

COURT OF APPEAL AFFIRMS DECISION LIMITING EMPLOYEE EQUITY ENTITLEMENTS

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The Ontario Court of Appeal has affirmed its earlier decision in [Mikelsteins v Morrison Hershfield Limited](#) (“*Mikelsteins*”),^[1] a landmark case regarding the distinction between employment rights and shareholder rights.

Background

In *Mikelsteins*, a director-level employee of Morrison Hershfield Limited (“MHL”) received a “Share Bonus” each year based upon the number of shares that he held in MHL’s parent corporation. This Share Bonus was subject to the terms of a shareholders’ agreement, which automatically deemed the employee to have sold his shares within 30 days of the date of written notice of his dismissal. The Court of Appeal found that the clause was enforceable, ruling that the Share Bonus was to be “determined in accordance with the terms of the shareholders’ agreement and only that agreement” (rather than in accordance with any statutory or common law notice period).^[2]

However, following the Supreme Court of Canada’s (“SCC”) decision in *Matthews v Ocean Nutrition Canada Ltd.* (“*Matthews*”),^[3] the *Mikelsteins* decision was remanded back to the Court of Appeal for reconsideration.

The Reconsideration

In *Matthews*, the SCC held that in calculating a dismissed employee’s common law entitlement to damages for reasonable notice, the appropriate starting point is to consider what compensation the employee would have received had the employer not breached the implied term to provide reasonable notice. Therefore, courts must ask two questions when determining the appropriate damages for breach of the implied term to provide reasonable notice:

1. Would the employee have been entitled to the compensation during the reasonable notice period?
2. If so, do the terms of the employment contract or plan unambiguously take away or limit that common law right?

Regarding the second question, contract and/or plan language must be held to a high standard. According to

the SCC: “the provisions of the agreement must be absolutely clear and unambiguous”. Neither requiring an employee to be “full-time” nor “active” is sufficient

In the *Mikelsteins* reconsideration, the question before the Court of Appeal was whether the ruling in *Matthews* would lead to a different conclusion regarding the employee’s entitlements under the shareholders’ agreement.

In relatively brief reasons, the Court of Appeal affirmed its previous decision. According to the Court of Appeal, the SCC’s analysis in *Matthews* was directed at determining the damages that an employee is entitled to receive following a breach of their employment contract, but does not extend to damages that arise outside of the realm of the employment relationship.

In *Mikelsteins*, the Court of Appeal had previously noted that the employee was “one of a select group of MHL employees who were eligible to purchase shares of MHL’s parent corporation.” Nevertheless, the Court of Appeal was of the view that the employee had not been granted shares as compensation for his employment, but instead was given the opportunity to use his own funds to purchase the shares. His entitlement to the shares was, therefore, governed by his rights as a shareholder of MHL’s parent company rather than a dismissed former employee, and the SCC’s analysis in *Matthews* had no application.

Takeaways for Employers

The *Mikelsteins* reconsideration confirms that the rights of a shareholder once their employment is terminated differ from the rights of an employee under his or her employment contract (such as the employee’s right to receive damages for lost benefits during the reasonable notice period). However, the terms of the shareholders’ agreement still need to be clear and unambiguous to be enforceable, particularly as such terms relate to the termination of a shareholder’s rights.

[1] 2019 ONCA 515 [*Mikelsteins*].

[2] *Ibid* at para 25.

[3] 2020 SCC 26 [*Matthews*].

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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