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Ontario Superior Court Declines to Enforce "Harsh and Oppressive" Forfeiture Provision for Dismissed Employee's Unvested Stock Awards

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The Ontario Superior Court has released its decision in *Battiston v Microsoft Canada Inc.* *(Battiston)*, which involved the without-cause termination of a long-serving employee. Among other issues raised in the litigation was the status of Mr. Battiston's unvested stock awards that had been granted to him as an employee under annual stock award agreements. As is typical for equity-based incentive plans and awards, the stock award agreements provided that unvested awards would be cancelled and of no further effect on termination of employment. However, in a surprising turn, the Ontario Superior Court declined to enforce the forfeiture provision on the basis that, because it was "harsh and oppressive," it had not been sufficiently brought to the employee's attention during the course of his employment.

Forfeiture provisions in equity-based incentive plans and awards are routine, and a commonly held view is that, given the nature of such plans as "long-term incentive" arrangements, a participant ought not to reap the benefit of continued vesting following the termination of his or her employment. Simply put, there would no longer be any employment services to incent or reward. Nevertheless, *Battiston*, if not successfully appealed, now provides Ontario employers with a new caution.

The Facts

Mr. Battiston joined Microsoft Canada in December 1995 as a senior consultant. Over the years, he was promoted several times. After nearly 23 years, he was terminated for performance reasons (but without cause) in August 2018 – a termination, in Mr. Battiston's view, that came as a surprise to him.

In addition to his base salary, every year Mr. Battiston received benefits, including merit increases, a cash bonus and, crucial to the case, stock awards under Microsoft's Rewards Policy – bonuses and stock awards that formed a significant portion of Mr. Battiston's total compensation. The stock awards were evidenced by a stock award agreement and vested over time. It is possible that the stock awards were styled as "restricted share units" or "RSUs," as they are under similar plans maintained by other employers, although those terms were not used in the decision.

One key provision of each stock award agreement was to stipulate that, subject to certain exceptions not relevant to the case, unvested awards would be forfeited on termination of employment. Upon each annual stock grant, Mr. Battiston was provided with a copy of the stock award agreement and required to sign an acknowledgment that he had read and understood its terms. Mr. Battiston later testified that he simply signed the acknowledgment without reading the accompanying agreement each year because it was too long. At the time of his termination, he had unvested stock awards representing 1,057 Microsoft shares.

Upon termination, Mr. Battiston was advised that he would receive no merit increases and no cash bonus for the 2018 fiscal year and further that, under the stock award agreements, he was no longer entitled to any unvested stock awards.

Decision of the Court Relating to Stock Awards

Despite the clear provisions in the stock award agreements to the contrary, Mr. Battiston claimed he was under the impression that he would be eligible to cash out his unvested stock awards at termination. As noted above, this would be an unusual result under an equity-based incentive plan because such plans typically serve as long-term retention tools that tie the employee's long-term compensation to share value. Following a termination of employment, there is no longer any employment relationship to retain, nor are there any further services provided by the employee that could contribute to share value.

The Court agreed with the employer that each stock award agreement "unambiguously excludes [Mr. Battiston's] right to vest his stock awards after he has been terminated without cause" (Battiston, at para 64). Nevertheless, the Court found that the termination provisions in the stock award agreements were unenforceable because they were "harsh and oppressive" and, as such, they should have been, but were not, specifically drawn to Mr. Battiston's attention during his employment.

Mr. Battiston was therefore entitled to damages in lieu of the 1,057 shares subject to the unvested awards, which the Court specified would be calculated as of the date of termination of employment (rather than at the time of the trial, as argued by Mr. Battiston, when Microsoft's share price was higher).

It is unclear whether Microsoft Canada intends to appeal the Court's decision.

Implications

The result in *Battiston* raises cautions, particularly given the prevalence of equity-based incentives to employees, including RSUs and similar time-vested and performance-vested awards.

As noted above, such incentives are often forfeitable on termination of employment. *Battiston* does not impugn such forfeiture provisions per se, but offers new guidance for employers to take the time to ensure that employees are given notice of a plan's or award's key adverse provisions, such as the effect of termination of employment on unvested awards.

What is also true, however, is that the result in *Battiston* arose in the context of the specific facts of that case, including Mr. Battiston's total compensation package, large parts of which we have not focused on here. Subsequent terminations of employment under other incentive plans may yet lead to different results for Ontario employers before the Ontario courts.

What Can Employers Do Now?

So how best to give notice of adverse provisions to employees? In 1956, the venerable English jurist Lord Denning wrote: "Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."[1] Nothing in *Battiston* goes so far as to advise employers to start printing termination provisions in red ink, but small steps may go a long way to mitigating similar results under other plans. These could include special attention to termination provisions in employee seminars and webinars (even though provisions triggered on termination of employment are often uncomfortable topics to discuss while employees are still working). In addition, for employees who acknowledge terms and conditions of grants electronically, employers might consider working with their third-party plan administrators and record-keepers to draw attention to these provisions before an employee is able to click the box or button marked "I agree." Preparing a plain-language FAQ or other "wrapper" to accompany an individual award agreement or document may also be prudent in some cases.

On top of careful, clear and unambiguous drafting of the provisions themselves, implementation procedures should be structured with an eye to meaningfully informing employees of their rights and obligations, as well as a particular award's terms and conditions. After *Battiston*, employers may not be able to rely on signed acknowledgments alone.

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[1] *J. Spurling Ltd v Bradshaw*, [1956] EWCA Civ 3.

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