

# Are Employees Entitled to Incentive Payments During the Notice Period?

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The Supreme Court of Canada's recent unanimous decision in the case of *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, reinstated damages in the amount of \$1.1 million to an employee who had alleged constructive dismissal against his employer. More importantly, it provided guidance with respect to employee entitlement to incentive payments during the period of notice at common law. In short, the Supreme Court found that the employee was entitled to compensation under a Long-Term Incentive Plan ("LTIP") despite the fact that the terms of the LTIP explicitly provided that no such payments were owing following termination.

The facts were as follows: David Matthews had been employed by Ocean Nutrition Canada Ltd. ("Ocean") for 15 years. At the time of his resignation, Matthews was the Vice-President, New and Emerging Technologies. Matthews alleged constructive dismissal and he claimed damages for reasonable notice. Various levels of the courts agreed that he had in fact been constructively dismissed. Notice was set at 15 months.

Matthews also claimed that he had been deprived of a right under the LTIP, which provided that there would be a payment of \$1 million on a sale of the business. This triggering event occurred after his resignation (due to constructive dismissal) and during the common law notice period. The LTIP had been paid out to all other applicable employees.

The Company alleged that Matthews was not entitled to the LTIP and relied on the fact that under the plan, an employee had to be employed when a triggering event (or as the case states a "Realization Event") took place, and specifically stated:

*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.*

*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.*

At trial, the court found that Matthews was entitled to the \$1.1 million LTIP payment. Ocean appealed to the Nova Scotia Court of Appeal, who overturned the trial decision on the issue of LTIP entitlement on the basis that the language was clear and eliminated any entitlement to the payment following the end of Matthews' employment. Matthews then appealed to the Supreme Court of Canada.

Five organizations intervened at the Supreme Court, both on the issue of LTIP entitlement and the allegation that the constructive dismissal constituted a breach of Ocean's duty of good faith at law. And while the Supreme Court ultimately declined to make specific findings with respect to the duty of good faith, it set out the test for determining incentive eligibility during a common law notice period in the following way:

1. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period?

2. In that event, do the terms of the employment contract or bonus plan unambiguously remove or limit that common law right?

The Supreme Court found that had Matthews been given working notice of his termination during the reasonable notice period, he would have been entitled to the LTIP. The Court also found that language limiting or removing an employee's common law rights must be "*absolutely clear and unambiguous*". In other words, language requiring an employee to be active or full-time will not automatically remove an employee's right to common law damages because, if the employee had been provided with reasonable notice, they would in fact be full-time or active employees. Accordingly, the language of the LTIP did not unambiguously take away Matthews' right to receive the LTIP.

The applicability of the concept of a more fulsome duty of good faith in employment contracts may yet still be an issue to be determined. However, what is clear from this decision is that contractual language seeking to limit or curtail entitlement to a bonus or incentive plan during a period of reasonable notice will be met with extreme scrutiny by the courts. Employment terms and conditions which limit an employee's entitlements need to be drafted with precision. Employers should carefully review employment agreements and incentive plans to ensure the language is clear, precise and addresses entitlement during any period of notice at common law. "Plain language" is no longer necessarily persuasive.

In one piece of positive news for employers, the employer in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, has sought leave to appeal. (see our newsletter here). In the interim, we encourage all employers to update the termination provisions of their employment agreements in light of the Waksdale decision.

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