

Bonus Termination Provisions Can Be Enforceable Against Employees, Even When Employees Do Not Read Them

Over the past several years, there have been a wave of decisions from the courts which make it increasingly more difficult for employers to remove employees' entitlements to bonuses and incentive compensation upon termination of employment. Fortunately for employers, in [*Battiston v. Microsoft Canada Inc.*, 2021 ONCA 727](#), the Ontario Court of Appeal rendered a beneficial decision for employers on this issue.

Background and Decision Below

The Plaintiff, Francis Battiston, commenced a wrongful dismissal action against Microsoft Canada Inc. after his employment was terminated without cause in August 2018. Upon termination, the Plaintiff's awarded but unvested stock awards were rendered null and void.

At trial, the Plaintiff was awarded a reasonable notice period of nearly 24 months. The key issue before the trial judge was whether the Plaintiff was entitled to damages for his lost stock awards that would have otherwise vested during the reasonable notice period.

Notably, each year for 16 years when the stock awards were granted, the Plaintiff received the following email:

Congratulations on your recent stock award! To accept this stock award, please go to My Rewards and complete the online acceptance process. A record will be save 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...

While the Plaintiff would complete the online acceptance process each year, which included representing that he read the Stock Award Agreement, he in fact never read the Stock Award Agreement.

The trial judge ultimately found that the termination provision in the Stock Award Agreement unambiguously removed the Plaintiff's right to his stock awards that would have otherwise vested during the reasonable notice period. However, following the trial judge's finding of fact that the Plaintiff had never read the Stock Award Agreement, he found that the termination provisions could not be enforced against the Plaintiff due to a lack of notice:

[70]..... I also accept Battiston's evidence that he was unaware of these termination provisions and that these provisions were not brought to his attention by Microsoft. Microsoft's email communication that accompanied the notice of the stock award each year does not amount to reasonable measures to draw the termination provisions to Battiston's attention. Accordingly, the termination provisions in the Stock Award Agreements cannot be enforced against Battiston. Battiston is entitled to damages in lieu of the 1,057 shares awarded that remain unvested. [Emphasis added]

The Court of Appeal's Decision

Microsoft appealed the decision on the stock awards. In a brief decision, the Ontario Court of Appeal overturned the trial judge's ruling that the Plaintiff was entitled to his unvested stock awards over the reasonable notice period.

The Court of Appeal found that the Plaintiff had in fact been provided with sufficient notice of the termination provisions in the Stock Award Agreement and that as such, the termination provisions were enforceable against him. In coming to this conclusion, the Court of Appeal found that the trial judge failed to address the following key facts:

- 1) For 16 years the Plaintiff expressly agreed to the terms of the Stock Award Agreement;
- 2) The Plaintiff made a conscious decision not to read the Stock Award Agreement, despite indicating that he did read it by clicking the box confirming such; and
- 3) By misrepresenting his assent to Microsoft, he put himself in a better position than an employee who did not misrepresent, thereby taking advantage of his own wrong.

For these reasons, Microsoft's appeal was allowed and costs were awarded in the amount of \$20,000.

Practical Implications

This decision is a welcome win for employers on employee bonus entitlements over the reasonable notice period. The decision confirms that employees who misrepresent their acceptance and understanding of onerous terms of employment can still be held to such terms.

However, as a best practice, employers should still take steps to ensure that employees have actually read termination provisions in bonus plans in order to mitigate risks of unenforceability.

For further information, please contact a member of our growing team: [Leslie Dizgun](#), [Allyson Fischer](#), [Mitchell Smith](#), [Paul Schwartzman](#), [Justin Anisman](#), [William McLennan](#), [Alyssa Jagt](#), and [Oscar Moody](#).

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