SUPREME COURT OF NOVA SCOTIA
Citation: *Matthews v. Ocean Nutrition Canada Ltd*, 2017 NSSC 123

Date: 2017/05/12
Docket: Hfx No. 353606
Registry: Halifax

Between:

David Matthews

Applicant

v.

Ocean Nutrition Canada Limited

Respondent

SUPPLEMENTAL DECISION

Judge:	The Honourable Justice Arthur LeBlanc
Heard:	April 20, 2017, in Halifax, Nova Scotia
Final Written Submissions:	April 26, 2017
Counsel:	Blair Mitchell, for the Applicant Nancy Barteaux QC, for the Respondent

By the Court:

Introduction

[1] These are supplementary reasons to the main decision in this matter, which is at 2017 NSSC 16.

[2] The applicant, a chemist, was the respondent company's vice-president responsible for new and emerging technologies for some fourteen years. He resigned in June 2011. The applicant claimed that a new superior in the company, Emond, had reduced his responsibilities over several years, until, in 2011, he had only one or two hours of work per day. He claimed that he had been constructively dismissed. The company was sold after his departure, in July 2012. Mr. Matthews claimed that he would have been entitled to a payout on the sale, pursuant to Long-term Incentive Plan (LTIP), had he still been employed with the respondent at that time. I found that the applicant's efforts had been critical to the company's success, that the incentive agreement was important to his decision to stay after 2007, and that Emond had worked to reduce and ultimately to minimize the applicant's role. Accordingly, I held that the applicant was constructively dismissed, with an appropriate notice period of fifteen months. I also held that absent the constructive dismissal, the applicant would have been employed with the company at the time of the sale and LTIP payouts, and he was therefore entitled to compensation on that account. I dismissed a claim for punitive damages, and found it unnecessary to deal with an alternative claim for oppression.

[3] One of the sources of damages claimed by the plaintiff was his alleged loss of bonuses under ONC's Management Short Term Incentive Plan (STIP) during the period of reasonable notice. I made the following comments about the STIP in the decision:

> 412 I now turn to the Management Short Term Incentive Plan. In addition to his salary, Matthews received annual bonuses. Prior to 2007, these bonuses were somewhat informal. In 2007, the ONC STIP was introduced. Payments under the STIP were discretionary and typically disbursed between February and May of the following year. Eligibility for an STIP bonus payment was subject to the following conditions:
>
> > It is important to note in order to be eligible for any earned incentive bonus payout, you must:

> 1) Be in the employ of the company at the time of the earned payout. Payout date is anticipated to be between February 7th and February 28th, 2008.
>
> 2) Be deemed to have made a contribution to the result and be considered by the company to be performing your job responsibilities at an acceptable level or above.

413 For the year 2007, Dave Matthews received a bonus of $65,000. Due to ONC's failure to meet its budgeted sales and profit targets in 2008, he received a bonus of only $6,000 for that year. The company continued to struggle in 2009. On March 18, 2010, Robert Orr stated, in a letter to Matthews:

> As you are aware 2009 was a difficult year for the company. Despite achieving sales growth of about 16% our 2009 EBITDA performance was well below budget -- almost 40% - and this resulted in no management bonuses being achieved or paid for 2009. There were many factors at work, last year, including the global economic crisis, falling US dollar values, declining fish oil pricing and management of our margin performance. But 2010 is a new year and we get to start fresh with many of those issues behind us. ...

414 The tide turned in 2010. In an undated letter to Matthews, Martin Jamieson wrote:

> 2010 was an extraordinary year in the development of our company with significant positive change taking place and the promise of more to come. Throughout this challenging period our management team remained strong and focused and delivered some of the best results in the company's history.
>
> I am pleased to inform you confidentially that the company achieved its EBITDA target for the year although we did not hit our revenue target due to challenging competitive conditions in the marketplace. Based on these results, our Board of Directors has approved STIP payments at 50% of target. As a participant in the management STIP scheme you will be receiving a bonus payment of $50,000.00 by the end of February. ...

415 Matthews says he did not receive STIP payments for the years 2011 or 2012. He seeks damages for lost bonus payments. ONC says Matthews is not entitled to damages for lost STIP payments because he was not an employee at the time of the bonus payouts.

416 I am satisfied that the STIP bonuses were integral to Matthews' compensation. Although the bonuses depended upon ONC reaching certain targets, the Board approved a management bonus every year except 2009. The bonuses in 2007 and 2010 were substantial. It appears that when Matthews left ONC, the company was performing better than ever.

> 417 I must now consider whether the wording of the STIP limited or removed Matthews' common law right to damages. In my view, the condition precedent requiring that the employee "be in the employ of the company at the time of the earned payout" does not clearly oust Mr. Matthews' right to damages for loss of bonus payments. He is entitled to compensation for the loss of any bonuses paid by ONC to under the STIP during the reasonable notice period.

[4] The main decision concluded with a discussion of mitigation, where I stated, in part:

> 427 In addition to one month's lost earnings, Mr. Matthews is entitled to compensation for loss of the payout he would have received under the LTIP -- $1,086,893.36, less applicable tax deductions -- and any bonuses awarded under the STIP during the reasonable notice period.
>
> 428 A wrongfully dismissed employee cannot recover from the employer for losses that could reasonably have been avoided. The burden of proof is on the employer to show that the employee could reasonably have avoided some part of the loss claimed: *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324, 1975 CarswellAlta 57, at para. 11.
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> …
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> 430 Consistent with his duty to mitigate, Mr. Matthews quickly secured new employment at a higher salary. In his last several years at ONC, Matthews' gross salary was $142,000 CAD per annum. His salary increased to a net amount of $220,000 USD per annum when he joined TASA. Any salary or benefits Matthews received from TASA in excess of what he would have earned at ONC during the reasonable notice period must be deducted from his damage award.
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> …
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> 432 I will leave it to counsel to calculate the appropriate quantum based on my findings. I will hear from them if they are unable to reach agreement. [Emphasis added.]

[5] An issue has arisen with respect to what, if any, quantum of damages should be ordered on account of "any bonuses paid by ONC to under the STIP during the reasonable notice period" (para. 417). Mr. Matthews submits that the damages award should account for missed STIP amounts during the notice period, during 2011 and 2012. ONC takes the position that he should receive no damages on this account.

[6] ONC's position on the application was that Mr. Matthews should not receive damages arising from the loss of STIP payments because he was not employed by ONC when any such payments would have been made. As noted, I rejected this

position and held that if STIP was paid during the notice period, Mr. Matthews would be entitled to be compensated. This, of course, would be subject to STIP having been paid for that period.

[7] ONC submits that Mr. Matthews has not established that he sustained a loss with respect to the STIP during the reasonable notice period. Firstly, ONC says, there is no evidence supporting the calculation of any STIP due during the notice period. Secondly, ONC says, Mr. Matthews's own affidavits do not attach any documentary proof relating to STIP during the notice period. Thirdly, his cross-examination also did not furnish such proof. Fourthly, the fact that Mr. Matthews received STIP payments in previous years does not establish that he would have received one in 2011. The bonuses were based on whether the company met certain targets, which the Board used to determine STIP entitlement and quantum. There is no evidence that the ONC Board of Directors approved a STIP grid for 2011. ONC concedes that there is evidence of discussion of a 2011 STIP at a Board meeting in April of that year. Fifthly, ONC says, counsel for Mr. Matthews did not raise the issue of the 2011 or 2012 STIP on direct or cross-examination of various ONC executives, including Robert Orr, Martin Jamieson, Daniel Emond, and Craig Wilson. Accordingly, ONC submits that there is no evidence that STIP payouts were made in 2011 or 2012, and therefore there is no basis for damages in connection with the STIP.

[8] The question of entitlement to damages on account of lost bonuses was considered in *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, [2015] N.S.J. No. 166, where Smith A.C.J. awarded notice-period damages to a wrongfully terminated bank executive in respect of an "Annual Incentive Program." She said:

> 230 That takes me to the issue of whether the Plaintiff is entitled to have bonus income included in the calculation of his damages for the 24 month notice period. In *The Law of Dismissal in Canada*, 3d ed (Aurora, Ont: Canada Law Book, 2003) (Looseleaf: Updated to April 2015), Howard Levitt describes the general rule regarding bonuses in wrongful dismissal actions as follows at pp.9-6 and 9-7:
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> > If bonuses are reasonably anticipated by the employee, and have been provided both regularly and in fairly predictable amounts such that they are reasonably considered to be an integral part of the wage structure, they become part of the contract of employment... [Citations omitted]
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> 231 He continued at p.9-8:
>
> > As a general rule, the employee must establish entitlement to a bonus and, accordingly, bonuses will be included in calculating the damages for wrongful dismissal. This will be so even if the bonus had not originally

> been considered to be part of the remuneration package. If, on the balance of probabilities, the plaintiff but for his or her dismissal would have received the bonus, the court will award such bonus. If the plaintiff can demonstrate that he or she would have received the bonus during the notice period, then the bonus will form part of the damages. [Citations omitted]
>
> 232 In my view, the Bank's internal document that purports to preclude the payment of a bonus if an employee has been terminated or is receiving payments in lieu of notice cannot oust the ability of the court to award damages for this loss any more than an internal bank document could purport to limit the notice period an employee would be entitled to if wrongfully dismissed. If a bonus is an integral part of an employee's compensation package, the court can award damages for the loss of such.
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> 233 I am satisfied that the Annual Incentive Plan was an integral part of Mr. Garner's compensation and that the court should include bonus income in the 24 month notice period.
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> 234 I have not been provided with the bonus formula for the fiscal years 2012 and 2013. As indicated, the calculation is based on an employee's job level, his performance, as well as the Bank's performance each year. Mr. Garner is entitled to bonus payments for the 24 month notice period. The bonus shall be calculated based on him being a "level 9" Branch Manager. For the period from the date of termination to October 31st, 2011, it shall be calculated using the "exceptional" rating. For the remainder of the 24 month period, it shall be calculated using the "superior" rating. (I am not satisfied that Mr. Garner would have been able to maintain the pace he was keeping in 2011. On a balance of probabilities, I find that he would have had a "superior" rating for the remainder of the notice period.) I will hear from counsel in the event that they are unable to agree on the exact bonus figures.

[9] ONC submits that Garner is distinguishable, in that Smith A.C.J. had evidence allowing her to determine what level of bonus the plaintiff would in fact have been entitled to during the notice period. In this case, ONC submits, making the determination would require further evidence.

[10] I referred counsel to *Penvidic v. International Nickel*, [1976] 1 SCR 267, and asked for additional submissions. In *Penvidic*, the court held that where an entitlement to damages was established, the fact that calculation was difficult did not bar recovery. The trial judge had remarked that "the evidence was not as helpful as one would have expected and more records giving more particulars of when and where different types of work were being done would have been very useful" (277). Spence J said, for the court, at 278-280:

Viscount Haldane L.C., in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London, Limited* [[1912] A.C. 673.], said at pp. 688-9.

> The quantum of damage is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The judges who give guidance to juries in these cases have necessarily to look at their special character, and to mould, for the purposes of different kinds of claim, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity.
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> Subject to these observations I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.

The difficulty in fixing an amount of damages was dealt with in the well known English case of *Chaplin v. Hicks* [[1911] 2 K.B. 786], which had been adopted in the Appellate Division of the Supreme Court of Ontario in *Wood v. Grand Valley Railway Company* [(1913), 30 O.L.R. 44], where at pp. 49-50, Meredith C.J.O. said:

> There are, no doubt, cases in which it is impossible to say that there is any loss assessable as damages resulting from the breach of a contract, but the Courts have gone a long way in holding that difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages, and perhaps the furthest they have gone in that direction is in *Chaplin v. Hicks*, [1911] 2 K.B. 786. In that case the plaintiff, owing, as was found by the jury, to a breach by the defendant of his contract, had lost the chance of being selected by him out of fifty young ladies as one of twelve to whom, if selected, he had promised to give engagements as actresses for a stated period and at stated wages, and the action was brought to recover damages for the breach of the contract, and the damages were assessed by the jury at £100. The defendant contended that the damages were too remote and that they were unassessable. The first contention was rejected by the Court as not arguable, and with regard to the second it was held that "where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case": per Fletcher Moulton, L.J. at p. 795.

When *Wood v. Grand Valley Railway Company, supra*, reached the Supreme Court of Canada, judgment was given by Davies J. and was reported in 1915 CanLII 574 (SCC), 51 S.C.R. 283, where the learned justice said at p. 289:

> It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of guess work.
>
> I can see no objection whatsoever to the learned trial judge using the method suggested by the plaintiff of assessing the damages in the form of additional compensation per ton rather than attempting to reach it by ascertaining items of expense from records which, by the very nature of the contract, had to be fragmentary and probably mere estimations…

[11] The Nova Scotia Court of Appeal summarized the point in the following terms in *B.M.G. v. Nova Scotia (Attorney General)*, 2007 NSCA 120, [2007] N.S.J. No. 506:

> 172 The principles concerning certainty of damages deal with the quantification of a loss proven to have been caused by the wrongdoer's acts. If the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it does not excuse the wrong-doer from paying damages which can be proved. Even though the amount is difficult to estimate, the court must simply do its best on the evidence available: S.M. Waddams, *The Law of Damages*, 2nd ed. looseleaf (Toronto: Canada Law Book Ltd., 1991) at para. 13.30. This is often summed up by saying that difficulty of assessing damages is no bar to their recovery.

[12] The Court of Appeal discussed the process of drawing inferences in setting a damage amount in *Nova Scotia (Attorney General) v. Jacques Home Town Dry Cleaners*, 2013 NSCA 4, [2013] N.S.J. No. 4:

> 31 An inference may be described as a conclusion that is logical. An inference is not a hunch. A hunch is little more than a guess, a 50/50 chance at best, that may turn out to be right or wrong, once all the facts are brought to light. Whereas an inference is a conclusion reached when the probability of its likelihood is confirmed by surrounding, established facts. When engaged in the process of reasoning we are often called upon to draw an inference which acts as a kind of cognitive tool or buckle used to cinch together two potentially related, but still separated propositions. In the context of judicial decision-making, drawing an inference is the intellectual process by which we assimilate and test the evidence in order to satisfy ourselves that the link between the two propositions is strong enough to establish the probability of the ultimate conclusion. We do that based on our powers of observation, life's experience and common sense. In matters

> such as this, reasonableness is the gauge by which we evaluate the strength of the conclusion reached through our reasoning.
>
> 32 Two examples will illustrate my point. We anticipate it being more likely than not, that a wild toss of the football towards the sideline by a fleeing, desperate quarterback will land out of bounds. We know where the sidelines are, we see the errant throw sail off in that direction, and we can be sure the pass will be whistled out of bounds without needing to see the proof on instant replay. Similarly, noticing puddles on the street, and then a wet umbrella by the door tells us that it was raining, without having been outside in the rain to witness it.

[13] The applicant submits that the *Penvidic* principles provide a basis for awarding damages for loss of STIP payments during the notice period. As a basis for finding that there was a loss, and its assessment, he points principally to the evidence that he customarily received a STIP bonus each year, referencing receipt of an amount of $65,000 in 2008 and stating that he was "eligible" for payouts of $100,000 in each of 2009 and 2010. He states that he "received a bonus every year, before as well as after 2007", apparently including 2009, although this was not my finding on the main application (see paras. 413-416).

[14] ONC's position is that *Penvidic* should be distinguished on the ground that there has been no loss proven. ONC says there is "no evidence" of STIP bonuses being provided in 2011 or 2012, and no evidence that the company met the relevant EBITDA and revenue targets in those years. (I note in passing that in 2010 the Board exercised its discretion to make a fifty percent STIP payment despite not hitting the revenue target.) ONC also notes the variability of the payments from year to year. Additionally, ONC disputes the suggestion that Mr. Matthews received a STIP payment in 2009. I am satisfied that he did not.

[15] It is certainly correct to say that the evidence led on the STIP was less than perfect. The issue of whether STIP was paid in 2011 and 2012, though pleaded, was not raised by the applicant with any of the ONC executives who gave evidence. That said, the evidence does not have to be perfect to be persuasive on a civil standard. Based on the evidence of ONC's habitual payment of STIP bonuses, inferences from the economic fortunes of the company before and during the notice period, and the undisputed evidence that the STIP was discussed in a Board meeting in April 2011, I am satisfied that there were STIP payments made in 2011 and 2012.

[16] While there was of course no burden on ONC to disprove an entitlement to damages, ONC was aware that STIP was being advanced as a basis for damages.

There is nothing before the court to suggest that Mr. Matthews abandoned that claim. The evidence of whether such payments were made after Mr. Matthews left the company would be entirely within ONC's control. It is unconvincing for ONC to argue – as they do – that Mr. Matthews failed to provide evidence in his own affidavits to establish his entitlement to STIP payments after he left the company. He would have no direct knowledge of this. Nor is that fact that he did not refer on cross-examination to receiving notice of a 2011 STIP payment before he resigned in June of that year very significant, particularly in view of the evidence that STIP had been discussed in a Board meeting in late April. This does not, of course, excuse applicant's counsel's omission to raise the point in examining the various ONC officials. But I am not satisfied that that omission outweighs the circumstantial evidence that there would have been STIP payments in the years after the applicant left the company.

[17] I am further satisfied that there is sufficient evidence upon which to conclude that Mr. Matthews customarily received STIP payments when such payments were made from 2007. The amounts ranged from $65,000 in 2007, to $6000 in 2008, nothing in 2009, and the fifty percent payment of $50,000 in 2010 (see paras. 412-416 of the main decision). Applying the *Penvidic* reasoning, I see no better way to settle on a quantum for the remainder of the notice period than to average the amounts that Mr. Matthews actually received. (I will use the full amount for 2010, rather than the 50 percent actually paid.) This results in an average of $42,750 ($171,000/4). I award this amount for 2011, and half this amount ($21,375) for 2012, in view of the fact the company was sold in the middle of the year. This results in a total STIP damages recovery of $64,125.

[18] While it is possible that this results in a low estimate for the STIP amounts in the notice period, I note that the evidence does not allow me to draw any conclusions about the effect of any possible bonuses from the applicant's new employer, TASA. Accordingly, I am satisfied that this approach fairly balances the various uncertainties in the evidence.

[19] All payments are to be paid by the respondent after deduction of the difference between the applicant's TASA salary of $220,000 US and his ONC salary of $142,000. I will limit this deduction to twelve months, resulting in a deduction of $78,000. A fifty percent tax rate should be applied to this recovery, in accordance with Mr. Jamieson's calculations of what Mr. Matthews would have recovered under the LTIP had he been employed at ONC on the realization date.

There shall be no differentiation between US and Canadian currency for the purposes of the deduction.

[20] With respect to pre-judgment interest, the standard rate is five percent, as per Civil Procedure Rule 70.07. Both the Rule and s 41(i) of the *Judicature Act*, RSNS 1989, c 240, provide the court with a discretion, however. Rule 70.07 sets the rate at five percent, calculated simply, "unless a party satisfies a judge that the rate or calculation should be otherwise." The applicant seeks the usual rate, while ONC says the court should depart from the presumptive rate and apply a rate of 1.6 percent.

[21] According to ONC, a five percent rate would give the applicant a windfall, rather than placing him in the position he would have been in had he received the funds when they were owed, and had access to interest on the funds during that period. ONC says the length of the period for which pre-judgment interest is owed further supports a lower rate. ONC particularly emphasizes the different stipulated rates in other jurisdictions; I am not convinced that this (in itself) is a good reason to depart from the presumptive rate in this jurisdiction.

[22] I have no evidence that it was necessary for the applicant to borrow funds at a higher rate of interest, or that he had to forgo investments that would have brought a higher rate of return. I note that in *Garner v. Bank of Nova Scotia*, 2015 NSSC 122, [2015] N.S.J. No. 166, a wrongful dismissal case, Smith A.C.J. gave pre-judgment interest at a rate of 2.9 percent. This rate was agreed by the parties (para. 248). Nevertheless, this seems to me to be a reasonable rate, and *Garner* involved broadly similar subject matter to this case.

[23] Accordingly, the applicant's recovery (both in this decision and the main decision at paras. 426-330) is summarized as follows:

Base salary for July 2011:	$11,833.00 ($142,000/12)
LTIP:	$1,086,893.36
STIP:	$64,125.00
LESS TASA credits:	($78,000.00)
SUB-TOTAL:	$1,084,851.36
LESS withholding income tax at 50 percent.	

[24] The respondent shall pay to the applicant the amount of $1,084,851.36. From this amount the respondent shall remit the withholding tax in the amount of $542,425.68 to Canada Revenue Agency.

[25] I award pre-judgment interest at the rate of 2.9% per annum on the amount awarded. The period for which the interest is to be paid will be determined as part of the costs hearing.

[26] Counsel for the applicant may provide a draft order, consented to by the counsel for the respondent as to form, within seven days of the release of this decision. If counsel are unable to reach agreement on the form of the order, I request that each counsel provide me with their respective proposed orders not later than May 23, 2017.

LeBlanc, J.