

SCC puts employers on notice regarding long-term incentive plans

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In its decision released on October 13, 2020, the Supreme Court of Canada in *Matthews v. Ocean Nutrition Canada Limited*, 2020 SCC 26, confirmed that the test for limiting language in a long-term incentive plan (LTIP) is very high and language simply referring to termination without cause as a cessation event will not suffice to dispose of an employee's common law right to recovery under the LTIP through their reasonable notice period. The Supreme Court of Canada's decision provides some much-needed clarity to the divided case law, albeit to the detriment of employers.

Background

The plaintiff, David Matthews, worked for Ocean Nutrition Canada Limited (Ocean Nutrition) and its predecessor companies from January 1997 to June 2011. In June 2011, he resigned and sued Ocean Nutrition for constructive dismissal, seeking damages for breach of his employment contract including the loss of an LTIP (the Plan).

Under the terms of the Plan, if the company was sold during the period of time that Mr. Matthews was employed by it, he was entitled to receive a portion of the sale proceeds based on the formula contained in the Plan. The Plan provided that if Mr. Matthews was not a full-time employee at the time of the sale he would not be entitled to share in the proceeds, regardless of whether he resigned or was terminated with or without cause. The sale of Ocean Nutrition took place in July 2012. Had Mr. Matthews been employed with the company at the time of the sale he would have been entitled to receive a payout of approximately \$1.1 million under the Plan.

The trial judge found that Mr. Matthews had been constructively dismissed and was entitled to 15 months' notice. The sale of Ocean Nutrition took place during that 15-month period and therefore the trial judge found that Mr. Matthews was entitled to the payout from the sale of the company under the Plan as damages for his dismissal without cause. The trial judge found nothing in the Plan that limited Mr. Matthews' right to participate in the Plan during the reasonable notice period.

The Nova Scotia Court of Appeal reversed the trial judge's decision and found that Mr. Matthews was not entitled to the payout because the Plan clearly and unambiguously removed Mr. Matthews' entitlement to the payout upon his resignation or termination, with or without cause. Mr. Matthews appealed to the Supreme Court of Canada.

Decision

The Supreme Court of Canada overturned the decision of the Nova Scotia Court of Appeal and affirmed the trial judge's decision. The Court affirmed that the test for whether an

employee is entitled to compensation under an LTIP upon termination without cause is as follows:

- but for the termination, would the employee have been entitled to the compensation during the reasonable notice period; and
- is there something in the LTIP that unambiguously alters or removes the common law right to claim damages for that lost compensation that would have accrued had the employee worked until the end of the notice period.

The Court noted that it was undisputed that had Mr. Matthews worked until the end of his notice period he would have received the payout from the proceeds of the sale. Therefore, the focus in this case was strictly on the second part of the test.

The Court held that language requiring an employee to be “full-time” or “active,” such as the language used in the Plan, will not suffice to “unambiguously alter” an employee’s common law right to receive benefits under the LTIP upon termination without cause. Notably, the Court went further to hold that express limiting language of “termination, with or without cause” or “unlawful termination” will not unambiguously alter the employee’s common law entitlement either.

Although the Plan prevented an employee from receiving further benefits of the Plan where “the employee ceases to be an employee of [Ocean Nutrition], regardless of whether the Employee resigns or is terminated, with or without cause”, the Court held that this language was insufficient to prevent the common law right to recovery under the Plan. As such, Mr. Matthews was entitled to receive damages equal to what he would have received pursuant to the Plan had he worked until the end of the notice period.

Conclusion

This decision has a significant effect on employers who wish to limit employee entitlements under an LTIP upon termination without cause. Language that simply bars recovery upon termination without cause may not be sufficient to meet the high standard of “unambiguously altering the common law right” to recovery. Employers must ensure that the language of an LTIP is clear that entitlements under the plan terminate the day that notice of termination is given and do not have effect through any reasonable notice period. In light of this decision, employers should review their current incentive plans to determine if any limiting language sufficiently removes the employees’ common law right, or if revisions need to be made to do so and mitigate against potential liability for employee recovery upon terminations without cause.