CITATION: Kielb v. National Money Mart Company, 2015 ONSC 3790
COURT FILE NO.: CV-12-451806
DATE: 20150612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JONATHAN KIELB	)	*Jeff C. Hopkins*, for the Plaintiff
Plaintiff	)	
– and –	)	*Susan Crawford*, for the Defendant
NATIONAL MONEY MART COMPANY	)	
Defendant	)	
	)	**HEARD:** April 27-28, 2015

S.A.Q. AKHTAR J.

INTRODUCTION

[1] This case involves allegations of broken promises, ambiguous clauses and inequitable treatment and, at its heart, a contract that was both enticing in its promises and cruel in its execution. The plaintiff claims damages from the defendant, the National Money Mart Company ("Money Mart"), for an unpaid bonus to which he claims he was entitled under contract. In defending this action, Money Mart relies upon a clause restricting bonus payments only to those employees who were still with the company at the time of the payout (the "Limitation Clause").

FACTUAL BACKGROUND

[2] The facts of this case are not really in dispute. The defendant is a national financial services company providing services to both individuals and corporations. It was owned by Dollar Financial Group, a publicly traded company based in Pennsylvania. The plaintiff, a lawyer, began employment with the defendant on or about December 1, 2008, in the position of Vice President and Division General Counsel. The plaintiff's employment history includes a number of "in house" counsel roles. Prior to joining Money Mart, he served as general counsel at

ICI Canada. His employment with the defendant ended on April 21, 2010 when he was dismissed without cause.

The Build Up to the Employment Agreement

[3] In order to fully understand the issues in this case, it is necessary to examine the discussions between the plaintiff and the defendant prior to the plaintiff's acceptance of the offer of employment.

[4] The plaintiff became aware of an opening at Money Mart after seeing a posting in the Ontario Reports. He spoke to Kerry Heller, a member of the legal recruitment team of the company handling the employment vacancy for Money Mart. Although the plaintiff appeared to be an ideal fit for the job, he was unhappy with the base salary, which he considered inadequate, and thus did not express any further interest in the position. Shortly after their initial discussion however, Ms. Heller contacted the plaintiff expressing her view that his experience made him a suitable candidate and urged him to pursue the opportunity. The plaintiff did so with the intentions of conducting negotiations with the Money Mart management.

[5] On October 28, 2008, the plaintiff spoke with Roy Hibberd by telephone, with Ms. Heller acting as intermediary. The conversation with Hibberd was one area of controversy at this trial. The plaintiff, in discussing his prospective employment position with Hibberd, took written notes outlining the content of the conversation conducted by telephone. Those notes were admitted into evidence at trial and their significance revolved around the issue of Money Mart's Key Management Bonus Program ("KMB").

[6] The plaintiff testified that, in negotiations with Hibberd, he insisted that his base salary be increased. Hibberd was aware of the plaintiff's wage concerns and had raised the issue himself during their conversation. Hibberd talked at length about the company's bonus program. According to the plaintiff, Hibberd explained that the bonus program would more than make up for the deficiencies in salary and would form a significant part of the plaintiff's compensation.

[7] Hibberd insisted that the maximum salary on offer was the sum of $170,000.00. The bonus program, as explained by Hibberd, was a potentially lucrative avenue for the plaintiff. It operated in two stages. The first was a payment of up to 30% of an employee's salary based on company performance. The second, described as a "stretch" payment could be a further amount up to an additional 30% payable if the company exceeded targets outlined in the KMB year plan. The plaintiff testified that Hibberd assured him that any shortcomings in the plaintiff's desired salary would be met by the KMB. Although there was no guarantee of the amount, the historical results of the program demonstrated a healthy return of 45-50% of salary which would more than satisfy the plaintiff's demands. The program was even more attractive as the bonus was paid out on the basis of company or business unit performance rather than individual performance. According to the plaintiff, Hibberd informed him of the company's successful history in performance and business payout and told the plaintiff that since he, Hibberd, had come on board, the company revenues had doubled to $350 million. Revenues were likely to double again in "18-20 months". Even though Hibberd reiterated that he could not increase the plaintiff's salary above the $170,000.00 level, the compensation provided by the bonus had to be looked at

"as the entire package." According to the plaintiff, Hibberd used the KMB as an incentive to entice him to work for Money Mart. Certainly the plaintiff's concern regarding his base salary had been alleviated by the KMB and he was sold on the company. The plaintiff and defendant disagree as to whether the KMB program was an integral part of the plaintiff's total compensation package.

[8] Shortly afterwards, on November 14, 2008, the plaintiff received an email from Mary Ann McMenamin, an employee of the Dollar Finance Group, Money Mart's parent company. Attached to the email was the formal offer of employment which was reviewed by the plaintiff. This document is marked as Exhibit 1 Tab 2. The plaintiff engaged in further discussions with Hibberd, raising concerns about the base salary offered, the length of notice in the event of termination without cause and the non-competition clauses in the agreement. As a consequence, a revised offer of employment was forwarded to the plaintiff on November 21, 2008. Hibberd informed the plaintiff that he until the following Monday, November 24, 2008 to accept or reject the offer. He accepted on Monday, November 24, 2008 at 4:55pm.

The Revised Employment Agreement

[9] There are four terms of the revised employment agreement that play a significant role in this case. They are reproduced in full below:

> (a) The Bonus Plan Clause ("the Limitation Clause")
>
> KEY MANAGEMENT BONUS and LONG TERM INCENTIVE PLAN
>
> Bonus: Annual bonus earnings of up to 30% of your annual base salary each fiscal, based upon the attainment of annual Company and Dollar Financial Corp (DFC) profitability targets. It is possible that your said 30% bonus earnings may increase up to an additional of 30% of your annual base salary if the Company and DFC exceed their profitability targets as outlined in the Company's management bonus program. All annual bonus amounts will be prorated based on your months of employment for the first fiscal year. The Company is on a fiscal year ending June 30. The Company may amend the terms of the bonus plan from year to year. Your business unit designation for the fiscal year 2009 will be "Canadian Retail". Any bonus which may be paid is entirely at the discretion of the Company, does not accrue, and is only earned and payable on the date that it is provided to you by the Company. For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof. You also hereby waive any claim to constructive dismissal based on the fact that a bonus is not paid, is less than was previously paid, or is less than is paid to another employee.
>
> The terms of the Key Management Bonus Program are as provided under the terms of that Program from time to time, and as may change at the Company's sole discretion.

This clause set out the scope and criteria for the KMB payouts. Most significantly, it specified that KMB did not accrue and would only be payable to the employee at the date provided by the Company. The 2010 date was September 17, 2010 and eligibility for the KMB payout depended on being an employee at the time of the payout or, if terminated, an employee within the statutory notice period.

(b) "The Notice Period Clause"

TERMINATION BY THE COMPANY

The company shall be entitled to terminate your employment with the Company at any time:

(a) for just cause without notice or compensation effective immediately on written notice to you; or

(b) without cause, provided that:

(i) The Company shall give you written notice of such termination as required by the ESA, which notice may be effective immediately (in which case you will be provided with pay in lieu of notice); and,

(ii) The Company shall, within 10 business days from the date of giving such notice, or pay in lieu thereof, pay to you 4 (four) weeks per year of service and pro-rated for partial years of service (the "Termination Payment"), inclusive of any amounts paid in clause (i) above, in return for your execution of a full and final release of any and all claims by you as against the Company, Dollar, or any related entities. You agree to accept the Termination Payment in full satisfaction of all entitlement arising from such termination, whether under statute, contract or common law, including entitlements to reasonable notice;

(c) "The Independent Legal Advice Clause"

INDEPENDENT LEGAL ADVICE

You acknowledge that you have had sufficient time to review and consider the provisions contained herein, that you have read and understand these provisions and your obligations as they have been described herein, and that you have been given an opportunity to obtain independent legal advice concerning the interpretation and effect of these provisions, and you're [sic] the [sic] signature below is an acknowledgment of same.

(d) "The Entire Agreement Clause"

ACCEPTANCE

This letter contains the entire agreement between you and the Company, Dollar and DF . There are no other oral or written agreements or representations between you and the Company, Dollar and DFC.

The revised offer contained new clauses which reflected the plaintiff's concerns with respect to the November 14, 2008 offer. For example, the clause dealing with severance had been altered from what was effectively a two week notice period to include additional notice reflecting years of service.

The Plaintiff's Reaction

[10] However, the plaintiff testified that he was "surprised" at what he'd been sent. The plaintiff was particularly dismayed by the language of the Limitation Clause which had expanded significantly from the offer received on November 14, 2008. The plaintiff viewed the wording as "harsh and unnecessary". Of particular concern was the example given whereby, in the event of termination without cause, the plaintiff would be deemed to have waived his bonus. He felt that the contract itself was one sided and the language seemed more akin to that of a "bully".

[11] The plaintiff also testified about the independent legal advice clause contained in the revised agreement. He appeared to indicate that this was a clause which had not been present in the first offer of employment sent on November 14, 2008. In this respect, he was not entirely accurate as a clause recommending that the plaintiff obtain legal advice did exist in the letter accompanying the prior agreement. The November 21, 2008 offer stipulated that, as part of the agreement, the plaintiff was obliged to acknowledge that he had had "sufficient time to review and consider the provisions" and been given an opportunity to obtain legal advice. The plaintiff, however, testified that neither of these conditions had actually been fulfilled. The acceptance deadline of the following Monday meant there was insufficient time to contact a lawyer. In the plaintiff's view, he had "no choice" but to accept what was, in effect, a take it or leave it ultimatum by the company. At 4.55 pm, on Monday November 24, 2008, the plaintiff emailed Hibberd to accept his offer.

Employment and Termination

[12] The plaintiff began employment with Money Mart on December 1, 2008. The agreement, however, was eventually signed on December 11, 2008, approximately 18 days after the plaintiff had accepted the employment offer by email.

[13] Pursuant to the agreement, and the KMB, the plaintiff received a pro-rated bonus for the 7 months that he was employed during the 2008/09 fiscal year. The "fiscal year" upon which the KMB is calculated, defined internally by Money Mart, runs between July 1 and June 30 annually. The plaintiff's KMB payout for September 2009 amounted to $10,855.95. Further, in July 2009 the plaintiff's salary was increased to $172,479.12. In August 2009, the plaintiff received a copy of Money Mart's 2010 KMB outline.

[14] On April 21, 2010, the plaintiff's employment with Money Mart was terminated on a without cause basis. No evidence was led as to the reason for his departure. The plaintiff was offered a termination package of 2 weeks statutory termination pay combined with a further six week's salary pursuant to his employment contract. The additional six week salary was, however, contingent upon the plaintiff signing a full and final release obviating Money Mart from any further financial obligations. The plaintiff refused to sign that release and received only the statutory payment.

[15] Money Mart took the position that since he was not an employee at the required payout date—September 17, 2010—he was ineligible for KMB payment for that year. The 2009/2010 bonuses amounted to 59.4% of an employee's base salary.

THE PLAINTIFF'S CLAIMS

[16] The plaintiff seeks damages for his termination of employment with Money Mart. He claims:

(a) the amount representing his 2009/10 bonus accrued to his date of termination in the amount of $86, 239.56;

(b) the amount representing his bonus accrued over his 8 week contractual notice period; and,

(c) the salary he would have earned over the 8 week contractual notice period.

[17] The plaintiff argues that the Limitation Clause relied upon by the defendant is unenforceable because it:

(a) is contrary to public policy;

(b) has been inconsistently applied; and/or,

(c) is ambiguous, contradictory and illegal.

I - IS THE AGREEMENT CONTRARY TO PUBLIC POLICY?

[18] In answering this issue, two questions require determination. Firstly, was the KMB part of the overall compensation that the plaintiff was entitled to? Secondly, did the Limitation Clause apply to restrict the Plaintiff's entitlement to the bonus? Thirdly, if so, is the effect contrary to public policy?

(i) Was the KMB Part of the Plaintiff's Total Compensation?

[19] In both *Schumacher v. Toronto Dominion Bank* (1997), 147 D.L.R. (4th) 128, [1997] O.J. No. 2004 (Ont. Ct. J. [Gen. Div.]) and *Prins v. Lakeview Development of Canada* (1990), 22 A.C.W.S. (3d) 936, [1990] O.J. No. 1647 (Ont. S.C. [H.C.]), the courts decided that a key factor in awarding a dismissed employee his bonus was the fact that the bonus constituted "an integral part of the plaintiff's financial package". Mr. Hopkins, for the plaintiff, argues that his client's

position matches that of the plaintiff in *Schumacher*, wherein the defendant company also sought to rely upon a contractual clause that limited bonuses only to those employed at the company at the time of payment.

[20] In the instant case, the plaintiff's testimony with respect to the negotiations leading up to agreement of employment leaves no doubt that the bonus program was represented as part of the overall compensation package. This is particularly true given that the program was presented as a panacea to the plaintiff's dissatisfaction with the base salary being offered. Hibberd never testified at trial and Mr. Hopkins asks me to draw an adverse inference against the defendant in light of their failure to call him. I choose not to go that far, but choose instead, to accept the uncontradicted evidence of the plaintiff. Accordingly, I find that in their verbal communications, Money Mart, through Hibberd, held out the bonus plan as an important and integral part of the plaintiff's overall compensation package in an effort to ensure his services.

[21] Ms. Crawford, for the defendant, counters with the proposition that even if representations were made in the manner testified to by the plaintiff, they could not constitute contractual terms due to the Entire Agreement Clause contained in the offer of employment that bound the parties exclusively by the terms contained within the written agreement. Thus, regardless of any findings with respect to the telephone conversation between the plaintiff and Hibberd, this court cannot consider any of the discussions prior to the creation of the written employment agreement.

[22] There is a line of authorities governing the applicability of entire agreement clauses and in what circumstances they may be unenforceable. In *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, 266 D.L.R. (4th) 577 (C.A.), the Court of Appeal for Ontario held that entire agreement clauses should be construed in the same manner as exclusionary clauses. This approach is sensible as both types of clauses seek to limit the liability of one of the parties to the agreement. The exclusionary clause excludes liability for damages for breach of contract, whilst the entire agreement clause excludes liability to for representations made outside the written contract.

[23] In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, the Supreme Court of Canada founded a new approach upon which exclusionary clauses should be analyzed. The Court adopted a three pronged approach:

> (1) Did the parties intend for the exclusion clause to apply to the circumstances of the particular case? This question depends on the court's interpretation of the intention of the parties as expressed in the contract.
>
> (2) If the clause applies, was it unconscionable?
>
> (3) If the clause applied and was not unconscionable, was it contrary to overriding public policy?

[24] Does this new approach to exclusionary clauses also apply to entire agreement clauses, as per *Shelanu*? The Divisional Court, in *7326246 Canada Inc. v. Ajilon Consulting*, 2014 ONSC

28, [2014] O.J. No 538 (Div. Ct.) held that it did, and applied the *Tercon* principles to the entire agreement clause in that case. I agree that this is a necessary corollary to *Tercon*. I find that the Entire Agreement Clause is unenforceable on the basis of all three prongs as a result of Hibberd's representations.

[25] With respect to the intention of the parties, I cannot accept the proposition that both parties intended the discussions held prior to the written agreement to be ignored as a result of the Entire Agreement Clause. The plaintiff's central concern, communicated in the clearest of fashion, was the amount of remuneration that he was to receive if he accepted Money Mart's job offer. Hibberd's response was equally clear: the KMB would make up the shortfall between the base salary and the plaintiff's target. Even though there were no guarantees of how much extra the plaintiff would earn, it was, if the company financial criteria were met, automatically paid out. These assurances were not made to be ignored.

[26] However, if I am wrong and the clause did indeed exclude the verbal enticement made by Hibberd, I also find it to be unconscionable given the circumstances under which the agreement was negotiated. In *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461 at para. 82, the Supreme Court of Canada described "unconscionability" as follows:

> Under the doctrine of unconscionability, a limitation of liability clause will be unenforceable where one party to the contract has abused its negotiating power to take undue advantage of the other. This doctrine is generally applied in the context of a consumer contract or contract of adhesion.

[27] In this case, the plaintiff was given a straight "take it or leave it" position with a deadline of three days (including the weekend) to accept a job offer that he had negotiated on more than one occasion. Hibberd, in his November 21, 2008 letter, indicated that the revised terms "reflects the discussions we had over the past week and it certainly reflects a considerable number of concessions and additional benefits that we are pleased to offer you." By making this statement, Hibberd was expressly referencing the terms discussed with the plaintiff. The letter contained no express warning that the KMB was not an integral part of the plaintiff's compensation. The contract itself, save for the phrase "the award is discretionary", painted the picture of an automatic bonus following the achievement of specified company financial objectives. Indeed, the description of the KMB as contained in Schedule A of the agreement speaks to financial criteria for payout and emphasizes in bold the maximum potential "if all maximum Base and Stretch Bonus EBITDA levels are attained: 60%". The Entire Agreement Clause took on much greater significance given Hibberd's representations and the plaintiff's well known desire to reap the benefit of the KMB. Like the court in the *Ajilon Consulting* case, I find the defendant abused its stronger informational position in the circumstances to entice the plaintiff into consenting to an improvident clause.

[28] Finally, I conclude that the Entire Agreement Clause is unenforceable on public policy grounds in the sense that it would exclude the prior discussions between the plaintiff and Hibberd. It ill serves the public interest to permit companies and their recruitment agencies to orally promise automatic financial benefits and bonuses in order to secure prospective employment candidates and then eliminate those benefits without a clear and timely warning.

[29] I conclude therefore that the KMB payment was an integral part of the plaintiff's compensation package.

(ii) Did the Limitation Clause Apply to Restrict the Plaintiff's Right to the Bonus?

[30] Even though I agree with the plaintiff's position that the KMB was an integral part of his compensation package, I disagree with the notion that this point alone resolves the case in his favour. In making this argument, the plaintiff relies heavily on the case of *Schumacher*. He also cites a number of other decisions that, he argues, give rise to the following principle: once a bonus plan is found to be an integral part of a claimant's compensation plan, any limitation clause is contrary to public policy. For instance, the plaintiff notes that in *Prins* at p. 6 (O.J.) the court observed that "[i]t would be completely unfair to allow an employer to avoid paying a performance bonus that was part of the employment contract by terminating an employee."

[31] In *Schumacher*, the plaintiff, a senior vice president of a bank, discovered that his employer hired another financial manager to oversee operations that until that point had been solely his responsibility. The new hire affected the plaintiff's job description and his financial compensation by reducing his annual bonus. There had been no discussion of the new hire with the plaintiff because the bank feared that the plaintiff might leave if he knew. The plaintiff felt compelled to resign and brought an action for wrongful dismissal. Kiteley J. agreed that he had been constructively dismissed without cause. In assessing damages, Kiteley J. examined the bonus payment program that operated during the plaintiff's tenure at the company. As in the instant case, the plaintiff's employment agreement stipulated that, in order to receive the bonus payment, an employee would have to be actively employed by the company on the date of payment. Kiteley J. concluded that the bonus payment, was an integral part of the plaintiff's compensation. She also held that the company, in dismissing the plaintiff without cause, should have provided reasonable notice, and calculated that period as being 13 months which would, had reasonable notice been given, made the plaintiff an employee at the time of payment. At para. 223 of her reasons, Kiteley J. made the following observation, which the plaintiff relies upon to establish his cause of action in this case:

> [The plaintiff's] involuntary inability to comply with the condition of the PCP ought not to be justification for the Bank in declining the award of the bonus as part of Schumacher's damages. If that were the case, an employer would achieve a significant advantage by wrongfully terminating an employee because the severance package would not have to include any bonus. Where the bonus was promoted as an integral part of the employee's cash compensation, it would be inappropriate and unfair to the employee to be deprived of the bonus by reason of the unilateral action of the employer. I do not agree with the position taken by the Bank on this third issue. Schumacher remains entitled to consideration of a bonus, both for the period he worked and the notice period.

[32] The plaintiff urges this court to follow the same principle and to find that if the KMB formed an integral part of the plaintiff's total compensation, he is entitled to a pro-rated award for the period up until his dismissal and the duration of the notice period. In doing so, Kiteley J.'s concern that "it would be inappropriate and unfair to the employee to be deprived of the

bonus by reason of the unilateral action of the employer" is avoided. Mr. Hopkins very effectively argues the public policy value of this type of interpretation.

[33] This argument, at first blush, appears very attractive. In both *Schumacher* and the instant case, the plaintiffs were dismissed without cause. The bonus payment was contractually contingent upon the plaintiff being an active employee on the payment date itself. In both cases, it could be argued that the employer was seeking an advantage by using the without cause termination date to deprive the plaintiff of financial remuneration. However, there are a number of significant distinguishing features between *Schumacher* and the other cases relied upon by the plaintiff that distinguish them from the current case.

[34] The most significant distinguishing factor, in my view, is the existence of the Limitation Clause and its language. Although the clause had the same effect as that in *Schumacher*, namely the requirement that the plaintiff had to be employed at the time that the bonus was payable, the qualifications on the payout outlined in the same clause appear to be far more restrictive, particularly in the use of examples given. I agree with Ms. Crawford that the language used in the plaintiff's contract is not found in the cases cited.

[35] In *Kieran v. Ingram Micro Inc.* (2004), 189 O.A.C. 58, [2004] O.J. No. 3118 (C.A.), leave to appeal dismissed, [2004] S.C.C.A. No. 423, the Court of Appeal for Ontario distinguished *Schumacher* on this basis. Lang J.A., for a unanimous court wrote, at paras. 56-58:

> Under Ontario law, Mr. Kieran would be entitled to damages for the loss of the Plans, as they formed part of his compensation, absent contractual terms to the contrary. In the presence of contrary contractual terms, those terms govern: see Gryba v. Moneta Porcupine Mines Ltd., [2000] O.J. No. 4775 (C.A.) at para. 49; Brock v. Matthews Group Ltd. (1991), 43 O.A.C. 369.
>
> Mr. Kieran argues that the Plan provisions should be interpreted to find that they do not address a situation of dismissal without cause, and should be construed strictly against the employer who controlled their drafting. Interpreted in that context, the Plans, it is said, would be found to include as "employment", the period of notice given a wrongfully dismissed employee. That argument, applied to this case, would mean that Mr. Kieran would be considered an employee during the nine months of notice after his termination and entitled, during that period, to exercise his options.
>
> There is, however, no ambiguity in the Plans at issue. This is not a plan such as the one examined by Kiteley J. in Schumacher v. Toronto-Dominion Bank (1997), 29 C.C.E.L. (2d) 96 (Ont. Gen. Div.). In that case, the "Phantom Options" contained contractual terms that negatived the participant's right to his options when he "ceases to be an employee". A person ceases to be an employee, in the case of a wrongful dismissal, after the period of reasonable notice: see paras. 237-240. While a plan that addresses only "cessation of employment" may create an ambiguity, the plans at issue in this case do not. The focus of the inquiry is on the

> wording of the particular plan: Brock v. Matthews, supra, at para. 22. [Emphasis added].

[36] Moreover, Kiteley J.'s calculation of the notice period in *Schumacher* was based on common law principles of reasonable notice; a procedure necessitated by the absence of a defined contractual notice period. Her conclusion that a period of 13 months was the appropriate notice period led to the result that Mr. Schumacher would still be considered an active employee within that period. That situation is very different in the case at hand due to the contractual notice period personally negotiated by the plaintiff, which mandated the defendant to provide eight weeks notice on termination, subject to further qualifications. Since the plaintiff was dismissed in April 2010, even with the eight week notice period taking him to June 2010, he would fall outside the qualification period required for the bonus payment.

(iii) Is the Limitation Clause Contrary to Public Policy?

[37] The most significant distinguishing factor is the action of the plaintiff himself. The Limitation Clause was no secret to the parties. Indeed, the plaintiff testified as to his concerns when he first received the revised offer. Yet, despite his reservations, the plaintiff chose to accept the revised employment agreement. He testified that he had "no choice" but to accept the agreement. I found this part of his testimony unconvincing. The plaintiff had already re-negotiated several terms in the original offer, including an additional weeks' vacation and a $5000.00 signing bonus. In addition, he had persuaded the defendant to remove the probationary clause existing in the first agreement and substantially increased the notice period in the event of termination. Given the time that elapsed between the date of the offer and his actual signing of the agreement, I find that he had sufficient time to obtain independent legal advice on the matter. The plaintiff had a number of "choices" open to him. He could have sought further re-negotiation of the Limitation Clause, asked it be removed or, ultimately declined the revised offer. He chose none of these options and accepted the defendant's offer. He was lured, no doubt, by the handsome compensation—potentially his base salary plus 60%—that he readily believed would be forthcoming. His choice was to live with the less favourable clauses in his contract and the risks that they entailed.

[38] It may well have been that some of the provisions, particularly the "full and final release" clause in the termination provision, could be viewed as harsh. However, harshness of the provision does not make it invalid if both parties have agreed to it: *Jivraj v. Strategic Maintenance Ltd.*, 2014 ABQB 463, 244 A.C.W.S. (3d) 861.

[39] Public policy would be ill served by permitting the plaintiff to accept a potentially lucrative position with the full knowledge that it contained a potentially unfavourable limitation clause and then to complain when that clause was actually executed.

[40] For the above reasons, I find that the agreement was not contrary to public policy.

II - IS THE AGREEMENT UNENFORCEABLE BECAUSE IT HAS BEEN APPLIED INCONSISTENTLY?

(i) Is the Plaintiff Estopped from Leading Evidence Regarding Diana Brough?

[41] As a preliminary point with respect to this aspect of the case, Ms. Crawford brought an application seeking the exclusion of evidence to be led by the plaintiff purporting to demonstrate Money Mart's more favourable treatment of another employee, Ms. Diana Brough. Ms. Crawford alleged that the plaintiff was estopped from tendering this evidence as a result of a ruling by Master Short dated December 1, 2014, where he dismissed the plaintiff's application to "Seek Answers on Two Refusals on Discovery".

[42] The questions asked at discovery were:

(1) to inquire whether other Canadian executives who were terminated prior to September 17, 2010 still received a Bonus payment ; and,

(2) with respect to the other Canadian executives who were terminated pro to September 17, 2010 get received a Bonus payment, advise:

i) the names of those who received the Bonus;

ii) on what dates they left the company during fiscal 2009-10; and,

iii) the Bonus amount received.

[43] According to Ms. Crawford, the Master's finding that he was "not satisfied that he either refused question is relevant in its present form to the plaintiff's entitlement, if any in this case" acted as a bar to the plaintiff's use of Ms. Brough's evidence. I agreed with Ms. Crawford's descriptions of the principles of res judicata and estoppel (emanating from *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1967] A.C. 853 and approved by the Supreme Court of Canada in *Angle v. Minister of National Revenue,* [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544), which outline the following three conditions to establish issue estoppel:

1. the same question has been decided;

2. the judicial decision which is said to create the estoppel was final; and,

3. the parties to the judicial decision were the same persons or parties to which the estoppel was raised.

[44] I rejected Ms. Crawford's position on how the test should be applied to this case. Whilst it is undisputed that the parties to the decision were the same, Master Short was not deciding the same question, nor was he creating a judicial decision that was final.

[45] The question before Master Short was whether the defendant should provide information to the plaintiff as part of the discovery process. In his view, since "neither refused question" was

relevant, he declined to make the defendant provide an answer to those questions. That is a fundamentally different question than that asked here i.e. whether the plaintiff can tender evidence showing an inconsistency in Money Mart's treatment of employees.

[46] Further, it could hardly be said that Master Short's decision that the refused questions need not be answered due to their lack of relevancy is a final determination of whether the plaintiff could actually lead Ms. Brough's evidence at trial. That decision is firmly reserved to the judge adjudicating at trial (or a different pre-trial motions judge if agreed by the parties). It would be a fundamental shift if a Master asked to resolve questions at a Discovery hearing was able to make future evidentiary rulings binding a future trial judge.

[47] As a result, I dismissed Ms. Crawford's estoppel argument and permitted Mr. Hopkins to lead the evidence of Ms. Brough.

(ii) The Evidence of Deirdre Brough

[48] Deirdre Brough was employed by the defendant from October 2008 to July 2010, initially as Vice President of Marketing and subsequently as Director of Marketing. Her employment overlapped with that of the plaintiff and she participated in the same KMB. Like the plaintiff, she too viewed the KMB as an integral part of her compensation. Her employment was terminated without cause on July 8, 2010 and she was offered severance pay of approximately $14,000.00. No bonus payments were initially offered. However, after Ms. Brough complained, the company offered, on August 9, 2010, what it described as a "gratuitous payment" of $62,000.00. This was roughly the amount that Ms. Brough would have been entitled to under the KMB for the fiscal year of 2010. Ms. Brough took this to be the bonus payment and it is not seriously disputed by the defendant that it was not. It is also not disputed that Ms. Brough's employment agreement would not have extended from July 8, 2010 to the payout date of September 17, 2010.

(iii) Does the Inconsistent Treatment make the Plaintiff's Contract Unenforceable?

[49] The plaintiff submits that he was in no different to Ms. Brough and yet was treated differently, and, therefore, unfairly. I reject that argument for the following reasons.

[50] Firstly, the language in Ms. Brough's offer of employment is markedly different to that of the plaintiff's. The plaintiff's Limitation Clause is far broader than Ms. Brough's as evidenced by the absence, in Ms. Brough's employment agreement, of the "for example" passage, cited above. Secondly, Ms. Brough's employment agreement, Exhibit 4 in these proceedings, contained a bare outline of the bonus provisions with promises of "Details to follow". The detailed KMB provision, marked as Exhibit 2, in these proceedings and provided to the plaintiff as part of his offer was not given to Ms. Brough at the same time as the offer of employment. She would, therefore, have been unaware of the details when she sought legal advice and signed the contract offered to her. Accordingly, the limitation restricting the plaintiff's bonus entitlement would not have applied to Ms. Brough.

[51] Furthermore, Ms. Brough worked for the entire fiscal year unlike the plaintiff who was two months short of that total. Whilst that fact alone might not have been sufficient, it is, taken

into consideration with the other factors referred to above, a significant enough difference between the plaintiff and Ms. Brough to justify distinguishing between the two. It should also be noted that Ms. Brough did not receive a pro-rated bonus for her contractual notice period.

[52] Finally, the fact that Money Mart treated Ms. Brough differently does not, per se, entitle the plaintiff to a bonus payment when he was otherwise legitimately denied it on the basis of his employment contract. There was nothing to stop Money Mart from being more generous to Ms. Brough, so long as it acted in good faith and without ulterior motive: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 495. Certainly, there is no evidentiary basis to suggest that Money Mart acted in an improper exercise of its discretion.

III – WAS THE AGREEMENT AMBIGUOUS?

[53] The plaintiff argues the Limitation Clause is unenforceable due to its ambiguous and contradictory nature. The portion to which he objects is reproduced as follows:

> Any bonus which may be paid is entirely at the discretion of the Company, does not accrue, and is only earned and payable on the date that it is provided to you by the Company. For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof.

[54] The position advanced is that the clause initially purports to remove the bonus payment if the plaintiff's employment is terminated, even if the payment would otherwise be payable within the plaintiff's statutory notice period. The next sentence, however, purports to contradict that notion by stipulating that any bonus payable *after* the statutory notice period would be deemed to be waived, thereby implying that a bonus payable within the statutory notice period could still be claimed. This, says the plaintiff, flies in the face of authorities requiring clear language of contracts that seek to restrict employment rights: *Taggart v. Canada Life Assurance Co.* (2006), 146 A.C.W.S. (3d) 674, [2006] O.J. No. 310 (C.A.).

[55] In addition, relying on the doctrine of *contra proferentem*—where an ambiguity in a contract is resolved against the party that inserted it and is relying upon it—the plaintiff submits that the Limitation Clause becomes illegal as it contravenes s. 60 of the *Employment Standards Act*, 2000, S.O. 2000, c. 41 ("ESA") which reads:

> (1) during a notice period under section 57 or 58, the employer,
>
> (a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

[56] If the ambiguity is resolved in the plaintiff's favour, he argues that the clause would prevent him from receiving a bonus during his statutory notice period and therefore run afoul of the ESA.

[57] Regrettably for the plaintiff, I find the clause to be unambiguous in its restrictive nature. The clause is to be read in its entirety and, in my view, makes clear that if the plaintiff's notice period fell within the bonus payment period, it would be honoured. Any doubts about the ambiguity argument are resolved by the plaintiff himself; he clearly understood what it meant. He testified to his surprise and dismay at the language in the clause and the manner in which it favoured Money Mart. According to him, the clause was harsh and contained "bully language."

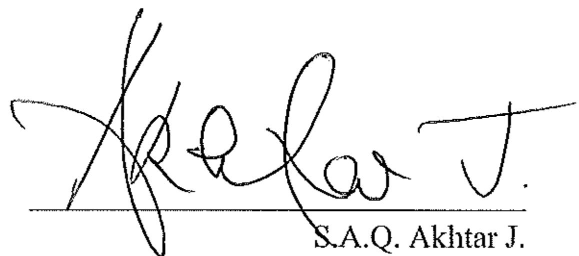
[58] Even though I have already found the clause to be unambiguous, I pause to note that application of the *contra proferentem* doctrine would not assist the plaintiff in this case. Application of that doctrine would lead to an interpretation whereby Money Mart would be precluded from relying on the unfavourable aspect of the ambiguity: disentitlement to the bonus during the statutory notice period. The plaintiff's argument on this point seems to take the doctrine into reverse by only allowing the interpretation unfavourable to the plaintiff.

[59] For these reasons, I find the Limitation Clause to be unambiguous and enforceable by Money Mart.

CONCLUSION AND COSTS

[60] I find the contract to be enforceable both in respect to the bonus payment and the issue of termination payments. Whilst one may find the termination payment to be somewhat draconian in its application, particularly in requiring a full and final release for an additional period of payment, it was part of an agreement entered into with full knowledge by the plaintiff. He is bound by its terms. The plaintiff's claim is therefore dismissed.

[61] I invite both parties to make submissions as to costs. Each submission must be no longer than 5 pages in length. The defendant shall file its submissions within 30 days of this judgment with the plaintiff to file his submissions within 30 days thereafter.



S.A.Q. Akhtar J.

Released: JUN 12 2015

CITATION: Kielb v. National Money Mart Company, 2015 ONSC 3790
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DATE: 20150612

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JONATHAN KIELB

Plaintiff

– and –

NATIONAL MONEY MART COMPANY

Defendant

REASONS FOR JUDGMENT

S.A.Q. Akhtar J.