



SUPREME COURT OF CANADA

CITATION: Matthews v. Ocean Nutrition Canada
Ltd., 2020 SCC 26

APPEAL HEARD: October 8, 2019
JUDGMENT RENDERED: October 9, 2020
DOCKET: 38252

BETWEEN:

David Matthews
Appellant

and

Ocean Nutrition Canada Limited
Respondent

- and -

**Canadian Association for Non-Organized Employees, Don Valley Community
Legal Services, Law Students' Legal Advice Program, Canadian Association of
Counsel to Employers and Parkdale Community Legal Services**
Interveners

CORAM: Wagner C.J. and Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: Kasirer J. (Wagner C.J. and Moldaver, Côté, Brown, Rowe
(paras. 1 to 89) and Martin JJ. concurring)

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MATTHEWS v. OCEAN NUTRITION CANADA LTD.

David Matthews

Appellant

v.

Ocean Nutrition Canada Limited

Respondent

and

**Canadian Association for Non-Organized Employees,
Don Valley Community Legal Services,
Law Students' Legal Advice Program,
Canadian Association of Counsel to Employers and
Parkdale Community Legal Services**

Interveners

Indexed as: Matthews v. Ocean Nutrition Canada Ltd.

2020 SCC 26

File No.: 38252.

2019: October 8; 2020: October 9.

Present: Wagner C.J. and Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Employment law — Constructive dismissal — Duty to provide reasonable notice — Damages — Employee working for employer for approximately 14 years — Employer providing long term incentive plan according to which employee would receive bonus payment if company sold — Company sold soon after employee constructively dismissed — Whether damages for breach of duty to provide reasonable notice include incentive bonus.

Beginning in 1997, M, an experienced chemist, occupied several senior management positions with Ocean Nutrition Canada Limited (“Ocean”). As a senior executive, M was part of Ocean’s long term incentive plan (“LTIP”), a contractual arrangement designed to reward employees for their previous contributions and to provide an incentive to continue contributing to the company’s success. Under the LTIP, a “Realization Event”, such as the sale of the company, would trigger payments to employees who qualified under the plan. In 2007, Ocean hired a new Chief Operating Officer, who began a campaign to marginalize M in the company, limiting M’s responsibilities and lying to M about his status and prospects with Ocean. Despite his problems with senior management, the LTIP was a key reason for which M wanted to stay with Ocean, anticipating Ocean would soon be sold. However, M eventually left Ocean in June 2011, taking a position with a new employer.

About 13 months after M’s departure, Ocean was sold for \$540 million. The sale constituted a Realization Event for the purposes of the LTIP. Since M was not actively employed on that date, Ocean took the position that M did not satisfy the terms

of the plan, and he did not receive a payment. M filed an application against Ocean alleging that he was constructively dismissed, and that the constructive dismissal was carried out in bad faith and in breach of Ocean's duty of good faith. The trial judge concluded that Ocean constructively dismissed M, and that M was owed a reasonable notice period of 15 months. The trial judge also held that M would have been a full-time employee when the Realization Event occurred had he not been constructively dismissed, and that, because the terms of the LTIP did not unambiguously limit or remove his common law right to damages, M was entitled to damages equivalent to what he would have received under the LTIP. The Court of Appeal unanimously upheld the decision that M had been constructively dismissed and that the appropriate reasonable notice period was 15 months. However, a majority of the court found that M was not entitled to damages on account of the lost LTIP payment.

Held: The appeal should be allowed, the judgment of the Court of Appeal set aside and the trial judgment restored.

At common law, an employer has the right to prompt an employee to choose to leave their job in circumstances that amount to a dismissal subject to the duty to provide reasonable notice. The obligation to provide reasonable notice does not, in theory, turn on the presence or absence of good faith. The contractual breach that arises from the employer's choice is simply the failure to provide reasonable notice, which leads to an award of damages in lieu thereof. A breach of the duty to exercise good faith in the manner of dismissal is a distinct contractual breach and is independent of

any failure to provide reasonable notice. It can serve as a basis to answer for foreseeable injury that results from callous or insensitive conduct in the manner of dismissal. Damages arising out of the same dismissal are calculated differently depending on the breach invoked. The nature of the contractual breach of good faith is of a different order than that associated with the failure to provide reasonable notice.

Courts should ask two questions when determining whether the appropriate quantum of damages for breach of an implied term to provide reasonable notice includes bonus payments. First, courts should consider the employee's common law rights and examine whether, but for the termination, the employee would have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period. Second, if so, courts should determine whether the terms of the employment contract or bonus plan unambiguously take away or limit that common law right. This approach accords with basic principles of damages for constructive dismissal, anchoring the analysis around reasonable notice. When an employee sues for damages for constructive dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice. This approach respects the well-established understanding that the contract effectively remains alive for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been entitled to but for the dismissal. Damages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice

of termination. There is no such implied term of the contract to provide payment in lieu. The payment in lieu is not damages for a breach of the contract, but rather one component of the compensation provided for in the contract. If an employer fails to give proper notice or pay in lieu, the breach is in the failure to pay, not in the termination.

In the present case, in determining whether M's damages include an amount to compensate him for his lost LTIP payment, the focus should be on what damages were appropriately due for Ocean's failure to provide M with reasonable notice and not on whether the terms of the LTIP were plain and unambiguous. The issue is not whether M is entitled to the LTIP in itself, but rather what damages he is entitled to and, specifically, whether he was entitled to compensation for bonuses he would have earned had Ocean not breached the employment contract. It is uncontested that the Realization Event occurred during the notice period and therefore, but for M's dismissal, he would have received an LTIP payment during that period. In such circumstances, there is no need to ask whether the LTIP payment was integral to his compensation. On the first question, M is prima facie entitled to receive damages as compensation for the lost bonus. On the second question, the LTIP does not unambiguously limit or remove M's common law right. Had M been given proper notice, he would have been full-time or actively employed throughout the reasonable notice period. For the purpose of calculating wrongful dismissal damages, the employment contract is not treated as terminated until after the reasonable notice period expires. M should therefore be awarded the amount of the LTIP as part of his common

law damages for breach of the implied term to provide reasonable notice. On the issue of good faith, it suffices to say that a contractual breach of good faith rests on a wholly distinct basis from that relating to the failure to provide reasonable notice.

Cases Cited

Approved: *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 352 O.A.C. 1; *Lin v. Ontario Teachers' Pension Plan Board*, 2016 ONCA 619, 352 O.A.C. 10; *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163; **distinguished:** *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214; **referred to:** *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362; *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500; *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846; *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661; *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.L.R. (3d) 234; *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, 95 B.C.L.R. (3d) 260; *Nygaard Int. Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103; *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, 47 C.C.E.L. (4th) 218; *Brock v. Matthews Group Ltd.* (1988), 20 C.C.E.L. 110, aff'd (1991), 34 C.C.E.L. 50; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Hunter*

Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Schumacher v. Toronto-Dominion Bank* (1997), 147 D.L.R. (4th) 128; *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102; *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Styles v. Alberta Investment Management Corp.*, 2015 ABQB 621, [2016] 4 W.W.R. 593; *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315; *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15; *Dunlop v. B.C. Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334; *Poole v. Whirlpool Corp.*, 2011 ONCA 808, 97 C.C.E.L. (3d) 20; *Doyle v. Zochem Inc.*, 2017 ONCA 130, 31 C.C.P.B. (2nd) 200; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (Farrar, Bryson and Scanlan JJ.A.), 2018 NSCA 44, 2018 C.L.L.C. ¶210-053, 48 C.C.E.L. (4th) 171, [2018] N.S.J. No. 200 (QL), 2018 CarswellNS 393 (WL Can.), setting aside in part a decision of LeBlanc J., 2017 NSSC 16, [2017] N.S.J. No. 32 (QL), 2017 CarswellNS 55 (WL Can.), with supplementary reasons, 2017 NSSC 123, [2017] N.S.J. No. 161 (QL), 2017 CarswellNS 325 (WL Can.). Appeal allowed.

Howard Levitt, Allyson Lee, Blair Mitchell and Saba Khan, for the appellant.

Nancy F. Barteaux, Q.C., Mary B. Rolf and Kate E. Ross, for the respondent.

Stacey Reginald Ball, Nadine Côté and Sean O’Donnell, for the intervener the Canadian Association for Non-Organized Employees.

Andrew Monkhouse and Alexandra Monkhouse, for the intervener Don Valley Community Legal Services.

Martin Sheard and David McWhinnie, for the intervener the Law Students' Legal Advice Program.

Tim Lawson, Brandon Kain and Adam Goldenberg, for the intervener the Canadian Association of Counsel to Employers.

Christopher Rootham, Andrew Montague-Reinholdt and John No, for the intervener Parkdale Community Legal Services.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[1] This appeal bears on the redress available to an employee who, by reason of the circumstances of his departure from a job he had held for many years, is treated in law as if he were dismissed. By extension, it concerns some of the proper contours of an employer's common law right to determine the composition of its workforce.

[2] Different complaints are often made by employees who sue for wrongful dismissal. This case is no exception: in his original application, the employee alleged he was dismissed “without notice” and that this dismissal was in breach of the employer’s “duty of good faith”. He asked for damages reflecting his entitlement to reasonable notice, including an incentive bonus that fell due during the period, as well as damages for the employer’s dishonest conduct, including punitive damages and damages in the amount of the lost bonus should it be excluded by a contractual term.

[3] The fact that the employee was constructively dismissed and is entitled to notice is no longer in dispute. The parties continue to disagree, however, as to the remedies that should be afforded to the employee at common law. Specifically, the parties dispute whether the failure to provide damages for reasonable notice includes the disputed bonus. Moreover, they are at odds as to the existence of the employer’s alleged dishonest conduct and its eventual impact. The employee points this Court to the duty to act honestly in the performance of the contract, which, as this Court has recalled, “was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts” (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 73, referencing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 98; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 58).

[4] The parties’ disagreement provides an occasion to clarify the duty to provide reasonable notice and to state clearly that a violation of a duty of good faith is

a distinct contractual breach, with each alleged breach reflecting different considerations in respect of an employer's common law right of dismissal without cause in employment contracts having an indeterminate term. In making their respective cases, the employee and employer in this case call for significant changes to the law — respectively for an extension of good faith and a narrowing of the duty to provide reasonable notice — changes that, if existing principles are properly understood, are ultimately unnecessary to the disposition of the appeal.

[5] While I see the law as largely settled for the purpose of answering the employee's claim, the manner in which these complaints have been conflated in this case invites the Court to state plainly the different character of these paths of redress for breach of contract in employment. As in this instance, the complaints are sometimes intertwined at the expense of a proper understanding of the law of wrongful dismissal. In fairness to the parties here, this confusion is not altogether uncommon, since courts — even this Court — have at times conflated them when determining remedies for wrongful dismissal.

[6] For the reasons that follow, as a simple matter of the breach of the duty to provide reasonable notice, I respectfully disagree with the majority of the Court of Appeal's conclusion that the employee's damages do not include the incentive bonus. Given this conclusion, on the employee's own theory of the case, we need not provide a full answer to his allegations of dishonesty; this appeal can be resolved on settled employment law principles, despite the clear dishonest behaviour exhibited by the

employer over a protracted period. But beyond clarification as to how courts should analyze claims for financial redress upon dismissal, the employee's complaint that he was mistreated nevertheless deserves some modest comments. In his notice of application, the employee sought a declaration that his termination was wrongful in that his employer's associated conduct was "oppressive", "unfair", and "carried out in bad faith" (A.R., at pp. 144-45). While he has made no detailed pleading on appeal for his original claim for punitive damages and, surprisingly perhaps, made no specific claim for damages for mental distress when he instituted proceedings that can flow when an employer fails to exercise good faith in the manner of dismissal, he remains insistent that the employer breached its obligations of good faith when he was lied to in the run up to the constructive dismissal.

[7] Some of this doggedness on appeal is explained by the fact that the employee asked not just for money but also sued his employer for non-financial reasons. The trial judge explicitly noted that the employee's sense of self-worth was particularly tied up in his job. This Court has been resolute in asserting that employment is a source of personal fulfilment — that brand of human dignity that comes from work — and this often comes into sharpest focus when a job is unfairly taken away (see, e.g., *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 991). Recently in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, at para. 84, my colleague Wagner J., prior to his appointment as Chief Justice, identified these considerations as rooted in the "non-monetary benefits all workers may in fact derive from the performance of their work".

[8] Some comment on this aspect of the employee's claim is in my view appropriate. Recognition that an employer has acted dishonestly, independent of any failure to provide notice or other financial loss, can vindicate an employee whose sense of dignity is unfairly shaken when a valued job is lost.

II. Background

[9] David Matthews, an experienced chemist, is one of a handful of individuals in the world with the skills needed to run a large-scale omega-3 facility. Beginning in 1997, Mr. Matthews occupied several senior management positions with Ocean Nutrition Canada Limited ("Ocean"). His expertise proved extremely valuable to the success of Ocean in the manufacture of omega-3 products. Sometime company President and Chief Executive Officer, Robert Orr, testified that "[e]veryone who has gotten any value created out of Ocean in large part owes that in some measure to [Mr. Matthews]" (see 2017 NSSC 16, at para. 66 (CanLII)).

[10] Mr. Matthews was deeply invested in his job. The trial judge wrote: "I find that Matthews is an individual whose sense of identity and self-worth is highly connected to his work. He is a person who values honesty and integrity, and is willing to work hard in exchange for fair treatment and respect" (para. 292).

[11] Mr. Matthews' fortunes took a turn for the worse in 2007, when Ocean hired a new Chief Operating Officer, Daniel Emond. Frictions quickly developed between the two men. For whatever reason, the senior manager did not like

Mr. Matthews, and did not consider him to be a valuable asset to Ocean. Mr. Emond was responsible for assigning responsibilities to Mr. Matthews, and he soon began what the trial judge characterized as a “campaign” to marginalize Mr. Matthews in the company (para. 296). This course of conduct went beyond decisions limiting Mr. Matthews’ responsibilities, and included instances in which Mr. Emond “lied” to Mr. Matthews and Mr. Orr about his status and prospects with Ocean, “went behind [Mr. Matthews’] back”, and “ignored Matthews’ request to speak with him” relating to his role within the company (paras. 296-299). Indeed, the extensive findings of facts that the trial judge set out included repeated incidents of dishonesty attributed to senior management toward Mr. Matthews (paras. 291-326). While I will not repeat every detail, the following examples illustrate how Mr. Matthews was treated in the final years of his employment.

[12] The “first step in a campaign to push Matthews out of operations and minimize his influence” began in 2007, when Mr. Emond drastically reduced the number of people reporting to Mr. Matthews (para. 296). Over the next four years, the trial judge observed that Mr. Matthews’ responsibilities were reduced further, he became progressively more ostracized within the company, and Mr. Emond’s conduct was characterized by dishonesty (e.g., see paras. 297-300). The trial judge explicitly found that Mr. Emond had “no qualms about leaving Matthews in a state of anxiety about his future”, and that Mr. Matthews was left in a “prolonged state of anxiety and uncertainty” (paras. 317 and 341).

[13] At various times when confronted about decisions to transfer oversight away from Mr. Matthews or to change his reporting responsibilities, Mr. Emond would indeed lie to Mr. Matthews about his efforts to minimize the latter's role (see, e.g., paras. 296, 298 and 301). At one point, Mr. Emond wrote a letter to Mr. Matthews that purported to establish a reconciliation, acknowledging that their relationship had been "based on mistrust" and in which he undertook to be "more open and honest" with Mr. Matthews so he might be "respected by me" and by others in the company (see para. 114). The trial judge found that Mr. Emond's "use of the word 'honest' in the letter was intended to mean exactly that, with the implication being that he had been dishonest with Matthews in the past" (para. 301). These dishonest statements were relied upon by at least one other executive, who in turn developed "significant animosity" toward Mr. Matthews (paras. 286-87). Senior management also sought to exclude Mr. Matthews from various initiatives in which Mr. Matthews would normally participate, even if it was to the detriment of Ocean.

[14] In 2010, when Mr. Orr stepped away from running Ocean and became Chair of the Board of Directors, Mr. Matthews' situation worsened. Martin Jamieson assumed the role of President and Chief Executive Officer and, soon after his arrival, Mr. Matthews was placed under review. The trial judge found it had become clear that "Matthews' departure from [Ocean] was a possible consequence of the review" (para. 283). Around this time, Mr. Emond advised the Board of Directors there would soon be no place in the company for Mr. Matthews. When Mr. Orr informed him of these developments, Mr. Matthews' frustrations grew, as he was already suspicious that

Ocean was conducting due diligence for a possible sale, a process in which he would normally have had a role but from which he found himself excluded.

[15] A potential sale of Ocean was significant, as it meant Mr. Matthews would be able to realize on Ocean's long term incentive plan ("LTIP"). The LTIP, a contractual arrangement providing for payment upon the sale of the company, proposed by Ocean and to which Mr. Matthews agreed in 2007, was designed for certain senior executives in service of two goals: to reward the participating employees for their previous contributions and provide an incentive to continue contributing to the company's success. Ocean's retention goal proved successful, as Mr. Matthews ended up staying longer than he would have otherwise. As the trial judge found, the LTIP was a "key reason" Mr. Matthews stayed with the company, particularly when his problems with senior management developed (para. 388).

[16] Mr. Matthews advised Mr. Emond that he wanted to stay in his role as he anticipated the company would soon be sold. Mr. Emond falsely told him he did not know what Ocean's plans were for him. He then sent an email to Mr. Jamieson, with the subject line "here we go again". It read in part:

Moreover [Matthews] also ask me if he is part of the restructuring ??????? He said that he would like to stay as he believe the company will be sold to have is incentive on the sale ?????? Anyway I manage to get myself out of it not sure he believe me but he got an answer. [Transcribed as in original.]

(see trial reasons, at para. 194)

[17] A few months later, Mr. Matthews asked Mr. Jamieson whether Ocean was planning on terminating him. Mr. Jamieson told him the company had no such plans. Soon after, Mr. Matthews found himself meeting with the company's Vice President of Human Resources, discussing a possible termination package. Mr. Matthews advised the human resources representative that he would forfeit severance in order to protect his entitlement under the LTIP. In the end, however, negotiations over an "exit strategy" never came to fruition, as Mr. Matthews took a position with a new employer on June 22, 2011, officially leaving Ocean on June 24, 2011.

[18] About 13 months after Mr. Matthews' departure, Ocean was sold for \$540 million. This constituted a "Realization Event" for the purposes of the LTIP, thus triggering payments to employees who qualified under the plan. But since Mr. Matthews was not actively employed on that date, Ocean took the position that he did not satisfy the terms of the plan. Accordingly, Mr. Matthews did not receive a payment. Notably, the trial judge found that Mr. Emond's mistreatment of Mr. Matthews was not motivated by a desire to deprive him of his LTIP entitlement, nor was there evidence of a company conspiracy to "get rid of Matthews in order to deprive him of his LTIP entitlement" (para. 325).

[19] Mr. Matthews filed an application against Ocean, alleging that his employer constructively dismissed him, behaved in a manner that was "oppressive of, unfairly prejudicial to and unfairly in disregard" of his interests, and, separately, that the constructive dismissal "was carried out in bad faith at law and in breach of the

corporation’s duty of good faith” (A.R., at p. 145). He sought the declaration alluded to earlier as well as loss of pay, bonuses and benefits, together with general damages, and compensation pursuant to an oppression remedy under s. 241(1) of the *Canada Business Corporation Act*, R.S.C. 1985, c. C-44. In light of Ocean’s conduct that proceeded “in contum[e]lious disregard of [his] contractual entitlements” (A.R., at p. 145), Mr. Matthews also asked for punitive damages and solicitor and client costs.

III. Prior Decisions

A. *Supreme Court of Nova Scotia (LeBlanc J.)*

[20] The trial judge concluded that Ocean constructively dismissed Mr. Matthews, and that Mr. Matthews was owed a reasonable notice period of 15 months. The trial judge relied upon this Court’s decision in *Potter*, where Wagner J. explained that, typically, an employee’s decision to leave their employment may be considered a constructive dismissal in two different ways. First, an employee may be prompted to leave because the employer substantially breached an express or implied term of the employment contract. Second, Wagner J. drew upon cases where “the employer’s treatment of the employee made continued employment intolerable” (at para. 33), explaining that such cases will amount to constructive dismissal where the employer displayed, through its cumulative actions over time, that it no longer intended to be bound by the contract.

[21] The trial judge was satisfied that the test for constructive dismissal had been satisfied on either branch articulated in *Potter*. With respect to the first branch, he concluded that it was an implied term that Mr. Matthews would be assigned work “which is substantially similar in terms of job duties, pay, responsibility and status” (para. 337, citing P. Barnacle, *Employment Law in Canada* (4th ed. (loose-leaf)), vol. 2, at §13.42). By unilaterally reducing Mr. Matthews’ responsibilities in such a substantial manner, Ocean breached the employment contract.

[22] In terms of the second branch, the trial judge found that Ocean’s senior manager “engaged in a course of conduct aimed at pushing Matthews out of operations and minimizing his influence and participation in the company”, alluding to his findings of fact regarding Mr. Emond’s deceit in respect of Mr. Matthews’ future prospects with the company, as a result of which he “became increasingly ostracized” (para. 347). Given the behaviour, a reasonable person in Mr. Matthews’ position would have felt that Ocean “had engaged in a course of conduct that evinced an intention [to] no longer . . . be bound by the contract” (para. 353).

[23] Relying on *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 352 O.A.C. 1, and *Lin v. Ontario Teachers’ Pension Plan Board*, 2016 ONCA 619, 352 O.A.C. 10, the trial judge held that Mr. Matthews would have been a full-time employee when the Realization Event occurred had he not been constructively dismissed. Because the terms of the LTIP did not unambiguously limit or remove his

common law right to damages, Mr. Matthews was entitled to damages equivalent to what he would have received under the LTIP.

[24] Given his conclusion on the LTIP, the trial judge wrote that it was unnecessary to decide whether Mr. Matthews was entitled to an equivalent amount pursuant to the oppression remedy (para. 418). The trial judge went on to reject Mr. Matthews' claim for punitive damages, as he was not satisfied that Ocean's actions were directly motivated by a desire to deprive Mr. Matthews of his LTIP entitlement (para. 422).

[25] Based on his findings, the trial judge awarded Mr. Matthews lost earnings, \$1,086,893.36 for the loss of the LTIP payment he would have received during the notice period, and other benefits, less an amount of \$78,000 for mitigation of damages, representing monies paid to him by his new employer.

[26] The trial judge provided supplementary reasons regarding the quantum of damages during the reasonable notice period (2017 NSSC 123). A decision on costs was postponed pending a hearing on the matter. That was suspended while the case went to appeal.

B. *Court of Appeal of Nova Scotia (Farrar and Bryson J.J.A., Scanlan J.A. dissenting)*

[27] The judges on appeal all agreed that Mr. Matthews' original claim for wrongful dismissal and for an oppression remedy had "morphed" into a case of constructive dismissal (2018 NSCA 44, 48 C.C.E.L. (4th) 171, at paras. 1 and 151). Accepting the trial judge's findings of fact, the Court of Appeal unanimously upheld his decision that Mr. Matthews had been constructively dismissed and that the appropriate reasonable notice period was 15 months. The judges differed, however, on the issue of damages and the relevance of good faith.

(1) Majority Reasons (Farrar J.A., Bryson J.A. Concurring)

[28] The majority judges disagreed with the trial judge that Mr. Matthews was entitled to damages on account of the lost LTIP payment. The trial judge confused an employee's right to reasonable notice with an employee's ability to recover under an incentive plan. The proper question, they said, was "whether the employee qualifie[d] pursuant to the terms of the agreement" (para. 63).

[29] In their view, clause 2.03 of the LTIP was unambiguous, leading to the conclusion that Mr. Matthews' right to recover under the plan ceased the moment he left Ocean. They further held that clause 2.05 clearly stated that the LTIP could not be used for severance purposes, which, in their view, the trial judge had erroneously done. As was the case in *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1,

44 Alta. L.R. (6th) 214, the plain and unambiguous language of the LTIP therefore deprived Mr. Matthews of the opportunity to recover under the LTIP.

[30] The majority judges went on to comment on the dissenting reasons. First, they observed that “[t]his may have been a different case if the hearing judge had concluded that [Ocean] had orchestrated Matthews’ termination to avoid any liability it might have under the [LTIP]”, but this was rejected by the trial judge (paras. 89-90 and 114-16). In the majority’s view, the dissenting judge ignored this key finding of fact. Second, the majority judges noted that it was open for the trial judge to award “additional damages as a result of the manner in which [Mr. Matthews] was treated”, but “given his finding that there was no bad faith on the part of Ocean Nutrition, he could not and did not do so” (para. 122 (emphasis added)). Even though the majority judges found for Ocean in part and reversed one portion of the judgment in first instance, it awarded no costs on appeal.

(2) Dissenting Reasons (Scanlan J.A.)

[31] Focusing principally on the allegations of mistreatment, the dissenting judge reasoned that the parties could not have “intended to agree that a rogue manager such as Emond could engineer the dismissal of a valued long-term employee through a series of lies, deceit and manipulation so as to result in that employee not being entitled to share in the value he was so essential in creating” (para. 148). Drawing on *Bhasin*, he held that “[t]here was an implied agreement that the LTIP and the employment contract would be performed with honesty and integrity” (para. 148). The dissenting

judge explained his view that Mr. Emond's actions displayed the type of dishonesty contemplated in *Bhasin*:

Neither party should be able to rely upon lies, deceit and manipulation to deny the other side of the benefits of the contractual relationship, even if that was not the primary goal of the party acting dishonestly. The hearing judge did not find that Ocean acted to intentionally deny Matthews' entitlement to the LTIP benefits, but my colleague says a consequence of Emond's action, which resulted in Matthews leaving, was the loss of the LTIP benefits. [para. 168]

The dissenting judge concluded that Ocean should therefore be held liable for any damages sustained as a result of that dishonesty.

[32] Justice Scanlan then presented a second path to recovery, again based on *Bhasin*. In his view, the employment contract included an implied term of honest performance as part of the prohibition against unlawful dismissal without notice. Given that Ocean would benefit financially from Mr. Emond's deception, and by extension from Mr. Matthews' dismissal, the dissenting judge would have used the LTIP as a means to measure the damages for the constructive dismissal. This was appropriate since Ocean knew that a consequence of Mr. Matthews' dismissal was that his LTIP would be at risk, and that the sale of Ocean might soon occur. Consequently, the loss of opportunity to participate in the LTIP was a predictable loss. Based on these conclusions, he would "have awarded costs on this appeal to Matthews in the amount of 30% of appropriate trial costs" (para. 211).

IV. Analysis

A. *Arguments on Appeal*

[33] On appeal, the parties continue to disagree as to the amount that should be paid to Mr. Matthews for damages, specifically whether he was entitled to compensation for the lost LTIP payment. This, in turn, reflects the disagreement between them as to the basis for awarding those damages — whether as a remedy for failure to provide reasonable notice or to act in good faith, or both. Respectfully stated, their arguments on appeal are confounding when placed side-by-side — not only do they address matters at cross-purposes but, at times, the parties seem to be speaking past one another.

[34] At the hearing, Mr. Matthews confined his arguments almost exclusively to the consequences of Ocean’s alleged dishonesty. He argued that the majority of the Court of Appeal failed to recognize that Ocean, through its dishonest actions, breached the duty set forth in *Bhasin* “to ensure that the contract is performed in line with the organizing principle of good faith and the duty of honest performance” (A.F., at para. 47). Relying on *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, Mr. Matthews submitted that, as a remedy for this breach, he was entitled to an amount equivalent to the LTIP payment. Moreover, he urged this Court to recognize good faith as animating the whole of the performance of the employment contract. This is relevant given what Mr. Matthews described as a “four-year course of lying to him about the status of his employment” (transcript, at p. 9).

[35] Mr. Matthews offered, secondarily, two further bases for his claim. First, he said, the majority of the Court of Appeal misdirected itself in failing to consider damages for Ocean’s breach of its obligation to provide him with reasonable notice. Moreover, in light of the supposed breach of the duty of honest performance, Mr. Matthews argued, Ocean should have been barred from relying on the exclusionary clauses. In any event, Mr. Matthews said the LTIP was misread and the majority should have deferred to the trial judge’s interpretation of that contract. Second, Mr. Matthews invoked the doctrine of estoppel to support his argument that Ocean cannot rely upon the exclusion clause.

[36] By contrast, Ocean focused on defending the exclusion of the LTIP as a matter of contractual interpretation. Ocean submitted that the bonus was not integral to Mr. Matthews’ compensation. Further, it agreed with the majority of the Court of Appeal that the trial judge had misinterpreted the LTIP and that, given its plain and unambiguous language, the bonus should have been excluded from any damage award.

[37] Ocean had little to say on good faith, except to acknowledge that the employer had displayed some “bad conduct” and to assert that there was no finding, at trial or in the majority opinion on appeal, of bad faith (transcript, at p. 66). After proposing a fresh characterization of certain facts relating to the interaction between Ocean’s representatives and Mr. Matthews to that end, Ocean urged this Court to hold that the majority judges on appeal were right to conclude there was no bad faith. In any event, Ocean argued that the common law does not recognize any duties of good faith

on the employer during the performance of the contract that could serve as a basis for the payment of the bonus.

[38] In these reasons, I seek to explain my view, respectfully stated, that the majority of the Court of Appeal erred in not awarding Mr. Matthews the amount of the LTIP as part of his common law damages for breach of the implied term to provide reasonable notice. In considering all of the complaints made by Mr. Matthews, it bears recalling that he did not seek damages for mental distress,¹ and while he originally pleaded for punitive damages, he did not pursue that head of damages on appeal in this Court. Consequently, it is unnecessary in the circumstances, and perhaps even unwise given the method on which *Bhasin* rests, to resolve Mr. Matthews' allegations of dishonest treatment since I propose to award him the only remedy sought on appeal — an amount equivalent to his LTIP entitlement — on the basis of reasonable notice. That said, Ocean's alleged dishonest behaviour over a protracted period, but in the manner of dismissal nonetheless, attracts a brief comment. I come to this view for two reasons.

[39] The first pertains to the proper method of analyzing claims for wrongful dismissal, like that of Mr. Matthews, where the employee alleges a failure to provide reasonable notice as well as bad faith. So long as damages are appropriately made out and causation established, a breach of a duty of good faith could certainly give rise to

¹ The term “aggravated damages” was used on occasion by the two parties throughout this appeal. I note, however, that in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at paras. 52-54, this Court explained that this term is largely a misnomer, and that compensatory damages for a contractual breach of the duty of good faith spoken to in *Wallace* “are based on what was in the reasonable contemplation of the parties at the time of contract formation”.

distinct damages based on the principles in *Hadley*, approved in this setting in *Keays* (at paras. 55-56), including damages for mental distress. Punitive damages could also be available in certain circumstances. To this end, ensuring litigants take care that their pleadings are properly made out, and ensuring courts are following a methodologically coherent approach to constructive dismissal cases is certainly of value as it can affect the ultimate damage amount to be awarded to an employee plaintiff.

[40] It is apparent too from the pleadings here that there is a measure of uncertainty as to the impact of *Bhasin*, not just in Mr. Matthews' case but on employment law more generally. At a minimum, I believe this is an occasion to re-affirm two important principles stated in *Potter*. First, given the various submissions in this case, I would recall that the duty of honest performance — which Cromwell J. explained in *Bhasin* applies to all contracts, and means simply that parties “must not lie [to] or otherwise knowingly mislead” their counterparty “about matters directly linked to the performance of the contract” — is applicable to employment contracts (*Bhasin*, at para. 33, see also para. 73; *Potter*, at para. 99). Second, given the four-year period of alleged dishonesty leading up to Mr. Matthews' dismissal, I would also reiterate that when an employee alleges a breach of the duty to exercise good faith in the manner of dismissal — a phrase introduced by this Court in *Wallace*, and reinforced in *Keays* — this means courts are able to examine a period of conduct that is not confined to the exact moment of termination itself. All this reflects, in my view, settled law.

[41] The second reason relates to the qualitatively different types of the contractual breaches alleged from the start by Mr. Matthews. This difference was addressed, in some measure, in *Keays* when it was determined that the breach in question should not, as was sometimes the case, simply bump-up the reasonable notice period.² To say that one has been treated dishonestly is quite unlike saying that one has been dismissed without notice. This is directly relevant to Mr. Matthews' call for the courts to declare that he was mistreated by Ocean.

B. *The Appropriate Method of Analysis*

[42] Properly understood, the claim pursued here indeed rests on allegations of distinct contractual breaches of Mr. Matthews' employment contract.

[43] Neither party disputes that, at common law, an employer has the right to terminate the employment contract without cause — or, in this case, prompt the employee to choose to leave their job in circumstances that amount to a dismissal — subject to the duty to provide reasonable notice, a right which, as this Court noted in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, at para. 23, is reciprocal in the contract of employment. When breached, the obligation to provide reasonable notice does not, in theory, turn on the presence or absence of good faith: it is, in a manner of speaking, a “good faith” wrongful dismissal (see *Machtinger*, at p. 990). The contractual breach that arises from the employer's choice in this regard is simply the failure to provide

² K. Banks, “Progress and Paradox: The Remarkable yet Limited Advance of Employer Good Faith Duties in Canadian Common Law” (2011), 32 *Comp. Lab. L. & Pol'y J.* 547, at pp. 561-62.

reasonable notice, which leads to an award of damages in lieu thereof (*Wallace*, at para. 115, per McLachlin J., as she then was, dissenting, but not on this point). There is some dispute in the cases regarding how to determine what damages should be awarded in the event of a breach, which I will consider below, but this breach does not turn on whether or not the employer acted honestly or in good faith.

[44] Running parallel to the argument on reasonable notice, Mr. Matthews has alleged that his termination was also in breach of contract because it failed to meet the expected standard of good faith. Under rules recognized by this Court in *Bhasin* and *Potter*, an unhappy employee can allege dishonesty in the performance of the contract by the employer — i.e., a breach of the duty of honest performance, which Cromwell J. in *Bhasin* described as contractual doctrine — independently of any failure to provide reasonable notice. This Court has also recognized in *Wallace* and *Keays* that an unhappy employee can allege mistreatment — i.e., conduct that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” — in the manner of dismissal by the employer (*Wallace*, at para. 98; *Keays*, at para. 57). A breach of the duty to exercise good faith in the manner of dismissal is also independent of any failure to provide reasonable notice. It can serve as a basis to answer for foreseeable injury that results from callous or insensitive conduct in the manner of dismissal, a point to which I will return to at the conclusion of these reasons (*Wallace*, at para. 88).

[45] Importantly, damages arising out of the same dismissal are calculated

differently depending on the breach invoked. Again, this is nothing but a reflection of settled law. In *Keays*, at para. 56, for example, Bastarache J. helpfully explained that “[t]he contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision”. By contrast, he explained that failure to act in good faith during the manner of dismissal “can lead to foreseeable, compensable damages” based on the *Hadley* principle (para. 58). Contrary to what had been thought until that time, an extension of the notice period was not to be used to determine the proper amount to be paid (para. 59). This is because the nature of the contractual breach is of a different order than that associated with the failure to provide reasonable notice. Indeed, it is this fundamental difference that explains why principles of mitigation apply differently to mental distress damages flowing from a breach of the good faith obligation in the manner of dismissal (*Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 32).

[46] With this in mind, I turn now to examine the duty to provide reasonable notice, which as will become plain, is dispositive of this appeal.

(1) Duty to Provide Reasonable Notice

[47] In the case at bar, the only disagreement in respect of reasonable notice turns on whether Mr. Matthews’ damages include an amount to compensate him for his lost LTIP payment.

[48] In my respectful view, the majority of the Court of Appeal erred by focusing on whether the terms of the LTIP were “plain and unambiguous” instead of asking what damages were appropriately due for Ocean’s failure to provide Mr. Matthews with reasonable notice. The issue is not whether Mr. Matthews is entitled to the LTIP in itself, but rather what damages he is entitled to and whether he was entitled to compensation for bonuses he would have earned had Ocean not breached the employment contract. By focusing narrowly on the former question, the Court of Appeal applied an incorrect principle, resulting in what I see as an overriding error.

(a) *Redress for Breach of the Implied Term to Provide Reasonable Notice of Termination*

[49] Insofar as Mr. Matthews was constructively dismissed without notice, he was entitled to damages representing the salary, including bonuses, he would have earned during the 15-month period (*Wallace*, at paras. 65-67). This is so because the remedy for a breach of the implied term to provide reasonable notice is an award of damages based on the period of notice which should have been given, with the damages representing “what the employee would have earned in this period” (para. 115). Whether payments under incentive bonuses, such as the LTIP in this case, are to be included in these damages is a common and recurring issue in the law of wrongful dismissal. To answer this question, the trial judge relied on *Paquette* and *Lin* from the Court of Appeal for Ontario. I believe he took the right approach.

[50] In *Paquette*, the employee participated in his employer’s bonus plan, which

stipulated that employees had to be “actively employed” on the date of the bonus payout. That language is broadly comparable to that found in the LTIP which, at clause 2.03, requires the claimant to be a “full-time employee” of the company. In *Paquette*, but for the employee’s termination, the employee would have received the bonus within the reasonable notice period. The motion judge in that case, however, concluded that the employee was not entitled to the bonus because, while he may have been “notionally” employed during the reasonable notice period, he was not “actively” employed and so did not qualify under the terms of the plan.

[51] The employee’s appeal was allowed. The Ontario Court of Appeal relied principally on its prior decision in *Taggart v. Canada Life Assurance Co.* (2006), 50 C.C.P.B. 163, concerning a similar question related to pension benefits. In that case, Sharpe J.A. rightly cautioned that courts should not ignore the legal nature of employees’ claims. “The claim is not”, he said, “for the pension benefits themselves. Rather, it is for common law contract damages as compensation for the pension benefits [the employee] would have earned had [the employer] not breached the contract of employment” (para. 16). Consequently, “a terminated employee is entitled to claim damages for the loss of pension benefits that would have accrued had the employee worked until the end of the notice period” (para. 13). With respect to the role of a bonus plan’s contractual terms, Sharpe J.A. explained that “[t]he question at this stage is whether there is something in the language of the pension contract between the parties that takes away or limits that common law right” (para. 20).

[52] The Court of Appeal in *Paquette* built upon the approach in *Taggart*, proposing that courts should take a two-step approach to these questions. First, courts should “consider the [employee’s] common law rights” (para. 30). That is, courts should examine whether, but for the termination, the employee would have been entitled to the bonus during the reasonable notice period. Second, courts should “determine whether there is something in the bonus plan that would specifically remove the [employee’s] common law entitlement” (para. 31). “The question”, van Rensburg J.A. explained, “is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the [employee’s] common law rights” (para. 31).

[53] I agree with van Rensburg J.A. that this is the appropriate approach. It accords with basic principles of damages for constructive dismissal, anchoring the analysis around reasonable notice. As the court recognized in *Taggart*, and reiterated in *Paquette*, when employees sue for damages for constructive dismissal, they are claiming for damages as compensation for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice (see also *Iacobucci v. WIC Radio Ltd.*, 1999 BCCA 753, 72 B.C.L.R. (3d) 234, at paras. 19 and 24; *Gillies v. Goldman Sachs Canada Inc.*, 2001 BCCA 683, 95 B.C.L.R. (3d) 260, at paras. 10-12 and 25; *Keays*, at paras. 54-55). Proceeding directly to an examination of contractual terms divorces the question of damages from the underlying breach, which is an error in principle.

[54] Moreover, the approach in *Paquette* respects the well-established understanding that the contract effectively “remains alive” for the purposes of assessing the employee’s damages, in order to determine what compensation the employee would have been entitled to but for the dismissal (see, e.g., *Nygaard Int. Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.), at pp. 106-7, per Southin J.A., concurring; *Gillies*, at para. 17).

[55] Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

(b) *Application to Mr. Matthews’ Case*

[56] The first question is whether Mr. Matthews would have been entitled to the LTIP payment as part of his compensation during the reasonable notice period. Since the Realization Event was triggered within the 15-month reasonable notice period, Mr. Matthews argues that he is *prima facie* entitled to damages for the lost LTIP payment as part of his common law damages.

[57] Ocean argues that Mr. Matthews cannot satisfy the first stage of the analysis. It points this Court to *Singer v. Nordstrong Equipment Limited*, 2018 ONCA

364, 47 C.C.E.L. (4th) 218, where the Court of Appeal for Ontario presented the first question by asking whether the bonus was “an integral part of his compensation package” (para. 21). Relying on this formulation, Ocean contends that, under the first step, Mr. Matthews has a common law entitlement to damages for all compensation and benefits that are integral to his compensation. Ocean maintains that the LTIP payment was not integral to Mr. Matthews’ compensation since he did not have a vested right at the date of termination.

[58] The trial judge confronted this submission and concluded that Ocean was attempting to introduce an extra requirement into the analysis that is not supported by the jurisprudence (para. 387). I agree. The test of whether a benefit or bonus is “integral” to the employee’s compensation assists in answering the question of what the employee would have been paid during the reasonable notice period (see, e.g., *Brock v. Matthews Group Ltd.* (1988), 20 C.C.E.L. 110 (Ont. H.C.J.), at p. 123, aff’d (1991), 34 C.C.E.L. 50 (C.A.); *Paquette*, at para. 17). Thus, in *Paquette* and *Singer*, where the bonuses at issue were discretionary, the Court of Appeal for Ontario considered this so-called “integral” test since there was doubt as to whether the employee would have received those discretionary bonuses during the reasonable notice period.

[59] This case is different. The purpose of damages in lieu of reasonable notice is to put the employee in the position they would have been in had they continued to work through to the end of the notice period. It is uncontested that the Realization Event

occurred during the notice period. But for Mr. Matthews' dismissal, he would have received an LTIP payment during that period. In such circumstances, there is no need to ask whether the LTIP payment was "integral" to his compensation.

[60] Furthermore, in answer to a question from one of my colleagues at the hearing, counsel for Ocean conceded that Mr. Matthews may well have had an entitlement to the LTIP absent clauses 2.03 and 2.05. I am thus satisfied that, on this first step, Mr. Matthews is *prima facie* entitled to receive damages as compensation for the lost bonus.

[61] On the second step, the question is whether the terms of the LTIP unambiguously limit or remove Mr. Matthews' common law right. It should be mentioned that the parties took opposing positions on the applicable standard of review for questions related to the interpretation of the LTIP. Both parties relied on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. For his part, Mr. Matthews argued that the trial judge's interpretation should be reviewed for palpable and overriding error. Ocean, in contrast, said that the standard of review should be correctness, relying on the standard form contract exception described in *Ledcor*. Ocean stressed that there is no evidence that Mr. Matthews negotiated the relevant terms, and that the LTIP applies to multiple employees.

[62] I am careful to note that the trial judge did not find that this was a commonly-used standard form agreement. In *Ledcor*, the Court was tasked with interpreting a standard form agreement commonly used in the insurance industry,

where “consistency [in interpretation] is particularly important” (para. 40). Justice Wagner explained that, given that standard form contracts are those that are so widely used that the “interpretation of the . . . contract could affect many people” (at para. 39), a standard form exception is appropriate. This case is different: the only relevant finding by the trial judge on this issue is that it was “a limited number of executives” that were affected by the LTIP (para. 61). In the end, however, it is not necessary to decide whether or not the LTIP was truly a standard form contract in this case, since the trial judge did not consider one of the two main clauses at issue in this case, clause 2.05, which therefore must be interpreted in any event.

[63] Returning, then, to the main clauses at issue, which provide the following:

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.

[64] The question is not whether these terms are ambiguous but whether the wording of the plan unambiguously limits or removes the employee’s common law

rights (*Paquette*, at para. 31, citing *Taggart*, at paras. 12 and 19-22). Importantly, given that the LTIP is a “unilateral contract”, in the sense that the parties did not negotiate its terms, the principle of contractual interpretation that clauses excluding or limiting liability will be strictly construed “applies with particular force” (*Taggart*, at para. 18, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 459). As this Court recognized in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 73, albeit in the commercial context, and cited here to underscore just this point, sophisticated parties are able to draft clear and comprehensive exclusion clauses when they are minded to do so.

[65] To this end, the provisions of the agreement must be absolutely clear and unambiguous. So, language requiring an employee to be “full-time” or “active”, such as clause 2.03, will not suffice to remove an employee’s common law right to damages. After all, had Mr. Matthews been given proper notice, he would have been “full-time” or “actively employed” throughout the reasonable notice period (*Paquette*, at para. 33, citing *Schumacher v. Toronto-Dominion Bank* (1997), 147 D.L.R. (4th) 128 (Ont. C.J. (Gen. Div.)), at p. 184; see also para. 47; *Lin*, at para. 89). Indeed, the trial judge and the majority of the Court of Appeal agreed that an “active employment” requirement is not sufficient to limit an employee’s damages (trial reasons, at para. 398; C.A. reasons, at para. 66).

[66] Similarly, where a clause purports to remove an employee’s common law right to damages upon termination “with or without cause”, such as clause 2.03, this language will not suffice. Here, Mr. Matthews suffered an *unlawful* termination since he was constructively dismissed without notice. As this Court held in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 108, exclusion clauses “must clearly cover the exact circumstances which have arisen”. So, in Mr. Matthews’ case, the trial judge properly recognized that “[t]ermination without cause does not imply termination without notice” (para. 399; see also *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394, at para. 14; *Lin*, at para. 91). Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as “terminated” until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee’s common law entitlement.

[67] I therefore agree with the trial judge that clause 2.03 does not unambiguously limit or remove Mr. Matthews’ common law right. In my respectful view, the majority of the Court of Appeal erred in concluding otherwise.

[68] As mentioned, it is true that the trial judge did not expressly consider clause 2.05. The dissenting judge suggested this clause only prevents Mr. Matthews from seeking the bonus as part of his severance, and not part of a claim for wrongful dismissal damages. The majority disagreed, arguing there is no functional difference between severance and damages (paras. 120-21).

[69] I respectfully disagree with the majority of the Court of Appeal on this point. The trial judge did not use the LTIP to calculate severance; rather, he determined the quantum of damages that Mr. Matthews was entitled to under the common law following the constructive dismissal. As the dissenting judge explained in detail, severance and damages are distinct legal concepts. The primary purpose of providing reasonable notice (or damages in lieu thereof) is to protect employees by providing them an opportunity to seek alternative employment (see *Wallace*, at para. 120, per McLachlin J., as she then was, dissenting, but not on this point). Severance pay, by contrast, “acts to compensate long-serving employees for their years of service and investment in the employer’s business and for the special losses they suffer when their employment terminates”, and is often provided for in provincial employment standards legislation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 26).

[70] Moreover, clause 2.05 must be read as a whole; it also states that the LTIP “does not have any current or future value other than on the date of a Realization Event”. If Mr. Matthews had been properly given notice of termination, he would have remained a full-time employee on the date of the Realization Event, and thus would have received an LTIP payment. His damages reflect that lost opportunity.

[71] In reaching a different conclusion regarding the interpretation of clauses 2.03 and 2.05, the majority judges relied on *Styles* from the Court of Appeal of Alberta. Ocean urges this Court to do the same. While this is not the occasion to examine the law in Alberta in depth, I allow myself the following observations.

[72] At issue in *Styles* was a similar question to the one here: was the employee, upon being terminated without cause, entitled to receive a payment under his employer's contractual long-term incentive plan? Upon termination, the employer paid the employee a lump sum payment equal to three months' salary pursuant to the terms of his employment contract (*Styles v. Alberta Investment Corp.*, 2015 ABQB 621, [2016] 4 W.W.R. 593, at paras. 9 and 27, per Yungwirth J.). The bonus would not have vested until several *years* after the employee's termination (*Styles*, at paras. 17-23, per Yungwirth J.). Consequently, the employee could not recover damages for a payment under the bonus in connection to the reasonable notice period. At a minimum, *Styles* is thus distinguishable from Mr. Matthews' case. The latter raises issues surrounding damages connected to the notice period, while the former does not.

[73] It also bears noting that the Court of Appeal of Alberta in *Styles* suggested that *Paquette*, one of the cases I rely on here, is premised upon an erroneous reading of this Court's decision in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315. In *Styles*, the Court of Appeal noted that "[t]he common law implies a term of reasonable notice, or pay in lieu, in those circumstances. The payment in lieu is not 'damages' for a breach of the contract, but rather one component of the compensation provided for in the contract. If an employer fails to give proper notice or pay in lieu, the breach is in the failure to pay, not in the termination" (para. 34 (footnote omitted)). The Court of Appeal then observed that "[t]here are decisions from other jurisdictions that treat termination as a breach, but they do not reflect the law of Alberta: see for example [*Paquette*]. *Paquette* relies on the *dictum* in [*Sylvester*], at para. 1, but para. 15 of that

decision confirms that it is the non-payment that is the breach, not the termination itself” (para. 34, fn. 1).

[74] On my reading, this Court in *Sylvester* confirmed that “[d]amages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice of termination” (para. 15 (emphasis added)). Authority elsewhere confirms this same idea: there is no such implied term of the contract to provide payment in lieu (see, e.g., *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, 277 O.A.C. 15, at para. 44).³

[75] As explained by the Court of Appeal for British Columbia in *Dunlop v. B.C. Hydro & Power Authority* (1988), 32 B.C.L.R. (2d) 334, at pp. 338-39, there are three principal reasons why this is an important distinction. First, there are issues surrounding the complexity of an implied term to provide pay in lieu of notice, and whether such a term can readily be implied into an employment contract. Second, implying a term to provide pay in lieu of notice “would mean that if an employer elected to give pay in lieu of notice, the employer would be complying with the contract and not breaking it”, and thus “the contract would require the full payment to be made immediately”. Third, if the employer elected to invoke such an implied term and gave no notice of termination, “there would be no obligation on the part of the employee to mitigate damages by seeking other employment” since the term requires a payment in

³ See D. B. Buchanan, “Defining Wrongful Dismissal: The Alberta Schism” (2019), 57 *Alta. L. Rev.* 96.

full without regard to the employee's actual losses. Ensuring that courts and litigants properly understand this distinction is thus important as it can profoundly affect employees' financial lives. To the extent that some cases suggest otherwise, I respectfully disagree.

[76] Finally, at this stage of the analysis, it may also 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 (*Paquette*, at para. 18; *Taggart*, at paras. 20-23; *Poole v. Whirlpool Corp.*, 2011 ONCA 808, 97 C.C.E.L. (3d) 20, at paras. 5-6). This issue, however, does not arise on these facts. Moreover, as several interveners commented on in this appeal, it may be appropriate to question whether the clause at issue is compatible with minimum employment standards (*Machtinger*, at p. 1004). This issue was not canvassed by the courts below and, in the present circumstances, it is unnecessary to explore further.

[77] In sum, I agree with the trial judge that Mr. Matthews is entitled to receive damages equal to what he would have received pursuant to the LTIP, subject to mitigation.

(2) Good Faith

[78] Again, and I say so respectfully, the parties' arguments on good faith were confounding when placed side by side. Mr. Matthews focused largely on the duty of honest performance, and confirmed at the hearing that he is not seeking damages for

mental distress flowing from a breach of the duty to exercise good faith in the manner of dismissal, noting that this “just doesn’t get him there” in respect of the LTIP (transcript, p. 17). Ocean, in contrast, defended the conclusion of the Court of Appeal that there was “no bad faith” in “the manner in which [Mr. Matthews] was treated”, recalling specifically the trial judge’s finding that Mr. Matthews had failed to show that Ocean had planned to terminate him in order to deprive him of his LTIP entitlement (see para. 122).

[79] Ocean is no doubt correct on this very last point. That said, and contrary to the succinct conclusion of the majority judges in the Court of Appeal, I share Mr. Matthews’ view that the trial judge did make abundantly clear that the treatment experienced by Mr. Matthews from 2007 until the moment of his departure constituted dishonest conduct on the part of Ocean. He found, as a matter of fact, that Ocean’s senior manager undertook a four-year “campaign”, characterized by lies and dishonesty, to push Mr. Matthews out of operations (see, e.g., paras. 294, 296, 298 and 301).

[80] The trial judge did not, however, explicitly find a breach of contract resulting from this dishonesty. He did not speak to the duty of honest performance, likely because — given that the original pleadings were filed before *Bhasin*’s release — *Bhasin* was not pleaded at trial. Nor did he pursue an analysis, in accordance with *Wallace* and *Keays*, to determine whether this dishonesty amounted to a breach of the duty to exercise good faith in the manner of dismissal. One suspects this too reflected

the character of the pleadings, since no compensatory damages for mental distress flowing from Mr. Matthews' treatment in the manner of his dismissal were pursued.

[81] On this latter point, I would take this opportunity to recall that, had the issue been properly placed before the trial judge, it was certainly within the trial judge's prerogative to tie the dishonesty that occurred over the four-year period to the "manner of dismissal". Due to the circumstances in *Wallace* and *Keays*, "in the manner of dismissal" was originally conceptualized as the *moment* of dismissal, suggesting to some degree that good faith must exist only at the very end of the employment relationship. Yet, circumstances of constructive dismissal show that this reading sometimes needs to be extended. Following *Potter*, an employee's constructive dismissal may be better understood as the consequence of conduct over a series of events in time, and not just a tipping point. On this reading, *Potter* extends the notion of "in the manner of dismissal" to encompass circumstances in which termination stems from an employee's decision to leave their job brought about, as here, by a series of events that predate the actual moment of the parting of ways between employer and employee (paras. 31-35). The constructive dismissal may, depending on the facts of a given case, reflect a choice to leave prompted by a series of changes to the employee's working conditions over time, absent any misconduct. Or a constructive dismissal may reflect a choice to leave where dishonest or like misconduct eventually pushes the employee out the door. In the latter circumstance, this suggests that, at least retrospectively, the duty is relevant to the performance of the contract prior to the moment of termination. Indeed, there is no coherent reason why the measure of

misconduct cannot be understood retrospectively in cases of wrongful dismissal “so long as it is ‘a component of the manner of dismissal’” (*Doyle v. Zochem Inc.*, 2017 ONCA 130, 31 C.C.P.B. (2nd) 200, at para. 13, citing *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.), at para. 23).

[82] In recognizing this, *Potter* affirmed what courts were already doing: examining the employment relationship retrospectively, and thus implicitly finding that good faith is owed not merely at the very end of the relationship. As Professor England has observed, courts have frequently examined whether employers treated their employees with good faith in constructive dismissal cases by, for example, ensuring employees were safeguarded from bullying, intimidation, and harassment from managers and other employers (*Individual Employment Law* (2nd ed. 2008), at pp. 92-93). This extension in *Potter* thus allowed for a more flexible measure of conduct over the period leading up to the moment of actual termination of the employment contract.⁴

[83] I would not, however, say anything further on how *Bhasin*, on the one hand, and *Wallace* and *Keays*, on the other, apply to this case. It suffices to say that a contractual breach of good faith rests on a wholly distinct basis from that relating to the failure to provide reasonable notice. I say this on the basis of my proposed conclusion above, with respect to Mr. Matthews’ financial claim for breach of the implied duty to provide reasonable notice. At the hearing, counsel for Mr. Matthews

⁴ See C. Mummé, “*Bhasin v. Hrynew*: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins?” (2016), 32 *Int’l J. Comp. Lab. L. & Ind. Rel.* 117, at p. 122.

acknowledged that, if he received damages to compensate him for his lost LTIP payment as part of his reasonable notice damages, he cannot now claim the same amount under the *Hadley* principle. While the breaches of contract are indeed distinct, they cannot be deployed to provide what amounts to double recovery. Moreover, Mr. Matthews drew the Court's attention to the anxiety caused by Ocean, but made no request for damages for mental distress. As noted, while he originally claimed for punitive damages at trial, he did not pursue this head of damages on appeal. Given that Mr. Matthews failed to press his claim with further detail or argument, even when questioned on point by members of the Court, I need not go further to decide whether some duty of good faith has been breached, since no further remedies are being sought.

[84] Further, I note that Mr. Matthews and several interveners argue that the general organizing principle of good faith described in *Bhasin* manifests itself in various ways throughout the whole of the contractual performance. Ocean answers that any extension of good faith would be an unwieldy precedent.

[85] Mr. Matthews' argument is a serious one. Not all mistreatment by an employer will result in a constructive dismissal — some employees, for financial or other reasons, might choose not to leave their job. It might be that, as argued by various parties in this appeal, a duty of good faith will one day bind the employer based on a mutual obligation of loyalty in a non-fiduciary sense during the life of the employment contract, owed reciprocally by both the employer and employee. I recognize, however, that whether the law should recognize this is a matter of fair debate.

[86] This is a dismissal case. In light of the comment in *Bhasin* (at para. 40) that the common law should develop in an incremental fashion, I would decline to decide whether a broader duty exists during the life of the employment contract in the absence of an appropriate factual record.

[87] Lastly, I recall that in his original application, Mr. Matthews sought a declaration that the termination of his employment reflected conduct on the part of Ocean that was oppressive and unfair, and that his dismissal was “carried out in bad faith at law and in breach of [Ocean’s] duty of good faith”. I recognize that, generally speaking, the mental distress that an employee might feel as a result of employer dishonesty is translated by law, in financial terms, as damages, and that, further, Mr. Matthews has declined to seek such damages here. Nevertheless, a proper acknowledgment that an employer’s conduct was contrary to the expected standard of good faith can transcend the request for damages, and may be meaningful for an employee in a way that a mere finding that reasonable notice was provided cannot. One aspect of this relates to dignity in the workplace, and the non-financial value associated with fair treatment upon dismissal (J. Fudge, “The Limits of Good Faith in the Contract of Employment: From *Addis* to *Vorvis* to *Wallace* and Back Again?” (2007), 32 *Queen’s L.J.* 529, at p. 548; G. Anderson, D. Brodie and J. Riley, *The Common Law Employment Relationship: A Comparative Study* (2017), at Ch. 11). Indeed, this Court has been emphatic in recognizing that, in addition to whatever financial dimension work entails, a person’s employment is “an essential component of [their] sense of identity, self-worth and emotional well-being” (*Reference re Public Service Employee*

Relations Act (Alta.), [1987] 1 S.C.R. 313, at p. 368). To this end, it is understandable that employees seek some recognition that they have been mistreated, reflecting that they feel it unfair, beyond any compensatory matter, that they were forced to quit in such circumstances.

[88] Regrettably, Mr. Matthews gave no explanation as to what basis this Court would make a formal declaration in these circumstances. I would refrain from making a declaration of a contractual breach related to good faith in the formal sense. Nonetheless, I would observe that it is clear from the findings at trial Mr. Matthews was mistreated and lied to about the security of his future with the company in the years leading up to his constructive dismissal in a manner that contributed to making his job intolerable. Compensation during the reasonable notice period does not speak to this. While it may not result in further remedies in this case, it is not inappropriate to recall that the “non-monetary benefit” (*Potter*, at para. 84) derived from the performance of work can be wrongly taken from employees if, at dismissal, they are lied to or misled as to the reasons for termination.

V. Conclusion

[89] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the Supreme Court of Nova Scotia, with costs throughout.

Appeal allowed with costs throughout.

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Solicitors for the intervener Don Valley Community Legal Services: Monkhouse Law, Toronto.

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