CITATION: Battiston v. Microsoft Canada Inc., 2020 ONSC 4286
COURT FILE NO.: CV-18-605527
DATE: 20200715

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
FRANSIC BATTISTON	)	*Andrew Monkhouse* and *Samantha Lucifora*, for the Plaintiff
Plaintiff	)	
– and –	)	
MICROSOFT CANADA INC.	)	*Thomas Gorsky* and *Samia Hussein*, for the Defendant
Defendant	)	
	)	**HEARD:** December 9, 10 and 11, 2019

M. D. FAIETA J.

REASONS FOR DECISION

INTRODUCTION

[1] The Plaintiff, Fransic Battiston, ("Battiston") was employed by the defendant Microsoft Canada Inc. ("Microsoft") for almost 23 years until his termination, without cause, on August 10, 2018. In addition to his base salary, every year Battiston received benefits, including merit increases, cash bonus and stock awards under Microsoft's Rewards Policy. These bonus payments constituted about 30% of Battiston's total compensation. The Policy provides that such rewards reflect an employee's impact on team, business and customer results over the last year. Battiston was terminated shortly after Microsoft's 2018 fiscal year, which ended June 30, 2018. He was advised that he would receive no merit increase and no cash bonus for the 2018 fiscal year. Microsoft also takes the position that following his termination, Battiston was no longer entitled to the vesting of any granted but unvested stock awards.

[2] Battiston has attempted to apply for numerous positions without success and he has commenced a digital marketing business.

[3] At trial, the main issues addressed by the parties were: 1) the appropriate length of the notice period; 2) whether Battiston was entitled to cash bonus for his work during fiscal year 2018 as well as during the notice period; 3) whether Battiston was entitled to the vesting of his previously award stock bonuses during the notice period.

[4] Prior to his termination, Battiston received a $2,000 yearly allowance in lieu of health and dental care benefits as well as an RRSP benefit whereby Microsoft would match Battiston's contributions to his RRSP up to $6,250 per year. Microsoft conceded that Battiston would be entitled to these benefits during the notice period.

[5] The parties agree that Microsoft has paid $238,306.00 to Battiston as described in an email from Ms. Hussein dated December 10, 2019 (Exhibit 5).

[6] Battiston and two employees of Microsoft testified at trial.

BACKGROUND

[7] Battiston obtained a degree of Bachelor of Science in Electrical Engineering in 1988. He joined Microsoft in December 1995 as a Senior Consultant. The offer of employment dated December 5, 1995 states that he would be paid $72,500 per annum and would be entitled to participate in Microsoft's benefits plan. It also provided that Microsoft "… may provide you a bonus based upon your performance. Bonuses are provided in the sole discretion of Microsoft Canada. You will not have an entitlement to a bonus as a right". In July 1999, Battiston was promoted to Principal Consultant and continued to provide services directly to clients.

[8] In 2001, Battiston was promoted to Managing Consultant. Associate, Senior and Principal Consultants reported directly to him. In 2002, Microsoft split his position into three separate roles: sales, consulting management and delivery management. Battiston opted to pursue the sales role and was appointed as a Services Executive. In this role, Battiston was responsible for overall service sales to Enterprise Service customers within Ontario including the broader public sector. He states that he exceeded his sales targets and was asked in 2005 to take on more responsibility as a Services Sales Manager which manages Services Executives and other Services salespersons. In this role, he managed about nine sellers across Canada.

[9] In 2009, Battiston was promoted to Premier Field Engineering Manager. He oversaw the Premier Field Engineering organization in central Canada with about 20-25 engineers reporting to him.

[10] In 2013, Battiston successfully applied for, and obtained, a lateral move to an operations positions as the Business and Operations Manager, Consulting and Support. In this position, Battiston reported to the Manager of Delivery Operations who in turn reported to the Director of Delivery Operations.

[11] In January, 2017, Philipp Wehnelt was appointed as Director of Operations Enterprise Services. In this capacity, Wehnelt became Battiston's manager and had direct oversight of the

work that Battiston performed for Microsoft. Wehnelt was based in Germany and would have quarterly performance management meetings ("Connects") with Battiston who was based in Canada. Between January 2017 and August 2018, Wehnelt had telephone meetings approximately twice a month as well as quarterly performance reviews known as "Connects". During Connects they would discuss Battiston's performance over the previous quarter and reviewed Wehnelt's expectations for his performance in the following quarter. Battiston would complete one portion of the Connect Summary and Wehnelt would post a detailed summary of their discussion on a second portion of the Connect Summary and deliver a copy of that document to Battiston.

[12] It should be noted that prior to Wehnelt's appointment, Battiston's previous managers had viewed him as a "good" performer.

[13] In May, 2017, Wehnelt conducted his first Connect with Battiston. He shared some negative feedback that he had received from an internal client, a Business Partner, which represented 75% of his work, viewed Battiston "sometimes more like an observer rather than a driver" and wanted him to be more proactive.

[14] In September 2017, Wehnelt conducted his second Connect with Battiston. Wehnelt emphasized that a key aspect of his position was to demonstrate value to Business Partners. He warned Battiston that he "really need[ed] to take a different approach to get on track for a quick turnaround" and provided two strategies to do so.

[15] In February, 2018, Wehnelt conducted his third Connect with Battiston. He advised Battiston that he had not achieved the required turnaround and that he had not used on of the two designated strategies that had been outlined.

[16] In early March 2018, the Plaintiff's role was eliminated due to structural changes across Microsoft Corp. which is Microsoft's parent company. Battiston's new role involved some continued responsibilities from his previous role and some new responsibilities.

[17] In June, 2018, Wehnelt conducted his last Connect with Battiston. During their meeting and in the Connect Summary, Wehnelt confirmed to Battiston that the impact delivered by Battiston in the fiscal year had been "in summary below expectations". The most significant concern expressed was his view Battiston "… continued failure to take lead projects and drive greater results, as opposed to simply responding to specific requests".

[18] Wehnelt did not provide Battiston with a Performance Improvement Plan as it was neither legally required nor did he feel that it would be appropriate considering Battiston's performance history.

[19] On August 9, 2018, Battiston was terminated from his employment without cause due to his performance.

[20] The following letter dated August 9, 2018 from Laura Gibbons, HR Manager, Microsoft, was emailed to Battiston:

> I am writing to confirm your employment has been terminated, effective immediately.
>
> You will receive payment of any outstanding wages, as well as any accrued vacation pay.
>
> In accordance with the terms of your employment agreement, your group insurance benefit will continue until September 25, 2018.
>
> You are being provided with a 3-month career transition program with Right Management to assist you with re-employment. We encourage you to commence the program promptly.
>
> In order to further assist you with your transition, Microsoft is also prepared to provide you with the following:
>
> a. Payment of the sum of $399,922.92 which is equivalent to 101.81 weeks of your average weekly salary of $3,928.13.
>
> The amounts offered above are conditional on your signing and returning this letter, together with the accompanying Release and Indemnity. The release includes confirmation from your regarding confidentiality of this proposal, an obligation not to disparage Microsoft or its representatives and confirmation regarding return of property. Payments referred to in this letter are in Canadian funds, and subject to any required withholding.
>
> 1. You are required to return all company property in your possession or control ("Company Property"), including without limitation computers, credit and security cards, keys, electronic devices, correspondence and other documents relating to the operations or activities of the company. Under no condition are you to reproduce or retain a copy of any Company Property.
>
> 2. You may have the right to convert your group life insurance policy to term insurance, provided that you apply within 31 days of the termination of your benefits, without your being required to submit evidence of insurability. Information about this conversion privilege, and any other conversion options, may be obtained from Sun Life.
>
> 3. If applicable, any final RBI (Revenue Based Incentive) or UBI (Utilization Based Incentive) payment is scheduled to be made on approximately the middle of the month following the end of this quarter.

4. You may have the right to transfer portions of payments referred to in this letter into your Sun Life RRSP. If you wish to do so, please notify your HR Manager by August 16, 2018.

5. You will be reimbursed for any allowable business expenses incurred prior to the termination of your employment, in accordance with company policy. Please submit expenses for payment using the manual expense forms accompanying the package.

6. The treatment of any stock awards granted to you will be in accordance with the terms and conditions of the applicable Microsoft stock plan(s), as amended. Any awards unvested as of today are null and void.

7. You are reminded that you signed the "Employment Agreement Regarding Non-Disclosure, Confidentiality and Non-Solicitation", a copy of which is enclosed. You are required to comply with the provisions of this agreement.

Please carefully read and consider the terms of this letter and enclosed Release and Indemnity and seek whatever professional advice you deem appropriate. Please indicate your acceptance of this offer, as outlined above, by signing and returning a copy of this letter to me by no later than August 16, 2018 along with a copy of the executed Release and Indemnity. Should you elect not to accept this offer, the only payments you will receive on account of your termination of employment will be your minimum requirements under applicable employment standards or legislation, including RRSP contributions.

[21] Battiston states that he was "shocked" by his termination. He did not expect to be fired as he was never the subject of Performance Improvement Plan nor had been assisted with his performance.

ANALYSIS

[22] The following issues are raised:

- What is the appropriate length of the notice period?
- Is Battiston entitled to a bonus award (merit increase and cash bonus) under Microsoft's Rewards Policy: 1) for fiscal year 2018?; 2) during the notice period?
- Is Battiston entitled to have previously granted stock awards under Microsoft's Stock Plan vest during the notice period?
- Did Battiston fail to mitigate his damages?

[23] In *O'Reilly v. IMAX Corporation*, 2019 ONCA 991, at para. 32, Chief Justice Strathy stated:

> 1. A wrongfully dismissed employee is entitled to damages for the loss of wages, salary and other benefits, that would have been earned during the notice period.
>
> 2. This principle applies to bonuses, stock options, or incentives that are an integral part of the employee's compensation, as well as pension benefits that would have accrued or been earned during the notice period.
>
> 3. In considering whether the loss of such benefits is recoverable, the court undertakes a two-step analysis.
>
> 4. The first step requires a determination of the employee's common law right to damages for breach of contract, bearing in mind that the measure of damages is the amount to which the employee would have been entitled had the employer performed the contract.
>
> 5. The second step requires the court to determine whether the terms of the relevant contract or plan unambiguously alter or remove the employee's common law rights, having regard to the presumption that the parties intended to apply the law, in the absence of clear language to the contrary.

ISSUE #1: WHAT IS THE APPROPRIATE LENGTH OF THE NOTICE PERIOD?

[24] In *Machtinger v. HOJ Industries Ltd*. [1992] 1 S.C.R. 986, para. 19, the Supreme Court of Canada stated:

> In Canada, it has been established since at least 1936 that employment contracts for an indefinite period require the employer, absent express contractual language to the contrary, to give reasonable notice of an intention to terminate the contract if the dismissal is without cause.

[25] Battiston submits that 24 months of notice is reasonable. Microsoft offered 23 ½ months of notice in their termination. At trial, Microsoft submitted that 16 months was appropriate as its earlier offer had been part of a package where no bonuses would be paid.

[26] In *Paquette v. TeraGo Networks Inc.*, 2015 ONSC 4189, 2-16 C.L.L.C. 210-056, var'd on other grounds, 2016 ONCA 618, 352 O.A.C. 1, at paras. 22-31, Justice Perell described the relevant principles in assessing the length of reasonable notice of termination as follows:

- The purpose of requiring reasonable notice is to give the dismissed employee an opportunity to find other employment;

- In determining what constitutes reasonable notice of termination, a court must the length of notice, a court must consider:
    - The character of employment;
    - The length of employment;
    - The age of the employee at termination; and
    - The availability of similar employment having regard to the experience, training and qualifications of the employee: *Bardal v. Globe & Mail Ltd*., (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145.
- The determination of what period constitutes reasonable notice of termination is a principled art and not a mathematical science that turns on the particular facts of each case. There is no "right" figure for reasonable notice. Most cases yield a range of reasonable figures;
- A longer notice period will usually be justified for older long-term employees;
- Generally, the longer the duration of employment, the longer the notice period;
- A longer notice period is provided for senior management or highly skilled and specialized employees and a shorter period is provided for lower rank or unspecialized employees; and
- Economic factors such as a downturn in the economy or in a particular industry or sector of the economy may indicate that an employee may have difficulty finding another position and may justify a longer notice period.

[27] An employee's substantial average annual compensation and the possibility of equity participation are relevant in assessing the availability of similar employment opportunities: *Love v. Acuity Investment Management Inc*., 2011 ONCA 130, 89 C.C.E.L. (3d) 157, at para. 22.

[28] None of the four *Bardal* factors should be overemphasized when assessing the length of reasonable notice: *Singer v. Nordstrong Equipment Ltd*., 2018 ONCA 364, 47 C.C.E.L. (4th) 218 at paras. 5-6.

[29] The length of reasonable notice is determined by the circumstances that existed at the time of termination and not how long it, in fact, took the Plaintiff to find similar employment: *Holland v. Histopia.com*, 2015 ONCA 762, para. 61.

[30] Battiston's T4 income was as follows:

Year	Amount
2015	$296,159.61
2016	$304,169.84
2017	$302,605.71

[31] There is no dispute that at the time of his termination, Battiston was 53 years old and had been employed with Microsoft for 22 years and 8 months. The parties agree that Battiston's most recent base salary was $204,262.76. In his last position as Business and Operations Manager, Battiston was focused on international operations where the clients that he serviced were not based in Canada. In his second last position as Premier Field Engineering Manager, Battiston served a middle management role.

[32] The parties provided several cases in support of their position on the appropriate period of reasonable notice. The Plaintiff relies on the first six cases shown below. The Defendant relies on the remaining cases.

	Position	Age	Length of Service (Years)	Level of Compensation	Notice Period (Months)
Chen v. Purdue Pharma, 2015 ONSC 1967	Director of Business Development	56	22.5	$228,808.08 base and bonus	24
Pioro v Calian Technology Services Ltd.	Manager, Manufacturing	47	Almost 19	$533,299.32 base salary	22
George v. Imagineering Ltd., 14 C.C.E.L. (3d) 102 (Ont. S.C.), aff'd 23 C.C.E.L. (3d) 31 (Ont. C.A.)	President	54	23	$177,512.16	30 (including 5 months of bad faith gross up)

	Position	**Age**	**Length of Service (Years)**	**Level of Compensation**	**Notice Period (Months)**
Maasland v. Toronto (City), 2015 ONSC 7598, 29 C.C.E.L. (4th) 144	Senior Engineer	57	25	$142,524	26
Irvine v. Jim Gauthier Chevrolet Oldsmobile Cadillac Ltd.	G.M.	57	19	$183,000	24
Poole v Whirlpool Corp.	Director	53	17	$225,000	19
Fewer v. Toromont Industries Ltd., 2009 CanLII 42592 (ONSC)	General Manager	47	22	$110,000 base salary	16
Hagholm v. Coreio Inc., 2017 ONSC 7713	Manager, Consulting Services	59	22	$112,000 base salary	22
Winfield v. Pattison Sign Group, 2013 ABQB 595	Senior Sales Representative	55	24	$191,393 base salary	18

[33] Battiston has unsuccessfully applied for about seventy jobs of a comparable type in the 14 months following his termination. Sometimes hundreds of people applied for the same job. Microsoft's submission that Battiston has a broad skill set which makes him more readily employable is undermined by the fact that he did not receive one request for an interview. Further, Microsoft's failure to provide Battiston with a letter setting out the basic biographic details of his 22-year period of employment with Microsoft, despite a request for same within one week of his termination, did not help him in the task of finding similar employment.

[34] Having considered his age, length of services, character of his employment, the availability of similar employment and the case law provided by the parties, I find that the period of reasonable notice in this case should be 24 months.

ISSUE #2: IS BATTISTON ENTITLED TO A BONUS AWARD (MERIT INCREASE AND CASH BONUS) UNDER MICROSOFT'S REWARD POLICY DURING THE NOTICE PERIOD?

[35] In *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, the Ontario Court of Appeal stated, at para. 48:

> Damages for wrongful dismissal generally include all compensation and benefits that the employee would have earned during the notice period: *Paquette v. TeraGo Networks Inc*., 2016 ONCA 618, 352 O.A.C. 1, at para. 16. This amount may include bonus payments that the employee would have been entitled to had they continued to be employed during the notice period: at para. 17. In *Paquette*, at paras. 30-31, this court articulated a two-part test for determining whether a wrongfully dismissed employee is entitled to damages for the loss of bonus entitlement: (1) was the bonus an integral part of the employee's compensation package, triggering a common law entitlement to damages in lieu of bonus?; and (2) if so, is there any language in the bonus plan that would specifically remove the employee's common law entitlement? See also: *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619, 352 O.A.C. 10, at paras. 84-86; *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, 47 C.C.E.L. (4th) 218, at paras. 21-22; *Bain v. UBS Securities Canada Inc*., 2018 ONCA 190, 46 C.C.E.L. (4th) 50, at para. 9.

[36] Whether a bonus is an integral part of the employee's compensation package turns on a consideration of (a) the bonus is received each year although in different amounts; (b) bonuses are required to remain competitive with other employers; (c) bonuses were historically awarded and the employer had never exercised its discretion against the employee; and (d) the bonus constituted a significant component of the employee's overall compensation: *Wolfman v. Rocktenn-Container Canada, L.P*., 2015 ONSC 1432, para. 37.

[37] Microsoft's Rewards Allocation Approach & Eligibility Policy ("Rewards Policy") states:

> Rewards allocation is the process in which an employee's merit increase, annual bonus and annual stock awards are determined. Annual rewards allocation occurs in July and August followed by employee reward discussion in August and September.
>
> Our approach to rewards allocation is designed to reinforce a high-performing organization and to reward results that contribute to team, business and customer impact. …
>
> Performance is about your impact on team, business and customer results – and our annual rewards are based on impact made over the past year. The biggest impact can be achieved through a successful combination of three inter-related factors, as shown in the following graphics… Your key individual accomplishments that contribute to team,

business or customer results, Your results that build on the work, ideas or efforts of others, Your contributions to the success of others. …

At the end of the fiscal year, managers will indicate the impact that each of their employees had over the past year. These impact recommendations will roll up through the management chain to inform rewards decision-making. The senior leaders of each organization will ensure their final reward decisions meet budget.

Make use of Connects and the Perspectives tool as structured ways to gather input on how you're doing and to find out how you might further optimize your impact. …

Managers will start by using 1:1 meeting, Connects, formal and informal feedback, and their own observations to reflect on what you have done to optimize your impact throughout the year. …

Taking all of this into account, your manager will determine your impact in the context of your business, role and the level of challenge within which the business impact and results were delivered. …

When recommending rewards, your manager has the flexibility to consider each person's impact on its own (not relative to peers) and to recommend rewards that he or she feels aligns with that impact.

Managers will work with their next level managers to discuss their impact recommendations and adjust as need to align their perspectives.

Senior managers who have broader visibility across the organization will take part in People Discussions to review initial impact recommendations from across the organization. … Managers who attend People Discussions will not discuss every employee or create stack ranks or buckets. Instead, managers will focus on where they have seen the greatest impact and will discuss recommendations for who get the highest rewards. …

Ultimately, actual rewards outcomes for an individual may vary from a manager's initial recommendation, since leaders will need to consider all of the recommendations submitted from across the business and allocate budget accordingly. …

You will learn about your rewards outcomes in a Rewards Discussion with your manager sometime between mid-August and mid-September.

This will be a relatively brief discussion that provides a chance for you to review your rewards for the last fiscal year and to ask any questions about those rewards and how they relate to the impact you had over the year. There is no document or end-of-year Connect associated with your Rewards Discussion.

> After the Rewards Discussion, you will continue to work with your manager to schedule Connects and use the Connects to reflect on and capture the impact you have made in the previous period and your plans for the upcoming period. This will be done according to the cadence established in your organization or team. [Emphasis added]

[38] Battiston received a merit increase and cash bonus every year from Microsoft except the last year of his employment.

[39] Wehnelt testified that from 2015 until his termination, Battiston was eligible to receive annual cash bonuses of anywhere from 0% to 30% of his base salary, with 15% designated as the percentage awarded to employees who met expectations.

[40] Between 2015 and 2017, Battiston received the following bonuses under the Rewards Policy and stock under the Stock Plan (which will be addressed below).

	Base Salary	**Merit**	**Cash Bonus**	**Stock**
September 2015		2.5%	34,400 CDN	662 Shares - $28,800 USD
September 2016		1.7%	29,600 CDN	418 Shares - $24,000 USD
September 2017	$201,463.00	1.4%	24,200 CDN	193 Shares - $14,400 USD
August 2018	$204,262.76	NIL	NIL	NIL

[41] Given these circumstances, I find that the merit increase and the cash bonus under the Rewards Policy were significant parts of the total income.

[42] Turning to the second part of the analysis, I find that there is nothing in the Rewards Policy that removes the common law entitlement to receive bonuses during the notice period.

[43] Accordingly, I find that Battiston is entitled to damages for the lost opportunity to earn a merit increase and cash bonus during the notice period. I reject Microsoft's submission that the measure of such damages is zero during the notice period because he would not have improved his performance given that he failed to improve his performance after dissatisfaction with his performance was repeatedly expressed through the Connects process. However, the proper measure of such damages is based on the average of the amounts that were awarded for such bonuses in the two-year period preceding his termination: *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, para. 25. Using the figures shown above, I find that Battiston is entitled to a 0.7% annual merit increase during the notice period and an annual cash bonus of $12,100 during the notice period.

ISSUE #3: IS BATTISTON ENTITLED TO A BONUS AWARD (MERIT INCREASE AND CASH BONUS) UNDER MICROSOFT'S REWARD POLICY FOR FISCAL YEAR 2018?

[44] The discretion to award a bonus must be exercised in a fair and reasonable manner. Thus, the factors taken into consideration in deciding whether to award a bonus must be related to performance and the employer must have used a process whereby the employer considered all factors that it was required to consider: *Chann v. RBC Dominion Securities*, [2004] O.J. No. 5340, para. 65 submits that the bonus award did not result from a fair and reasonable process.

[45] As outlined in the Rewards Policy, the decision to award a bonus is based on meetings between the employer and the manager, Connects, formal and informal feedback and the manager's own observations.

[46] Wehnelt stated that a bonus is based on rating each employee's impact on a scale of 0 to 200. Those employees with an impact of less than 60, do not receive a bonus under the rewards program used by Microsoft. Gibbons testified that performance models were no longer used a bell curve since 2013 as the Rewards Policy was designed to reward top performers and not assign rewards through a forced distribution.

[47] The process for the determination of Battiston's bonus for the fiscal year ending June 30, 2018 took the following steps. In June 2018, Wehnelt stated that he recommended that Battiston receive no bonus as he had had zero impact in fiscal year 2018. He states that his decisions were supported by his own observations and feedback from various Business Partners. His recommendations were rolled up through the management chain to inform the allocation of Annual Rewards which occurs in July and August. Persons senior to Wehnelt reviewed his recommendation and requested further details regarding Battiston's performance which he provided. The recommendation was confirmed. In the normal course, bonuses are communicated to employees between mid-August and mid-September during meetings with managers known as "Reward Discussions". Wehnelt states that Microsoft's bonus decision would have been communicated to Battiston sometime between mid-August, 2018 and mid-September, 2018 had his employment not been terminated on August 10, 2018.

[48] Battiston submits that the bonus process was unfair because it was coloured by the fact that he had been terminated and he was denied the opportunity to meet with his manager to discuss his zero-bonus award as his employment had been terminated by the time that such bonuses were announced. However, Wehnelt's zero bonus recommendation was made two months prior to his termination. Further, the fact that Wehnelt did not directly communicate the bonus decision to Battiston is not unfair or unreasonable given that his employment had been terminated. The Rewards Policy contemplates a relatively brief discussion where the employee is given an opportunity to ask questions about the bonus award and how it relates to the employee's performance over the last year. The policy does not contemplate that the bonus may

be changed as a result of such discussion. Given these parameters, it makes little sense for Microsoft to have met with Battiston to discuss the bonus award for fiscal year 2018.

[49] There was some dispute as to whether Wehnelt found that Battiston had zero impact or whether his impact was less than 60 on a scale of 0 to 200 which would have resulted in a zero-bonus award in any event. I find that Wehnelt expressed both views. In any event, the main point is that he viewed Battiston's performance for fiscal year 2018 as sufficiently unimpactful such that he was not worthy of a bonus. It was not unreasonable for Wehnelt to make a zero-bonus recommendation given the evidence, particularly the various Connects, nor was it unreasonable for Microsoft to adopt that recommendation particularly as they asked for Wehnelt to provide greater detail regarding his justification for a zero bonus. In short, there was nothing capricious or arbitrary about Microsoft's award given that it seeks to align bonuses with an employee's impact and given the views expressed by Wehnelt and other stakeholders related to Battiston's impact.

[50] Accordingly, I dismiss Battiston's claim for a merit increase and cash bonus for fiscal year 2018.

ISSUE #4: IS BATTISTON ENTITLED TO DAMAGES FOR AWARDED BUT UNVESTED STOCK AWARDS?

[51] The award of a stock bonus to a Microsoft employee, including Battiston, was communicated by an email which typically states:

> 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.
>
> Questions? Please find additional information about stock awards on HRWeb.

[52] Battiston confirmed that he received these types of emails each year and that his practice was simply to click acceptance of the stock plan without reading it given the length of the Stock Awards Agreement.

[53] Microsoft's records show that Battiston accepted the following stock awards online:

Award ID #	**Date of Acceptance**
0000001384408	September 15, 2013
0000001441955	September 19, 2014

0000001567057	September 17, 2015
000000170711	September 20, 2016
0000002019684	September 18, 2017

[54] Under the terms of the Stock Award Agreements that governed during this period, each stock award vested in various percentage increments each year over months or yeears. At the time of the termination of his employment, Battiston had 1,057 awarded but unvested shares.

[55] Microsoft's 2013 and 2014 Stock Award Agreements include the following provisions:

> 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 Section 2(j) of the Plan), Awardee's rights under this Award Agreement in any unvested SAs shall terminate (as further described in Section 11(k) 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:
>
> (k) 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 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); [Emphasis added]

[56] The key clauses noted above, remain unchanged in Microsoft's 2015, 2016 and 2017 Stock Award Agreements which state:

> 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); [Emphasis added]

[57] Battiston testified that he did not read the length Stock Award Agreemens nor did Microsoft draw his attention to the termination provisions shown above. Battiston states that he was under the impression that he would be eligible to cash out his granted but unvested stock awards in the event that he was terminated without cause.

[58] Microsoft submits that Battiston is not entitled to damages for awarded but unvested stock awards because he had no entitlement to the vesting of such awards under the terms of the Stock Award Agreement given its termination provisions.

[59] Battiston submits that:

- The Stock Award Agreements do not unambiguously oust Battiston's entitlement to the vesting of stock awards during the notice period;

- In the alternative, the termination provisions in the Stock Award Agreements are onerous and unenforceable as Microsoft did not bring those provisions to his attention; and

- In the further alternative, the termination provisions are void on the grounds that the stock awards constitute "wages" under the *Employment Standards Act, 2000*, S.O. 2000, c.41 ("ESA") are void under the *ESA* as the termination provisions disentitle Battiston to vesting of stock awards during the statutory notice period.

Is Battiston Entitled to Damages for Loss of the Vesting of Unvested Stock Awards during the Notice Period?

[60] There is no dispute that the stock awards were an integral part of Battiston's compensation package, and thus *prima facie* triggered a common law entitlement to damages in lieu of bonus.

[61] Microsoft submits that the termination provisions specifically removed Battiston's common law entitlement as they provide

> "… 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), ..." [Emphasis added]

[62] Battiston submits that the cessation of "active employment" has been insufficient to oust an employee's common law right to damages in other cases: *Paquette v. TeraGo Networks Inc*., 2016 ONCA 618; *Bernier v. Nygard International Partnership*, 2013 ONSC 4578; *Schumacher v. Toronto-Dominion Bank*, (1997), 29 C.C.E.L. (2d) 96 (Ont. Gen. Div.).

[63] Nevertheless, in this case, it is quite clear that the Stock Award Agreement provides that an employee's right to vest Stock Awards terminates when that employee is no longer actively providing services to employer when he or she has been terminated for any reason even if such reason is unlawful. In my view, the circumstances of this case more closely resemble *Kieran v. Ingram Micro Inc*., [2004] O.J. No. 3118 (C.A.) which provided that the employee was not entitled to exercise stock options once he was "terminated for any reason …" Given the broad language of the termination provision, the presumption that termination must be according to law in order to end an employee's right to vest stock options is rebutted.

[64] I find that the Stock Award Agreement unambiguously excludes Battiston's right to vest his stock awards after he has been terminated without cause.

Are the Termination Provisions in the Stock Award Agreements Unenforceable for Lack of Notice?

[65] There is no dispute that the termination provisions found in the Stock Award Agreements were not drawn to Battiston's attention by Microsoft.

[66] Battiston relies on *Tilden Rent-A-Car Co. v. Clendenning* (1976), 18 O.R. (2d) 601 (C.A.), for the submission that the termination provisions of the Stock Award Agreements should not be enforced as they were not specifically brought to his attention. *Tilden* was recently considered in *MacQuarie Equipment Finance Ltd. v. 2326695 Ontario Ltd. (Durham Drug Store)*, 2020 ONCA 139, where the Ontario Court of Appeal stated:

> [32] … As noted by Professor John D. McCamus in *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), at p. 193: "If an agreement is entered into on the basis of a document proffered by one party and signed by the other, it is clearly established that the agreement between the parties contains the terms expressed in the document, whether or not the signing party has read the documents."
>
> [33] However, Professor McCamus adds that sometimes, even with a signed agreement, inadequate notice of a particularly unfair term may render that term unenforceable, at p. 194:
>
> > In many contractual settings, it will not be expected that a signing party will take time to read the agreement. Even if the document is read, it may well be, especially in the context of consumer transactions, the purport of particular provisions of the agreement will not be understood by the signing party. Under traditional doctrine, then, although the fact of the signature appears to dispense with the notice issue, the opportunities for imposing harsh and oppressive terms on an unsuspecting party are, as a practical matter, as present in the context of signed documents as they are in the context of unsigned documents. Accordingly, it is perhaps not surprising that the recent jurisprudence indicates that notice requirements are migrating into the context of signed agreements.
>
> [34] The leading Ontario case on this point remains this court's decision in *Clendenning*. There, Dubin J.A. (as he then was) for the majority refused to enforce a limitation of liability provision in a car rental agreement that purported to exclude the rental company's liability for a collision where the customer had driven the car after consuming alcohol. Before renting the car, the customer had chosen to pay an additional premium for "collision damage waiver", which he had been led to understand provided comprehensive insurance for vehicle damage. He signed the rental agreement without reading it.
>
> [35] In finding the exclusion clause unenforceable, Dubin J.A. highlighted that such a rental transaction was typically concluded in a "hurried, informal manner", and that the liability exclusion provision was "[o]n the back of the contract in particularly small type and so faint in the customer's copy as to be hardly legible": at pp. 602, 606. The

exclusion clause was also "inconsistent with the over-all purpose for which the transaction is entered into by the hirer": at p. 606.

[36] In these circumstances, Dubin J.A. concluded that "something more should be done by the party submitting the contract for signature than merely handing it over to be signed" (at p. 606) — namely, reasonable measures must be taken to draw harsh and oppressive terms to the attention of the other party, at p. 609:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*. [Emphasis added]

[67] *Tilden* also applies to the enforcement of termination clauses found in bonus plans. In *Paquette v. TeraGo Networks Inc*, 2016 ONCA 618, at para. 18, the Ontario Court of Appeal stated:

> Where a bonus plan exists, its terms will often be important in determining the bonus component of a wrongful dismissal damages award. The plan may contain eligibility criteria and establish a formula for the calculation of the bonus. And, as here, the plan may contain limitations on or conditions for the payment of the bonus. To the extent that there are limitations, the question may arise as to whether they were brought to the attention of the affected employees, and formed part of their contract of employment. The latter issue does not arise here, however, as the appellant did not dispute that he was aware of the plan's terms. [Emphasis added]

[68] In *Poole v Whirlpool Corp*., 2011 ONCA 808, an employee was never given or shown a copy of the bonus plan, was never asked to agree to its terms, nor was he aware that it required him to be actively employed in order to be eligible to receive a bonus. The Court stated, at paras. 4-6:

> [4] The appellants contend that to be eligible for a bonus under the applicable Bonus Plan, the respondent was required to be actively employed on December 31st of the year for which the bonus was claimed. As the respondent was fired in March 2010, he did not qualify for a bonus in 2010 or 2011.

> [5] The motion judge was correct to reject this contention. The bonus eligibility precondition relied on by the appellants was not incorporated in the respondent's 2007 letter of employment; nor was there any evidence that the precondition was otherwise drawn to the respondent's attention at any time, whether orally, in writing, or by means of the appellants' internal intranet communications system, or that he ever agreed to it. The appellants elected not to cross-examine the respondent on his affidavit materials, in which he swore that he never agreed to the precondition and was unaware of any reference to it on the appellants' intranet system.
>
> [6] The appellants' failure to lead evidence or otherwise establish through cross-examination of the respondent that they had communicated the bonus eligibility precondition to the respondent or obtained his assent or agreement to it precludes any reliance by the appellants on the precondition to defeat the respondent's bonus claim. [Emphasis added]

[69] In *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512, the employer took the position that the employee was not entitled to bonus payments over the notice period because his bonus entitlement was limited by a termination provision contained in the bonus plan. The Court of Appeal found that the termination provision was unenforceable as it had been unilaterally imposed and not brought to the employee's attention at any time before his termination. At para.74 the Court of Appeal stated:

> Notably absent from the record was any direct evidence that the terms in question were brought to Mr. Dawe's attention. As counsel for Mr. Dawe argued on appeal, had Mr. Beettam's memo of March 29, 2006 contained one further sentence that referred to the termination provisions, it is quite possible that this litigation would never have been commenced. Alternatively, Mr. Dawe may have objected to the inclusions of these limitations, leading to scenarios (2) or (3), discussed in *Wronko* (at para. 67, above). Given how the transition of the bonus plans was implemented by Equitable Life, we will never know how things would have played out had Mr. Dawe been informed that he would be forfeiting large sums of money even if his employment were to be terminated without cause.

[70] I find that the termination provisions found in the Stock Award Agreements were harsh and oppressive as they precluded Battiston's right to have unvested stock awards vest if he had been terminated without cause. 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.

[71] Finally, I note that there were almost no submissions at trial regarding the quantification of these damages. Battiston submitted that damages arising from the failure to vest shares over

the notice period should be assessed as of the date of trial. There is no basis for this view in law or on the evidence. Battiston states that he has not sold earlier vested stock awards given by Microsoft that have already vested. He stated that such awards form a considerable part of his family's net worth. The law provides that there is a general presumption that damages for breach of contract will be assessed as of the date of breach unless there are special circumstances that dictate otherwise: *Rougemount Capital Inc. v. Computer Associates International Inc*., 2016 ONCA 847, paras. 50-52. No special circumstances have been articulated that would justify a departure from this presumption.

[72] Given that I have concluded that the termination provisions of the Stock Award Agreements are unenforceable, it is unnecessary to address Battiston's argument that the termination provisions are void under the *ESA*.

ISSUE #4: DID BATTISTON FAIL TO MITIGATE HIS DAMAGES?

[73] The applicable legal principle in relation to an employee's duty to mitigate were outlined in *Paquette v. TeraGo Networks Inc*., 2015 ONSC 4189, rev'd on other grounds 2016 ONCA 618, at paras. 43-49:

- An employee has a duty to mitigate losses and is not entitled to recover for losses that were avoidable;
- Similarly, an employee must take into account benefits from actually mitigating the loss;
- The onus is on the employer to establish that the employee failed to take reasonable steps to find a comparable position and that the employee would likely have found a comparable position reasonably adopted to his or her abilities;
- In assessing an employee's mitigation efforts, the employee should be held to a standard of reasonableness not perfection;
- A Court may grant judgment before the expiration of the notice period but the employee will be subject to a duty to mitigate for the duration of the notice period using one of three approaches:
    - The Contingency Approach – the employee's damages are discounted by a contingency for re-employment during the balance of the notice period;
    - The Trust and Accounting Method – the employee is granted judgment but a trust in favour of the employer is impressed on the Judgment funds for the balance of the notice period requiring the employee to account for any earnings; and
    - The Partial Summary Judgment Approach – the employee is granted a partial summary judgment and the parties return to Court during and or at the end of the notice period.

[74] Since his termination, Battiston has used the career seeking service provided by Right Management. He has attended 15 training sessions which included elements such as career planning, self-discovery, personal branding and job searching.

[75] Battiston states that LinkedIn is his primary tool for doing job searches and applications. It appears to be his only tool as all of the job applications that he has made have been through LinkedIn. A list generated by LinkedIn shows that he has applied to about 70 positions from October 10, 2018 to November 23, 2019. He has not received a single request for an interview.

[76] Battiston explains that he used LinkedIn to search for employment by entering certain search terms, and filters, which resulted in the receipt of emails from LinkedIn regarding possible employment opportunities. Sometimes he would also visit LinkedIn and actively search for jobs.

[77] Microsoft submits that Battiston has not made a serious effort to search for employment. Battiston acknowledged that he failed to read the emails that he received from LinkedIn as he did not realize that some of the acknowledgement emails also referred to other jobs that he might be interested in applying for. Battiston also admitted that he did not call anyone in his network to look for work. From January 31, 2019 to April 25, 2019, his job log shows that he did not apply for one job during that time. He states that there were no job applications made during this period as there were no jobs of interest. During this period, Battiston invested in a franchise, PinPoint Local, that provides digital marketing services. He trained for 22 hours during this period. Battiston invested $10,465.00 in this franchise opportunity which he hopes will become a full-time business. However, he has earned no income from this business.

[78] Two months is a reasonable amount of time to gather oneself following termination to commence looking for alternate employment: *Devlin v. High Liner Foods Incorporated*, 2019 ONSC 6897, para. 34. I agree with this principle and find that Battiston did not fail to mitigate his loss by not searching for alternate work within the first two months following his termination.

[79] While Battiston could have applied greater effort to looking for a comparable position, there is no evidence that he would have likely found a comparable position had he done so particularly as he did not receive a single interview for the seventy jobs for which he did apply. Accordingly, Microsoft has failed to establish that Battiston failed to mitigate his damages.

[80] Finally, a court may grant Judgment before the expiration of the notice period but the employee will be subject to a duty to mitigate for the duration of the notice period using one of the three approaches described earlier. The notice period expires August 10, 2020 and I accept Battiston's submission that it is unlikely that he will find similar employment given his lack of success to date in one obtaining a single interview, I find that it is reasonable to apply a 1% contingency. Accordingly, I reduce Battiston's notice period from 24 months to 23 ¾ months.

CONCLUSIONS

[81] Judgment is granted to Battiston on the following terms:

(1) Battiston is entitled to a 23 3/4 months notice of termination.

(2) Battiston's base salary at the time of his termination was CDN $204,262.76. Battiston is entitled to the payment of base salary during the notice period less any amounts already paid, namely $238,306.00, and less any amounts received by way of his mitigation efforts which has been nil.

(3) Battiston's claim for a cash bonus and merit increase for Fiscal Year 2018 is dismissed.

(4) Battiston is entitled to an annual cash bonus of $12,100 during the notice period and an annual merit increase of 0.7% during the notice period.

(5) Battiston is awarded damages for the granted stock awards that would have vested during the notice period had his employment not been terminated. Such damages are to be assessed as of the date of the breaches using the closing market price for the stock on those dates.

(6) Battiston is awarded $2,000 per year in lieu of health and dental care benefits during the notice period.

(7) Battiston is awarded up to $6,250 per year for his contributions to an RRSP during the notice period.

[82] Costs submissions shall be a maximum of five pages excluding settlement offers and Bills of Costs. Battiston shall deliver his costs submissions by July 29, 2020. Microsoft shall deliver their costs submissions by August 12, 2020. Battiston may deliver reply submissions by August 19, 2020.

Mr. Justice M. Faieta

Released: July 15, 2020

CITATION: Battiston v. Microsoft Canada Ltd., 2020 ONSC 4286
COURT FILE NO.: CV-18-605527
DATE: 20200715

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FRANSIC BATTISON

Plaintiff

– and –

MICROSOFT CANADA INC.

Defendant

REASONS FOR DECISION

Mr. Justice M. D. Faieta

Released: July 15, 2020