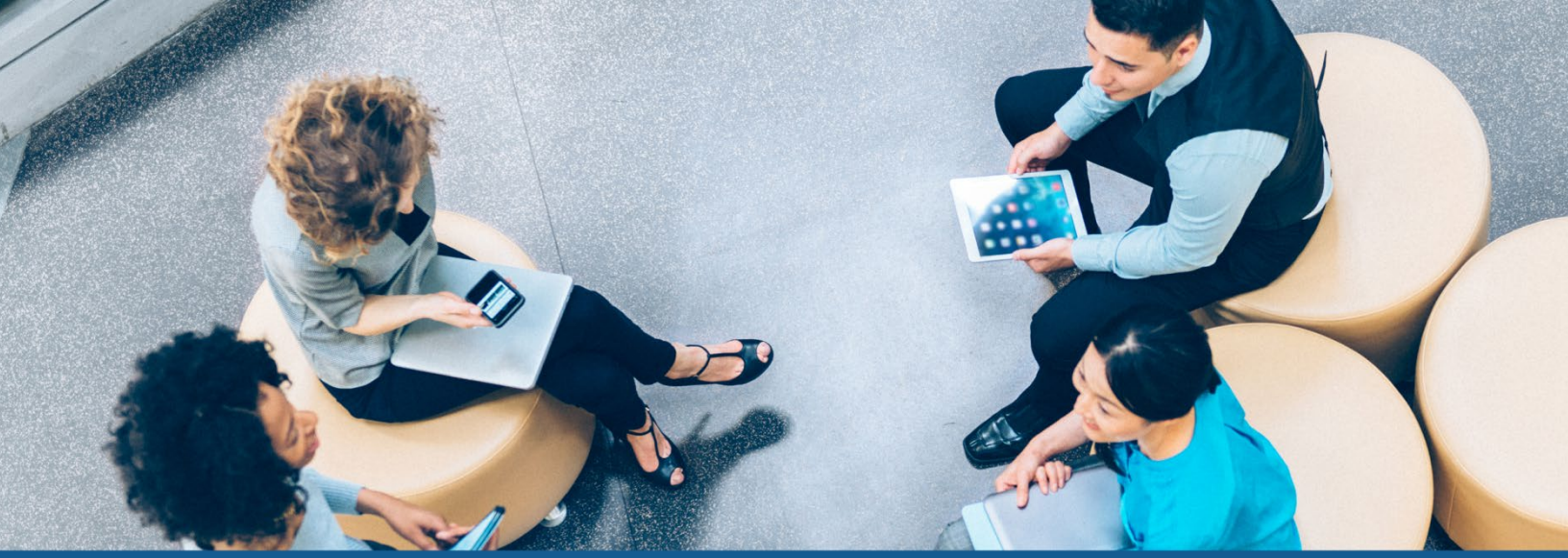

What's New in HR Law

Failure to Notify: *Battiston v Microsoft Canada Inc.*

July 20, 2020

Bottom Line

In the recent case of *Battiston v Microsoft Canada Inc*, 2020 ONSC 4286, the Ontario Superior Court held that the otherwise enforceable termination provisions of a stock awards agreement were unenforceable because the employer did not specifically call the provisions to the employee's attention.

Background

Mr. Battiston worked for Microsoft Canada for 23 years when, on August 10, 2018, the employer terminated his employment without cause, citing concerns about his performance. The employee brought a wrongful dismissal action claiming, in part, that he was entitled to have previously granted stock awards vest during the notice period. At the time of his termination, Mr. Battiston had 1,057 awarded but unvested shares.

As part of his annual compensation, the employee received a stock bonus pursuant to the employer's annual Stock Award Agreements. The Stock Award Agreements in question contained the following termination language:

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> 4. Termination of Awardee's Status as a Participant. Except as otherwise specified in Sections 5, 6 and 7 below, in the event of termination of Awardee's Continuous Status as Participant (as such term is defined in the Plan), Awardee's rights under this Award Agreement in any unvested SAs shall terminate (as further described in Section 11(m) below). For the avoidance of doubt, an Awardee's Continuous Status as a Participant terminates at the time Awardee's actual employer ceases to be the Company or a "Subsidiary" of the Company" as that term is defined in Section 2(y) of the Plan.
>
> […]
>
> 11. Acknowledgement of Nature of Plan and SAs. In accepting the Award, Awardee acknowledges, understands and agrees that:
>
> […]
>
> (m) consistent with Section 4 above, for purposes of the Award, Awardee's Continuous Status as a Participant will be considered terminated as of the date Awardee no longer is actively providing services to the Company or a Subsidiary (regardless of the reason for such termination and whether or not later to be found invalid or in breach of employment laws in the jurisdiction where Awardee is employed by the terms of Awardee's employment agreement, if any), and unless otherwise expressly provided in this Award Agreement or determined by the Company, Awardee's right to vest in SAs under the Plan, if any, will terminate as of such date and will not be extended by any notice period (e.g. Awardee's period of service would not include any contractual notice period or any period of "garden leave" or similar period mandated under employment laws in the jurisdiction where Awardee is employed on the terms of Awardee's employment agreement, if any); the senior corporate officer in charge of the Human Resources department or the Committee shall have the exclusive discretion to determine when Awardee is no longer actively providing services for purposes of the Award of SAs (including whether Awardee still may be considered a Continuous Status as a Participant while on a leave of absence);

The employee's stock bonuses were communicated via email, which directed him to go to a website to complete an online acceptance process. The email also directed the employee to read and accept the stock award and accompanying documents. The employee confirmed that

he received these emails, but that his practice was to simply click acceptance of the Stock Awards Agreements without reading them because the agreements were long. The employee also testified that Microsoft did not draw his attention to the termination provisions contained in the Stock Awards Agreements, and that he was under the impression that he would be eligible to cash out on his granted but unvested stock awards if he was terminated from employment without cause.

The employee argued that the Stock Awards Agreements did not unambiguously oust his entitlement to the vesting of stock awards during the notice period. He also argued that even if the language of the termination provisions ousted these entitlements, the termination provisions were onerous and unenforceable because Microsoft did not specifically bring the provisions to his attention.

Ontario Superior Court of Justice Declares the Termination Provision Unenforceable

The Court held that the stock awards were an integral part of the employee's remuneration and, as such, the employee was *prima facie* entitled to damages in lieu of the stock awards; however, it was be possible to rebut this *prima facie* entitlement if the language of the Stock Awards Agreement clearly and unambiguously limited the employee's entitlements upon termination.

Despite the fact that the Court found that the termination provisions in the Stock Awards Agreements clearly and unambiguously limited the employee's entitlement to have stock options vest post-termination from employment, the Court noted that where one party presents a contract to another that contains a harsh or onerous provision, that provision must be specifically drawn to the attention of the party who is entering into the contract. Failing to do so may render the harsh or onerous term to be unenforceable, even where the contract appears to have been agreed to by both parties.

Following this analysis, the Court found that the termination provisions in the Stock Award Agreements were harsh and oppressive on the basis that they precluded the employee's right to have unvested stock awards vest in the event that he was terminated without cause. There was no dispute that the employer did not specifically draw the termination provisions to the employee's attention, and the Court accepted the employee's evidence that he was unaware of the existence of the termination provisions. Accordingly, the Court held that the termination provisions were unenforceable, and awarded the employee damages for the stock awards that would have vested during the notice period.

Check the Box

This decision highlights that having a well-drafted and legally compliant contractual provision may not be enough to withstand judicial scrutiny. This case is the newest addition to a growing body of case law establishing that contractual provisions that are disadvantageous to an employee – whether contained in an employment agreement or incentive payment plan –

should be drawn to the individual's attention at the time the agreement is effected in order to ensure the provisions' enforceability.

Date: July 15, 2020

Forum: Ontario Superior Court of Justice

Citation: *Battiston v Microsoft Canada Inc*, 2020 ONSC 4286

Need more information?

For more information about employment agreements, incentive payment plans, or employment litigation, please contact Madeline Davis at 416-408-5528 or your regular lawyer at the firm.

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