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Court Imposes “Harsh and Oppressive” Standard in Refusing to Enforce Stock Plan

In a recent decision, *Battiston v Microsoft Canada Inc.*,¹ the Ontario Superior Court refused to enforce termination provisions, similar to those commonly found in stock award agreements, which provided that an employee lost their right to unvested awards upon termination of employment. The court found that the termination provisions were unenforceable despite being unambiguous because they were “harsh and oppressive” and the employer ought to have brought them to the employee’s attention.

Facts

The employee, Mr. Battiston, joined Microsoft Canada in December 1995 as a Senior Consultant. He was promoted a number of times over the years, but in 2018 was terminated without cause.

During his employment with Microsoft, Mr. Battiston’s compensation included stock awards that were subject to Microsoft’s Rewards Policy. For the stock awards, Microsoft had an online acceptance process that qualifying employees had to follow to indicate that they had read, understood and accepted the terms of the stock award agreement.

The termination provisions of the stock award agreement stipulated that unvested stock awards would be forfeited if the qualifying employee was terminated for any reason. At the time of his

¹ 2020 ONSC 4286 (CanLII)

termination, Mr. Battiston had 1,057 awarded but unvested stock awards.

Mr. Battiston claimed that he was entitled to the unvested stock awards because:

- The stock award agreement did not unambiguously terminate his right to vesting the stock during his notice period;
- The termination provisions were onerous and unenforceable because Microsoft failed to bring them to his attention; and
- The stock awards constituted wages under the Employment Standards Act, 2000 and, as a result, the termination provisions are void as they terminate his right to unvested stock (wages) during his notice period.

Court's Decision

The Court found that the termination provisions were “harsh and oppressive” as they terminated Mr. Battiston’s right to vest stock awards if he was terminated without cause. The Court further held that, due to the nature of the termination provisions, Microsoft should have taken reasonable measures to ensure that these provisions were brought to Mr. Battiston’s attention. As a result, the court held that the termination provisions were unenforceable against Mr. Battiston and awarded damages for stock awards that would have vested during his notice period if his employment had not been terminated.

In reaching its conclusion, the court accepted Mr. Battiston’s evidence that he was unaware of the termination provisions because Microsoft did not bring these provisions to his attention. Importantly, the court found that Microsoft’s online acceptance process for stock awards did not constitute a reasonable measure to ensure that the termination provisions were brought to his attention, even though the employee was expressly required to acknowledge that he had read the plan.

Key Takeaways for Employers

Microsoft has filed a Notice of Appeal. We will continue to update you on developments in this case.

For now, employers should be aware that even an unambiguous termination provision that limits an employee's entitlements to post-termination awards or pay may be deemed "harsh and oppressive." If so, and if the provision is not expressly brought to an employee's attention, the court may choose not to enforce that provision.

Employers should ensure that they bring the employees' attention to bonus and stock plan provisions that limit employees' entitlements upon termination.

Should you need assistance with measures that your organization can take to ensure that termination provisions which limit employees' entitlements are brought to their attention prior to acceptance, please contact McMillan's Labour and Employment Group.

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[a cautionary note](#)

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