NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1953-13T2

ROBERT MORRIS MILLOUL,

Plaintiff-Appellant,

v.

KNIGHT CAPITAL GROUP, INC.,
KNIGHT CAPITAL AMERICAS, LLC.,
KCG HOLDINGS, INC. and BRENDAN
JOSEPH MCCARTHY,

Defendants-Respondents.

Argued February 9, 2015 – Decided September 1, 2015

Before Judges Espinosa and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2913-13.

Andrew William Dwyer argued the cause for appellant (The Dwyer Law Firm, LLC, attorneys; Mr. Dwyer and Angelica M. Cesario, on the brief).

William Dugan (Seyfarth Shaw) of the New York and Illinois bars, admitted pro hac vice, argued the cause for respondents (Howard M. Wexler (Seyfarth Shaw), Robert T. Szyba (Seyfarth Shaw), and Mr. Dugan, attorneys; Mr. Wexler, Mr. Szyba, Mr. Dugan, and Giselle Perez de Donado (Seyfarth Shaw) of the Illinois bar, admitted pro hac vice, on the brief).

PER CURIAM

Plaintiff, Robert Morris Milloul, appeals from the Law Division's November 8, 2013 order granting a motion to compel arbitration filed by defendants, Knight Capital Group, Inc. (Knight), Knight Capital Americas Capital LLC, KCG Holdings Inc. and Brendan Joseph McCarthy. In granting the motion, the judge relied upon a "Dispute Resolution" agreement (DRA) that plaintiff signed at the commencement of his employment with Knight after that entity acquired his previous employer. The DRA required plaintiff to submit any employment disputes to final and binding arbitration. The court found, based on the papers submitted by the parties, that plaintiff read and understood the DRA and was, therefore, bound by its provisions.

On appeal, plaintiff argues the court erred as a matter of law and, therefore, its decision is subject to our de novo review. Also, he argues that the court mistakenly found that plaintiff agreed to arbitrate his claims of workplace discrimination and retaliation, and waive his right to a jury trial. Similarly, he contends that the DRA did not include a "clear and unmistakable" waiver of his right to a jury trial under the circumstances. Further, plaintiff asserts that enforcement of the DRA violates New Jersey's prohibition against

waiver of a right to a jury trial in claims arising under its Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

Defendants disagree. They argue that LAD claims can be arbitrated and the DRA is "clear and unmistakable." They urge us to give the deference to which the trial court is entitled in these matters, especially with regard to its finding that plaintiff knowingly and voluntarily signed the agreement.

Subsequent to the entry of the Law Division's order compelling arbitration and the filing of this appeal, the Supreme Court issued its opinion in Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014), cert. denied, __ U.S. __, 135 S. Ct. 2804, __ L Ed. 2d __ (2015). In a supplemental submission to us, plaintiff argued the Court's holding in Atalese requires us to reverse the Law Division's order because the DRA did not meet the Court's requirement that, to be enforceable, an arbitration agreement must explain that an individual is giving up his or her right to bring claims before a court or jury. Defendants again disagree. They argue that Atalese involved a consumer contract and not an employment agreement and, in any event, the language in the DRA, unlike the one in Atalese, clearly expressed plaintiff's agreement to waive his right to a trial, which plaintiff, as an "educated, professional employee," understood when he signed the DRA.

We have considered these arguments in light of our review of the record and the applicable legal principles. We reverse.

The salient facts are derived from the motion record. Plaintiff's religion is Orthodox Judaism and he is of Syrian descent. He began working for Edgetrade, Inc. in January 2006. Plaintiff was initially hired by Joseph Wald and Brandon Krieg. Krieg was plaintiff's supervisor at Edgetrade and continued as his supervisor after Edgetrade was purchased by Knight in January 2008. Five years later, plaintiff filed a complaint against defendants asserting he was subjected to numerous instances of anti-Semitism, primarily through McCarthy's actions, and ultimately fired, because he was Jewish and in retaliation for complaining to human resources. After plaintiff filed his complaint, defendants sought to enforce the DRA, which plaintiff allegedly signed after Knight acquired EdgeTrade.

The DRA was not included in the documents Knight first gave to plaintiff to sign after its acquisition of EdgeTrade. Initially, plaintiff was given a letter agreement, dated December 18, 2007, as a written offer of continued employment by Knight, which he signed on January 10, 2008.[1] Plaintiff reviewed

[1] The acquisition had not been completed at the time plaintiff was given or signed the agreement. On January 15, 2008, Knight publicly announced it had completed the acquisition of EdgeTrade.

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the letter agreement "at length," which stated, "During your employment, you will be subject to all the management, compliance and other policies of Knight as Knight may determine such policies from time to time," and, the agreement "constitutes the entire agreement between the parties." The document did not contain any reference to arbitration, alternative dispute resolution or waiving the right to bring claims in court.

Knight conducted new hire orientation sessions for former EdgeTrade employees on January 10, 11, and 15, 2008. Meredith Curley, a Senior Human Resources Generalist, believed plaintiff attended the orientation session on January 15, 2008. Each employee was provided a new hire packet which contained "[New York and New Jersey] payroll forms (W-4, direct deposit, etc.), [the DRA], Employee Acknowledgment, Code of Ethics[,] and benefits information," a background check form, which included responses to seven questions, and an employee acknowledgment form (collectively, the forms).[2] Curley informed employees the payroll forms had to be returned by January 24, 2008, but the rest of the forms had to be returned by the end of the month.

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[2] Plaintiff's signature on the forms is dated January 15, 2008.

Curley also told employees she and other human resources staff were available to answer any questions about the forms. She did not recall plaintiff asking any questions. Curley stated neither she nor any Knight employee she was aware of pressured anyone to complete the forms immediately.

Plaintiff disputed that he was given the forms at a group orientation session and that he was given until the end of the month to read and sign them. According to plaintiff, Knight required him to fill out the forms immediately. He claimed he was "handed a bunch" of standard human resources forms and was "pressured to sign the forms quickly and immediately." Plaintiff recalled he was not given an opportunity to read the forms and was not advised the forms were related to arbitration or waving his right to sue Knight. As a result he completed and signed the forms on January 15, 2008, without reading them. The DRA was apparently signed by plaintiff with the other forms on January 15, 2008, but, while plaintiff acknowledged the signature looked like his signature, he had no recollection of seeing the DRA.

The DRA was one paragraph in length and stated:

> I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application for employment, my employment or the cessation of my employment with Knight Capital Group, Inc. or any of its

> affiliates exclusively by final and binding arbitration pursuant to the rules of the American Arbitration Association. Such claims include but are not limited to claims under federal, state and local statutory law or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.

Plaintiff filed a complaint, which he later amended on July 11, 2013. The next month, defendants filed their motion to compel arbitration. On November 8, 2013, the parties argued the motion. After considering the parties written submissions and counsels' oral arguments, the judge denied the motion, and placed her reasons on the record on the same day.

The judge rejected plaintiff's claim that he never saw the DRA and found the DRA's language to be a sufficient waiver of plaintiff's right to a trial for any LAD claim he had against defendants. In reaching her decision, the judge noted plaintiff "spent no time contemplating [the DRA] or consulting an attorney." She also observed the DRA was included in the packet of other forms such as a W-[4] form and a direct deposit form. As to the waiver of plaintiff's right to a trial, the judge stated:

> If he stopped [after the first sentence], or even after the first line because he mistakenly thought, oh, this only has to do

> with previously unasserted claims and I have no previously unasserted claims, he did so to his detriment. Because it goes on to say exclusively by final and binding arbitration. Then it cites the forum and it cites the rules that will govern the exclusive final binding arbitration. The next sentence, such claims include . . . but are not limited to claims under federal, state, local statutory law or common law such as. Now, when the drafter of this resolution chose to do this maybe he or she could have erred on the side of caution and listed every possible statute or case decisional law that creates a cause of action. That seems impractical. However, what they did . . . choose to do, which is include a limited but not complete list of all workplace discrimination claims . . . So this is not the greatest arbitration clause I've ever seen. . . . [B]ut [it] isn't unclear either. . . .
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> . . . [I]t's not full of legal jargon until one gets down to the partial list of causes of action. And it is just as unambiguous and as clear and plain language for someone like [plaintiff] to understand.

The court entered its order compelling arbitration and dismissing the complaint, without prejudice. This appeal followed.

"[O]rders compelling or denying arbitration are deemed final and appealable as of right." GMAC v. Pittella, 205 N.J. 572, 587 (2011); see also R. 2:2-3(a). Because the issue of whether the parties have agreed to arbitrate is a question of law, we review a judge's decision to compel or deny arbitration de novo. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186

(2013). Therefore, "the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Waskevich v. Herold Law, P.A., 431 N.J. Super. 293, 297 (App. Div. 2013) (citations and internal quotation marks omitted).

We conduct our review with the understanding that "'arbitration [is] a favored method of resolving disputes.'" Hirsch, supra, 215 N.J at 186 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001)). The "New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate[s a] state polic[y] favoring arbitration." Atalese, supra, 219 N.J. at 440. "'[T]he affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes.'" Ibid. (alteration in original) (quoting Martindale v. Sandvik, Inc., 173 N.J. 76, 92 (2002)); see also Wein v. Morris, 194 N.J. 364, 375-76 (2008); NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div.), certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013). "The Arbitration Act, in part, provides '[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity

for the revocation of a contract.'" Hirsch, supra, 215 N.J. at 187 (alteration in original) (quoting N.J.S.A. 2A:23B-6(a)).

Generally, because of their favored status, arbitration agreements "should . . . be read liberally to find arbitrability if reasonably possible." Jansen v. Salomon Smith Barney, Inc., 342 N.J. Super. 254, 257 (App. Div.) (citations omitted), certif. denied, 170 N.J. 205 (2001). A court must resolve all doubts related to the scope of an agreement "in favor of arbitration." Id. at 258 (citations omitted). Courts operate under "'a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" Waskevich, supra, 431 N.J. Super. at 298 (quoting EPIX Holdings Corp. v. Marsh & McLennan Cos. Inc., 410 N.J. Super. 453, 471 (App. Div. 2009)).

Two questions arise in our evaluation of a motion to compel arbitration. The first is whether there is a valid and enforceable agreement to arbitrate disputes. Martindale, supra, 173 N.J. at 86. The second is whether the particular dispute between the parties is covered within the scope of the agreement. See id. at 92.

In order for an agreement's arbitration clause to be enforceable, it must meet certain conditions, including that the parties understand they are giving up their ability to litigate their claim in court. As we recently observed:

> In Atalese, the Court emphasized an arbitration clause in a contract must assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue. By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court.
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> [Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 487-88 (App. Div. 2015) (citation and internal quotation marks omitted).]

In Atalese, the Court stated:

> An agreement to arbitrate, like any other contract, must be the product of mutual assent, as determined under customary principles of contract law. A legally enforceable agreement requires a meeting of the minds. Parties are not required to arbitrate when they have not agreed to do so.
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> Mutual assent requires that the parties have an understanding of the terms to which they have agreed. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court. But an average member of the public may not know -- without some explanatory comment -- that arbitration is a

> substitute for the right to have one's claim adjudicated in a court of law.
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> Moreover, because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.
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> [Atalese, supra, 219 N.J. at 442-43 (citations and internal quotation marks omitted).]

Therefore, "[a]lthough the public policy of this State is to favor arbitration as a means of settling disputes which otherwise would go to court, it is equally true that the duty to arbitrate, and the scope of the arbitration, are dependent solely upon the parties' agreement." Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 100-101 (App. Div.) (citations omitted), certif. denied, 117 N.J. 87 (1989); see also Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 556 (2015). "In evaluating the existence of an agreement to arbitrate, a court 'consider[s] the contractual terms, the surrounding circumstances, and the purpose of the contract.'" Hirsch, supra, 215 N.J. at 188 (alteration in original) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)).

A court must also determine the scope of the subject matter to be addressed in the arbitration. "'[A]rbitration is a matter of contract and a party cannot be required to submit to

arbitration any dispute which he has not agreed so to submit.'" Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 148-49 (App. Div. 2008) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648, 655 (1986)); Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 324, 344 (App. Div.), certif. denied, 188 N.J. 353 (2006). "'Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.'" Garfinkel, supra, 168 N.J. at 132 (quoting In re Arbitration Between Grover & Universal Underwriters Ins. Co., 80 N.J. 221, 228-29 (1979)).

We look to the language of the agreement to determine if the parties intended to waive their right to litigate their claim in court. Contract provisions are to be "read as a whole, without artificial emphasis on one section, with a consequent disregard for others." Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000), aff'd, 169 N.J. 135 (2001). "Literalism must give way to context." Ibid. (citation omitted). A court must keep in mind "the contractual scheme as a whole," Republic Bus. Credit Corp. v. Camhe-Marcille, 381 N.J. Super. 563, 569 (App. Div. 2005) (quoting Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956)), and "the objects the parties were

striving to attain." Celanese Ltd. v. Essex Cnty. Imp. Auth., 404 N.J. Super. 514, 528 (App. Div. 2009).

Parties to a contract can express their intention to arbitrate their disputes rather than litigate them in court, without employing any special language. An arbitration clause is generally not required

> to identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration. But the clause, at least in some general and sufficiently broad way, must explain that the plaintiff is giving up [the] right to bring [the] claims in court or have a jury resolve the dispute.
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> [Atalese, supra, 219 N.J. at 447.][3]

When an employer seeks to enforce an arbitration provision in an employment agreement in which an employee waives a constitutional or statutory right to sue, the waiver must be as

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[3] The Court instructed that in consumer contracts:

> [n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights. It is worth remembering, however, that every "consumer contract" in New Jersey must "be written in a simple, clear, understandable and easily readable way." N.J.S.A. 56:12-2. Arbitration clauses -- and other contractual clauses -- will pass muster when phrased in plain language that is understandable to the reasonable consumer.
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> [Id. at 444.]

clear as one contained in a consumer contract. "'A clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue.'" Garfinkel, supra, 168 N.J. at 132 (quoting Marchak, supra, 134 N.J. at 282). For that reason, "a party's waiver of statutory rights 'must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" Ibid. (quoting Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 78 N.J. 122, 140 (1978)).

The requirement for a clear and unmistakable waiver is consistent with New Jersey's strong public policy protecting the rights of workers and prohibiting discrimination in the workplace, as evidenced by various statutory enactments. For example, the policies that support the LAD and the rights it confers on aggrieved employees are essential to eradicating discrimination in the workplace. Courts should "not assume that employees intend to waive those rights unless their agreements so provide in unambiguous terms." Id. at 135.

The public policy to protect workers from discrimination is not, however, harmed by a contractually agreed-upon, plain and clear arbitration provision that limits a worker to making a

claim against his or her employer through arbitration only. When properly drafted, such provisions promote New Jersey's public policy in favor of the arbitration of disputes. Wein, supra, 194 N.J. at 375-76; see also NAACP of Camden Cnty E., supra, 421 N.J. Super. at 424; Singer v. Commodities Corp., 292 N.J. Super. 391, 400 (App. Div. 1996) (New Jersey courts "have long favored the settlement of dispute by arbitration." (citation and internal quotation marks omitted)); Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 389 (App. Div. 1997) (There is a "strong public policy in our state favoring arbitration as a means of dispute resolution [which] require[es] a liberal construction of contracts in favor of arbitration.").

We "have consistently held that employees' agreements to arbitrate their discrimination claims against their employees are enforceable, without perceiving any conflict between the[] two public policies" of favoring arbitration and protecting workers. Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 259 (App. Div.) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23, 111 S. Ct. 1647, 1650, 114 L. Ed. 2d 26, 35 (1991)), certif. denied, 165 N.J. 527 (2000). The Court has recognized

> there is no indication in the text or legislative history[y] of . . . the LAD that restrict[s] the use of an arbitral forum to pursue those claims. Indeed, in respect of

> the LAD, a judicial remedy was never perceived to be essential to vindicate such claims. The LAD always permitted such claims to be pursued through an administrative hearing proceeding. Plainly, a jury trial is not applicable in the administrative setting.
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> [Martindale, supra, 173 N.J. at 93 (citations omitted)].

An employee, therefore, "may, by contract, give up his or her right to pursue a statutory LAD remedy in favor of arbitration." Alamo, supra, 306 N.J. Super. at 389; see also Quigley, supra, 330 N.J. Super. at 260 ("New Jersey courts have also enforced employees' agreements to arbitrate statutory employment claims."). "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Martindale, supra, 173 N.J. at 93 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 3354, 87 L. Ed. 444, 456 (1985)).

However, an agreement's requirements to arbitrate statutory claims must be "particularly clear." Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79, 119 S. Ct. 391, 396, 142 L. Ed. 2d 361, 371 (1999). "'We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated.

More succinctly, the waiver must be clear and unmistakable.'" Id. at 80 (quoting Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708, 103 S. Ct. 1467, 1477, 75 L. Ed. 2d 387, 400 (1983)).

For that reason, the language in a alternative dispute resolution clause of an employment agreement must do more than mention, "by general reference, statutory claims redressable by the LAD." Garfinkel, supra, 168 N.J. at 134. It is not necessary, however, for the agreement to "refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights. Id. at 135.

> To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., workplace discrimination claims.
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> [Ibid.]

Where an agreement to arbitrate failed to mention at all that a statutory remedy - like the LAD - was subject to arbitration rather than a trial, courts have refused to enforce the provision. For example, in Garfinkel, the arbitration clause in dispute was contained in an employment contract between a doctor and a medical group. The arbitration clause stated: "Except as otherwise expressly set forth in Paragraphs

14 or 15 hereof, any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration . . . in accordance with the rules then obtaining of the American Arbitration Association . . . ." Id. at 128. The Court held "that because of its ambiguity the language contained in the arbitration clause does not constitute an enforceable waiver of plaintiff's statutory rights under the LAD." Id. at 127. Specifically, it concluded the arbitration clause was "silent in respect of plaintiff's statutory remedies." Id. at 135.

Similarly, in Waskevich, supra, 431 N.J. Super. at 296, we held that an arbitration clause in an employment contract between a lawyer and a law firm, which required arbitration of "'any controversy, claim, or dispute arising out of or relating to this Agreement, including the construction, interpretation, performance, breach, termination, enforceability, or validity thereof[,]'" did not apply to plaintiff's LAD claims. Earlier, in Alamo, the arbitration clause concerned the company's employment manual and stated "If I claim that Alamo has violated this [manual], I agree that the dispute shall be submitted to and resolved through binding arbitration." Alamo, supra, 306 N.J. Super. at 387, 391. We found that clause did not mention the LAD and it was "inadequate to constitute a waiver of

statutory remedies." Id. at 392. We explained it would not have been difficult for the company to bind the employee in all circumstances if it had just made the clause more inclusive as we previously enforced arbitration of LAD violations "where the employee had agreed to submit any dispute regarding the employment agreement to arbitration." "The any dispute language is the very least an employer needs to utilize in order to guarantee arbitration of all disputes." Id. at 394.

An employee's right to know that arbitration includes a waiver of his or her right to a trial in court is equally as important as their right to know the type of claims they are agreeing to arbitrate. We, therefore, hold that an arbitration provision in an employment agreement must include language informing the employee that he or she is waiving a right to a trial in court and, as the Court found in Atalese regarding a consumer contract, it must "be written in a simple, clear, understandable and easily readable way." Atalese, supra, 219 N.J. at 444. As a result, not only must the the type of statutory claims be identified as required in Garfinkel, but so must the waiver. Minimally, the agreement must state in some express fashion that the employee is sacrificing his or her right to a trial. See e.g. Martindale, supra, 173 N.J. at 81-82 (enforcing arbitration provision in an employment agreement in

which the employee "agree[d] to waive [his] right to a jury trial in any action or proceeding related to [his] employment"). The DRA that plaintiff signed did not even mention a waiver of plaintiff's right to a trial. Without that reference, it cannot be enforced.

Reversed and remanded for entry of an order vacating the order under review and scheduling the matter for trial. We do not retain jurisdiction.