CITATION: Wigdor v. Facebook Canada Ltd., 2025 ONSC 4861
COURT FILE NO.: CV-24-00725601-0000
DATE: 20250708

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DANIEL WIGDOR	*Alysha Shore and Catherina Fan*, lawyers for the Applicant
Applicant	
– and –	
FACEBOOK CANADA LTD. and META PLATFORMS, INC.	George Avraam, Jennifer Bernardo and Rono Khan, lawyers for the Respondents
Respondents	
	HEARD: May 20. 2025

Leiper, J:

REASONS FOR DECISION

Introduction

[1] The Applicant, Daniel Wigdor (the Applicant) seeks relief concerning the termination of his employment with Facebook Canada Ltd. ("Facebook Canada"). He seeks an order as to the effect of his employment agreement and orders for his entitlement to Restricted Stock Units (RSUs) by virtue of his agreements with Facebook Canada's parent company, Meta Platforms Inc. ("Meta").

[2] For the reasons that follow, I find that the termination provision in the Applicant's employment agreement are unenforceable because they violate the *Employment Standards Act,* 2000 S.O. 2000, c. 41 (ESA). In applying the common law principles, I conclude that the Applicant is entitled to 10 months of notice.

[3] On the issue of the Applicant's entitlement to RSUs that vested during the non-working notice period, I find that s. 61 of the ESA and the agreements as to the RSU program do not entitle

the Applicant to the RSUs which vested after his final day of work on December 8, 2023. I find that the RSU agreements are valid and enforceable.

Background

[4] The Applicant is a tenured professor at the University of Toronto, Department of Computer Science. His area of study is human-computer interaction.

[5] Meta is a publicly traded company, formerly known as Facebook Inc. Facebook Canada is Meta's wholly-owned Canadian subsidiary.

[6] In 2011 the Applicant founded Chatham Inc. to provide technology consulting services for financial, legal and technological firms. Until 2018, he was Chatham Inc.'s sole employee.

[7] In August of 2016, the Applicant began providing services to one of Meta's subsidiaries. By 2018 the Applicant was engaged in project management and overseeing a staff team of 20 within Chatham Inc. and 150 members of the Meta "Reality Labs" team.

[8] In 2020, Meta and the Applicant negotiated a share-purchase agreement (SPA) which contemplated that Chatham Inc.'s employees (including the Applicant) would be terminated by Chatham Inc. and begin employment with Meta.

[9] The acquisition was structured as a share purchase in which Chatham Inc.'s consulting division, "Chatham Labs" was spun out into a standalone company, Chatham Labs Inc. Chatham Labs' assets and employees were transferred to Chatham Labs Inc. and Meta purchased the shares of Chatham Labs Inc. via its wholly-owned subsidiaries.

[10] The Applicant began employment with Facebook Canada on September 12, 2020. His title was Director, Research Science,. In that capacity, he continued work on the project he had begun in his consulting role via Chatham Inc. with management responsibilities for a team of approximately 150 people.

[11] The Applicant enjoyed an employment arrangement which permitted him to work at 80% of a full-time equivalent position with his university employer, approximately 32 hours per week while fulfilling his job with Meta. His base salary was $253,100.37, with additional benefits including a wellness allowance, participation in an RRSP matching program, eligibility for semi-annual discretionary bonuses and health/dental benefits.

The Employment Agreement

[12] The Applicant signed an employment agreement with Facebook Canada which recognized his prior work at Chatham Inc. for the purpose of entitlements on termination. Paragraph 1 of that agreement provided as follows:

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> 1. Commencement of Employment…. No employment with a previous employer counts towards your period of continuous employment with the Company [Facebook], except that the Company will recognize your service with Chatham Labs Inc. and its predecessors, beginning on July 1, 2011, only for the purpose of determining any minimum required entitlements under the Ontario Employment Standards Act, 2000, as amended from time to time ("Employment Standards Legislation") which will govern your employment. [Emphasis added.]

[13] The Applicant submits, and I consider below, whether this provision conflicts with the detailed probationary termination provisions found in s. 12(a) of the employment agreement which reads:

> 12. Termination. Your employment with the Company is on an indefinite basis. You understand and agree that this Section 12 will apply throughout your employment with the Company, even if your role, duties and responsibilities or compensation change significantly over time. Although you will not be entitled to any reasonable notice or entitlements except as set out below, whether at common law or otherwise, in no event will your entitlements upon termination be less than those minimum entitlements set out in Employment Standards Legislation.
>
> a. Termination without Cause. During the first three (3) months of your employment, including any prior service with Chatham Labs Inc. or its predecessors, the Company may terminate your employment at any time by providing you with two (2) weeks of advance notice or base pay in lieu of notice.
>
> After the first three (3) months of your employment, the Company may terminate your employment without cause by providing you with all of your minimum entitlements under Employment Standards Legislation, including notice of termination, or payment in lieu of notice, benefits continuation (if required), and severance pay (if applicable). In addition to your minimum statutory entitlements and in exchange for a full and final release in favour of the Company, the Company will also provide you with an additional 4 weeks of base pay for every year of completed service, up to a maximum of 12 months' base pay (inclusive of any Employment Standards Legislation notice and, if applicable, severance amount).
>
> […]
>
> The Company reserves the right to make a payment, or payments, in lieu of your notice, or elect to provide part of your notice as working notice and part as payment in lieu of notice. Any such payments will be subject to applicable payroll and tax withholdings required by law. For further clarity, you will not be entitled to any further reasonable notice or entitlements, whether at common law or otherwise.
>
> [Emphasis added.]

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The RSU Entitlements

[14] The second issue arising on this Application concerns the RSUs which were granted at the time the Applicant started work with Facebook Canada and on an ongoing basis. These are governed by Meta's 2012 Equity Incentive Plan and RSU Award Agreements.

[15] There are two relevant RSU Agreements. In the 2020 RSU Agreement, RSU vesting is terminated during the ESA notice period. The Applicant submits that this agreement clearly breaches s. 61 of the ESA, which requires employers to maintain all "terms and conditions of employment" during the statutory notice period. I discuss that issue below.

[16] The 2021-2023 RSU Agreements have differently worded provisions than the 2020 RSU Agreement. Under their terms, a terminated employee will forfeit their RSUs "forthwith" and the employee is not entitled to RSUs which may vest during a period of statutory notice. The Applicant submits that the terms of the 2021-2023 RSU Agreements are misleading to employees. He further submits that both RSU Agreements require employees to forfeit their RSUs even if Meta has terminated their employment as a reprisal or for other reasons prohibited by the ESA. Thus, the Applicant submits that these are unlawful terms and the RSU agreements should not be given legal effect.

[17] The termination provisions in the 2020 and in the 2021-2023 RSU Agreements are:

2020 RSU Agreement	**2021-2023 RSU Agreements**
Termination This provision replaces Section 5 of the Agreement: If Participant's service Terminates for any reason, all unvested RSUs shall be forfeited to the Company forthwith, and all rights of Participant to such RSUs shall immediately terminate. For the avoidance of doubt, it is noted that, except as may be agreed to in the sole discretion of the Company, if Participant is Terminated by his/her employer for any reason or if Participant's Termination is due to his/her voluntary resignation, all unvested RSUs shall be forfeited as of the date that is the earlier of: (i) the date Participant's employment is terminated, and (ii) the date Participant is no longer actively providing services to the Company or any of its Subsidiaries (regardless of the reason for such Termination and whether or not later found to be invalid or in breach of employment laws in the jurisdiction where Participant is employed or the terms of Participant's employment agreement, if any), and no vesting shall continue during any notice period in relation to his/her Termination, whether specified under	**Termination** This provision replaces Section 5 of the Agreement: If Participant's service Terminates for any reason, all unvested RSUs shall be forfeited to the Company forthwith, and all rights of Participant to such RSUs shall immediately terminate. Despite any other definition of "Termination", "Terminated" or "Termination Date" in the Plan, the Notice or the Agreement, if Participant is an Employee of the Company or a Parent, Subsidiary or Affiliate, then Participant's service Terminates when Participant has ceased to provide services to his/her Employer, whether such cessation is initiated by Participant; by his/her Employer, with or without cause, and whether or not later found to be invalid or unlawful; by mutual agreement or by operation of law ("***Termination of Employment***"). For the avoidance of doubt, unless explicitly required by applicable legislation, the date on which a Termination of Employment occurs and all unvested RSUs are forfeited will not be extended by any period during which notice, pay in lieu of notice or related payments or damages are provided or required to be provided under local law (including, without limitation, statute, contract, regulatory law, and/or

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contract or statutory, regulatory or common law, including any "garden leave" or similar period. In case of any dispute as to whether Termination has occurred, the Company shall have sole discretion to determine whether such Termination has occurred and the effective date of such Termination for purposes of the Plan. [Emphasis added.]	common or civil law). Participant will not earn or be entitled to any pro-rated vesting for that portion of time before the date on which a Termination of Employment occurs, nor will Participant be entitled to any compensation for lost vesting. Notwithstanding the foregoing, if applicable employment standards legislation explicitly requires continued entitlement to vesting during a statutory notice period, Participant's right to vest in the RSUs under the Plan, if any, will terminate effective as of the last day of Participant's minimum statutory notice period. Participant will not earn or be entitled to pro-rated vesting if the vesting date falls after the end of Participant's statutory notice period, nor will Participant be entitled to any compensation for lost vesting. [Emphasis added.]

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The Termination

[18] Facebook Canada terminated Dr. Wigdor's employment on December 4, 2023 via a "Termination Letter", effective December 8, 2023.

[19] The Termination Letter stated that Facebook Canada was entitled to terminate the Applicant's employment without notice by paying the minimum statutory payments under the ESA, which Facebook Canada calculated as 8 weeks of notice pay and 12.5 weeks of severance pay based on his service with the Respondents and his prior service at Chatham Inc. and Chatham Labs Inc. Facebook Canada stated that it would only pay the supplemental amounts due on termination by virtue of the employment agreement and offered in the Termination Letter, if the Applicant signed the full and final release appended to the Termination Letter.

[20] The Applicant did not sign the release, because it included a term which precluded him from disputing the forfeiture of his unvested RSUs, which were valued in the millions of dollars.

[21] The Applicant alleges that in response, Meta withheld all the amounts he was owed on termination. He did not receive his ESA notice, severance pay, nor the supplemental amounts provided for in the Employment Agreement. After he started this application, approximately 10 months after his termination, Meta paid his ESA notice and severance pay.

[22] Meta acknowledges that it made "mistakes" post-termination, in that it prematurely terminated the Applicant's benefits on December 8, 2023, and failed to pay his severance of $97,346.37 until October 2, 2024. Meta characterized this as an administrative error which "should not have happened." The error was explained in evidence filed by way of an affidavit from Melinda Richards, Human Resources Business Partner. Ms. Richards personally saw to the retroactive reinstatement of the Applicant's health benefits on January 8, 2024 and that issue was resolved on January 22, 2024.

[23] Ms. Richards gave hearsay evidence from Meta's "payroll team" that reported "an internal misunderstanding" about paying the Applicant's statutory entitlements in the absence of a signed severance agreement.

The Issues on the Application

[24] This Application raises four issues:

a) Is the Applicant's employment agreement void because its termination clause contravened the ESA?

b) If the answer to a) is yes, what is the appropriate period of notice which governs the Applicant's termination?

c) Is the Applicant entitled to the value of the forfeited RSUs and other benefits which would have vested during the notice period?

d) Is the Applicant entitled to an award of punitive damages due to its breaches of the ESA and treatment of the Applicant on termination?

The Legal Framework

[25] Employment relationships in Ontario are governed by the ESA and by common law principles. The ESA is remedial legislation. As such it is to be interpreted "in a way that "encourages employers to comply with the minimum requirements of the Act, and … extends its protections to as many employees as possible": *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, at p. 1003; *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, at para. 28.

[26] The ESA prohibits employers from contracting out of the ESA's minimum standards. Section 5(1) provides that any language contracting out of or waiving an employment standard is "void" and unenforceable.

[27] Courts require a "high degree of clarity" from termination clauses. Any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause in accordance with the *contra proferentem* principle: *Nemeth v. Hatch Ltd.*, 2018 ONCA 7, 418 D.L.R. (4th) 542 at para. 12.

[28] When an employer includes a specific termination provision in an employment agreement that contracts out of the ESA or appears to do so, a general saving provision stating that the employer will always comply with the ESA's minimum requirements cannot "save" the agreement: *Rossman v. Canadian Solar Inc.,* 2019 ONCA 992, at para. 40; *Groves v. UTS Consultants Inc*., 2019 ONSC 5605, at para. 62, aff'd 2020 ONCA 630.

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[29] The policy rationale for this approach is to prevent employers from slipping unenforceable terms into agreements, hoping that employees will accept those terms; *Rossman v. Canadian Solar Inc.*, at paras. 40-41.

[30] When an employee is terminated, ss. 54 and 57 of the ESA require an employer to provide a set number of weeks of notice of termination based on the employee's length of service. During the statutory notice period, s. 60 prohibits an employer from reducing the employee's wage rate or altering any other term or condition of employment" and requires an employer to "maintain the employee's benefits".

[31] An employer may reduce the amount of notice, or give no notice, but it must pay the employee their wages in lieu of notice under the provisions of s. 61 of the ESA which read:

> **Pay instead of notice**
>
> **61** (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,
>
> (a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and
>
> (b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive. 2000, c. 41, s. 61 (1); 2001, c. 9, Sched. I, s. 1 (14).
>
> **No regular work week**
>
> (1.1) For the purposes of clause (1) (a), if the employee does not have a regular work week or is paid on a basis other than time, the amount the employee would have been entitled to receive under section 60 shall be calculated as if the period of 12 weeks referred to in subsection 60 (2) were the 12-week period immediately preceding the day of termination.

[32] Severance pay and pay in lieu of notice are considered "wages" under s. 1(1) of the ESA. As such, these must be paid by the later of 7 days after an employee's employment ends or their next pay day pursuant to s. 11(5) of the ESA.

[33] The ESA does not require notice to be given during the first three months of employment in normal circumstances, however, as was the case here, where an employee is hired by a successor firm as part of a business purchase, the employee's service is calculated based on total years of employment with the seller and purchaser: ss. 9(1) and 54, ESA; *Manthadi v. ASCO Manufacturing*, 2020 ONCA 485 at para. 48.

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[34] The treatment of employee stock holdings and stock options as part of compensation will depend on the wording of the agreements between the employer and employee: *Brock v. Matthews Group Ltd.* (1991), 43 O.A.C. 369; *Kieran v. Ingram Micro Inc.*, 2004 CanLII 4852 (ON CA) at para. 22; 32 A.C.W.S. (3d) 706 at para. 58; *O'Reilly v. IMAX Corporation*, 2019 ONCA 991; 313 A.C.W.S. (3d) 560 at paras. 49-53.

[35] With that brief overview of the applicable legal framework, I turn to the analysis of the issues on this Application.

a) Is the Applicant's employment agreement void because its termination clause contravened the ESA?

[36] The Applicant submits that the employment agreement is void because s. 12a does not comply with the ESA termination requirements. The case law is clear that where an employment agreement, even in some defined circumstances conflicts with the ESA, the whole contract is void. The interpretive process is to read the agreement as a whole and in the context of the circumstances as they were known at the time the agreement was made: *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992, at paras. 25-29; *Covenoho v. Pendylum Ltd.*, 2017 ONCA 284, at para. 7.

[37] The Respondents submit that two provisions in the employment agreement establish that it complies with the ESA. Section 1 of this agreement confirms that the Respondents will recognize his service with Chatham Labs Inc. and its predecessors, for statutory purposes. They submit that this recognition satisfies the "sale of a business" provisions of the ESA . Further they submit that the preamble in s. 12 contemplates the Applicant's prior service and thus recognizes his "minimum entitlements upon termination" under employment standards legislation to notice.

[38] Essentially, the Respondents say that the words in s. 12 "cure" the problem in 12 a. Reading these provisions side by side:

s. 12:	s. 12a:
Termination.	a. Termination without Cause.
Your employment with the Company is on an indefinite basis. You understand and agree that this Section 12 will apply throughout your employment with the Company, even if your role, duties and responsibilities or compensation change significantly over time. Although you will not be entitled to any reasonable notice or entitlements except as set out below, whether at common law or otherwise, in no event will your entitlements upon termination be less than those	During the first three (3) months of your employment, including any prior service with Chatham Labs Inc. or its predecessors, the Company may terminate your employment at any time by providing you with two (2) weeks of advance notice or base pay in lieu of notice.

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minimum entitlements set out in Employment Standards Legislation.	

[39] The three months' notice provision in 12a is contrary to the ESA. The Respondent seeks to rely on the introductory provisions found in 12 which promise compliance with employment standards legislation. This is a "saving" argument which the Court of Appeal has found will not "cure" provisions in the same agreement which are contrary to the ESA.

[40] As the Court of Appeal wrote in *Rossman v. Canadian Solar:*

> This outcome exploits vulnerable employees who hold unequal bargaining power in contract negotiations. Moreover, it flouts the purpose of the ESA – to protect employees and to ensure that employers treat them fairly upon termination: *Machtinger*, at pp. 1002-3.

Rossman at paras. 40-41.

[41] Based on his nine years of service with Chatham Labs, the Applicant was entitled to receive upon termination (i) 8 weeks of notice based on all wages and benefits, (ii) continued vacation pay accrual and benefits continuation during the 8 week notice period, and (iii) 9 weeks of severance pay, and not merely 2 weeks of working notice or base pay. The Applicant submits, and I accept that the first paragraph of s. 12(a) contravenes ss. 9(1), 54, 57, and 63 of the ESA. It is not "saved" by the introductory portions of s. 12.

[42] I find that the employment agreement is void and the Applicant is entitled to damages under common law principles.

b) If the answer to a) is yes, what is the appropriate period of notice which governs the Applicant's termination?

[43] The parties agree on the law of common law notice and that the factors articulated in *Bardal v. Globe & Mail Ltd. (*1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. H.C.J.) at p. 145 apply. Where they disagree is on the application to this case, particularly the role of the release signed at the time of the share purchase agreement and how it should be applied to the question of the Applicant's entitlement to notice.

[44] I address the *Bardal* factors and the arguments made by the parties next.

a) Character of employment and length of service: For 3.25 years with the Respondent, the Applicant managed a team of 150 technical employees, as Director of Research Science. His own technical expertise was essential to the role. Dr. Keller, Vice-President, Research Science, and worked at 80% to accommodate his part-time university position.

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b) Experience: The Applicants submit that the Applicant's 9 years of work with the Respondents pre-acquisition, followed by his 3.25 years on a specialized project, with significant management responsibilities is a strong factor in assessing his entitlement to notice.

The Respondents submit this factor is irrelevant because on the share purchase and release, the Applicant received $20M and a significant RSU grant, and released his future employers. They rely on the principles discussed in *Manthadi v. ASCO Manufacturing,* 2020 ONCA 485 at paras 73-77, specifically that a payment made on a share purchase may be taken into account in determining a fair remedy for termination by a successor employer.

Like the release in *Manthadi,* a plain reading of the release signed on the share purchase reveals that it was to deal with any retroactive claims that the Applicant might have against his former employer at Chatham Labs. Inc. The purpose of the release, as stated was to "establish an amicable arrangement for ending [his] employment relationship with the Company."

The release provisions release the successor company, the Respondent from liabilities "which arise out of [Dr. Wigdor's] employment with, change in employment status with, and/or termination of employment with [Chatham Labs Inc.]" that he "may have or have had … arising from conduct occurring up to and through the date of this Agreement". I agree with the Applicants that the release is narrowly drafted in terms of time frame and subject matter.

Finally, the release does not tie the share purchase to any promise of future employment. It reads, that the Applicant "underst[oo]d and agree[d] that [he] ha[d] no right to employment with any member of the Facebook Group".

Thus, while the Applicant may not have had 12.25 years of continuous employment for the purposes of the experience factor, the release did not purport to release his successor employer from reasonable notice on termination at common law, considering his prior experience at Chatham Labs Inc.: *Manthadi v. ASCO Manufacturing*, at paras. 54-59, 62-67; *Antchipalovskaia v.Guestlogix Inc.,* 2022 ONCA 454, at para. 46. The release is a part of the factual matrix on the experience factor, but is not determinative of the notice period.

The Applicant received significant remuneration on the share purchase, which is a factor to be considered alongside his valued experience. His submissions in reply acknowledge that this ought to be considered along with the other circumstances. I agree.

c) Age and availability of similar employment, having regard to the employee's experience, training, and qualifications: The Applicants submit that a longer notice period is justified by virtue of the highly specialized work the Applicant performs. By way of comparative employment, there are only 7 technology companies with research centres in Toronto that would require a director to lead a Human Computer Interaction research team. The Applicant has mitigated his losses by returning to full-time work as tenured professor at U of T, however not fully given the equity grants which were a part of his remuneration with the Respondents.

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The Respondents submit that as a 44-year old highly skilled employee the Applicant should readily be able to find comparable alternative employment or consulting work, given his skills, experience, and deep research knowledge in human-computer interaction.

[45] The parties provided several comparator cases. The following are of assistance:

i. *Rodgers v. CEVA*, 2014 ONSC 6583 in which the court found a 14-month notice period should be awarded to a 55-year-old manager of defendant's Canadian operations with 3.5 years of service in circumstances where, among other things, "there [were] only six companies in Canada who carried on a business similar to that of the defendant. In his reasons for decision, Taylor, J. wrote:

> To summarize, the plaintiff's age, his position as the Canadian manager of the defendant's operations responsible for over 500 employees and sales in excess of $140 million annually, the limited number of similar positions in Canada and the requirement that the plaintiff make a significant investment with a company associated with the defendant as a condition of employment all point to a lengthy notice period. The recruitment of the plaintiff by the defendant when he was employed in a senior position of significant length of service is also a factor tending to increase the period of notice. Against those factors is the short period of time that the plaintiff was employed by the defendant. However, I have concluded that both parties to the employment contract contemplated, at the commencement of the employment relationship, that it would be a long one (at para. 45).

ii. *Schultz v. Canada Lands Company CLC Limited*, 2019 ONSC 2124 in which Parfett, J. awarded a 12-month notice period to 58-year-old Director of Real Estate employed for 3 years, 8 months. There, factors such as the high level of responsibility by the plaintiff, and his age at termination plus the difficulty in finding similar employment lengthened the notice period from four months to twelve months.

[46] Ultimately, each employee's situation is unique. Here, the factors which suggest a longer notice period include the highly specialized nature of the Applicant's training and skills, and the significant amount of responsibility he had with the Respondents. I accept that there are few comparable positions, with a commensurate type of remuneration, including the opportunity to share in RSUs or an equivalent type of compensation. He brought 9 years of highly relevant, direct experience to the role and served in that role as an employee for 3.25 years along with members of the team he had built at Chatham Labs Inc.

[47] In terms of fair compensation for his years of employment, I consider the significant sum he received on the share purchase in the analysis of his years of experience. This is part of the overall picture. He has also mitigated his damages to some extent by resuming full time employment, which makes his situation somewhat unique. He is 44 years of age, and is thus at

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"mid-career" versus employees 10-15 years his senior, which were the ages of many employees in the cases provided by the parties.

[48] I find that the Applicant should receive 10 months' notice, less working notice, statutory pay in lieu of notice, and severance pay, as well as any mitigation income he earned during the statutory period, that being income over and above what he was earning while employed with the Respondents.

c) Is the Applicant entitled to the value of the forfeited RSUs and other benefits under the relevant agreements which would have vested during the notice period?

The 2020 RSU Agreement

[49] The Applicant submits that the two versions of the RSU agreements which applied to him are in clear breach of the ESA and should not be given effect. The first version, in 2020, terminates the vesting of RSUs during the notice period. He submits that this breaches the requirements in s. 61 of the ESA that employers "maintain all terms and conditions of employment during the statutory notice period."

[50] I disagree. The relevant provisions of the ESA are found in s. 61(a)(b) which provides for the employer's responsibilities during the statutory notice period. During this period, the employer must "continue[s] to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive." In contrast to s. 61 which applies during the statutory notice period, s. 60 which applies during the working notice period requires that in addition to wages and benefit plans, employers must not "alter any other term or condition of employment."

[51] "Benefits" in this context are not entitlement to the RSUs, but are provided for in the context of "benefit plan contributions. RSUs, like stock options, are not wages.

[52] This interpretation is consistent with the plain wording of the section, and the caselaw. For example, in *North v. Metaswitch Networks Corporation*, 2017 ONCA 790, the Court of Appeal described the purpose of section 61:

> Section 61 allows an employer to terminate the employment of an employee without notice, so long as the employer makes a lump sum payment equivalent to the amount that would have been received under s. 60 (i.e., based on regular wages) and continues to make benefit plan contributions. The definition of regular wages includes wages, which are defined broadly in the ESA, in s. 1(1), as:
>
> (a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,

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> (b) any payment required to be made by an employer to an employee under this Act, and
>
> (c) any allowances for room or board under an employment contract or prescribed allowances[.]

[53] Section 61(1.1) of the ESA sets out the formula that employers must use to calculate pay in lieu of notice for employees, like Dr. Wigdor, who are not paid hourly. That formula is based on the "regular wages" earned by the employee in the 12 weeks before termination. The ESA's definition of "wages" and "regular wages" only includes monetary remuneration, payments required under the ESA, and certain prescribed allowances. Had the legislature chosen to include other forms of compensation in "wages" it could have adopted a more expansive definition that would include stock options and RSUs.

[54] While the Applicant relies on an application of s. 61 to a profit-sharing plan in *Sandhu v. Solutions 2 go Inc.,* 2012 ONSC 2073, that decision pre-dated the Court of Appeal's decision in *North.* I am bound to follow the description of s. 61 in *North,* particularly in its connection of the definition of "wages" to the entitlements of employees during a period of notice under s. 61.

[55] In an analogous situation, the Court of Appeal found in *Kieran v. Ingram Micro Inc.* 2004 CanLII 4852 (ONCA) that the language in the employee's stock option plan was unambiguous. There, the employer stipulated that the employee's right to exercise stock options was not extended by the reasonable notice period, and the employee was not entitled to damages. The language used in *Kieran* provided that if the participant's employment "is terminated for any reason other than death, disability … or retirement", the employee would be forced to sell his shares back to the issuer. The termination provision also confirmed that the relevant termination date "for any reason" occurred when the participant "ceases to perform services," even if the employee received compensatory payments or other pay in lieu of notice of termination: *Kieran* at paras. 46 and 71.

[56] There is similar forfeiture language found in the 2020 RSU Agreement. I conclude that the Agreement is enforceable. Given the clear language of section 61, these provisions do not breach the ESA. RSUs are not "wages" for the purpose of the Applicant's compensation during the notice period.

[57] I turn next to the 2021, 2022 and 2023 RSU agreements.

The 2021-2023 RSU Agreements and their effect

[58] The Applicant submits that the amended RSU agreements that were in force between 2021-2023 permit vesting during the statutory notice period but do so in a manner designed to deliberately mislead employees about their entitlements upon termination. The source of the ambiguity in these agreements arises from the wording: That language provides that unvested RSUs are forfeited upon termination and that "the date on which a Termination of Employment

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occurs … will not be extended by any period during which notice, pay in lieu of notice or related payments or damages are provided or required to be provided under local law (including, without limitation, statute…)" unless "if applicable employment standards legislation explicitly requires continued entitlement to vesting during a statutory notice period" (emphasis added).

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[59] The Applicant submits that because the ESA does not expressly require RSUs to vest during the statutory notice period, that by including wording which suggests that the legislation could require vesting, this imports an ambiguous term into the RSU agreements. Accordingly, the Applicant submits that the entire provision is void.

[60] I disagree. The provision does not purport to identify a particular piece of legislation. Legislation may be amended. The meaning is clear. As the Respondents submit, this statement is no different than a termination provision that provides employees with "only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations", whether the dismissal is with or without cause: *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593 at para 7.

[61] I find that the 2021-2023 agreements are valid and enforceable. They do not permit ongoing vesting of the Applicant's RSUs during the notice period. As with the 2020 agreement, s. 61 of the ESA does not apply to the vesting of the RSU's by virtue of the calculation of "wages" and the definition of "wages" under the ESA.

Is there a common defect in all versions of the RSU Agreements?

[62] Finally, the Applicant submits that there is a defect in common to both the 2020 and the 2021-2023 agreements that renders these agreements void and unenforceable. The language he relies on is as follows:

> (a) the 2020 RSU Agreement provides that all RSUs will be forfeited even if the termination is "later found to be … in breach of employment laws"; and
>
> (b) the 2021-2023 RSU Agreements provide that all RSUs will be forfeited even if the termination is "later found to be invalid or unlawful."

[63] He submits that these provisions overreach because they fail to recognize situations where employers cannot be lawfully terminated, for example after a job-protected leave (s. 53) or as a reprisal for exercising their statutory rights (s. 74). In purporting to remove part of an employee's rights to compensation, that is, via RSUs, even in circumstances where they have been unlawfully terminated, the Applicant submits this renders these Agreements void as attempts to contract out of the ESA.

[64] The Applicant relies on cases where employers have included such broad language in termination provisions of employment contracts, and found these to be unenforceable: *Dufault v.*

The Corporation of the Township of Ignace, 2024 ONSC 1029, at para. 46, aff'd on other grounds, 2024 ONCA 915; *Baker v. Van Dolder's Home Team Inc.,* 2025 ONSC 952, at paras. 9-10, 12. However, those cases deal with employment agreements which were found to contain unlawful termination provisions, not separate compensation agreements.

[65] The Respondents submit that the decision in *Kieran* found similar language to that used in this case to be unambiguous and enforceable. The language used in *Kieran*, "terminated for any reason" is analogous to the language found in the 2020 and the 2021-2023 RSU agreements.

[66] While there may be instances where termination could be found to be unlawful, in the context of an employment contract e.g. under ss. 53 or 74 of the ESA, those provisions are not in play here.

[67] The Applicant's RSU rights were governed by separate agreements that are not treated the same way as his rights under his employment contract: *Mikelsteins v. Morrison Hershfield Limited*, 2019 ONCA 515 at para 16. I agree with the Respondents that the Applicant's contractual entitlements were independent of any relief he may have been entitled to receive under his employment agreement, the ESA, or the common law.

[68] I decline to find that the 2020 and the 2021-2023 RSU Agreements are void or unenforceable.

d) Is the Applicant entitled to an award of punitive damages?

[69] The Applicant sought $20,000 in punitive damages in his Notice of Application,. He seeks leave to amend to increase the amount sought for punitive damages to $75,000. His claim in punitive damages relates to the failure of his employer to pay out his statutory notice and severance and in requiring him to sign a release which was contrary to the ESA. He submits that as a large employer, the Respondents are obliged to model compliance with employment standards.

[70] The Respondents submit that their failure to pay the Applicant's entitlements for 10 months were not motivated by vindictiveness or malice, but were "mistakes" which they corrected. While flawed, they submit that this conduct does not rise to the level of being so extreme that it ought to be punished: *Honda Canada v. Keays*, 2008 SCC 39 at para 68. They describe the delay as an unintentional administrative error.

[71] I find that the circumstances suggest more than an unintentional administrative error but falling short of reprehensible conduct. The hearsay evidence filed by the Respondents with the "explanation" for the 10 month delay is inadequate and vague. The timing of the payment, coming after legal proceedings were commenced, leads me to infer that at the very least, the Respondents were prepared to let the Applicant's entitlements languish. Clearly, they were interested in

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negotiating a release with him and to that extent he had their attention. Yet, they were curiously passive about seeing to his other statutory entitlements.

[72] Overall, I find that while dilatory, the conduct here does not rise to the level of "harsh" or "malicious". I conclude that the Applicant has not established that he is entitled to punitive damages.

Conclusion

[73] I find in favour of the Applicant on issue of the enforceability of his employment contract. I find in favour of the Respondents on the issues of the RSU agreements and punitive damages. Once counsel have conferred on the precise terms of the order in accordance with these reasons, they may provide a draft for review and signature.

Costs

[74] The parties have agreed on costs, however because there has been mixed success on this application. I leave it to counsel to discuss any adjustment to their agreement, and to include such agreement along with their draft order.

Leiper, J.

Date: July 8, 2025

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CITATION: Wigdor v. Facebook Canada Ltd.., 2025 ONSC 4861
COURT FILE NO.: CV-24-00725601-0000
DATE: 20250708

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ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

DANIEL WIGDOR

Applicant

– and –

FACEBOOK CANADA LTD. and META PLATFORMS, INC.

Defendants

REASONS FOR DECISION

Leiper, J.

Released: July 8, 2025