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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIK ADOLPH,

Plaintiff and Respondent,

v.

UBER TECHNOLOGIES, INC.,

Defendant and Appellant.

G059860, G060198

(Super. Ct. No. 30-2019-01103801)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Reversed with directions.

Littler Mendelson, Andrew Spurchise, Sophia Behnia, and Anthony Ly for Defendant and Appellant.

Desai Law Firm, Aashish Y. Desai, Adrienne De Castro; Goldstein, Borgen, Dardarian & Ho, Andrew Paul Lee and Mengfei Sun for Plaintiff and Respondent.

Erik Adolph sued Uber Technologies, Inc. (Uber), which owned the meal delivery service for which Adolph worked, for various Labor Code violations, including claims under the Labor Code Private Attorneys General Act of 2004, Labor Code section 2698 et seq. (PAGA). The first time this case was before us, we affirmed the trial court’s orders (1) granting Adolph’s motion for a preliminary injunction to prevent an arbitration initiated by Uber, and (2) denying Uber’s petition to compel arbitration of Adolph’s sole remaining claim under PAGA. Our decision was based primarily on clear California law that PAGA claims were not subject to arbitration (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 384 (*Iskanian*)), and could not be split into individual and non-individual claims.

Following the United States Supreme Court’s decision in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. \_\_\_\_ [142 S.Ct. 1906] (*Viking River*), which abrogated, in part, the holding in *Iskanian*, the California Supreme Court held Adolph still had standing to pursue the non-individual PAGA claims in court. (*Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1119 (*Adolph*)). The California Supreme Court reversed this court’s opinion and remanded the matter to us to conduct further proceedings consistent with its opinion.

We now vacate our previous decision. Having considered the issues on appeal in light of the recent decisions of the United States and California Supreme Courts, we reverse the trial court’s orders.

#### FACTS

Adolph was a driver for UberEATS, a meal delivery service. Uber owned the company through which drivers are connected with those in need of UberEATS’ services. Before he began making deliveries for UberEATS in March 2019, Adolph created an account to use the UberEATS app. In creating his account, Adolph accepted an arbitration agreement that was “governed by the Federal Arbitration Act” and “applies to any dispute, past, present or future, arising out of or related to this Agreement or

formation or termination of the Agreement and survives after the Agreement terminates.” The parties do not dispute the terms of the arbitration agreement or that Adolph accepted its terms.

The arbitration agreement contains a waiver of all non-individual PAGA claims, whether in court or in arbitration. It also provides that the validity of the PAGA waiver may only be resolved in court, not through arbitration, and that if the PAGA waiver is found to be unenforceable, the litigation of PAGA claims must be stayed pending the outcome of arbitrable individual claims.

In October 2019, Adolph filed a putative class action complaint against Uber, claiming Uber had misclassified employees as independent contractors, and therefore failed to reimburse the class members for necessary work expenses. The complaint alleged two causes of action: (1) violation of Labor Code section 2802, and (2) violation of Business and Professions Code section 17200. Uber filed a petition to compel arbitration of Adolph’s individual claims, strike the class action allegations, and stay all court proceedings. The parties stipulated to allow Adolph to file a first amended complaint adding a third cause of action for civil penalties under PAGA.

After the first amended complaint was filed, Uber filed a renewed petition to compel arbitration. The trial court granted the petition compelling arbitration of Adolph’s individual claims in the first two causes of action, found the class claims on the first two causes of action were waived, and stayed the PAGA cause of action.

Adolph then filed a motion for leave to file a second amended complaint, which would include only the PAGA cause of action, and a motion for preliminary injunction to prevent the arbitration from proceeding. The trial court granted both motions. Uber filed a notice of appeal from the order granting the preliminary injunction, appeal No. G059860.

Adolph filed the second amended complaint alleging a single cause of action under PAGA. Uber filed a petition to compel arbitration of Adolph’s independent

contractor status and of all issues of enforceability or arbitrability. The petition requested the PAGA claim be stayed pending arbitration on the threshold issue of whether Adolph was an aggrieved employee entitled to assert it. Adolph both opposed and moved to strike the petition. The trial court denied the petition to compel arbitration, and Uber filed a notice of appeal, appeal No. G060198.

This court granted the parties' joint motion to consolidate appeal Nos. G059860 and G060198. In a nonpublished opinion, we affirmed the trial court's orders, citing *Iskanian, supra*, 59 Cal.4th 348, and holding the PAGA claims were not subject to arbitration, the agreement purportedly waiving the right to bring a claim on behalf of others under PAGA violated public policy, and the issue of whether a plaintiff is an aggrieved employee under PAGA was not subject to arbitration. (*Adolph v. Uber Technologies, Inc.* (Apr. 11, 2022, G059860, G060198) [nonpub. opn.], review granted July 20, 2022, S74671.)

Uber filed a petition for review. Soon thereafter, the United States Supreme Court issued its opinion in *Viking River, supra*, 596 U.S. \_\_\_ [142 S.Ct. 1906], which abrogated, in part, the holding in *Iskanian*: “[T]he FAA [Federal Arbitration Act] preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.” (*Viking River, supra*, 596 U.S. at \_\_\_ [142 S.Ct. at p. 1924].)

The California Supreme Court granted review of this case to determine “whether an aggrieved employee who has been compelled to arbitrate individual claims ‘premised on Labor Code violations actually sustained by’ the plaintiff [citations] maintains statutory standing to pursue non-individual ‘PAGA claims arising out of events involving other employees’ [citation] in court.” (*Adolph, supra*, 14 Cal.5th at p. 1119.) The *Adolph* court concluded such an aggrieved employee does have standing to pursue non-individual PAGA claims in court: “In sum, where a plaintiff has filed a PAGA action comprised of individual and non-individual claims, an order compelling arbitration

of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court.” (*Id.* at p. 1123.) The California Supreme Court reversed this court’s prior judgment and remanded the case for further proceedings consistent with its opinion. (*Id.* at p. 1128.) The parties did not submit supplemental briefs after the finality of the California Supreme Court’s opinion. (Cal. Rules of Court, rule 8.200(b)(1).)

## DISCUSSION

Because the evidence is not in conflict, we review the order denying a petition to compel arbitration *de novo*. (*Banc of California, National Assn. v. Superior Court* (2021) 69 Cal.App.5th 357, 367.) The trial court’s order granting a preliminary injunction is reviewed for abuse of discretion. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; *Olson v. Hornbrook Community Services Dist.* (2021) 68 Cal.App.5th 260, 268.)

The arbitration agreement between the parties contains a PAGA waiver by which Adolph “agree[d] not to bring a representative action on behalf of others under [PAGA] in any court or in arbitration.” Such a waiver is unenforceable. (*Iskanian, supra*, 59 Cal.4th at pp. 383–384.) *Viking River* affirmed this portion of the *Iskanian* holding. (*Viking River, supra*, 596 U.S. \_\_\_ [142 S.Ct. at pp. 1916–1917].) Pursuant to paragraph 15.3(v) of the arbitration agreement between Adolph and Uber, this unenforceable provision must be severed from the agreement. (*Viking River, supra*, 596 U.S. \_\_\_ [142 S.Ct. at pp. 1917, 1925].)

*Viking River* held non-individual PAGA claims must be dismissed when individual PAGA claims are sent to arbitration. “PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA’s standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. [Citation.] When an employee’s own dispute is pared away from a PAGA action, the employee is no different from a member

of the general public, and PAGA does not allow such persons to maintain suit.” (*Viking River, supra*, 596 U.S. \_\_\_ [142 S.Ct. at p. 1925].)

The California Supreme Court, however, held in *Adolph* that a plaintiff whose individual PAGA claims are subject to arbitration still has standing to pursue non-individual PAGA claims in court. (*Adolph, supra*, 14 Cal.5th at p. 1123.) The United States Supreme Court’s contrary decision does not bind the California Supreme Court. “Because ‘[t]he highest court of each State . . . remains “the final arbiter of what is state law”’ [citation], we are not bound by the high court’s interpretation of California law. (*Id.* at p. 1119; see *Viking River, supra*, 596 U.S. at p. \_\_\_ [142 S.Ct. at p. 1925] (conc. opn. of Sotomayor, J.) [‘Of course, if this Court’s understanding of state law is wrong, California courts, in an appropriate case, will have the last word’].) And although the high court’s interpretations may serve as persuasive authority in cases involving a parallel federal constitutional provision or statutory scheme [citations], *Viking River* does not interpret any federal provision or statute similar to PAGA.” (*Adolph, supra*, 14 Cal.5th at p. 1119.) *Adolph* has standing to proceed with his non-individual PAGA claims in the trial court, while his individual PAGA claims must be addressed in arbitration.

The parties’ arbitration agreement provides that if its PAGA waiver is found to be unenforceable and is severed, “any representative actions brought under the PAGA must be litigated in a civil court of competent jurisdiction,” and “the litigation of any representative PAGA claims in a civil court of competent jurisdiction shall be stayed, pending the outcome of any individual claims in arbitration.” The language of the arbitration agreement is consistent with *Adolph*’s statements to the California Supreme Court regarding the proper resolution of this matter, where he explained “his PAGA action could proceed in the following manner if he were ordered to arbitrate his individual PAGA claim: First, the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the

Code of Civil Procedure. Following the arbitrator’s decision, any party may petition the court to confirm or vacate the arbitration award under section 1285 of the Code of Civil Procedure. If the arbitrator determines that Adolph is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment (Code Civ. Proc., § 1287.4), would be binding on the court, and Adolph would continue to have standing to litigate his non-individual claims. If the arbitrator determines that Adolph is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and Adolph could no longer prosecute his non-individual claims due to lack of standing. [Citation.]

“Uber makes no convincing argument why this manner of proceeding would be impractical or would require relitigating Adolph’s status as an aggrieved employee in the context of his non-individual claims, and we see no basis for Uber’s concern. In any event, *Viking River* makes clear that in cases where the FAA applies, no such relitigation may occur. [Citation.]” (*Adolph, supra*, 14 Cal.5th at pp. 1123–1124.)

The trial court’s order denying the petition to compel arbitration was based on “California authority indicat[ing] PAGA actions cannot be split in individual arbitrable and representative nonarbitrable components.” As that authority is no longer valid, the trial court’s order must be reversed with directions to grant the petition to compel arbitration with respect to Adolph’s individual PAGA claims and to deny the petition with respect to Adolph’s non-individual PAGA claims.

The trial court’s order granting the preliminary injunction was similarly based on the trial court’s finding “the only purpose the arbitration sought by defendant can now serve . . . is to impermissibly split the PAGA claim.” Because the PAGA claim is, in part, arbitrable, Adolph has not demonstrated a likelihood of prevailing on the merits of the issue or a likelihood the interim harm he might suffer would outweigh any

harm suffered by Uber. Therefore, the order granting the preliminary injunction must also be reversed.

#### DISPOSITION

The orders are reversed. The petition to compel arbitration shall be granted in part and denied in part. Appellant to recover costs on appeal.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.