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Ontario Court of Appeal clarifies protection for restricted stock units during notice period

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Law360 Canada (August 24, 2026, 8:41 AM EDT) -- The Ontario Court of Appeal's decision in *Wigdor v. Facebook Canada Ltd*., [2026] O.J. No. 3529 is a significant ruling on termination clauses, employee equity compensation and the minimum standards imposed by the *Employment Standards Act, 2000* (ESA) and a case that every executive employment lawyer should be following.

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In a nutshell, the court confirmed that employment agreements and related compensation plans must be assessed for ESA compliance at the time the contract is formed, and that employers cannot avoid statutory minimum standards by characterizing valuable compensation entitlements as forfeited immediately upon termination.

The decision is particularly important for employers who use restricted stock units (RSUs), bonuses or other incentive compensation as part of an employee's overall remuneration. It confirms that, where such entitlements are a term or condition of employment, by way of executive employment contract, they cannot be removed during the statutory notice period in a manner that contravenes the ESA.

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If a contractual provision purports to do so, it may be void and incapable of limiting the employee's common law notice damages.

Facts of the case

The appellant was a tenured professor and the founder of a technology consulting business. In 2020, one of the respondents acquired the appellant's technology consulting business as part of a transaction intended to bring the appellant and his team into the respondents' workforce. Following the transaction, the appellant became employed by the respondents as director, research science.

The appellant's compensation package included base salary, benefits and a substantial grant of restricted stock units in the respondents. The RSUs vested quarterly over a four-year period and were treated as employment compensation. The RSU agreements provided that unvested RSUs would be forfeited on termination and that vesting would not continue during any notice period, whether statutory, contractual or at common law.

The respondents terminated the appellant's employment in December 2023. The termination letter provided for his minimum ESA entitlements and contemplated further supplemental payments if he signed a release. The appellant did not sign the release because it would have prevented him from disputing the forfeiture of his unvested RSUs. The respondents later paid his ESA entitlements.

At first instance, the application judge held that the termination provisions in the executive employment agreement were unenforceable because they contravened the ESA. As a result, the appellant was entitled to common law reasonable notice, assessed at 10 months. However, the application judge declined to award damages for RSUs that would have vested during that period.

Decision of the Court of Appeal

The Court of Appeal allowed the appellant's appeal in part and dismissed the respondents' cross-appeal.

The court upheld the application judge's finding that the termination provisions in the employment agreement were void because they breached the ESA. In particular, the employment agreement purported to allow the respondents to terminate the appellant during the first three months of employment on two weeks' notice, despite s. 9 of the ESA requiring recognition of his prior service with his technology consulting business for purposes of calculating statutory termination entitlements after a sale of business.

The central issue on appeal was whether the appellant was entitled to damages for RSUs that would have vested during the 10-month common law reasonable notice period. The court applied the framework from *Matthews v. Ocean Nutrition Canada Ltd*., [2020] S.C.J. No. 26, asking whether the employee would have received the compensation but for the termination, and if so, whether the contractual language validly removed that entitlement. There was no dispute that, had the appellant remained employed during the notice period, RSUs worth approximately US$4.7 million would have vested.

The court held that the application judge erred by reading ss. 60 and 61 of the ESA separately. Section 60 prohibits an employer from reducing wages or altering any other term or condition of employment during the statutory notice period. Section 61 permits an employer to terminate without working notice only if it pays a lump sum equal to what the employee would have received under s. 60 had notice been given. The court held that these provisions must be read together: pay in lieu of notice must place the employee in the same financial position they would have occupied had they received working notice, without alteration to the terms and conditions of employment during the statutory notice period.

On that basis, the court found that the appellant's RSU entitlements were a term or condition of employment. They were included in the employment documentation, described as employee compensation, vested during employment and were treated as taxable employment benefits. The RSU agreements therefore contravened the ESA to the extent they purported to stop vesting during the statutory notice period. Because those provisions were void, they could not validly remove the appellant's common law entitlement to damages for the RSUs that would have vested during the reasonable notice period.

The court increased the appellant's damages by US$4,711,647.29, representing the value of the RSUs that would have vested during the 10-month notice period.

Key takeaways for employers and executive employees

Every executive employment lawyer should heed this Ontario Court of Appeal decision. This decision reinforces the importance of drafting termination and incentive compensation provisions that comply with the ESA from the outset of the employment relationship.

For employers, it is a reminder that termination clauses, equity plans, bonus plans and release conditions should be reviewed together to ensure they do not undermine minimum statutory entitlements. Employers cannot rely on broad saving language or post-termination compliance to cure provisions that contract out of statutory minimum standards. Where equity compensation forms part of an employee's compensation, a provision that terminates vesting during the statutory notice period may unlawfully alter a term or condition of employment.

For executive employees, the decision confirms that valuable compensation rights may survive termination where they would have vested during the reasonable notice period and where the employer's contractual language does not validly comply with the ESA.

Frank Portman is an employment lawyer at Massey LLP. His specialty is executive employment law where he assists presidents, vice-presidents and other C-level executives and the organization seeking to hire their talents to complete the deal through effective executive employment contracts.

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