COURT OF APPEAL FOR ONTARIO

CITATION: Celestini v. Shoplogix Inc., 2023 ONCA 131
DATE: 20230228
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Simmons, Paciocco and Zarnett JJ.A.

BETWEEN

Stefano Celestini

Plaintiff (Respondent)

and

Shoplogix Inc., Friedman Canada Inc., and Vela Software International Inc.

Defendants (Appellants)

Michael A. Polvere and James R. Leslie, for the appellants

David Conn, for the respondent

Heard: October 4, 2022

On appeal from the judgment of Justice Michael T. Doi of the Superior Court of Justice, dated May 31, 2021, with reasons reported at 2021 ONSC 3539.

Zarnett J.A.:

OVERVIEW

[1] The common law “changed substratum” doctrine is central to this appeal. Under it, provisions in a written employment contract that restrict or limit the amounts payable to a dismissed employee may be unenforceable. The doctrine applies where there have been fundamental expansions in the employee’s duties after the employment contract was made, such that the substratum of the

employment contract has disappeared or substantially eroded, or it can be implied that the contract could not have been intended to apply to the role ultimately occupied by the employee.

[2] In 2017, the appellant Shoplogix Inc. ("Shoplogix")[1] dismissed the respondent, Stefano Celestini, from his employment, without cause. When it did so, Shoplogix took the position that Mr. Celestini's rights were governed by an employment contract signed 12 years earlier, in 2005. The 2005 contract provided that, upon a without cause termination, Shoplogix would pay Mr. Celestini's base salary, and continue his group health insurance, for 12 months, and would make a pro-rated payment for his annual bonus accrued up to termination. It provided that these payments would be in full satisfaction of all claims arising out of the termination.

[3] Mr. Celestini took the position that, by 2017, the termination provisions relied on by Shoplogix had become unenforceable, because the substratum of the 2005 contract had disappeared, or been substantially eroded, due to material changes in his employment duties since 2005. Therefore, he claimed he was entitled to common law damages for wrongful dismissal, due to the breach by Shoplogix of the implied term to provide reasonable notice of termination. Based

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[1] There are two other appellants in this appeal. As discussed below, the appellant Friedman Canada Inc. became the parent company of Shoplogix in 2017. The appellant Vela Software International Inc. amalgamated with Shoplogix in 2018. For convenience, I refer exclusively to Shoplogix as the party with the employment obligations vis-à-vis Mr. Celestini.

on his age, seniority, length of service and other factors, he maintained that the reasonable notice he should have received was substantially greater than 12 months, and the resulting damages for lost salary, benefits and bonus he would have earned in the notice period would significantly exceed the amounts payable on termination under the 2005 contract.

[4] On a motion for summary judgment, the motion judge found that Mr. Celestini's responsibilities fundamentally and substantially increased over the course of his employment, and that "[a]s such, the substratum of his [2005] contract of employment disappeared and implicated the changed substratum doctrine which left the notice terms in his contract no longer enforceable". Mr. Celestini was therefore entitled to damages at common law for the failure of Shoplogix to provide reasonable notice of termination. The motion judge found the appropriate notice period was 18 months. He awarded damages comprised of six additional months of base salary (in addition to the 12 Shoplogix had already paid), bonus entitlements Mr. Celestini would have received over the 18 month notice period less an amount for accrued bonus paid to him on termination, car allowance entitlements, and lost life insurance benefits. The total awarded was $421,043.05.

[5] Shoplogix appeals. It submits the motion judge incorrectly expanded the changed substratum doctrine and erred in finding that any changes in Mr. Celestini's employment duties were sufficient to engage the doctrine's proper

operation. According to Shoplogix, the motion judge should have treated the termination provisions in the 2005 employment contract as continuing in force, and since they were complied with, dismissed Mr. Celestini's claim. It argues, alternatively, that the motion judge erred in awarding damages for lost bonus entitlements, and in any event, calculated them incorrectly.

[6] Mr. Celestini cross-appeals. He submits that the motion judge erred in deducting, from the damages award, the bonus payment that Mr. Celestini received at the time of termination.

[7] For the reasons that follow, I would dismiss the appeal. The motion judge's finding that the changed substratum doctrine applied, his finding that damages should be awarded for lost bonus entitlements in the period of reasonable notice, and his calculation of the amount of the bonus that would have been earned in the period of reasonable notice, are each entitled to deference on appeal. Shoplogix has not identified any reversible error justifying appellate interference with these determinations.

[8] I would also allow the cross-appeal in part. In my respectful view, the motion judge made a reversible error in deducting the entire amount of Shoplogix's payment to Mr. Celestini for the bonus that he earned in the period before termination, from the damages award relating to the bonus payments he would have earned in the 18 months following termination. Even though the 2005 contract

had become unenforceable, Shoplogix still had an obligation to pay the bonus up to dismissal. It was only entitled to a credit to the extent that, under the contractual bonus arrangements that were enforceable at the time of dismissal, the payment on termination represented an overpayment of Shoplogix's obligations.

BACKGROUND

[9] Shoplogix was founded in 2002. Mr. Celestini was one of its co-founders, and he originally served as its Chief Executive Officer ("CEO").

[10] In 2005, a venture capital firm purchased some of the shares in Shoplogix from the founders, including from Mr. Celestini. Mr. Celestini stepped down as CEO and was replaced by Kevin Dwyer. Mr. Celestini was given the position of Chief Technology Officer ("CTO").

[11] Shoplogix and Mr. Celestini signed a written employment contract dated May 17, 2005 (the "2005 Contract").

[12] The 2005 Contract provided that Mr. Celestini would be employed as CTO and would carry out the duties of that office set out in any Shoplogix by-laws and as specified by the CEO, subject to the overall direction of the board and "consistent with such office". He was also to perform "any other duties that may reasonably be assigned to him by the CEO or the board". Mr. Celestini was to report to the CEO.

[13] The 2005 Contract provided that Shoplogix could dismiss Mr. Celestini without cause by giving one month's written notice and continuing to pay his base salary and group health coverage for 12 months from the date of termination. Mr. Celestini would also be entitled to be paid an amount equal to the bonus he received in the prior year, pro-rated for the period of the current year up to termination. The 2005 Contract provided that its provisions concerning notice and termination were fair and equitable and the payments it contemplated would be in full satisfaction of any claims regarding termination of employment.

[14] The motion judge found that Mr. Celestini's role as CTO at the time of the 2005 Contract involved certain duties as assigned by Mr. Dwyer. These focussed on transferring product and corporate knowledge within Shoplogix. The CTO role at that time did not involve sales, travel, infrastructure responsibilities, or financing.

[15] In 2008, Mr. Celestini and Shoplogix entered into an Incentive Compensation Agreement ("ICA"), a bonus plan for management-level employees. The motion judge found that it significantly changed Mr. Celestini's compensation from the bonus arrangements in the 2005 Contract. He also found that Shoplogix did not mention or ratify the 2005 Contract when the ICA was agreed to.[2]

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[2] In 2012, Mr. Celestini also became a participant under the Management Incentive Plan ("MIP"), a retention bonus structure in which participants would be entitled to a share of a pooled fund were a certain "exit event" to be triggered, which included the sale of all or substantially all of the company's shares. The fund would be valued at 10% of what Shoplogix and its shareholders received if the business was sold. Mr. Celestini's share of the fund was 33%.

[16] The motion judge found that the increased compensation provided by the ICA was consistent with substantial and fundamental changes to Mr. Celestini's role that began in 2008, when a new CEO, Martin Ambrose, replaced Mr. Dwyer. Mr. Ambrose instituted dramatic changes to revitalize Shoplogix. One change was the drastic reduction in the number of senior management personnel, which caused Mr. Celestini's workload and responsibilities to increase substantially. These new responsibilities included: managing important aspects of sales and marketing; directing managers and senior staff who were reassigned to report to him; travelling to pursue international sales; handling all of the company's infrastructure responsibilities; and soliciting investment funds.

[17] Friedman Canada Inc. acquired all of Shoplogix's shares on March 2, 2017. Mr. Celestini was dismissed without cause by Shoplogix on the same day. Applying the terms of the 2005 Contract, Shoplogix continued Mr. Celestini's base salary and group health coverage for 12 months beyond the termination date (that is, to March 2, 2018). Shoplogix also paid a further sum representing a pro-rated bonus for the portion of 2017 up to his termination. Since Mr. Celestini had earned a bonus of $293,850.00 in 2016, the pro-rated bonus that Shoplogix paid him for the period January 1, 2017 to March 2, 2017 was $50,554.44[3].

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[3] Since MIP entitlements had also been triggered by the sale of Shoplogix, Mr. Celestini was paid a portion of that entitlement, with a portion outstanding at the time of the motion judge's order. No issue was raised on the appeal regarding the MIP entitlements.

[18] Mr. Celestini brought an action for wrongful dismissal. Relying on the changed substratum doctrine, he alleged that fundamental changes had occurred in his employment duties since 2005, making the terms of the 2005 Contract unenforceable. He claimed damages for the failure to receive reasonable notice of termination, in amounts significantly in excess of what Shoplogix had paid him. Shoplogix defended on the basis that Mr. Celestini's only rights upon termination were those in the 2005 Contract.

[19] Both parties sought summary judgment.

The Motion Judge's Decision

[20] The motion judge granted summary judgment in favour of Mr. Celestini. He articulated the law concerning the changed substratum doctrine. He was satisfied on the evidence that "Mr. Celestini's duties changed substantially and fundamentally over the course of his employment". Mr. Celestini received new responsibilities that were "substantial and far exceeded any predictable or incremental changes to his role that reasonably would have been expected when he started as CTO in 2005". Although Mr. Celestini's CTO job title remained the same, the role Mr. Celestini was asked to, and did, fulfill "fundamentally changed" under the leadership of Mr. Ambrose as CEO, compared to what the role had been under the previous CEO, Mr. Dwyer. Reinforcing this were the substantial changes

to Mr. Celestini's compensation as a result of the ICA. All of this resulted in the substratum of the 2005 Contract disappearing.

[21] The motion judge also noted the failure of Shoplogix to obtain any acknowledgment, while the changes were occurring, that the 2005 Contract remained applicable. He found that the 2005 Contract did not expressly provide that it would continue to apply notwithstanding any changes in Mr. Celestini's responsibilities – in doing so, he rejected Shoplogix's argument that a section of the contract which required Mr. Celestini to perform duties "reasonably assigned to him" could be given that effect.

[22] The motion judge concluded that the termination provisions of the 2005 Contract had become unenforceable by the time of Mr. Celestini's dismissal, and as a result, he was entitled to damages at common law, which the motion judge found should be based on an 18-month notice period.

[23] The motion judge calculated damages for lost salary during the additional six-month period not covered by what Shoplogix had paid ($112,500). He calculated additional damages with respect to Mr. Celestini's car allowance ($28,000) and life insurance entitlements ($3,600).

[24] The motion judge also concluded that Mr. Celestini would have been entitled to an ICA bonus in the reasonable notice period. He calculated the average of the annual bonuses Mr. Celestini received in the three calendar years before 2017 to

be $223,131.66, and then calculated damages for lost bonus during the 18 month reasonable notice period of $334,697.49, being 1.5 times the average annual bonus. The motion judge went on to deduct the pro-rated amount of bonus up to the time of termination ($50,554.44) that Shoplogix paid under the 2005 Contract.

[25] As a result, the motion judge awarded total damages of $421,043.05 (exclusive of interest).

ANALYSIS

(1) The Motion Judge Did Not Err in Applying the Changed Substratum Doctrine

(a) Introduction

[26] Shoplogix submits that the motion judge improperly applied the changed substratum doctrine. It makes two related arguments.

[27] First, it argues that the doctrine requires there to have been fundamental changes to an employee's duties arising from a promotion. The doctrine could not be properly applied to an employee who was always a senior executive and who, since the commencement of the contract, held the same job title.

[28] Second, it argues that the changes the motion judge relied on were incremental, and not sufficiently dramatic or fundamental to justify abrogating the 2005 Contract.

[29] I do not accept these arguments. The first is inconsistent with the changed substratum doctrine, properly understood. The second is inconsistent with the motion judge's conclusions of mixed fact and law which are entitled to deference. I begin by situating the doctrine in its employment law context, before discussing the standard of review and returning to Shoplogix's specific arguments.

(b) The Doctrine

[30] The common law implies a term into an employment relationship of indefinite duration that the employee will receive reasonable notice before being discharged without cause. Reasonable notice is generally determined by reference to factors such as the character of the employment, the length of service, the age of the employee, the availability of similar employment, and the experience, training and qualifications of the employee: *Machtinger v HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 998-99. It follows that what will constitute reasonable notice for a specific employee may change over time, as the employee gains greater seniority and responsibility.

[31] The law also recognizes that, as long as the minimum requirements of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 are not infringed, parties to an employment arrangement may prescribe, by express contract, the entitlements of the employee on termination, and if they do so, these will apply instead of the implied term of reasonable notice: *Machtinger*, at pp. 999-1000.

[32] The changed substratum doctrine operates as a limit on when an employee's common law entitlements will be restricted by the express terms of a historical written contract. Given that an employer-employee relationship may evolve in a fundamental way after the written contract was made, the doctrine recognizes the potential inappropriateness and unfairness of applying the contract's termination provisions to circumstances that were not contemplated at the time of contracting.

[33] In *Wallace v. Toronto-Dominion Bank* (1983), 41 O.R. (2d) 161 (C.A.), at pp. 180-81, leave to appeal refused, [1983] S.C.C.A. No. 98, Robins J.A. described the doctrine and its rationale as follows:

> [T]here are readily imaginable cases where an employee's level of responsibility and corresponding status has escalated so significantly during his period of employment that it can be concluded that the substratum of an employment contract entered into at the time of his original hiring has disappeared or it can be implied that that contract could not have been intended to apply to the position in the company ultimately occupied by him.

[34] More recently, Perell J. summarized the effect of the authorities in *MacGregor v. National Home Services*, 2012 ONSC 2042, at paras. 11-12:

> The changed substratum doctrine is a part of employment law. The doctrine provides that if an employee enters into an employment contract that specifies the notice period for a dismissal, the contractual notice period is not enforceable if over the course of employment, the important terms of the agreement concerning the employee's responsibilities and status has significantly changed.

> The idea behind the changed substratum doctrine is that with promotions and greater attendant responsibilities, the substratum of the original employment contract has changed, and the notice provisions in the original employment contract should be nullified. [Citations omitted.]

[35] The written employment contract may oust the application of the changed substratum doctrine, if it expressly provides that its provisions, including its termination provisions, continue to apply even if the employee's position, responsibilities, salary or benefits change: *Miller v. Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, 10 C.C.E.L. (4th) 187, at paras. 35-36, aff'd 2014 BCCA 311, 16 C.C.E.L. (4th) 49, leave to appeal refused, [2014] S.C.C.A. No. 424. The written employment contract may also have continuing force even if there have been substantial changes in the employee's duties if the parties ratified its continued applicability when those changes occurred: *Schmidt v. AMEC Earth & Environment et al.*, 2004 BCSC 1012, at paras. 32-33.

(c) The Standard of Review

[36] The question of whether the changed substratum doctrine applies in any particular situation is one of mixed fact and law. A judge is required to apply the legal description of the doctrine to the factual situation presented and the terms of the written employment contract. Absent extricable legal error, a decision that the doctrine applies is entitled to deference on appeal and will not be disturbed unless the judge committed a palpable and overriding error: *Housen v. Nikolaisen*,

2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26, 36. To the extent that the judge must interpret the written employment contract to determine such questions as whether changes in duties went beyond what was contemplated in the contract, whether the contract provided that it continued to apply even if such changes took place, or whether its continued applicability was ratified by the parties, the judge's interpretation is also entitled to deference, absent extricable legal error: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 52.

(d) A Change in Title is Not Required

[37] Shoplogix's first submission hints at extricable legal error, as it asserts that the motion judge failed to properly recognize a required element of the changed substratum doctrine. According to Shoplogix, the doctrine does not apply to an employee who was always an executive or a member of senior management. In any event Shoplogix submits that the doctrine requires both a fundamental expansion of the employee's duties and a promotion which necessarily implies a change in title.

[38] I do not accept this argument.

[39] To the extent that Shoplogix suggests that the doctrine can only apply to an employee who began in a non-executive role, there is nothing to support such a limitation either in the doctrine itself or the principle that underlies it.

[40] As for the argument that a promotion with a change in title is necessary, Shoplogix attempts to draw this proposition from a statement in *Rasanen v. Lisle-Metrix Ltd.* (2002), 17 C.C.E.L. (3d) 134 (Ont. S.C.), aff'd (2004), 187 O.A.C. 65 (C.A.). At para. 40 of his decision, Dambrot J. stated: "It is interesting to note that in virtually every case where a Canadian court has concluded that the substratum of the employment contract had disappeared, this resulted from a significant promotion of the employee, and not a demotion" (emphasis added).

[41] What Dambrot J. was doubting, in the quoted sentence, was the argument of the plaintiff employee that he could rely on the changed substratum doctrine because of reductions rather than expansions of his role − he argued that his bonus, salary and the number of people reporting to him had been reduced, and his title had been changed from Marketing and Sales Manager to "senior industrial sales": *Rasanen*, at paras. 6-10. Dambrot J. observed that "where the employee has been demoted or deprived of other entitlements, surely his argument [to escape the effect of termination provisions in a contract] must be based on [those changes resulting in] a breach, and not on the changed substratum doctrine": at para. 42. He did not ultimately find it necessary to limit his decision to that point, as he found that the doctrine had no application given that no changes of a fundamental nature had occurred in the employment relationship: at para. 52.

[42] I agree with Dambrot J. that there must be a fundamental expansion, not a reduction, in the employee's duties in order to engage the changed substratum

doctrine. But this does not mean that in addition to that fundamental expansion of duties, a change in the employee's formal title must also have occurred. The question of whether the "employee's level of responsibility and corresponding status has escalated so significantly" (the phrase used in *Wallace*) is one of substance, not form. It may be relevant that the employee was given a new title, but it is simply one contextual factor. More important is whether there were actual increases, of a fundamental nature, in the duties and degree of responsibility of the employee. If there were, the employee was for all intents and purposes "promoted", given their escalated status, even if the assigned title did not change. Put another way, where the duties and responsibilities are fundamentally increased the meaning of the job title is redefined as if a new job title were given.

(e) There Is No Reversible Error in the Finding That There Was a Fundamental Increase of Responsibilities Sufficient to Engage the Doctrine

[43] Shoplogix's second argument is that the changes that did occur were incremental, not fundamental, given the duties described in the 2005 Contract, its contemplation of additional duties, and the actual responsibilities that were assigned to Mr. Celestini up to 2017. This argument is also flawed, as it is contradicted by the motion judge's findings that were available to him on the record and are entitled to deference. Shoplogix has not identified any palpable and overriding error in those findings.

[44] In essence, Shoplogix asks us to replace the motion judge's express findings about the nature of the changes and the meaning of the 2005 Contract, which he made after an assiduous review of the record, with others based on a different reading of the record. It is not the role of this court to retry the case.

[45] The motion judge's findings support his conclusion to apply the changed substratum doctrine. At paras. 56-57, he found:

> Based on the foregoing, I am satisfied that Mr. Celestini's duties changed substantially and fundamentally over the course of his employment. Among other things, he received the following new tasks: a) managing important sales and business development activities; b) handling technical, solutions management and quality assurance matters; c) directing managers and staff who were reassigned to report directly to him (i.e., after he had worked for several years without any direct reports); d) pursuing business opportunities with international partners that introduced global travel requirements; e) handling a range of company infrastructure and other administrative matters; and f) contributing significant work to solicit investment funding. In my view, these responsibilities were substantial and far exceeded any predictable or incremental changes to his role that reasonably would have been expected when he started as CTO in 2005. In addition, Shoplogix made substantial changes to his compensation. In light of these significant changes, I find that the substratum of his original contract of employment disappeared and that its notice terms should no longer be enforced as they could not have been intended to apply to his role at termination. Applying the changed substratum doctrine, I find that the terms in the Employment Agreement that purport to limit the notice obligations for termination should no longer have contractual force. Although his job title remained unchanged, I am satisfied that the substantial changes to

> his position support the application of the substratum doctrine in this case.
>
> The Employment Agreement does not feature a term which expressly states that its terms continue to apply notwithstanding *any* changes to Mr. Celestini's responsibilities, which otherwise may have averted the application of the substratum doctrine in this case. [Emphasis in original; citations omitted.]

[46] I see no error in these findings and accordingly reject this ground of appeal.

(2) The Award of Damages Related to the ICA Bonus

[47] Shoplogix argues that, even if it could not rely on the 2005 Contract, the motion judge erred in failing to find that the ICA ousted Mr. Celestini's bonus entitlement over the reasonable notice period. It submits that the ICA addressed bonus payment on termination of employment and limited it to the amount unpaid up to the date of termination.

[48] The ICA provided:

> 1. Eligibility. Subject to Section 2 below, if Employee's employment terminates for any reason prior to the last day of the Quarterly Compensation Period, or the Performance Requirements are not satisfied during the Quarterly Compensation Period, the Employee will not earn, and Shoplogix shall not have any obligations to pay, the Incentive Compensation. If the Incentive Compensation is earned pursuant to this Agreement prior to the termination of employment, the net amount will be paid within thirty (30) days after it is earned.
>
> 2. Effect of Termination Upon Earning the Retention Incentive. Notwithstanding the foregoing, if prior to the end of the Compensation Period, Employee resigns his employment then Shoplogix shall pay to Employee the

> Incentive Compensation earned up to the date of termination within thirty (30) days of the effective date of termination. If Shoplogix terminates Employee's employment for "Cause", then Employee will not earn and Shoplogix will not have any obligations to pay Employee any portion of the Incentive Compensation. For greater certainty, if prior to end of the Compensation Period, Shoplogix terminates Employee's employment for a reason other than Cause, then Shoplogix shall pay to Employee the Incentive Compensation earned up to the date of termination within thirty (30) days of the effective date of termination. [Emphasis added; emphasis in original deleted.]

[49] The motion judge rejected Shoplogix's position. He concluded that Mr. Celestini's wrongful dismissal damages should include the ICA bonus that would have been earned during the notice period.

[50] In my view, the motion judge's determination that the terms of the ICA did not clearly oust Mr. Celestini's common law entitlement to damages for the loss of his ICA bonus was free of error.

[51] The motion judge properly considered this issue by applying the decision of the Supreme Court in *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, 449 D.L.R. (4th) 583. In *Matthews*, at paras. 52-55, the Supreme Court adopted this court's approach to interpreting bonus entitlement as set out in *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 34 C.C.E.L. (4th) 26, and *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619, 402 D.L.R. (4th) 325. The analysis is two-part: (1) would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period?; and (2) if so, do the

terms of the employment contract or bonus plan unambiguously take away or limit that common law right?.

[52] In *Paquette*, van Rensburg J.A. concluded that a condition requiring an employee to be "actively employed" by the employer on the date of the bonus payout was insufficient to displace the employee's common law entitlement to damages for a lost bonus: see para. 47. In *Lin*, she concluded that a clause stating that no bonus shall be earned or payable where an employee resigns or the employee's employment is terminated prior to the payout of a bonus was also insufficient to displace the common law entitlement to a bonus payment because it is, in effect, the same as a requirement of "active employment" at the date of bonus payout: see paras. 86-89.

[53] In *Matthews*, the long-term incentive plan provided for a bonus payment if the employer was sold and the employee was still employed by the employer at time of sale. The particular provision at issue stated as follows:

> 2.03 CONDITIONS PRECEDENT: ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause. [Emphasis added.]

[54] Kasirer J., writing for a unanimous court, held, at para. 65, that language requiring an employee to be "full-time" or "active" is not sufficient to remove an

employee's common law right to damages. Similarly, at para. 66, he also concluded that a clause purporting to remove an entitlement to the bonus upon termination "with or without cause" did not remove the right to damages for loss of the entitlement to earn that bonus during the reasonable notice period. He reasoned that:

> Here, Mr. Matthews suffered an *unlawful* termination since he was constructively dismissed without notice. As this Court held in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 108, exclusion clauses "must clearly cover the exact circumstances which have arisen". So, in Mr. Matthews' case, the trial judge properly recognized that "[t]ermination without cause does not imply termination without notice" (para. 399; see also *Veer v. Dover Corp. (Canada) Ltd.* (1999), 120 O.A.C. 394, at para. 14; *Lin*, at para. 91). Yet, it bears repeating that, for the purpose of calculating wrongful dismissal damages, the employment contract is not treated as "terminated" until after the reasonable notice period expires. So, even if the clause had expressly referred to an unlawful termination, in my view, this too would not unambiguously alter the employee's common law entitlement. [Emphasis in original.]

[55] The ICA provides that if Shoplogix terminated Mr. Celestini's employment for a reason other than cause, then Shoplogix would pay the bonus earned up to the date of termination. Like the clauses considered in *Matthews* and *Lin*, s. 2 of the ICA does not unambiguously oust Mr. Celestini's right to damages upon the circumstances that actually arose, that is, a without cause termination without reasonable notice − termination without cause must be taken to mean a lawful termination following the reasonable notice period. I agree with the motion judge

that the ICA did not oust the right to common law damages representing the loss of bonus over the reasonable notice period.

[56] Shoplogix also argues that the motion judge erred in quantifying Mr. Celestini's bonus entitlement.

[57] Shoplogix submits that there was no legal or factual basis for the motion judge to calculate what Mr. Celestini would have earned had he been given reasonable notice by averaging the annual bonuses that he earned in the last three calendar years immediately preceding his dismissal.

[58] In my view, there is no merit to this argument. Calculations of damages are entitled to considerable deference on appeal and will not be interfered with in the absence of an error of law or principle, a misapprehension of evidence, or if palpably incorrect: *SFC Litigation Trust v. Chan*, 2019 ONCA 525, 147 O.R. (3d) 145, at para. 112.

[59] There is no one particular way of calculating an employee's damages related to the lost opportunity to earn a bonus. This court has affirmed trial judges' calculations of the bonus based on a three-year average prior to dismissal especially where, as here, the bonus calculation could not have been performed in the usual manner because a portion of its components was based on work performance: see *Bernier v. Nygard International Partnership*, 2013 ONCA 780, 14 C.C.E.L. (4th) 155, at para. 5; *Paquette*, at para. 49.

[60] Like the court in *Bernier*, the motion judge in this case noted that a component of Mr. Celestini's bonus was based on his performance. He further observed that the parties had not adduced any evidence of Shoplogix's actual business performance in the 2017 and 2018 fiscal years: see para. 75. He rejected the calculation of Shoplogix's expert because it was unclear how he came to his figure. It was for these reasons that the motion judge utilized an average based on what was paid in 2014, 2015 and 2016.

[61] In my view, the motion judge made no reversible error in adopting an averaging approach for the bonus entitlement that would have been earned in the notice period.

(3) The Cross Appeal

[62] Mr. Celestini argues that the motion judge made a reversible error when he deducted the $50,554.44 bonus payment paid on dismissal from his damages award. He submits that the amount that was paid for bonus at the time of dismissal pertained to his bonus entitlement for the period in 2017 before he was dismissed (that is, January to March 2, 2017) while the damages the motion judge calculated related to the 18 months after he was dismissed (that is, 18 months following March 2, 2017).

[63] I agree with Mr. Celestini in part. In my view, the motion judge's decision to deduct the entire bonus payment Shoplogix made on dismissal was palpably

incorrect. It credited a payment made to satisfy a Shoplogix obligation to pay bonus referable to the period up to March 2, 2017, against a Shoplogix obligation to pay bonus referable to an 18 month period following March 2, 2017. Shoplogix had both obligations, and performance of one did not reduce its obligation to perform the other except to the extent Shoplogix made an overpayment of its obligations.

[64] Shoplogix makes two arguments as to why the motion judge did not make a reversible error in deducting the entire $50,554.44 payment.

[65] First, Shoplogix submits that the motion judge's calculation of damages for lost bonus in the sum of $334,997.49 represented the amount of bonus Mr. Celestini would have earned in 2017 and 2018 if he had been given reasonable notice of termination. Therefore, the amount paid on termination, even though referable to the first two months of 2017, needed to be deducted.

[66] I reject this submission. In my view, it is clear that the damages for lost bonus the trial judge calculated was for the reasonable notice period − that is, 18 months following March 2, 2017. It did not include the period before dismissal.

[67] Second, Shoplogix argues that Mr. Celestini should not be allowed to retain the bonus payment made at the time of dismissal, because to do so would be to countenance a windfall. The payment was made under the 2005 Contract, which provided for a payment of an amount equal to the bonus received in the prior year pro-rated for the period of the current year up to termination. Since the

2005 Contract was found not to have any force or effect by March 2017, it is unfair for Mr. Celestini to retain a payment made under it.

[68] I do not accept this argument as justifying the entire deduction. The $50,554.44 payment was for bonus for the period up to the date of dismissal on March 2, 2017. Even though the 2005 Contract was no longer enforceable, the ICA was still in force and obligated Shoplogix to pay Mr. Celestini his bonus entitlement for this period. The ICA expressly provided for a payment of bonus earned up to the date of termination. Shoplogix had to satisfy that obligation by making a payment to cover the period of 2017 prior to the date of dismissal.

[69] Shoplogix goes on to argue that even if the entire deduction was unjustified, a smaller deduction is. It submits that the payment made at the time of dismissal was calculated on the formula in the 2005 Contract, not the three-year averaging formula adopted by the motion judge to calculate ICA entitlements. Under the motion judge's formula to calculate what would have been earned under the ICA, Mr. Celestini would have only received a bonus for the time up to termination of $37,188.61. The difference, $13,365.83, was therefore an overpayment that should be deducted from his damages award.

[70] I agree with this submission.

[71] Mr. Celestini was entitled to be paid his bonus up to March 2, 2017 according to the ICA, not under the 2005 Contract. The formula used for calculating

Mr. Celestini's bonus entitlement for the period of 2017 prior to his dismissal should therefore be consistent with the formula used for determining his bonus entitlement in the reasonable notice period. Using the motion judge's methodology, Mr. Celestini should have been paid $37,188.61 for the period up to termination.

[72] The motion judge ought to only have deducted, from the damages award, $13,365.83, the amount by which the payment Mr. Celestini received on termination for pre-dismissal bonus exceeded what he should have received for the period.

[73] I would therefore allow the cross-appeal to the extent of increasing the damages award by $37,188.61.

CONCLUSION

[74] I would dismiss the appeal. I would allow the cross-appeal and increase the damages award in favour of Mr. Celestini by $37,188.61 before pre-judgment interest.

[75] In accordance with the agreement of the parties, I would award costs of the appeal and cross-appeal to Mr. Celestini in the sum of $10,000 inclusive of disbursements and applicable taxes.

Released: February 28, 2023 "J.S."

"B. Zarnett J.A."
"I agree. Janet Simmons J.A."
"I agree. David M. Paciocco J.A."