COURT OF APPEAL FOR ONTARIO AFFIRMS STRONG LIMITATION ON EMPLOYEE'S POST-TERMINATION BONUS ENTITLEMENT

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The Court of Appeal for Ontario has affirmed an Ontario Superior Court trial decision which upheld an employee bonus limitation provision despite describing the limitation as "somewhat draconian." The decision in *Kielb v. National Money Mart Company* ("*Kielb*") (2017 ONCA 356) is helpful to employers in that it confirms that *Ontario Employment Standards Act, 2000* ("**ESA**")-compliant limitations on an employee's termination entitlements are valid if unambiguous and freely negotiated by the parties to the employment agreement.

What Happened in Kielb?

In *Kielb*, a former in-house lawyer for the defendant company alleged that a non-discretionary bonus limitation clause was invalid. Kielb claimed the clause was ambiguous and thus unenforceable. He also challenged the wording on the grounds that it was unconscionable because of the severe limitation which it placed on his post-termination entitlement.

The clause in question provided that a participant's bonus did not accrue after the termination date and was only earned and payable on a set payout date. The clause stated:

> "... 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." [emphasis added]

Kielb was terminated without cause on April 21, 2010. However, the company's payout date for all bonuses was in September. The latest possible notice period date, in accordance with Kielb's employment contract, was in June 2010. Therefore, relying on the language of the limitation clause, the employer took the position that the termination package did not include any bonus entitlement.

The Court of Appeal agreed with the trial judge's interpretation of the limitation clause and found that Kielb

was not entitled to bonus pay upon termination since the payout date fell after any contractual or statutory notice period. The Court emphasized that it was open to the parties to agree how and when any bonus was declared, earned, accrued and would be payable. Based on how the limitation clause was worded, nothing had accrued nor was anything payable as of the termination date.

Further, the argument that the bonus clause was unconscionable was rejected by both the trial judge and Court of Appeal. Both Akhtar J. and the Court of Appeal emphasized that the limitation clause, albeit strict, was bargained for. The Court held as follows:

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

Takeaways for Employers

Kielb demonstrates that even a highly onerous contractual limitation on an employee's bonus entitlement may be upheld if the provision is unambiguous and evidence shows that the employee was aware of it when executing their employment contract.

It is noteworthy that both the trial judge and Court of Appeal emphasized the fact that Keilb negotiated his employment contract and was in a well-paid position. This emphasis indicates that the courts may have viewed matters differently in the case of an employee with less bargaining power or knowledge. Nevertheless, *Kielb* is a helpful reminder of the potential effectiveness of well-drafted contractual limitations.

By Kyle Lambert and George Waggott

A Cautionary Note