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## **Constructively Dismissed Employee Entitled to Bonus Despite Plan Language?**

By: [Landon Young](#)

There have been a number of cases in recent years considering whether dismissed employees are entitled to awards of bonuses as part of damages for wrongful dismissal. Almost all of them, at least in Ontario, have gone against the employer.

The Supreme Court of Canada has now considered the issue in its recent decision, *Matthews v. Ocean Nutrition Canada Limited* 2020 SCC 26. The Court awarded a dismissed employee bonus he would have earned had he not been dismissed despite language in the bonus plan that appeared to require that the be an employee at the time the bonus was payable in order to receive it.

In the *Matthews* case, the Nova Scotia Court of Appeal had ruled in the employer's favour and decided that the employee was not entitled to the bonus. The Supreme Court reversed the decision of the Court of Appeal and reinstated the original trial judge's decision that awarded the notice.

### ***Legal Backgrounder***

For many employers, the idea that a dismissed employee may be entitled to bonus based on a period of time following termination is a shocker. Most employers use such bonuses as a method of retention and to motivate strong performance. Of course, there is no upside for an employer to pay the employee a bonus if the employee is no longer employed.

The legal basis for such an entitlement is rooted in the common law (which is judge made law as opposed to legislation). Under the common law an employee is entitled to reasonable notice of termination unless the employee and employer have an enforceable agreement that some other entitlement will apply instead. What is an enforceable agreement has itself been the source of a great deal of litigation and is beyond the scope of this Update.

The general principle under the common law is that where an employee is terminated without reasonable notice, the employee will be entitled to the total compensation he or she could have expected to receive during the applicable period of notice. The goal of the common law is to put the employee in the same position he or she would have been had the employer given the employee actual working notice of termination (which, of course, rarely happens).

This means that where an employee has a bonus or incentive as part of his or her compensation, the employee will generally be entitled to whatever bonus he or she would have earned during the notice period provided it is an integral part of the employee's compensation and not purely discretionary.

The legal complication arises where the bonus plan contains language the purports to take away any entitlement to bonus following termination of employment. Some bonus or incentive plans have language that states an employee must be “active” or still employed in order to receive the bonus. This reflects the employer’s interest in only paying bonus where the employment relationship is continuing.

***The Facts of the Case***

Mr. Matthews was employed by Ocean Nutrition Canada Limited as a senior executive. As part of his compensation he participated in a long-term incentive plan (“LTIP”). The LTIP provided for payments to the employees covered by the plan if the Company were sold.

Mr. Matthews resigned from his employment and claimed that he was constructively dismissed. The trial judge found that he had been constructively dismissed as a result of dishonest behaviour by the individual Mr. Matthews reported to. The trial judge awarded him 15 months’ pay in lieu of notice under the common law. The Company was sold during this 15 month notice period. This meant that had Mr. Matthews received 15 months of working notice of termination he would have received the bonus payment. As a result, the trial judge included the bonus payment as part of the award of damages for pay in lieu of notice.

The finding of constructive dismissal was not disputed by the Company by the time the case was decided by the Supreme Court. However, the Company’s position was that Mr. Matthew’s was not entitled to an award of bonus because of the terms of the LTIP.

The LTIP contained language stating that the agreement would be of no force and effective “if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.” The LTIP also stated that the bonus provided for in the plan should not be included as part of the employee’s compensation “for any purpose, including in connection with the Employee’s resignation or in any severance calculation.”

***The Court’s Decision on Bonus***

The Supreme Court described the applicable questions for determining if a dismissed employee will be entitled to bonus for the period following the dismissal as follows:

- a) Would the employee have been entitled to bonus during the common law notice period?
- b) If so, do the terms of the employment contract or bonus plan unambiguously take away or limit the common law right?

The Court found that Mr. Matthews would have received the bonus under the LTIP during the applicable 15 month common law notice period following his dismissal but for the termination of his employment.

The question then was whether the terms of the LTIP took away Mr. Matthews' right to the bonus payment. The Court stated that the provisions of the agreement "must be clear and unambiguous" to take away the bonus.

The Court, citing previous cases decided by the Ontario Court of Appeal, stated that "active employment" type language in bonus plans will not be sufficient to take away employee entitlements to whatever bonus would have been earned during the applicable common law notice period. This type of language will typically say that an employee must be employed or not have been terminated at the time the bonus is due and owing in order to receive the bonus. The Court explained the reason as being that the employment contract is not treated as "terminated" under the common law until after the period of reasonable notice expires.

The Court found that the rest of the language was not sufficiently clear and unambiguous to take away the common law notice entitlement and, as a result, Mr. Matthews was entitled to the bonus.

The Court also noted that it may be appropriate "in certain cases to examine whether the clauses purporting to limit or take away an employee's common law right were adequately brought to the employee's attention." Although the Court then noted that this issue did not arise on these facts and so did not serve to set any precedent, they may signal where the Court believes the law should be going.

### ***The Court's Comments on Good Faith Performance of Employment Contracts***

The Court also commented on the potential existence and scope of a duty on employers to act in good faith in the performance of employment contracts. The issue arose because of allegations that the Company had acted dishonestly and in bad faith toward Mr. Matthews during his employment, which resulted in his constructive dismissal.

However, the Court made clear that the outcome of the case did not turn on the issue of whether the employer acted in bad faith, because it was not disputed that Mr. Matthews was constructively dismissed and his action had not sought additional damages for bad faith conduct. This limits the precedential value of its comments on this point.

The law is settled that employers have a duty to act in good faith when dismissing an employee and can be liable for extra damages to employees beyond pay in lieu of common law notice when an employer acts in bad faith when dismissing an employee. However, the question has arisen as to whether or not this duty of good faith also extends to the performance of employment contracts generally, not just at the point of dismissal.

The Court did not directly answer this question, but noted that in the context of a constructive dismissal it may be appropriate for the courts to extend the duty to circumstances of the constructive dismissal rather than just the dismissal itself. This means that employer bad faith conduct that may occur well before the actual point of constructive dismissal could be considered

by the courts when assessing whether bad faith damages may be appropriate in constructive dismissal cases.

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### *Takeaways for Employers*

The Supreme Court has confirmed that, at least in theory, it is possible for employers to take away employee entitlements to bonus post-dismissal by way of language in an employment contract or bonus plan.

However, the bar for drafting such exclusionary language has been set extraordinarily high, at least in the context of bonus plans. As noted above, the Supreme Court has said this language “must be absolutely clear and unambiguous.” The question arises for employers if it is indeed possible to draft a bonus plan with language that will reach this high bar. We have yet to see a case in Ontario that has cleared this bar.

To have a chance of passing muster if challenged in litigation, the language should unambiguously state that the employee will not have any entitlement to bonus as part of damages for pay in lieu of reasonable notice under the common law. But the reality is most bonus plans are not drafted or reviewed by employment lawyers and so typically do not refer to common law.

Critically, though, the employer’s bonus plan should also not be so broad as to exclude potential entitlements to pay in lieu of notice of termination under employment standards legislation. The employee may be entitled to a bonus or incentive payment under the legislation if it falls within the minimum statutory notice period.

Employers can also lessen the risk of having to pay post-dismissal bonuses by using employment contracts with enforceable termination clauses that contract out of the common law notice entitlements. If the employee is not entitled to reasonable notice of termination under the common law, then there is no basis to award damages for loss of bonus as part of an award of pay in lieu of notice under the common law (and one cannot contract out of bonuses payable in the statutory notice period, regardless).

However, even perfect language in the bonus plan and employment contract may not be sufficient if it has not been brought to the employee’s attention. Based on the comment made by the Supreme Court noted above, employers should be bringing such clauses to the attention of employees or prospective employees when entering into such contracts.

On the issue of the potential scope of the duty to act in good faith, employers will also need to be careful in how they handle making changes to employees’ terms and conditions of employment that could give rise to a constructive dismissal. Many employers have, of course, been required to

make changes to the terms of their employees' employment to deal with the challenges of the pandemic. Given the comments of the Supreme Court, employers should be fair and forthright in how such changes may be implemented or they may face a risk of an additional damages award.

For more information, **please contact:**

[Landon P. Young](mailto:lyoung@stringerllp.com) at [lyoung@stringerllp.com](mailto:lyoung@stringerllp.com) or 416-862-1713

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*UPDATE* is an electronic publication of Stringer LLP  
390 Bay Street, Suite 800, Toronto, Ontario M5H 2Y2  
T: 416-862-1616 Toll Free: 1-866-821-7306  
E: [info@stringerllp.com](mailto:info@stringerllp.com) I: [www.stringerllp.com](http://www.stringerllp.com)

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