still plaintiff's claim in the sense that she is statutorily entitled to bring it as an aggrieved employee. Indeed, incentivizing employees to bring these claims in times of diminishing government enforcement resources is the very raison d'etre for PAGA. Accordingly, the trial court did not err in finding that the PAGA claim was within the scope of the waiver provision, thus rendering the waiver unenforceable under *Iskanian*. Under the plain language of the arbitration agreement, the unenforceability of the waiver as to plaintiff's PAGA claim compels the conclusion that the "Construction and Severability" section voided the arbitration agreement as to plaintiff's non-PAGA causes of action. We therefore affirm.

PROCEDURAL BACKGROUND

A. Complaint and motion to compel arbitration

On April 6, 2018, plaintiff filed a complaint against defendant in which she asserted 17 individual and putative class claims primarily based on violations of the Labor Code and the

Fair Employment and Housing Act. Plaintiff also asserted a PAGA cause of action. She alleged she had complied with the "administrative prerequisites" for the PAGA action by providing written notice to defendant and the state Labor and Workforce Development Agency (LWDA), and the LWDA had not responded to the notice.

Defendant moved to compel arbitration of all causes of action except the PAGA claim based on an arbitration agreement executed by plaintiff and defendant's representative on September 2, 2014 (the Agreement), the same date on which plaintiff signed an employment agreement with defendant.

In a section entitled "Claims Covered by the Agreement" (underlining omitted), the Agreement states, in relevant part, "[Defendant] and [plaintiff] mutually agree to resolve by arbitration, and only by individual arbitration, all claims or controversies ('claims'), past, present or future, whether or not arising out of [plaintiff's] employment (or its termination), that [defendant] may have against [plaintiff] or that [plaintiff] may have against [defendant and specified entities and individuals affiliated with defendant]. [Plaintiff] agree[s] that no court or arbitrator shall determine any of [plaintiff's] rights or claims on a class, collective or representative basis under any federal, state or local law. [Plaintiff] understand[s], however, that [plaintiff] retains the right to bring claims in arbitration for [plaintiff] as an individual. [¶] The only claims that are arbitrable are those that, in the absence of this Agreement, would have been justiciable under applicable state or federal law."

The "Claims Covered by the Agreement" section also includes a broad and nonexclusive list of the kinds of claims to which the Agreement applies, including "claims for wages or

other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination . . . ; claims for benefits [with certain exceptions]; and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance . . . ."

A section entitled "Claims Not Covered by the Agreement" (underlining omitted) lists "[c]laims for workers' compensation or unemployment compensation benefits," as well as any existing dispute in which plaintiff was represented by counsel who had asserted a claim on her behalf.

Another section in the Agreement entitled "Construction and Severability" reads, "If any provision of the paragraph entitled 'Claims Covered by the Agreement' is adjudged to be void or otherwise unenforceable, then the parties agree that this Agreement shall be of no force or effect, because the parties intended to create an agreement to arbitrate individual disputes only. If any other provision of this Agreement is adjudged to be void or otherwise unenforceable, in whole or in part, such adjudication shall not affect the validity of the remainder of the Agreement. All other provisions shall remain in full force and effect based on the parties' mutual intent to create a binding agreement to arbitrate their disputes individually." (Underlining omitted.)

In its motion, defendant argued that the Agreement encompassed all of plaintiff's causes of action except the PAGA claim, which defendant contended "should be bifurcated, and should proceed before" the trial court.

B. Plaintiff's opposition and defendant's reply

In opposition to the motion to compel arbitration, plaintiff argued that the Agreement's language stating that "no court or

arbitrator shall determine any of [plaintiff's] rights or claims on a class, collective or representative basis" constituted a waiver of "[p]laintiff's right to bring a PAGA claim on a representative basis." Plaintiff contended the waiver was unenforceable under *Iskanian*, thus triggering the "Construction and Severability" clause and voiding the entire Agreement.

Plaintiff further argued that another court already had held that a similar arbitration agreement drafted by defendant was unenforceable, and therefore defendant's motion should fail on collateral estoppel grounds as well.[1] Finally, plaintiff asserted various contract defenses to enforcement of the Agreement, including unconscionability.

In its reply, defendant countered that the Agreement's waiver of representative actions did not apply to PAGA claims, because "PAGA actions belong to the state" and thus "fall entirely outside the scope of a predispute agreement to arbitrate." Because plaintiff did not own the PAGA claim, the PAGA claim could not be a "Claim[ ] Covered by the Agreement," and *Iskanian* did not apply. Accordingly, the waiver in the "Claims Covered by the Agreement" section was valid and did not trigger the nullification provisions in the "Construction and Severability" section. Defendant also argued the Agreement was not unconscionable, and collateral estoppel did not apply because the arbitration agreement in the earlier case was "materially different."

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[1] This earlier case is *Gentry v. Robert Half International, Inc.* (Aug. 14, 2018, A147553) [nonpub. opn.], decided by the First District Court of Appeal.

C. Trial court's ruling

The trial court denied defendant's motion to compel arbitration. The trial court agreed with plaintiff that the Agreement contained a PAGA waiver that was unenforceable under *Iskanian*, thus rendering the entire arbitration agreement unenforceable pursuant to the provisions in the "Construction and Severability" section.

The trial court rejected defendant's position that the PAGA claim was not a "Claim[ ] Covered by the Agreement" because the PAGA claim is between defendant and the state, not defendant and plaintiff. The trial court observed, "While . . . the Labor and Workforce Development Agency retains the right to recover penalties in a PAGA action, a PAGA claim is nonetheless a claim 'brought by an aggrieved employee on behalf of himself or herself and other current or former employees . . . .' (Lab. Code, § 2699, subd. (a).) It is a claim by [plaintiff] against [defendant], on her behalf and on behalf of other employees. It falls within the scope of the arbitration agreement."

The trial court rejected plaintiff's arguments based on collateral estoppel and unconscionability.

Defendant timely appealed.

STANDARD OF REVIEW

" 'The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract.' " (*Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 347.) Here, the trial court concluded the Agreement between the parties was unenforceable on its own terms, and thus there was no basis to compel arbitration. Because there is no "factual dispute or

conflicting evidence regarding the terms" of the Agreement, our review of the trial court's decision is de novo. (*Cox v. Bonni* (2018) 30 Cal.App.5th 287, 299.)

DISCUSSION

"The Legislature enacted the PAGA in 2003 after deciding that lagging labor law enforcement resources made additional private enforcement necessary ' "to achieve maximum compliance with state labor laws." ' [Citation.] The PAGA therefore empowers employees to sue on behalf of themselves and other aggrieved employees to recover civil penalties previously recoverable only by the Labor Commissioner . . . ." (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 184–185 (*ZB*).)

"All PAGA claims are 'representative' actions in the sense that they are brought on the state's behalf." (*ZB*, *supra*, 8 Cal.5th at p. 185; see *Iskanian*, *supra*, 59 Cal.4th at p. 387 [" '*every* PAGA action . . . is a representative action on behalf of the state' "].) Accordingly, a plaintiff may not commence a PAGA action unless the plaintiff first notifies the LWDA, and the LWDA either notifies the plaintiff it does not intend to investigate the alleged violation or fails to respond to plaintiff within a specified period. (Lab. Code, § 2699.3, subds. (a)(1)(A), (a)(2)(A).)

Iskanian held that "an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code. Because such an agreement has as its 'object, . . . indirectly, to exempt [the employer] from responsibility for [its] own . . . violation of law,' it is against public policy and may not be enforced." (*Iskanian*, *supra*, 59 Cal.4th at p. 383, alterations and ellipses in original, quoting Civ. Code, § 1668.) A PAGA waiver "also violates

Civil Code section 3513's injunction that 'a law established for a public reason cannot be contravened by a private agreement.' " (*Iskanian*, at p. 383.)

Here, the Agreement, in the section entitled "Claims Covered by the Agreement," stated that "[plaintiff] agree[s] that no court or arbitrator shall determine any of [plaintiff's] rights or claims on a class, collective or representative basis . . . ." As the trial court correctly found, this waiver of "claims on a . . . representative basis" encompasses PAGA claims, which are representative. (See *ZB*, *supra*, 8 Cal.5th at p. 185; *Iskanian*, *supra*, 59 Cal.4th at p. 387.) Under *Iskanian*, therefore, the waiver is unenforceable as to PAGA claims. (*Iskanian*, at p. 383.)

We further agree with the trial court that the waiver's unenforceability triggers the clause in the "Construction and Severability" section providing, "If any provision of the paragraph entitled 'Claims Covered by the Agreement' is adjudged to be void or otherwise unenforceable, then the parties agree that this Agreement shall be of no force or effect . . . ." (Underlining omitted.) The effect of the "Construction and Severability" section, in combination with the invalid PAGA waiver, is to void the entire Agreement, thus eliminating defendant's contractual basis to compel arbitration.

Defendant argues that PAGA claims are not "Claims Covered by the Agreement" and thus provide no basis to trigger the "Construction and Severability" clause. Defendant notes the Agreement only requires plaintiff to arbitrate "claims or controversies . . . that [plaintiff] may have against" defendant. Similarly, the waiver provision applies to "[plaintiff's] rights or claims." Citing *Iskanian*, defendant contends PAGA claims

belong to the state, not plaintiff, and thus are not covered under the terms of the Agreement.

Iskanian held that the Federal Arbitration Act (FAA) did not preempt the state rule against PAGA waivers because "the FAA aims to ensure an efficient forum for the resolution of *private* disputes, whereas a PAGA action is a dispute between an employer and the state [Labor and Workforce Development] Agency." (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) Our Supreme Court elaborated: "[A] PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state,* which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code." (*Id.* at pp. 386–387.)

Defendant cites later cases relying on *Iskanian*'s reasoning to hold that, just as employees may not *waive* their right to bring PAGA claims, they also may not *arbitrate* PAGA claims without the state's consent, because the state is the real party in interest and owner of the underlying claim for Labor Code violations. (See *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 677 (*Tanguilig*) [PAGA claim "is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer" because "the real party in interest in a PAGA suit, the state, has not agreed to arbitrate the claim"]; *Hernandez v. Ross Stores, Inc.* (2016) 7 Cal.App.5th 171, 178 [arbitration agreement applying to disputes between employer and employee did not encompass PAGA action, which was not an individual claim by employee but an action on behalf of state for civil penalties for Labor Code violations]; *Betancourt v. Prudential*

Overall Supply (2017) 9 Cal.App.5th 439, 445–446 (*Betancourt*) [because a PAGA claim "is brought on behalf of the state," "[t]he state is not bound by [an employee's] predispute agreement to arbitrate"]; *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 872 (*Julian*) ["an arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action does not encompass that action. Prior to satisfying those requirements, an employee enters into the agreement as an individual, rather than as an agent or representative of the state. As an individual, the employee is not authorized to assert a PAGA claim; the state—through LWDA—retains control of the right underlying any PAGA claim by the employee"]; *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"]; *Ware v. Golden 1 Credit Union, Inc.* (E.D.Cal. 2019) 375 F.Supp.3d 1145, 1151 ["an arbitration agreement only purports to cover disputes arising between signatories. [Citation.] The PAGA claim does not arise between [the employee] and [the employer]; it arises between [the employer] and the state"].)

Even accepting defendant's contention that the terms of the Agreement would apply only to claims plaintiff has against defendant, we nonetheless disagree that PAGA claims are outside the scope of the Agreement. We agree with the trial court that, while the dispute underlying a PAGA claim may be between the state and the employer, it is the plaintiff as the "aggrieved employee" who is statutorily entitled to bring the claim "on behalf

of himself or herself and other current or former employees." (Lab. Code, § 2699, subd. (a).) Further, it is the PAGA plaintiff, not the state, who is named in the action. (See *Julian*, *supra*, 17 Cal.App.5th at p. 871.) Thus, a PAGA claim is a claim plaintiff "may have against" defendant under the language of the Agreement, albeit in a representative capacity. For the same reason, a PAGA claim qualifies as one of "[plaintiff's] rights or claims" under the language of the waiver provision.

Our conclusion is consistent with *Iskanian* and its progeny. Those cases support the proposition that a plaintiff does not bring a PAGA action as an individual but as a representative or proxy of the state, who is the real party in interest and the owner of the underlying dispute. (See, e.g., *Correia*, *supra*, 32 Cal.App.5th at pp. 621–622 [agreeing with *Julian*, *Betancourt*, and *Tanguilig* that in a PAGA action the plaintiff "asserts the claim solely on behalf of, and as the proxy for, the state"].) This does not change the fact that it is the plaintiff who is statutorily entitled to bring the claim. In that sense, it is a claim the plaintiff "may have against" her employer. None of defendant's cited cases holds to the contrary, nor even addresses whether an agreement to arbitrate claims an employee "may have against" an employer and waive that employee's representative claims must be interpreted not to apply to PAGA claims.

Defendant argues that just as plaintiff could not agree to arbitrate PAGA claims without the state's consent (see, e.g., *Correia*, *supra*, 32 Cal.App.5th at p. 622), plaintiff could not agree to waive PAGA claims without the state's consent. Thus, argues defendant, the waiver is "limited to claims that [plaintiff] has the lawful capacity to agree to resolve through individual

arbitration," that is, those that plaintiff can prosecute without the state's consent.

The question here, however, is not whether plaintiff lawfully could waive her right to bring a PAGA claim. The question is whether the parties at the time they executed the Agreement intended the waiver to encompass PAGA claims. We think it clear they did. As set forth above, PAGA claims are indisputably representative claims, and there is no reason to think that a waiver expressly barring "claims on a . . . representative basis" was not intended to encompass such claims. Indeed, the waiver ruled unenforceable in *Iskanian* prohibited "representative actions" without specific reference to PAGA. (*Iskanian*, *supra*, 59 Cal.4th at pp. 360–361.) We also note that the Agreement is drafted broadly either to encompass or waive nearly every conceivable claim, which weighs against the narrower reading defendant urges.

Thus, regardless of whether the parties lawfully *could* waive PAGA actions, they *attempted* to do so, thereby including an unenforceable waiver in the Agreement that triggered the "Construction and Severability" section.

Defendant notes the Agreement states, "The only claims that are arbitrable are those that, in the absence of this Agreement, would have been justiciable under applicable state or federal law." In a footnote, defendant argues that "[a] PAGA claim would not be justiciable at the time [plaintiff] entered into the agreement because she had not been deputized by the State and might never have been deputized by the State to act for the State and bring a PAGA enforcement action." Defendant presents no authority to support measuring justiciability at the time an employee signs an arbitration agreement as opposed to

when the employee presents his or her claim in a court or any other forum. We reject defendant's argument.

In light of our holding, we do not reach plaintiff's arguments regarding collateral estoppel and unconscionability.

DISPOSITION

The order denying defendant's motion to compel arbitration is affirmed. Plaintiff is awarded her costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.