



## **Forfeiture Provisions Must be Brought to Employee's Attention**

In [Maynard v. Johnson Controls Canada LP](#), the Court of Appeal has confirmed that employers have a duty to notify employees of any forfeiture provisions in their employment contracts.

### ***a) Background Facts and Contract Terms***

The employee, Maynard was employed from March 2004 until his termination without cause in June 2018. In 2014, Maynard's remuneration was altered, and his compensation was now derived from a base salary, benefits, and a bonus and incentive plan in the form of Restricted Stock Units or RSUs set out in the company's Share and Incentive Plan. The Plan included a forfeiture provision stating that if Maynard was termination without cause,

"... then any [RSUs] still subject to the Restriction Period as of the date of such termination shall automatically be forfeited and returned to the Company." The Plan included a clause providing that the employer retained discretion to "waive the automatic forfeiture of any or all such [RSUs]".

Maynard's employment contract stated that at termination, he would be paid his ESA minimum entitlements equivalent to eight (8) weeks of notice and 14.3 weeks of severance. Paragraph 16 of the contract further advised that if Maynard signed a Release, the employer would provide him with a lump sum payment equivalent to four (4) weeks of pay for each completed year of service. At the time of his termination, Maynard's bonus and RSUs constituted 37% of his compensation; since the employer's offer in the employment contract excluded his bonus and RSU entitlements, Maynard refused to sign the Release and commenced litigation.

### ***b) Motion Judge's Decision***

The motion judge's [decision](#) found that Maynard was never shown a copy of the Plan, was not told of the forfeiture provision, and only learned about it when he began his action for wrongful dismissal. As the Court of Appeal has previously stated in [Dawe v. The Equitable Life Insurance Company of Canada](#), forfeiture clauses included in introduced incentive share plans are fundamental changes enacted unilaterally by an employer and are unenforceable unless they are properly communicated and brought to the employee's attention. The onus is on the employer to prove that the employee



accepted these adverse, unilateral changes to an integral part of their compensation.

The motion judge also cited [\*O'Reilly v. IMAX Corporation\*](#), where the court found that the loss of the right to exercise RSUs that would have accrued during the notice period, forms part of the damages available to a terminated employee at common law. The court in *IMAX* summarized the applicable principles as follows:

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 reasonable 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 reasonable 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.

In applying these principles, the motion judge in *Maynard* found that the forfeiture provisions were not brought to Maynard's attention and did not form part of his employment contract. Even if they had been, the contract contained an ambiguity because it permitted the employer discretion not to forfeit the RSUs if the termination was without cause:

In my view, it would not have been clear to Mr. Maynard that in the case of termination without cause, he would be forfeiting any RSUs previously awarded to him but not yet vested. Nor would it have been



clear to him that the calculation of wages or compensation during the notice period would not include the value of his regular bonus and equity share. In the absence of clear words of limitation, he is entitled to compensation for the loss of that income during the contractual period of pay in lieu of notice (at para 22).

### ***c) Court of Appeal Decision***

The motion judge granted summary judgment in favour of Maynard, awarding him the full entitlement under paragraph 16 of the employment contract, including the value of the RSUs. The employer appealed, arguing that Maynard gave up his entitlement to damages at common law when he signed the employment agreement. The Court of Appeal disagreed:

**[...] Because Mr. Maynard was not aware of the forfeiture provision and did not agree to it when the Share and Incentive Plan came into force, the exclusion of his RSUs from the calculation in para. 16 of the employment agreement breached that provision.** It was open to the motion judge to interpret the payments required under para. 16 as not being limited to base salary and specified benefits but to include the bonus/RSU elements of Mr. Maynard's compensation. The termination letter required Mr. Maynard to respond by signing the attached release by July 4, 2018, but nothing in the terms of the employment agreement permitted either an erroneous calculation or such an arbitrary deadline (at para 9).

The employer could not force Maynard to sign a Release that was not properly calculated. The Appeal was dismissed.

### **Key Takeaways:**

- Employers are required to clearly communicate new terms or conditions of employment to an employee if they subsequently seek to rely on those conditions.
- Employers should ensure that clauses in bonus or incentive plans, which purport to limit an employee's compensation at termination, are brought to the employee's attention at the time they are introduced.



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