

Case In Point

Appellate Court Considers Contractual Rights Upon Termination in Light of *Ocean Nutrition* and Affirms Original Decision

Date: March 17, 2021

In [*Mikelsteins v. Morrison Hershfield Limited*](#), the Ontario Court of Appeal confirmed its earlier finding that an employee's common law entitlements upon termination of employment are distinct from any rights the employee may have under a shareholder agreement where they have purchased the shares separate and apart from their compensation structure.

Background

In June 2019, the Court of Appeal overturned a motion judge's decision to grant a terminated employee the right to (i) hold onto existing shares in his former employer over a 26 month notice period and (ii) receive damages for the loss of a share bonus that would have been payable to him over the 26 month notice period.

The Court of Appeal found that the motion judge erred in applying a clause in the parties' shareholder agreement that expressly required the former employee to transfer his shares in the employer within 30 days of termination, at which time the employer had to pay the employee shareholder "fair value" for the shares. As noted in our previous [Case in Point](#), the Court of Appeal found that the motion judge had erred in conflating the employee's wrongful dismissal claim with his contractual entitlements and obligations as a shareholder. In so finding, the Court of Appeal stressed the context and rationale of the clause at issue, writing:

[21] Similarly here, the Shareholders' Agreement uses the cessation of Mr. Mikelsteins' employment as the triggering event for the process to transfer his shares. The termination occurred on October 26, 2017. There is a very plain and obvious reason why a corporation, that is employee owned, and which has terminated an employee who also happens to be a shareholder, would wish to commence the process of repurchasing the employee's shares the moment that employee is told of his or her dismissal, rather than at the end of the notice period. Understandably the corporation would not wish an employee to be able to exercise all of the rights of a shareholder once their employment is terminated.

Mr. Mikelsteins appealed the Court of Appeal's decision to the Supreme Court of Canada.

In October 2020, the Supreme Court issued its decision in [*Matthews v. Ocean Nutrition Canada Ltd.*](#) (see our [FTR Now](#) of October 13, 2020). *Ocean Nutrition* confirmed that employers must use clear and unambiguous language to remove or limit an employee's ability to either participate in or seek damages in lieu of bonuses or incentive compensation during the reasonable notice period. A court should first ask, "Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period?" and second, "If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?"

In November 2020, the Supreme Court remitted Mr. Mikelsteins' appeal back to the Court of Appeal for consideration in light of *Ocean Nutrition*.

At the Court of Appeal (Reprise)

On March 12, 2021, the Court of Appeal reaffirmed its original decision. In so doing, the Court of Appeal made the following comments about the test put forward by the Supreme Court in *Ocean Nutrition*:

[11] One very important factual point underpins these two questions. They are both directed at determining the rights of the employee *qua* employee. That is, they are both directed at determining the damages that an employee is entitled to arising from a breach of the contract of employment.

On the facts of Mr. Mikelsteins' case, the Court of Appeal found that, unlike the situation in *Ocean Nutrition*, Mr. Mikelsteins did not originally receive his shares in his former employer as a form of compensation as an employee of the company. Rather, he was given the opportunity to use his own money to purchase shares in the company. As such, his rights as a shareholder were governed by the parties' shareholder agreement, and not by the law concerning employment agreements.

Mr. Mikelsteins also attempted to change the Court of Appeal's finding with an argument involving the application of the *Employment Standards Act, 2000*. The Court of Appeal held that this and other issues were not open for its consideration given the direction it had received from the Supreme Court.

Mikelsteins is an important reminder of the various rights that are at issue at the time of termination, and underscores the importance of unambiguous language in contractual documents that govern an employee's entitlements upon termination.

Editor's Note on January 20, 2022: The Supreme Court of Canada dismissed the application for leave to appeal the Ontario Court of Appeal's decision.