

Share Buy Back Clause Limits Employer Liability During Reasonable Notice Period

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May 28, 2025

In [*Kirke v. Spartan Controls Ltd.*](#), the Alberta Court of Appeal held that while shareholder profit sharing (SHPS) payments can form an integral part of an employee's compensation package, a well-drafted share buy back clause can limit the employee's entitlement to such payments during the reasonable notice period.

Background

In this case, Spartan Controls Limited (Spartan) terminated Mr. Kirke's employment on a without-cause basis after almost 25 years of service. Following a summary trial, Mr. Kirke was awarded damages in lieu of 20 months of reasonable notice of termination under the common law based on his base pay, benefits and quarterly bonus payments only. This decision spared Spartan from having to provide SHPS payments to Mr. Kirke over the 20-month notice period as well.

On appeal, the parties did not dispute that Mr. Kirke was entitled to damages in lieu of notice over the reasonable notice period. The central dispute revolved around whether Mr. Kirke's wrongful dismissal damages should include payments he received through Spartan's optional SHPS program.

Share Buy Back Clause in SHPS Program

Spartan's SHPS program allowed eligible employees to purchase shares in Spartan's parent company, Spartech. These shares provided employees with payments tied to company profitability.

To participate in the SHPS program, employees were required to sign a unanimous shareholder agreement (USA). The USA contained clauses allowing Spartech to buy back the shares at any time (regardless of whether the shareholder was actively employed) with 90 days' notice. One of such clauses read:

2.6 The Company may at any time, by Ninety (90) days notice in writing to the Shareholder, require that the Shareholder sell all or a part of the Shares then owned by such Shareholder to the Company. Upon the elapse of the notice period to the Shareholder [sic] shall have the obligation to sell and the Company shall have the obligation to buy such Shares set out in the notice.

In this case, Mr. Kirke's termination letter provided him with 90 days' notice of his obligation to sell back his shares to Spartech.

The USA Unambiguously Limited Employee's Common Law Rights

The summary trial judge found that the SHPS payments were a part of Mr. Kirke's compensation. However, because the USA signed by Mr. Kirke authorized Spartech to buy back employee-owned shares at any time on 90 days' notice, Mr. Kirke's damages for the loss of SHPS payments during the reasonable notice period were likewise limited.

In deciding to uphold the trial judge's decision, the Court of Appeal's analysis was guided by the Supreme Court of Canada's decision in [*Matthews v. Ocean Nutrition Canada Ltd.*](#) The *Matthews* case established a two-part test for determining whether bonuses and other benefits should be included in wrongful dismissal damages:

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

Mr. Kirke invoked the *Matthews* case and asserted that the share buy back clause in the USA failed to limit his damages for the loss of SHPS payments during the reasonable notice period. He argued there was nothing in his employment contract, the SHPS program, or the USA that unambiguously took away or limited his common law right to claim damages for the loss of this part of his compensation. His position was predicated on the assertion that but for his wrongful dismissal, he had not just the right to work but the right to retain ownership of his shares and receive SHPS payments. He submitted that the circumstances of his case were analogous to cases where the entitlement at issue was defined to require "active employment."

However, the Court of Appeal rejected this argument on the basis that Spartan had a clear and unambiguous contractual right to buy back the shares on 90 days' notice. The Court found:

The difficulty with the analogy Mr. Kirke seeks to draw is that his right to retain shares and receive SHPS payments was not dependent solely on active employment. It was also and always subject to Spartech's right to buy back shares pursuant to the terms of the USA. The summary trial judge made no palpable and overriding error in concluding that, among other rights, the USA gave Spartech an unrestricted right to buy back Mr. Kirke's shares at any time upon 90 days' notice. There can be no debate that is what section 2.6 of the USA says. The plain language of the USA enabling the 90-day buy back of shares distinguishes Mr. Kirke's case from the cases upon which he relies. In each of them, the terminated employee received the bonus or benefit at issue as part of their wrongful dismissal damages because they had an otherwise unrestricted right to receive the bonus or retain the benefit had they worked during the reasonable notice

period...

The Court of Appeal's reasons stress the importance of clear and unambiguous contractual language in limiting common law rights. Because the USA clearly and unambiguously gave the employer the right to buy back shares with 90 days' notice, the Court found no reason to interfere with the trial judge's decision.

Employer Takeaways

This case underscores the critical importance of clear and unambiguous language in employment contracts and shareholder agreements. Employers should ensure that their contracts clearly define the terms of compensation, including any profit-sharing or share ownership programs, and explicitly address the implications of termination on these programs.

Further, when employees are also shareholders, their rights and obligations are governed by both their employment contracts and shareholder agreements. These agreements must be carefully considered in the context of wrongful dismissal. Employers should be aware that provisions in shareholder agreements, such as buyback clauses, can impact the calculation of wrongful dismissal damages.

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