

Case In Point

Appellate Court Considers Employee's Entitlement to Incentive Compensation in Light of *Ocean Nutrition*; Majority Affirms Original Decision

Date: August 24, 2021

In [Manastersky v. Royal Bank of Canada](#), a majority of the Ontario Court of Appeal confirmed its earlier finding that a trial judge had erred when he found a former executive was presumptively entitled to incentive compensation during the reasonable notice period.

Background Facts

During his employment with RBC Dominion Securities Inc. (RBCDS), Mr. Manastersky participated in a profit-sharing plan called the Mezzanine Carried Interest Plan (the Mezzanine CIP or Plan). Two funds – Funds 1 and 2 – had been established under the Mezzanine CIP, with each fund containing a portfolio of investments for an investment period. As part of his compensation, Mr. Manastersky had been granted points (shares) in the profits generated by the portfolios of Funds 1 and 2.

RBCDS terminated Mr. Manastersky's employment in February 2014, and several months later, it began to wind-up Funds 1 and 2. In addition, RBCDS approved the termination of the Mezzanine CIP regarding all future investment periods. Over the course of 2015 and 2016, RBCDS paid Mr. Manastersky the profits from Funds 1 and 2 to which he was entitled.

The Superior Court's Findings

Mr. Manastersky initiated a wrongful dismissal action against RBCDS claiming, among other things, that he was entitled to more than simply the payment of his share of the profits from Funds 1 and 2. The trial judge agreed and awarded Mr. Manastersky \$953,392.50 in respect of the lost opportunity to earn entitlements under the Mezzanine CIP during the 18-month reasonable notice period.

At the Court of Appeal

In July 2019, a majority of the Court of Appeal overturned the trial judge's decision. The majority found that the trial judge had erred by failing to ask and answer the proper question under the first step of the *Taggart v. Canada Life Assurance Co.* analysis (i.e. consider the employee's common law right to damages for breach of contract, or what the employee would have been entitled to under the plan during the reasonable notice period). As a result, the majority found that the trial judge wrongfully concluded Mr. Manastersky was presumptively entitled to damages in respect of the Mezzanine CIP simply because the payments under the Plan had historically constituted a significant part of his compensation.

The majority concluded that the provisions of the Mezzanine CIP combined with the Management Committee's decision to terminate the Plan meant that Mr. Manastersky was not entitled to any common law damages under the Mezzanine CIP beyond his vested points for Funds 1 and 2.

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

The Supreme Court of Canada's Findings in *Ocean Nutrition*

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. Manastersky’s appeal back to the Court of Appeal for consideration in light of *Ocean Nutrition*.

At the Court of Appeal (Reprise)

On June 24, 2021, the Court of Appeal released its decision, with the majority reaffirming its original decision. In so doing, it applied *Ocean Nutrition*’s analysis to the facts of Mr. Manastersky’s case, writing:

[40] [*Ocean Nutrition*] provides that damages for dismissal are designed to compensate the employee “for the income, benefits, and bonuses they would have received had the employer not breached the implied term to provide reasonable notice.” at para. 53. The terms of Mr. Manastersky’s employment contract did not entitle him to receive an annual incentive payment. The terms entitled him to receive a fund-specific incentive payment upon the end of a fund’s investment period. During his period of reasonable notice, Mr. Manastersky was entitled to receive damages calculated on the latter basis, not damages calculated on both bases. In my view, RBCDS paid Mr. Manastersky that to which he was entitled at common law and, with respect, the trial judge erred in concluding otherwise.

The majority therefore concluded that *Ocean Nutrition* did not alter the general principle as set out in recent decisions of the court that affirms the need to examine the strict wording of an incentive compensation plan when assessing entitlement throughout the common law notice period.

Manastersky reflects that terminated employees will not in all cases be entitled to wrongful dismissal damages with respect to incentive plan participation. Nevertheless, the specific structure and wording of an incentive plan will be critical to determining a terminated employee’s rights, and, particularly for typical annual or long-term incentive plans, courts will continue to look for unambiguous language clearly limiting an employee’s entitlements during a common law reasonable notice period.