COURT OF APPEAL FOR ONTARIO

CITATION: Kielb v. National Money Mart Company, 2017 ONCA 356
DATE: 20170505
DOCKET: C60707

Rouleau, Pepall and Roberts JJ.A.

BETWEEN

Jonathan Kielb

Appellant (Plaintiff)

and

National Money Mart Company

Respondent (Defendant)

Danny Kastner and Gregory Ko, for the appellant

Susan Crawford and Angela Wiggins, for the respondent

Heard: March 22, 2017

On appeal from the judgment of Justice S.A.Q. Akhtar of the Superior Court of Justice, dated June 12, 2015.

ENDORSEMENT

[1] In 2008, the appellant lawyer entered into an employment contract with the respondent. A non-discretionary bonus was found by the trial judge to be an integral component of the appellant's compensation.

[2] The parties' employment contract contained a bonus plan clause (the "limitation clause") that provided that the bonus did not accrue and was only earned and payable on the pay-out date. It went on to state:

> 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.

[3] The contract also included a termination clause which provided that the company was entitled to terminate the appellant's employment 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 entitlements arising from

> such termination, whether under statute, contract or common law, including entitlement to reasonable notice.

[4] The respondent's fiscal year runs from July 1 to June 30 and the bonus pay-out date for 2010 was September 17, 2010.

[5] The respondent terminated the appellant without cause on April 21, 2010 and paid him two weeks' notice in satisfaction of the appellant's statutory entitlement under the *Employment Standards Act*, 2000, S.O. 2000, c. 41 (the "ESA"). In the absence of a signed release, the respondent refused to pay the appellant the additional six weeks' base salary referenced in subparagraph (ii) of the contract.

[6] The appellant, in an amended amended statement of claim, sued the respondent for the following damages:

> (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 statutory and contractual notice period; and,
>
> (c) the salary he would have earned over his statutory and contractual notice period.

[7] The appellant did not plead a claim for any common law damages in the alternative or at all.

[8] At trial, the appellant argued that the limitation clause was unenforceable due to its ambiguous and contradictory nature and because it also contravened the ESA.

[9] The trial judge rejected these arguments. He construed the employment contract and found the limitation clause to be unambiguous. The clause was to be read in its entirety and, as such, it was clear that if the bonus pay-out date fell within the appellant's notice period, the respondent would honour its requirements. Moreover, even if the appellant had opted for the negotiated eight-week notice period, the notice period would have ended on June 16, 2010, before the bonus pay-out date, and the appellant would not have earned or have been eligible to receive the bonus payment.

[10] Applying the principles in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and recognizing that the trial judge had the opportunity to consider the full factual matrix, we see no reason to interfere with the trial judge's interpretation.

[11] The parties did not purport to contract out of or otherwise waive the appellant's statutory entitlements, which would have been void pursuant to s. 5(1) of the ESA. Rather, in clear and unambiguous language, the parties agreed that the appellant would be paid his entitlements under the ESA. The contract was also clear and unambiguous that the appellant's statutory entitlements included those bonus payments that would have been earned and paid out within the appellant's statutory notice period under the ESA.

[12] It was open to the parties to agree how and when any bonus was declared, earned, accrued and would be payable. We see no basis to interfere with the trial judge's finding that no bonus entitlement had accrued by or on the date of termination, nor did it accrue during the notice period under the terms of the contract or the provisions of the ESA.

[13] We would therefore not give effect to this ground of appeal.

[14] It was also open to the trial judge to dismiss the appellant's arguments based on unconscionability and public policy. As the trial judge found at para. 39 of his reasons, "[p]ublic 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". The provisions relating to the bonus were freely negotiated by the appellant. In any event, the appellant failed to meet the four-part test for unconscionability set out in *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, [2007] O.J. No. 3148.

[15] The appellant's remaining ground of appeal may be addressed succinctly. The appellant submits that the trial judge erred in finding the termination clause enforceable. As a result, he argues, he is entitled to his common law notice period, which he calculates as six months. This issue was neither pleaded nor argued at trial. Indeed, at trial, the appellant sought to enforce his contractual entitlement to

notice on termination in the amount of eight weeks. The evidentiary record is lacking and it would be prejudicial to the respondent to permit the appellant to advance this argument at this late stage: *Kaiman v. Graham*, 2009 ONCA 77, [2009] O.J. No. 324, at para. 18.

[16] We would not give effect to this ground of appeal and it is therefore unnecessary to address common law reasonable notice.

[17] Lastly, the respondent advised that it has withdrawn its cross-appeal.

[18] The appeal is dismissed. The appellant is to pay the respondent $15,000 in costs on a partial indemnity scale inclusive of disbursements and applicable tax. This sum represents the respondent's costs of the appeal less a reduction on account of the abandonment of its cross-appeal.