SCC Court File No.: 38252

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N:

DAVID MATTHEWS

APPELLANT
(Respondent)

and

OCEAN NUTRITION CANADA LIMITED

RESPONDENT
(Appellant)

and

CANADIAN ASSOCIATION FOR NON-ORGANIZED EMPLOYEES, DON VALLEY COMMUNITY LEGAL SERVICES, LAW STUDENTS LEGAL ADVICE PROGRAM, CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS AND PARKDALE COMMUNITY LEGAL SERVICES

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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Overview

1. For over twenty years, this Court has recognized a duty of good faith and fair dealing "in the manner of dismissal". Courts initially treated a breach of this duty as a factor to assess the length of reasonable notice,[1] but for the past decade a breach of this duty has led to direct compensation when it has caused mental distress or other tangible forms of loss.[2] The duty, however, remained limited to conduct in the "manner of dismissal."

2. The Intervenor, Parkdale Community Legal Services ("PCLS"), submits that this restrictive approach to the duty of good faith is no longer appropriate in the employment context. Rather, the time has come for this Court to recognize that the duty of good faith permeates throughout the entire employment relationship.

3. The Appellant has examined this point through the lens of this Court's decision in *Bhasin v Hrynew* and the organizing principle of good faith in contractual performance.[3] To that point, PCLS adds three more:

    i. A duty of good faith throughout the employment relationship is consistent with international treatment of the duty of good faith in Employment Law;

    ii. Extending the duty of good faith throughout the employment relationship creates consistency between constructive dismissal and standard dismissal cases; and

    iii. Extending the duty of good faith throughout the employment relationship eliminates confusion over the time-period covered by the "manner of dismissal".

4. In short, a duty of good faith throughout the employment relationship properly recognizes that an employee's vulnerability exists throughout the employment relationship and not solely at the moment of dismissal.

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[1] *Wallace v. United Grain Growers* [1997] 3 SCR 701.
[2] *Honda v Keays*, 2008 SCC 39.
[3] *Bhasin v Hrynew*, 2014 SCC 71.

5. PCLS will also address the proper analytical framework for damages for a breach of the duty of good faith and its interaction with damages for wrongful dismissal. In this case, the Nova Scotia Court of Appeal (both the majority and dissent) conflates two distinct legal concepts in its analysis of whether Matthews is entitled to his long term incentive and short term incentive plans ("LTIP/STIP") post termination: damages for wrongful dismissal and the duty of good faith contractual performance. These are distinct causes of action that courts must assess separately. PCLS provides a framework for doing so.

The Duty of Good Faith Permeates throughout the Employment Contract

1) Limiting the duty to the manner of dismissal lags behind international treatment

6. In *Bhasin,* this Court traced the origins of the doctrine of contractual good faith and how other jurisdictions have dealt with the obligation of good faith.[4] A similar analysis of good faith in employment in the United Kingdom, Australia, and New Zealand demonstrates two things:

   i. All three jurisdictions impose some form of good faith requirement in employment; and

   ii. The duty is not confined to the manner of dismissal.

a) United Kingdom

7. The UK House of Lords (as it then was) has recognized an obligation of good faith to reflect the inequality of bargaining power between the employer and employee in the employment contract.[5] This is expressed as an implied contractual term of "mutual trust and confidence", and it reflects the unique aspects of the employment contract.[6] The

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[4] *Bhasin, supra* note 3 at paras 48-58.
[5] *Malik v Bank of Credit and Commerce International SA*, [1998] AC 20.
[6] Douglas Brodie, "Fair Dealing and the World of Work" Industrial Law Journal, Vol. 43, No. 1, March 2014.

implied term of mutual trust and confidence is a concept meant to protect employees from exploitation, given their vulnerability in the employment relationship.[7]

8. The obligation of good faith is only applicable to the employment contract during performance of the contract. It is meant to govern the long-term relational contract to discourage opportunistic behaviour by either party.[8] However, an employee cannot seek common-law damages for bad faith "in the manner of dismissal" because such a right "*cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed*."[9]

b) Australia

9. In *Commonwealth Bank of Australia v Barker*, the Australian High Court rejected an implied obligation of mutual trust and confidence in employment contracts. The Court rejected this implied obligation because it believed it was a matter for Parliament to decide based on the policy considerations it raised.[10] The Court, however, left open the possibility of an obligation of good faith (which it saw as different from the implied term of mutual trust and confidence).[11]

10. Prior to *Baker*, lower level courts in Australia recognized a duty of good faith in employment contracts. For example, the Supreme Court of New South Wales defined this obligation as "*the honest and reasonable exercise of the employer's rights; with prudence, caution and diligence, and with care taken to avoid or minimize adverse consequences to the employee that are inconsistent with the agreed common purpose and expectations of the parties to the contract. Essentially, employers must treat employees*

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[7] Alan L. Bogg, Good Faith in the Contract of Employment: A Case of the English Reserve, 32 Comp. Lab. L. & Pol'y J. 729 (2011)
[8] Alan L. Bogg, Good Faith in the Contract of Employment: A Case of the English Reserve, 32 Comp. Lab. L. & Pol'y J. 729 (2011).
[9] *Johnson v Unisys Limited*, [2001] UKHL 13 at para 2; see also paras 54-58.
[10] *Commonwealth Bank of Australia v Barker*, [2014] HCA 32.
[11] *Ibid* at para 42. See also para 107.

fairly in the conduct of their business and must act responsibly and in good faith in the treatment of their employees."[12]

11. After *Baker*, Australian courts have held that an employer must exercise discretionary power under a contract of employment reasonably, similar to the obligation on administrative decision makers in Canada. [13] Interestingly, the New South Wales Court of Appeal relied upon the UK Supreme Court's 2015 decision in *Braganza v BP Shipping Limited*[14] on this same point, which in turn came to this conclusion because of the implied term of mutual trust and confidence adopted in the UK. This shows that while Australia has not adopted the implied term of mutual trust and confidence in all respects, the duty of good faith remains an animating principle in employment law in Australia.

c) New Zealand

12. The New Zealand *Employment Relations Act 2000* imposes a statutory duty on all parties to act in good faith during an employment relationship, requiring parties to act in a cooperative manner that allows both the employer and employee to achieve their economic objectives. The obligation extends beyond the manner of dismissal and permeates all aspects of the employment relationship.[15]

2) Limiting the duty of good faith to the manner of dismissal creates dissonance between constructive and actual dismissals

13. Constructive dismissal cases demonstrate the arbitrariness of only extending obligations of good faith to the manner of dismissal. In *Potter v New Brunswick Legal Aid Services Commission*, this Court explained that there are two ways an employee can establish a constructive dismissal:

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[12] *Foggo v O'Sullivan Partners (Advisory) Pty Limited*, [2011] NSWSC 501 at paras 98-99; see also *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor*, [2007] NSWSC 104 at paras 127-128.
[13] *Bartlett v Australia & New Zealand Banking Group Ltd*., [2016] NSWCA 30 at para 49.
[14] *Braganza v BP Shipping*, [2015] UKSC 17.
[15] *Employment Relations Act 2000*, Public Act 2000 No 24 Date of assent 19 August 2000.

i. Where the employer breached an express or implied contract term of the contract, in a way that was sufficiently serious to constitute constructive dismissal; or,

ii. Where an employer's conduct demonstrates that it no longer intends to be bound by the employment contract because it made continued employment intolerable.

With respect to the second type of constructive dismissal, this Court explained that a decision maker must look at conduct during the course of the employment relationship: "*[t]his approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract*."[16]

14. The case at bar illustrates how, particularly with the second type of constructive dismissal, the "manner of dismissal" requirement becomes arbitrary in the context of bad faith damages cases.

15. Specifically, as in this case, a decision maker must often assess the parties' conduct throughout many years of the employment relationship to determine whether the employee was constructively dismissed. If, on the facts, the decision maker concludes it became intolerable for the employee to stay in their employment, the employee is entitled to reasonable notice damages. The employee may also have a claim against the employer for its bad faith conduct "in the manner of dismissal" based on the employer's behaviour throughout the duration of the employment contract because the bad faith conduct also constituted part of the "manner of dismissal".

16. In contrast, if an employer engages in the exact same behaviour but the employee elects to stay in their employment, the employee would have no claim to bad faith damages, even if the employer ultimately elects to terminate the employee in an unrelated way. The bad faith treatment is not considered because the bad faith conduct occurred during the employment relationship, and not "in the manner of dismissal". This is problematic

[16] *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at paras 31-35.

because the form of termination, as opposed to an assessment of the employer's conduct, should not determine whether the employee can bring a claim for bad faith damages.

3) The "manner of dismissal" requirement creates confusion and unpredictability

17. Constructive dismissal is not the only concept that highlights the arbitrariness of the "manner of dismissal" requirement. Courts have consistently struggled with this when particular bad faith conduct constitutes part of "the manner of dismissal." Some courts have extended the obligation of good faith beyond the very moment of dismissal by interpreting this duty of good faith broadly, so that "*[p]re and post termination conduct may be considered in an award for moral damages, so long as it is 'a component of the manner of dismissal.*'"[17] In one case, the Ontario Court of Appeal considered behaviour going back as far as five years prior to the date of dismissal to justify an award of damages for breach of this duty of good faith.[18] This uncertainty about the duration of the duty of good faith renders it wavering, unreliable, and incapable of protecting vulnerable workers against bad faith conduct by their employers.

18. This Court originally created the duty of good faith to the manner of dismissal because "*the point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection*."[19] While employees certainly require protection from bad faith conduct when they are "most vulnerable", employee vulnerability exists throughout the employment relationship. An employee is vulnerable at the time of hiring,[20] during any renegotiation or change to the contract,[21] and in the employee's day-to-day performance of the contract. Indeed, this Court has recognized that employees are generally a "vulnerable group in society."[22] Restricting the duty of

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[17] *Doyle v Zochem*, 2017 ONCA 130 at para 13.
[18] *Lowndes v Summit Ford Sales Ltd.* (2006), 47 CCEL (3d) 198 (ONCA).
[19] *Wallace*, supra note 1 at para 95.
[20] *Rainbow Concrete Industries Limited v Kavan Cheff-Burns*, 2016 CanLII 14142 (ON LRB) at para 24;
[21] *Hobbs v TDI Canada Ltd.* (2004), 246 DLR (4th) 43 (ONCA) at para 42; *Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464 at para 49.
[22] *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at p 1051.

good faith to only the "manner of dismissal" fails to adequately address this inherent vulnerability permeating throughout the employment relationship.

19. In conclusion, the time has come to eliminate the requirement for bad faith conduct to occur only "in the manner of dismissal" and instead recognize that an employer owes an implied duty of good faith towards its employees. Such a step is consistent with international norms, ensures consistent treatment for all employees, and eliminates artificial arguments over when conduct in the "manner of dismissal" begins and ends.

The Proper Analytical Framework for Remedies in Bad Faith Cases

20. Generally, courts have restricted employee damages for bad faith conduct to mental distress damages: where an employer acts in bad faith "in the manner of dismissal" causing mental distress, the employee is entitled to damages reflecting the actual harm the employee suffered. In *Honda*, this Court explained that this concept requires that decision makers compensate an employee based on the actual harm they suffered, as opposed to awarding an arbitrary bump to their notice period.[23]

21. However, not all damages for bad faith conduct are necessarily for mental distress. For example, damages could include reputational harm[24] or, as is the case here, economic loss (i.e. the lost entitlement to the LTIP/STIP payments). PCLS submits that, when considering remedies for bad faith conduct other than mental distress damages, decision makers ought to use the same framework as in mental distress cases.

22. In the final two sections of these submissions, PCLS provides a framework for considering both reasonable notice and bad faith damages because, in some cases such as this one, there is some overlap. An employee may be entitled to compensation for the loss of a post-termination benefit (like the LTIP/STIP) as a remedy either for their wrongful dismissal or for bad faith conduct by the employer. While the Nova Scotia Court of Appeal somewhat conflated these two concepts in its analysis, reasonable notice and bad

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[23] *Honda, supra* note 2 at paras 53-56.
[24] *Tipple v Canada (Attorney General)*, 2012 FCA 158 at para 19.

faith damages are distinct legal concepts and this Court ought to adopt a framework that recognizes that they are two separate heads of damages.

a) Reasonable notice principles

23. Employment contracts for an indefinite period of time require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause.[25] Generally, reasonable notice includes all aspects of an employee's compensation, including benefits, commissions, incentives, and any other entitlements that form an integral part of the employee's compensation.[26] In this case, where the LTIP/STIP came due during the reasonable notice period and formed an integral part of his compensation, Matthews would be presumptively entitled to the LTIP/STIP as part of his notice period damages.

24. However, an employer can explicitly exclude an employee's entitlement to certain compensation as part of the notice period under two conditions:

i. It has done so clearly and unambiguously in the contract of employment;[27] and

ii. The exclusion complies with minimum provincial employment standards.[28]

25. The majority of the Court of Appeal addressed the first condition in this case and found that the language of the LTIP clearly excluded payment of that benefit upon termination.

26. With respect to the second condition, Matthews has not argued that the LTIP failed to comply with the Nova Scotia *Labour Standards Code* (the "*LSC*"). While the LTIP language does not comply with the *LSC* because the LTIP/STIP ends immediately upon termination and is not maintained through at least the statutory notice period, and as such ought to be void, PCLS appreciates that this issue is not currently before this Court.[29]

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[25] *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 998.
[26] *Paquette v TeraGo Networks Inc*, 2016 ONCA 618 at paras 16-17.
[27] *Machtinger, supra* note 27 at 998; *Wood v Deeley Imports Ltd*, 2017 ONCA 158 at para 40.
[28] *Machtinger, supra* note 27 at 1004.
[29] Paragraph 74(a) of the *Labour Standards Code* prohibits an employer from altering "any other term or condition of employment" during the statutory notice period.

27. PCLS nonetheless stresses that the Court ought to explicitly acknowledge two broader issues relating to the implications of minimum provincial employment standards:

    i. As set out above, an employer must satisfy a Court that its contractual language limiting an employee's entitlement upon termination complies with minimum provincial employment standards in order to oust the common law; and,

    ii. The issue of whether the LTIP/ STIP complied with the *LSC* is not being decided in this case, and as such, is a live issue for another day.

28. In summary, applying the above framework to this case, Matthews would have a presumptive entitlement to the LTIP/STIP because they arose during his common law notice period and formed an integral part of his compensation. However, if the employer satisfies the Court that it has clearly and unequivocally ousted the common law and (while not at issue in this case) such language complies with minimum provincial employment standards, Matthews would not be entitled to the LTIP/STIP payments.

b) Damages for a breach of the duty of good faith

29. The analysis does not end here, however. An employee could still argue an entitlement to a post-termination benefit, such as the LTIP/STIP, as damages flowing from the employer's breach of the duty of good faith. If an employee can prove a breach of the duty of good faith, the next is question is: what is the appropriate remedy for that breach?

30. In the dissenting decision at the Nova Scotia Court of Appeal in this case, Justice Scanlan conflated remedies from wrongful dismissal and bad faith conduct. Specifically, the dissent would have awarded Matthews the LTIP on the basis that the employer acted in bad faith and that Matthews' entitlement to the LTIP/STIP matured during the common law notice period.[30] Respectfully, this approach is not analytically correct and is a reversion to the *Wallace* manner of calculating damages by awarding notice period damages for a breach of the duty of good faith – but using a "dollar" bump instead of a notice-period bump.

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[30] *Matthews v Ocean Nutrition Canada*, 2018 NSCA 44 at paras 203 and 210.

31. Instead, the Court ought to adopt an approach consistent with its decision in *Honda*, where it explained that damages for a breach of the duty of good faith had to follow the *Hadley v Baxendale* principle: if the employee can prove bad faith conduct, the employee is entitled to damages that arise naturally from the breach itself or those that are in the reasonable contemplation of the parties at the time of contracting.[31] The entitlement is not tied to the common law notice period; rather, it is tied to whether the loss naturally flowed from the breach or was in the reasonable contemplation of the parties.

32. As such, in a case such as this, the question becomes: whether the loss of the LTIP/STIP arose naturally from the employer's bad faith conduct or whether it was reasonably foreseeable at the time the parties entered into the contract that bad faith conduct would lead Matthews to resign, despite contractual language disentitling him from the LTIP/STIP payments after resignation.

33. For clarity, PCLS takes no position on whether the employer acted in bad faith or whether the loss of the LTIP/STIP benefit was reasonably foreseeable. Rather, its position is that this is the analytical lens that the Court ought to apply to an employer's bad faith conduct. The same framework should apply if an employee is pursuing damages for mental distress, reputational harm, or, as in this case, economic loss.

Summary of PCLS's Position

34. In summary, PCLS's position is:

    i. The obligation of good faith ought to permeate all aspects of the employment contract, and not be confined to the manner of dismissal; and

    ii. The analytical framework for damages for bad faith must continue to recognize that reasonable notice and bad faith damages are separate concepts. While they may at times be overlapping, decision makers must assess them separately.

[31] *Honda, supra* note 2 at paras 55-56.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of August, 2019.

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SCHEDULE A – AUTHORITIES

NO.	AUTHORITIES	PARA
1.	*Bartlett v Australia & New Zealand Banking Group Ltd.*, [2016] NSWCA 30	6
2.	*Bhasin v. Hrynew*, 2014 SCC 71	3, 6, 13
3.	*Braganza v BP Shipping*, [2015] UKSC 17.	
4.	*Braiden v. La-Z-Boy Canada Limited*, 2008 ONCA 464	12
5.	*Commonwealth Bank of Australia v Barker, [2014] HCA 32*	6
6.	*Doyle v Zochem*, 2017 ONCA 130	11
7.	*Foggo v O'Sullivan Partners (Advisory) Pty Limited*, [2011] NSWSC 501	6, 12, 14
8.	*Hobbs v TDI Canada Ltd.* (2004), 246 DLR (4th) 43 (ONCA)	12
9.	*Honda v. Keays*, 2008 SCC 39	1, 14, 25
10.	*Johnson v Unisys Limited*, [2001] UKHL 13	6
11.	*Lowndes v Summit Ford Sales Ltd.* (2006), 47 CCEL (3d) 198 (ONCA)	11
12.	*Malik v. Bank of Credit and Commerce International SA*, [1998] AC 20	6
13.	*Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986	17, 18
14.	*Matthews v Ocean Nutrition Canada*, 2018 NSCA 44	24
15.	*Paquette v TeraGo Networks Inc*, 2016 ONCA 618	17
16.	*Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10*	7
17.	*Rainbow Concrete Industries Limited v Kavan Cheff-Burns*, 2016 CanLII 14142 (ON LRB);	12
18.	*Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor*, [2007] NSWSC 104	6
19.	*Slaight Communications v Davidson*, [1989] 1 SCR 1038	12

20.	*Tipple v Canada (Attorney General)*, 2012 FCA 158	15
21.	*Wallace v. United Grain Growers* [1997] 3 SCR 701	1,12
22.	*Wood v Deeley Imports Ltd*, 2017 ONCA 158	18
NO.	**PUBLICATIONS**	**PARA**
23.	Douglas Brodie, "Fair Dealing and the World of Work" Industrial Law Journal, Vol. 43, No. 1, March 2014	7
24.	Alan L. Bogg, Good Faith in the Contract of Employment: A Case of the English Reserve, 32 Comp. Lab. L. & Pol'y J. 729 (2011)	7,8

SCHEDULE "B" – LEGISLATION

https://www.ontario.ca/laws/statute/00e41