THE TIDE TURNS: POSITIVE DECISION FOR EMPLOYERS SEEKING TO ENFORCE STOCK AGREEMENTS

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A recent no-nonsense decision will bring comfort to employers navigating the murky technicalities of stock award agreements and, more specifically, clauses in stock award agreements that limit post-termination entitlements. In *Battiston v Microsoft Canada Inc.*[1], the Ontario Court of Appeal cut straight to the chase in overturning a Superior Court decision which invalidated a clause that restricted post-termination entitlements. In this case, the Court of Appeal found that the former employee, who for 16 years clicked a box in an email to confirm he understood and accepted a stock award agreement, could not feign ignorance about his stock award entitlements upon termination.

As set out in our previous bulletin, Mr. Battiston was a long-service employee who, among other alleged entitlements upon termination, claimed that he was owed 1,057 awarded but unvested stock awards that, under the express terms of his former employer's award agreement, were cancelled upon termination. The Ontario Superior Court found that the stock award agreement contained "harsh and oppressive" terms that must be drawn to the attention of an employee such as Mr. Battiston, and cannot be unilaterally imposed on an employee.

The Superior Court made its decision even though, in Mr. Battiston's case, Microsoft sent him an email each year, congratulating him on his stock award, which he could accept with a simple click. The email also advised him:

A record will be saved indicating that you have read, understood and accepted the stock award agreement and the accompanying Plan documents. Please note that failure to read and accept the stock award and the Plan documents may prevent you from receiving shares from this stock award in the future.

The Ontario Superior Court accepted Mr. Battiston's evidence that he was unaware of the termination provisions and that Microsoft's online acceptance process for stock awards did not constitute a reasonable measure for bringing the key clause to his attention, even though he had accepted the agreement's terms by "click wrap" agreement annually for *16 years*.

In its recent decision, the Ontario Court of Appeal disagreed and found that Mr. Battiston:

1. for 16 years expressly agreed to the terms of the stock award agreement;
2. made a conscious decision not to read the stock award agreement despite indicating that he read it by clicking the box confirming such; and
3. by misrepresenting his assent to his employer, put himself in a better position than an employee who did not misrepresent, thereby taking advantage of his own wrong.

As such, Mr. Battiston *did* receive notice of the stock award agreement termination provisions. This notice, coupled with the agreement's termination language, that the Superior Court earlier confirmed was otherwise enforceable, , disentitled him to stock awards that would have vested during his common law reasonable notice period.

Key Takeaways for Employers

The Court of Appeal's decision is a positive one for employers, many of which have worked to revise equity award agreements to ensure the enforceability of clauses limiting participants' rights upon termination of employment.

Nevertheless, employers should not assume that *Battiston* will be more broadly applied to save otherwise unenforceable post-termination restriction clauses or onerous terms that are not brought to signatories' attention. Technical termination language in bonus plans is still likely to be held to a high standard as we have seen with various other recent decisions, which stipulate mere reference to "active employment" will not be enough to oust an employee's entitlement to a bonus during a common law reasonable notice period.

However, *Battiston* does appear to offer employers greater latitude in the way in which they secure employee acknowledgement of an equity agreement's terms, including through "click wrap" or "click-through" methods.

McMillan's employment team would be pleased to help your organization take measures to limit costly payouts of incentive compensation upon termination.

By Kyle Lambert and Ioana Pantis

A Cautionary Note

[1] 2021, ONCA 727 (CanLII).


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