

CONSTRUCTIVELY DISMISSED EMPLOYEE ENTITLED TO BONUS PAYMENT DURING NOTICE PERIOD

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The Supreme Court of Canada recently released its decision in [Matthews v Ocean Nutrition Canada Limited](#), 2020 SCC 26, awarding a constructively dismissed employee with \$1.1 million dollars in damages for his employer's failure to provide him with 15 months of reasonable notice upon termination, and a bonus payment that realized during his reasonable notice period.

The Facts

David Matthews ("**Matthews**") was employed by Ocean Nutrition Canada Limited ("**Ocean**") from 1997 to 2011. Matthews took part in Ocean's Long-Term Incentive Plan ("**LTIP**"), which entitled employees to a payout in the event of a sale of Ocean (the "**Realization Event**"), so long as the employee remained employed by Ocean at the time of the Realization Event. The relevant exclusion clauses of the LTIP are as follows:

2.03 CONDITIONS PRECEDENT

ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the Employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.

2.05 GENERAL

The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of a Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.

[emphasis added]

In 2007, Ocean hired a new Chief Operating Officer ("**COO**") who initiated a "campaign to marginalize" Matthews. As a result of this, Matthews' job title was changed numerous times, his responsibilities were significantly reduced, and he was left in the dark about his status with Ocean. These events led Matthews to file his resignation with Ocean in 2011.

Thirteen months after Matthews' resignation, Ocean was sold. After learning of the sale, Matthews took the position that he was entitled to payment under the LTIP as this sale constituted a Realization Event. Ocean did not agree with Matthews and suggested that, because Matthews was no longer employed by Ocean, he was ineligible for the payment.

Matthews brought an action against Ocean alleging constructive dismissal and sought damages for failure to receive reasonable notice and the loss of the LTIP payment.



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The trial judge took the position that the events from 2007 onwards did in fact amount to a constructive dismissal and set Matthews' reasonable notice period at 15 months. The trial judge held that the LTIP payment was realized during the 15 months' reasonable notice period, and as a result, awarded Matthews with \$1.1 million in damages on account of payment under the LTIP.

Ocean appealed the decision of the trial judge to the Nova Scotia Court of Appeal, where the trial judge's finding of constructive dismissal was upheld; however, the Court of Appeal overturned the \$1.1 million dollar damages award on the basis that the exclusion clauses in the LTIP eliminated the right to any payout in the event the employee seized to be employed by Ocean.

The Supreme Court of Canada

Matthews appealed the decision to the Supreme Court of Canada, who unanimously set aside the Nova Scotia Court of Appeal's decision, and restored both the trial judgment and the \$1.1 million dollar damages award.

The Court confirmed that if an employer breaches their implied common law duty to provide employees with reasonable notice upon termination, then the employee is entitled to damages for breach of this implied term. The court also confirmed that these damages will include all of the salary including bonuses that an employee would have realized, had the employee continued to work throughout the reasonable notice period.

The Court followed the two-step approach laid out in [Paquette v TeraGo Networks Inc.](#), 2016 ONCA 618 to assist with determining whether the damages for breach of the implied term of reasonable notice includes bonus payments or other benefits:

1. Would the employee have been entitled to the bonus or benefit as party of their compensation during the reasonable notice period; and
2. If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

In answering the first question, the court found that the LTIP payment vested during what would have been Matthews' reasonable notice period of 15 months, thereby entitling Matthews to the LTIP payment. In answering the second question, the Court found that the exclusionary clauses of the LTIP were too ambiguous to extinguish Matthews' common law right to damages upon termination.

The Court held that language that requires an employee to be "full-time" or "active" in order to receive bonus or incentive payments is insufficient to limit an employee's right to common law damages that would have realized or been triggered during the notice period. Language that aims to remove an employee's common law right to damages upon termination "with or without cause" is also insufficient to remove an employee's right to common law damages when an employee has been terminated without notice, as a termination without reasonable notice does not equate to a "without cause" termination, but is rather an "unlawful" termination.

The Takeaway For Employers

The Court sets a very high bar for employers who are seeking to limit an employee's common law entitlements to bonus or incentive payments that may be owed during a reasonable notice period. Employers can expect the courts to closely scrutinize any language contained in their employment contracts and incentive plans that attempt to unambiguously limit an employee's common law entitlements. If there are exclusion clauses, employers must be sure to outline the exact circumstances that the exclusion would apply to, and must be

sufficiently clear and unambiguous when trying to limit or remove an employee's common law right to a bonus or other incentive payment during any common law reasonable notice period.

If you have any questions, contact a member of Fogler, Rubinoff LLP's employment group.

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