COURT OF APPEAL FOR ONTARIO

CITATION: Battiston v. Microsoft Canada Inc., 2021 ONCA 727
DATE: 20211018
DOCKET: C68550

Benotto, Brown and Harvison Young JJ.A.

BETWEEN

Fransic Battiston

Plaintiff (Respondent)

and

Microsoft Canada Inc.

Defendant (Appellant)

Deborah Glendinning, Nancy Roberts and Mark Sheeley, for the appellant

Andrew Monkhouse and Samantha Lucifora, for the respondent

Heard: September 9, 2020 by video conference

On appeal from the judgment of Justice Mario D. Faieta of the Superior Court of Justice, dated July 15, 2020.

REASONS FOR DECISION

[1] For almost 23 years, the respondent was employed by Microsoft Canada Inc. He was terminated without cause and brought an action for wrongful dismissal. The trial judge found that the respondent was entitled to 24 months' pay in lieu of

reasonable notice less 1 percent contingency for re-employment during the balance of the notice period, plus a 0.7 percent annual merit increase, an annual cash bonus of $12,100 and stock awards.

[2] Microsoft Canada Inc. appeals, but only with respect to the trial judge's conclusion that the respondent is entitled to unvested stock awards after his termination. The appellant relies on the Stock Award Agreement (the "Agreement") which provided that any unvested stock awards do not vest to an employee if employment ends for any reason. The trial judge found that the termination provisions in the Agreement were not drawn to the respondent's attention and could not be enforced because they were harsh and oppressive.

[3] In oral submissions, the appellant raised several issues in support of its position:

1) the trial judge erred in finding the termination provisions unenforceable as the decision was rendered prior to the Supreme Court decision *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, 449 D.L.R. (4th) 583. (In that case, the Supreme Court revised the test for whether bonus payments are included as part of damages in lieu of reasonable notice);

2) the Award Agreement was a separate agreement that did not form part of the compensation package because it was with the parent company, not the appellant;

3) the terms violate s. 60(a) or (b) of the *Employment Standards Act*, which precludes changes to wages during the notice period; and

4) the terms of the Agreement were not brought to the attention of the respondent.

[4] The appellant raised several more issues in written submissions:

1) the trial judge erred in law in imposing a common law right to damages in respect of the unvested stock awards (the first step of *Matthews*);

2) the trial judge erroneously ruled against the appellant after concluding that the award agreements were unambiguous (the second step of *Matthews*);

3) the trial judge erred by modifying the legal test by adding an unfounded "harsh and oppressive" standard; and

4) that policy considerations militate in support of allowing this appeal, including regarding differential treatment of employees post-termination.

[5] We need only address one issue which is dispositive of the appeal: the trial judge's conclusion that, because the respondent did not receive notice, the Agreement is unenforceable.

[6] Each year the respondent received an email as follows:

> 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 saved 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.

[7] Each year, for 16 years, the respondent confirmed that he received these emails. His practice was to click a box to confirm that he had read, understood and accepted the stock award agreement. In fact, he said that he did not read the Agreement and thus did not know about the termination provisions. He thought he would get the unvested stock if he was terminated.

[8] The trial judge found that the Agreement unambiguously excludes the respondent's right to vest his stock awards after he has been terminated without cause. However, he also found that the terms are unenforceable because they are harsh and oppressive and because the respondent was not given notice. The trial judge's reasons are somewhat unclear on this issue. Although he states at paragraph 65 that "there is no dispute" that notice was not given, he later made a finding of fact which demonstrates that the appellant did not concede the issue. He said the following at paragraph 70:

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

[9] This finding cannot stand because the trial judge's conclusion that the notice provisions were not brought to the respondent's attention fails to address the following facts:

1) For 16 years the respondent expressly agreed to the terms of the agreement.
2) The respondent made a conscious decision not to read the agreement despite indicating that he did read it by clicking the box confirming such.

3) By misrepresenting his assent to the appellant, he put himself in a better position than an employee who did not misrepresent, thereby taking advantage of his own wrong: see *Berlingieri v. DeSantis* (1980), 31 O.R. (2d) 1 (C.A.) at para. 18.

[10] The trial judge erred by finding the respondent received no notice.

[11] The appeal is allowed with costs in the amount of $20,000 inclusive of disbursements and HST. We do not interfere with the award of costs in the court below.

"M.L. Benotto J.A."
"David Brown J.A."
"A. Harvison Young J.A."