What's New in HR Law

Read Before you Click – Court of Appeal Finds No Entitlement to Unvested Stock Options

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Bottom Line

In *Battiston v. Microsoft Canada Inc.* the Court of Appeal for Ontario recently held that an employee who provided online confirmation that he had read his employer's stock option agreement was bound by the within provisions, notwithstanding the fact that he had not actually read them.

Background

Fransic Battiston was employed by Microsoft Canada Inc. for almost 23 years. In addition to his salary, Mr. Battiston received various benefits including merit increases, cash bonuses, and stock awards. These bonus payments made up approximately 30 percent of his total compensation.

In August of 2018, Mr. Battiston was terminated without cause and provided with a termination package offer of 23 ½ months' notice. He was advised that, as per Microsoft's Stock Award Agreements, he would not be entitled to any of his granted but unvested stock awards. Mr. Battiston rejected this offer and commenced a wrongful dismissal action against Microsoft.

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Lower Court Decision – Stringent and Onerous Terms Should Be Brought to an Employee's Attention

As outlined in our earlier update, at trial Mr. Battiston stated that his practice was to simply click "accept" on the Stock Award Agreements and admitted that he had not actually read them. He also stated that Microsoft did not draw his attention to the fact that the provisions therein disentitled him to vest any granted but unvested stock awards after his termination. He stated that it was his understanding that he would be able to vest these stock awards as long as his termination was without cause.

Each year Mr. Battiston was made aware of his stock bonus by an announcement email congratulating him on his award and directing him to complete an online acceptance process. This announcement also contained the following statement:

> … A record will be save[d] 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 Stock Award Agreements themselves contained termination provisions which provided that in the event of Mr. Battiston's termination, his rights to any unvested stock awards would terminate and would not be extended by any notice period, "regardless of the reason for such termination and whether or not later to be found invalid or in breach of employment laws".

Microsoft took the position that Mr. Battiston was not entitled to damages for unvested stock awards because he had accepted the Stock Award Agreements, which clearly stated that he would have no such entitlement upon the event of his termination. However, the trial judge rejected Microsoft's argument in this regard and granted judgment to Mr. Battiston for the unvested stock awards that would have vested during the notice period.

Despite the fact that the Court found the termination provisions "unambiguously" excluded Mr. Battiston's right to vest his stock awards after he was terminated for cause, it was noted that contractual terms that are particularly stringent and/or onerous should be brought to an employee's attention. The trial judge found that there was "no dispute" that Microsoft had not specifically brought these terms to Mr. Battiston's attention and that he had not in fact read them. Accordingly, the Court found that they were unenforceable. Microsoft appealed the trial decision.

Court of Appeal Decision – Employee Took Advantage of His Misrepresentations

The Court of Appeal focused on the trial judge's conclusion the Stock Award Agreements were unenforceable because Mr. Battiston was not provided with notice. The panel found that the trial judge's finding of fact that there was "no dispute" that Microsoft had not brought the terms of the Stock Award Agreements to Mr. Battiston's attention was incorrect, as he later made a finding of fact that demonstrated that Microsoft did not concede that issue. The panel also found that the trial judge's finding that the provisions were not brought to Mr. Battiston's attention failed to address the fact that:

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1. He expressly agreed to the terms of the agreement for 16 years;
2. He made a conscious decision not to read the agreement despite indicating that he had by clicking the confirmation box; and
3. By misrepresenting his confirmation to Microsoft he actually put himself in a better position than an employee who did not misrepresent themselves.

On this basis, the Court of Appeal found that the Stock Award Agreements provided to Mr. Battiston ***did*** count as notice, and despite his personal decision not to read them, the termination provisions had been brought to Mr. Battiston's attention. Microsoft's appeal was allowed.

Check the Box

In an increasingly digital world, this decision provides reassurance to employers that providing agreements to employees to review and execute electronically is a valid and legally permissible approach. Regardless of the manner in which a particular contract is presented, it remains best practice to ensure that contentious or onerous provisions are specifically drawn to an employee's attention so as to avoid future conflict and/or unnecessary litigation.

Need more information?

For more information about employment agreements, incentive plans, or employment litigation, please contact Hayley Smith at 416.408.5513, or your regular lawyer at the firm.

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