

COURT OF APPEAL FOR ONTARIO

CITATION: Wigdor v. Facebook Canada Ltd., 2026 ONCA 572

DATE: 20260807

DOCKET: COA-25-CV-1031

George, Copeland and Gomery JJ.A.

BETWEEN

Daniel Wigdor

Applicant (Appellant/
Respondent by way of cross-appeal)

and

Facebook Canada Ltd. and Meta Platforms, Inc.

Respondents (Respondents/
Appellants by way of cross-appeal)

Alysha Shore and Daniel Rosenbluth, for the appellant/respondent by way of cross-appeal

George Avraam and Jennifer Bernardo, for the respondents/appellants by way of cross-appeal

Tim Lawson, Brandon Kain, Marco Fimiani and John Gray, for the intervener, Canadian Association of Counsel to Employers

Heard: April 23, 2026

On appeal from the order of Justice Janet Leiper of the Superior Court of Justice, dated July 8, 2025, with reasons reported at 2025 ONSC 4861.

Copeland J.A.:

[1] This appeal arises from a wrongful dismissal application seeking damages in lieu of common law reasonable notice.

[2] The appellant, Daniel Wigdor (“Dr. Wigdor”), appeals from the application judge’s order dismissing his claim for the value of Restricted Stock Units (“RSUs”) that would have vested during the common law notice period. He also appeals the application judge’s denial of punitive damages.

[3] The respondents, Facebook Canada Ltd. and Meta Platforms, Inc. (“Facebook Canada” and “Meta”, and collectively, “the Respondents”), cross-appeal from the application judge’s determination that the termination provisions of the employment agreement were void for contravening minimum standards in the *Employment Standards Act 2000*, S.O. 2000, c. 41 (the “ESA”), and ordering the Respondents to pay damages for 10-months reasonable common law notice.

[4] For the reasons that follow, I would allow Dr. Wigdor’s appeal, except in relation to punitive damages, and dismiss the Respondents’ cross-appeal.

[5] The application judge did not err in finding that the termination provisions of the employment agreement contravened the ESA’s minimum standards, and thus, did not validly contract out of Dr. Wigdor’s common law right to reasonable notice.

[6] However, the application judge erred in her interpretation of ss. 60 and 61 of the ESA and their application to Dr. Wigdor’s entitlement to the RSUs. Section 60(1)(a) of the ESA provides, *inter alia*, that an employer shall not alter any “term

or condition of employment” during the period of notice of termination under the Act. Section 61(1) of the *ESA*, which governs pay in lieu of notice on termination, provides in (a) that an employer must, as a condition of termination without notice or with less notice than required under the *ESA*, pay the employee “a lump sum equal to what the employee would have been entitled to receive under section 60 had notice been given in accordance with that section.” The RSU Agreements, which were incorporated by reference into the employment agreement, purported to disentitle Dr. Wigdor to further vesting of RSUs immediately on termination. This is contrary to the obligation on employers in s. 60(1)(a) not to alter any “term or condition of employment” during the notice period. As a result, the termination provisions of the RSU Agreements, incorporated into the employment agreement, contravene the *ESA* and are unenforceable. Dr. Wigdor is entitled to damages for the value of the RSUs that would have vested during the 10-month common law reasonable notice period.

A. FACTUAL BACKGROUND

[7] Dr. Wigdor is a tenured professor in the Department of Computer Science at the University of Toronto. His area of study is human-computer interaction. Meta is a public company, formerly known as Facebook, Inc.¹ Facebook Canada is Meta’s Canadian subsidiary.

¹ In 2021, Facebook, Inc. changed its corporate identity to Meta. Following the convention of the parties and the application judge, I refer to the Canadian subsidiary’s parent company as Meta throughout these

[8] In 2011, Dr. Wigdor founded Chatham Inc. (“Chatham”) to provide technology consulting services for financial, legal, and technological firms. In August of 2016, he began providing services to one of Meta’s subsidiaries. By 2018, he was engaged in project management and overseeing a staff team of 20 within Chatham and 150 members of the Meta “Reality Labs” team.

[9] In 2020, Meta and Dr. Wigdor negotiated a share-purchase agreement to sell Chatham to Meta. Meta’s motivation for purchasing Chatham was to integrate Dr. Wigdor and his team into Meta’s workforce. The share-purchase agreement contemplated that Chatham’s employees, including Dr. Wigdor, would be terminated by Chatham and begin employment with Facebook Canada. Chatham’s consulting division was spun out into a standalone company. Meta then purchased the shares of this company via its wholly-owned subsidiaries.

[10] The share purchase agreement for Chatham contained several features designed to ensure that Dr. Wigdor and other key personnel accepted and maintained employment with the Respondents. For example,

- (a) Meta held back 50 percent of the purchase price and required that Dr. Wigdor and at least three key employees from Chatham remain employed by Meta or its subsidiaries for at least three years to receive the funds; and

reasons, although agreements entered into before the name change identify Facebook, Inc. as the contracting party.

- (b) As part of the purchase, Meta agreed to grant Dr. Wigdor 43,380 RSUs in Meta that were valued at US\$7.5 million. The RSUs are a form of equity compensation given to Meta employees that, once vested under a four-year schedule, become common shares in the corporation.

[11] Dr. Wigdor began employment with Facebook Canada on September 12, 2020. His title was Director, Research Science. Dr. Wigdor's employment was governed by an employment agreement signed on August 27, 2020 (the "employment agreement").

[12] As an employee of Facebook Canada, Dr. Wigdor continued work on the project he had begun in his consulting role via Chatham. He managed a team of approximately 150 people. He enjoyed an employment arrangement which permitted him to work at 80 percent of a full-time equivalent position with Facebook Canada, approximately 32 hours per week, while retaining his position at the University of Toronto on a part-time basis. His initial base salary was \$232,000 (later raised to \$253,100.37), with additional benefits. In addition, a letter that was incorporated as part of the employment agreement provided:

This letter is to confirm that your employer intends to recommend to the Board of Directors of Facebook, Inc. that you be granted restricted stock units ("**RSUs**") by Facebook, Inc. under the terms of the 2012 Equity Incentive Plan (as amended and restated on June 20, 2016) (the "**Plan**"). Subject to the approval of Facebook,

Inc. Board of Directors or committee thereof (the “**Board**”), you will be granted 43,380 RSUs under the Plan. [Emphasis in original.]

[13] The RSUs were governed by Meta’s 2012 Equity Incentive Plan (referenced in the letter included as part of the employment agreement) with additional terms set out in the RSU Agreements. There are four RSU Agreements, one for each grant in 2020, 2021, 2022, and 2023 (collectively, the “RSU Agreements”). The language contained in the 2020 RSU Agreement regarding forfeiture of unvested RSUs upon termination changed in 2021 and is the same in each of the 2021-2023 RSU Agreements. I discuss the provisions in the employment agreement and the RSU Agreements in more detail in the analysis section of these reasons.

[14] Facebook Canada terminated Dr. Wigdor’s employment by letter on December 4, 2023, effective December 8, 2023.

[15] The termination letter stated that Dr. Wigdor would be given his minimum entitlements under the ESA, amounting to 8-weeks pay in lieu of notice and 12.5-weeks of statutory severance pay under the *ESA*. It further provided that he would receive certain supplemental entitlements contemplated by the employment agreement if he signed a release.

[16] Dr. Wigdor did not sign the release appended to the termination letter because it included a term that precluded him from disputing the forfeiture of unvested RSUs.

[17] The Respondents did not deliver payment to Dr. Wigdor of the *ESA* entitlements referred to in the termination letter until 10 months after he was terminated, and only after the application that forms the basis of this appeal was commenced. At trial, Dr. Wigdor contended that the late payment of the *ESA* entitlements was intentionally designed to pressure him to sign the release or was a reprisal for his failure to do so. The Respondents took the position that the delay in paying the *ESA* entitlements was the result of an administrative oversight. This issue was the basis for Dr. Wigdor's claim of punitive damages.

B. THE APPLICATION JUDGE'S DECISION

[18] The application judge found that the termination provisions in the employment agreement were contrary to the *ESA* because they purported to contract out of Dr. Wigdor's right under s. 9 of the *ESA* to have his years of service with his prior employer (Chatham) recognized for the purpose of calculating his termination entitlements after the sale. As a result of that finding, the termination provisions in the employment agreement were unenforceable, and Dr. Wigdor was entitled to damages under common law principles. The application judge found that he 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).

[19] With respect to the RSUs, Dr. Wigdor argued that Meta's RSU Agreements, which were incorporated by reference into the employment agreement, breached ss. 60 and 61 of the *ESA*.

[20] The portions of ss. 60 and 61 relevant to this appeal are as follows:

Requirements during notice period

60 (1) During a notice period under section 57 or 58, the employer,

(a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

(b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and

(c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period.

...

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.

[21] Section 60(1)(a) requires that during the notice period, an employer “shall not reduce the employee’s wage rate or alter any other term or condition of employment”. Dr. Wigdor argued that the requirement in s. 60(1)(a) not to alter a term or condition of employment during the notice period is incorporated into the calculation of pay in lieu of notice under s. 61(1)(a) of the *ESA* because s. 61(1)(a) refers to payment of a lump sum “equal to the amount” the employee would have been entitled to receive if given working notice under s. 60.

[22] The application judge found that Dr. Wigdor was not entitled to damages for the RSUs that would have vested during the common law notice period. She held that s. 60 of the *ESA* only applied to working notice, while s. 61 only applied to pay in lieu of notice. Based on this interpretation of ss. 60 and 61, the application judge considered Dr. Wigdor’s entitlement to damages for the RSUs only under s. 61. She found that the RSUs did not fall within the scope of Dr. Wigdor’s entitlements under s. 61 because, in her view, unlike s. 60, s. 61 did not prohibit an employer from altering any “term or condition of employment” during the notice period. As a result, she found that the 2020 RSU Agreement did not contravene the *ESA* and was enforceable. The application judge also found that the 2021-2023 RSU

Agreements were enforceable and did not permit ongoing vesting during the notice period.

[23] The application judge dismissed Dr. Wigdor's claim for punitive damages.

[24] I discuss the reasoning of the application judge on each of these issues in more detail in the analysis below.

C. THE GROUNDS OF APPEAL AND CROSS-APPEAL

[25] Dr. Wigdor argues that the application judge erred in refusing to award damages for the RSUs that would have vested during the common law reasonable notice period. He argues that the provisions of the RSU Agreements that purported to terminate vesting of RSUs at the time of termination were invalid because they did not meet *ESA* minimum standards. The application judge erred in finding that the RSU Agreements complied with *ESA* minimum standards by (1) assessing compliance with the *ESA* only based on s. 61 of the Act; and (2) by committing errors in her statutory interpretation of s. 61 of the *ESA*.

[26] Dr. Wigdor also argues that the application judge erred in declining to award him punitive damages.

[27] In the cross-appeal, the Respondents argue that the application judge erred in her interpretation of the employment agreement, and in particular, in finding that the termination clause contravened the *ESA*, was void, and thus could not validly

contract out of Dr. Wigdor's common law entitlement to reasonable notice of termination.

D. ANALYSIS

1. The legal framework for termination clauses and *ESA* compliance

[28] I begin with the legal framework in relation to termination clauses and compliance with *ESA* minimum standards because it is relevant to both the appeal and the cross-appeal.

[29] At common law, an employee hired for an indefinite period can be dismissed without cause, but the employer must give reasonable notice or pay in lieu of notice. The common law presumption of termination with reasonable notice can be rebutted if the employment contract clearly specifies some other period of notice: *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at paras. 15-16; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 997-98.

[30] However, in Ontario, the *ESA* sets minimum standards for terms of employment. Pursuant to s. 5 of the *ESA*, employers and employees cannot contract out of the minimum standards in the Act. Any purported contracting out is void. As a result, terms of employment contracts that provide for notice periods will only be enforceable if they comply with *ESA* minimum standards. Among the

minimum standards set by the *ESA* are minimum notice periods upon termination: ss. 54-61.

[31] In the context of termination clauses, these principles have the following effect: if a termination clause does not comply with *ESA* minimum standards, it will be unenforceable, the common law presumption of reasonable notice for termination will not be rebutted, and the employee will be entitled to common law reasonable notice of termination: *Wood*, at para. 16; *Machtinger*, at p. 1000.

[32] The basic principles for the assessment of whether a termination clause in an employment contract complies with *ESA* minimum standards are well established: see *Wood*, at paras. 28, 43-51; *Machtinger*, at pp. 1002-05. Four points are of particular importance to this appeal.

[33] First, the *ESA* is remedial legislation, intended to protect the interests of employees. As a result, courts should favour an interpretation of the *ESA* that encourages employers to comply with its minimum standards over an interpretation that does not do so.

[34] Second, termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the *ESA*. If the only consequence for an employer of drafting a termination clause that does not comply with *ESA* minimum standards is an order that they comply, employers will have little

incentive to draft a lawful termination clause at the start of the employment relationship.

[35] Third, a termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees are entitled to know at the beginning of their employment what their entitlement will be at the end of their employment.

[36] Fourth, the interpretation of a termination clause and whether it meets the minimum standards set out in the *ESA* is based on the wording of the clause. Thus, even if the employer complies with the *ESA* minimum standards at the time of termination, that compliance does not have the effect of remedying a termination provision that does not comply with the *ESA* minimum standards in a contract entered into at the beginning of the employment.

2. The Cross-appeal

a. Did the application judge err in finding that the termination clause in the employment agreement violated the *ESA* by purporting to contract out of its minimum standards?

[37] I address the cross-appeal first because the parties agree that, if the cross-appeal is allowed and the termination clause in the employment agreement is found to be compliant with the *ESA*, then there would be no issue about damages in lieu of common law notice because the employment agreement would validly contract out of the common law presumption of reasonable notice. This would be

fatal to Dr. Wigdor's claim that he is entitled to damages for the RSUs that would have vested during the common law notice period.

i. Positions of the parties

[38] The Respondents argue that the application judge: (1) failed to read the employment agreement as a whole, and (2) failed to consider the factual matrix as context for interpreting the employment agreement. On the first point, the Respondents argue that the application judge failed to give effect to all terms in the employment agreement. Specifically, they refer to s. 1 of the employment agreement, which provides that the employer would recognize Dr. Wigdor's employment with Chatham when calculating his minimum entitlements under the *ESA*, and the reference in s. 12.a of the employment agreement to "including any prior service with Chatham Labs Inc.", which the Respondents argue recognized his prior service with Chatham. On the second point, the Respondents argue that the application judge failed to consider that Dr. Wigdor used counsel to negotiate the sale of Chatham, including the employment agreement.²

[39] The Respondents argue that both of these errors attract the correctness standard of review, but in the alternative argue that they constitute palpable and overriding errors.

² Although the Respondents argue that the application judge erred in finding that the termination provisions of the employment agreement contravened *ESA* minimum standards, they do not challenge her finding that the quantum of common law notice Dr. Wigdor was entitled to in light of that finding was 10 months.

[40] Dr. Wigdor argues that the application judge made no error in interpreting the employment agreement. The application judge properly considered the terms in the employment agreement as a whole. Contrary to s. 9 of the *ESA*, the termination provisions in the agreement contemplated that Dr. Wigdor could be terminated on two-weeks notice during the first three months of his employment with the Respondents. These provisions were unlawful because from the day Dr. Wigdor began work for the Respondents, he was entitled to be treated as having nine years' service for the purposes of notice under the *ESA*.

[41] Dr. Wigdor argues that on this issue of contractual interpretation, the applicable standard of review is palpable and overriding error, and the application judge made no such error.

ii. Standard of review

[42] In the absence of an extricable error of law, the standard of review is palpable and overriding error: *Wood*, at para. 43; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-55.

iii. The application judge made no palpable and overriding error in her interpretation of the employment agreement

[43] As I explain below, I am not persuaded that the application judge made any palpable and overriding error in her interpretation of the termination provisions in the employment agreement.

[44] Sections 1 and 12 are the termination provisions of the employment agreement. They provide as follows:

1. **Commencement of Employment.** Subject to the closing of the Acquisition and your satisfying the pre-employment condition in Section 4 of this Agreement, the **“Start Date”** of your indefinite employment with the Company shall be a date to be determined by the Company, subsequent to the closing of the Acquisition. ... *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.*

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). [Emphasis in italics added.]

[45] The application judge began by outlining the applicable law in relation to termination clauses and the *ESA*, referencing cases including *Wood* and *Machtinger*. The Respondents take no issue with her summary of the applicable law.

[46] The application judge found that the first paragraph of s. 12.a of the employment agreement contravened the minimum standards in the *ESA*. It provided that Dr. Wigdor could be terminated on two-weeks notice in the first three months of his employment, in circumstances where s. 9 of the *ESA* mandated that his nine years of previous employment at Chatham, before the Respondents acquired it, be included in calculating his entitlement to notice and severance under the *ESA*. The application judge found that, based on his nine years of employment with Chatham, had Dr. Wigdor been terminated within three months of commencing to work for the Respondents, under the *ESA* he would have been

entitled to receive (i) eight weeks of notice based on all wages and benefits, (ii) continued vacation pay accrual and benefits during the eight week notice period, and (iii) nine weeks of severance pay. Section 12.a contravened the *ESA* by providing for only two weeks of base pay on termination in the first three months of employment. She found that the general provisions in s. 12 promising compliance with the *ESA* could not cure the provisions in s. 12.a which were contrary to the *ESA*, referencing this court's decision in *Rossman v. Canadian Solar*, 2019 ONCA 992, 444 D.L.R. (4th) 131, at para. 40.

[47] I see no palpable and overriding error in the application judge's interpretation of the termination provisions of the employment agreement.

[48] The clear intent of s. 12.a was to purport to give the Respondents the ability to terminate Dr. Wigdor on two-weeks notice during the first three months of his employment.

[49] This contravenes ss. 9, 54, 57, and 59-61 of the *ESA*. Pursuant to s. 9 of the *ESA*, where a business is sold and an employee continues to be employed by the purchaser, the employee's prior employment with the seller must be included for the purpose of any subsequent calculation of the employee's length of employment. Thus, Dr. Wigdor's rights on termination under the *ESA* had to be calculated from the start of his employment with Chatham in 2011. The application judge correctly found that, pursuant to ss. 54, 57, and 59-61, from the outset of

Dr. Wigdor's employment with the Respondents in 2020, he was statutorily entitled to eight-weeks termination pay under ss. 54 and 57 of the *ESA*, as well as continued vacation pay accrual and benefits during the eight-week notice period, and severance pay of nine weeks, pursuant to ss. 64 and 65 of the *ESA*.

[50] The Respondents' argument that the application judge did not consider the employment contract as a whole, and in particular, did not consider s. 1 and the "including" portion of s. 12.a is without merit. In her summary of the relevant provisions of the employment agreement, the application judge underlined the portions of the agreement that the Respondents relied on, and in her analysis, she specifically referred to and considered the Respondents' arguments that portions of s. 1 and s. 12 made the termination provisions compliant with the *ESA* when read in the context of the agreement as a whole.

[51] I would add that I agree with Dr. Wigdor that the Respondents' proposed interpretation of s. 12.a of the agreement is strained in the context of the agreement as a whole, for three reasons. First, s. 12.a clearly refers to two-weeks notice or pay in lieu if termination occurs in the first three months of employment. The Respondents seek to rely on the language in s. 12.a of "including any prior service with Chatham Labs Inc. or its predecessors" to avoid the clear language of "two (2) weeks of advance notice or base pay in lieu of notice". But in order to read s. 12.a as the Respondents propose, the three-month probationary period would have to have run from the outset of Dr. Wigdor's employment with Chatham in

2011, and not from the start of his employment with the Respondents in 2020. If the Respondents' interpretation were correct, there would be no need for s. 12.a because the three-month probationary period would have expired in 2011.

[52] Second, s. 12.a refers to the right of the "Company" to terminate Dr. Wigdor on two-weeks notice in the first three months of his employment. The employment contract makes clear in the first sentence that the "Company" is Facebook Canada. Again, on the Respondents' interpretation, s. 12.a would make no sense because Facebook Canada was not Dr. Wigdor's employer in 2011 and had no ability to terminate him in 2011.

[53] Third, as Dr. Wigdor points out, the Respondents' proposed interpretation of the first paragraph of s. 12.a is inconsistent with the entire scheme of s. 12.a of the employment agreement. The second paragraph of s. 12.a provides that after the first three months of employment, the Respondents may terminate employment without cause by providing all of the minimum *ESA* entitlements, and:

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).

[54] On the Respondents' interpretation of s. 12.a, the formula of an additional "4 weeks of base pay for every year of completed service" is meaningless and

does no work. On the Respondents' interpretation, Dr. Wigdor would have qualified for the full 12-months additional pay on the first day of his employment with the Respondents. By recognizing his full 9 years of service with Chatham, Dr. Wigdor would have qualified immediately for 8 weeks of statutory notice, 9 weeks of severance, and 36 (9 years x 4 weeks per year) additional weeks pay on signing a release, for a total of 53 weeks pay (higher than the 12-month cap in the second paragraph of s. 12.a).

[55] The Respondents argue that a finding of ambiguity in a termination clause requires more than the existence of competing interpretations, relying on this court's decision in *Bertsch v. Datastealth Inc.*, 2025 ONCA 379, at para. 9. This general legal principle is, of course, correct. But as I will explain, it does not assist the Respondents in this case.

[56] If a termination clause is ambiguous, it must be interpreted in favour of the employee: *Wood*, at para. 28; *Rossman*, at para. 24 and 37. However, for genuine ambiguity to exist, there must be more than competing interpretations of the clause. The question of ambiguity is determined by an objective assessment of whether there are two or more reasonable interpretations of the clause: *Bertsch*, at para. 9; *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 45; *Rossman*, at para. 24.

[57] These principles do not assist the Respondents in this appeal because the application judge did not find that the termination provision was ambiguous. She found that it provided for termination on two-weeks notice or pay in lieu if termination occurred during the first three months of Dr. Wigdor's employment with the Respondents. I see no error in that conclusion. I have explained above why the Respondents' interpretation of the termination provisions is not a reasonable interpretation of the termination provisions.

[58] I turn then to the Respondents' argument that Dr. Wigdor had counsel at the time the sale and the employment agreement were negotiated. The Respondents did not make this argument before the application judge. The Respondents' factum before the application judge was filed in the appeal record. Although the Respondents' referred in passing, once, to the fact that Dr. Wigdor was represented by counsel when he negotiated the sale of Chatham and his employment agreement, their submissions about the validity of the employment agreement before the application judge did not rely on the fact that Dr. Wigdor was represented by counsel as a material surrounding circumstance to interpreting the employment agreement. Indeed, before the application judge, the Respondents did not make any arguments based on surrounding circumstances. Rather, they argued that read as a whole and in context, the termination provisions of the employment agreement were clear and were compliant with the *ESA*.

[59] Further, the Respondents have provided no authority for the proposition that the fact that a party was represented by counsel is a relevant factual circumstance to be considered when interpreting an employment agreement. To the contrary, this court has cautioned against allowing considerations of an employee's sophistication and access to independent advice to override the plain language in termination provisions: *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451, at para. 24; see also *Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796, 159 O.R. (3d) 430, at paras. 57 and 68.

[60] In *Sattva*, at para. 57, Rothstein J. cautioned against allowing the circumstances surrounding the formation of a contract to overwhelm the words of the agreement. At para. 58, he described the limits of surrounding circumstances relevant to interpretation of a contract as consisting "only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (citations omitted). The fact that a party is represented by counsel does not fall within these limits.

[61] The Respondents' argument seeks to rely on Dr. Wigdor's receipt of legal advice when he entered into the contract to suggest that he is not entitled to the same clarity in an employment contract as an employee not represented by counsel at the time the contract is formed. I reject that proposition.

[62] For these reasons, I see no error in the application judge's conclusion that the termination provisions of the employment agreement contravened the *ESA*, were thus unenforceable, and Dr. Wigdor was entitled to common law reasonable notice.

3. The Appeal

a. Did the application judge err in denying Dr. Wigdor damages for the RSUs what would have vested during the notice period?

i. Structure of the issue

[63] I begin by outlining the structure of the legal issue in relation to the RSUs. Under the Supreme Court's decision in *Matthews v. Ocean Nutrition*, 2020 SCC 26, [2020] 3 S.C.R. 64, at paras. 52-55, where there is an issue about whether a terminated employee is entitled to damages for a bonus or similar entitlement that would have been payable during the common law reasonable notice period, a court should ask two questions:

- (1) But for the termination, would the employee have been entitled to the bonus during the reasonable notice period?
- (2) If so, does the wording of the bonus plan unambiguously alter or remove the employee's common law right to reasonable notice?

See also: *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, 352 O.A.C. 1, at paras. 30-31; *Taggart v. Canada Life Assurance Company* (2006), 146 A.C.W.S. (3d) 674 (Ont. C.A.), at paras. 12-16.

[64] This approach is in accordance with the basic principles of damages on termination based on the employer's obligation to provide reasonable notice of termination as set out in *Machtinger* and *Wood*. If the employee would have been entitled to the bonus had they continued to be employed during the reasonable notice period, and if the terms of the bonus plan (i.e., part of the employment contract) do not remove the common law right to reasonable notice, or do so unlawfully such that they are void, then the damages for the failure to provide reasonable notice must include the bonus entitlement: *Matthews*, at paras. 53 and 76.

[65] In this appeal, there is no dispute that had Dr. Wigdor remained employed by the Respondents during the 10-month notice period, he would have been entitled to approximately US\$4.7 million in RSUs that would have vested during the 10-month common law notice period. The chart below, produced by the Appellant and unchallenged by the Respondents, outlines the details of the vesting dates and values of the RSUs during the 10-month common law notice period:

Vest date	Value per share on close of business on vesting date (US\$)	2020 Grant	2021 Grant	2022 Grant	2023 Grant	Value (US\$)
February 15, 2024 (2.5 months after notice of termination)	\$484.03	2711	49	167	208	\$1,517,434.05
May 15, 2024 (5.5 months after notice of termination)	\$481.54	2711	48	167	208	\$1,509,146.36
August 15, 2024 (8.5 months after notice of termination)	\$537.33	2712	49	168	208	\$1,685,066.88
Subtotal		8,134	146	502	623	
Total (all years combined)		9,405				US\$ 4,711,647.29

[66] The dispute in this appeal engages the second question asked in *Matthews*: whether the terms of RSU Agreements that formed part of the employment contract were contrary to ss. 60 and 61 of the *ESA*, such that they did not validly alter/contract out of vesting entitlements during the common law reasonable notice period. Answering this question requires interpreting ss. 60 and 61 of the *ESA*.

[67] The statutory interpretation of provisions of the *ESA* is a question of law, and thus reviewable on the correctness standard.

ii. Positions of the parties

[68] Dr. Wigdor argues that the application judge erred in law in finding that the RSU Agreements did not contravene the *ESA*. He relies primarily on two arguments.

[69] First, he argues that the application judge erred because she assessed the question of whether the RSU Agreements contravened the *ESA* from the perspective of events at termination, rather than at the time the contract was formed, contrary to *Wood* and *Machtinger*.

[70] Second, he argues that the application judge erred in her interpretation of s. 61 of the *ESA*. Her errors in interpreting s. 61 of the *ESA* were twofold: (i) in finding that s. 60 of the *ESA* only applies to working notice, and that s. 61 alone – without reference to s. 60 – governs pay in lieu of notice; and (ii) that s. 61 does not contain a prohibition on altering “terms or conditions of employment”. As a result of this error, the application judge incorrectly held that the obligation on an employer in s. 60(1)(a) not to alter a term or condition of employment during the statutory notice period had no application to the calculation of the “amount” of pay an employee is entitled to in lieu of notice under s. 61(1)(a).

[71] Dr. Wigdor argues that ss. 60 and 61 of the *ESA* must be read together. Properly interpreted, the obligation on an employer in s. 61(1)(a) to pay in lieu of notice “a lump sum equal to the amount the employee would have been entitled to receive under section 60” had notice been given, means payment of a lump sum

based on no alteration to a term or condition of employment during the notice period.

[72] Dr. Wigdor argues that the RSU Agreements contravene s. 60 of the *ESA* because they purport to alter a term or condition of employment during the statutory notice period by depriving employees of ongoing vesting of RSUs during the notice period. As a result, the termination provisions of the RSU Agreements are void, and Dr. Wigdor is entitled to damages for the RSUs that would have vested during the common law reasonable notice period.

[73] The Respondents argue that the application judge made no errors in her interpretation of ss. 60 and 61 of the *ESA*. They argue that the application judge was correct in holding that s. 61 of the *ESA* only required the payment of wages and benefits as pay in lieu of statutory notice, and not other entitlements. They argue that the application judge was correct not to “incorporate” s. 60 into s. 61. They argue that unlike s. 60, s. 61 does not restrict an employer from altering employment terms other than wages and benefits.

[74] The Respondents argue that on a plain reading of the RSU Agreements, vesting stopped when Dr. Wigdor’s employment was terminated (i.e., 4 days after the notice of termination). This is not contrary to the *ESA* because only s. 61 is applicable and it only provides for payment of wages and benefits in lieu of notice.

[75] I address these issues by first considering the statutory interpretation of ss. 60 and 61 of the *ESA*. I then consider Dr. Wigdor's arguments about two errors made by the application judge in considering whether the obligation on an employer in the *ESA* not to alter terms or conditions of employment during the notice period applied to the RSU entitlements. Finally, I address why the RSU Agreements contravened the requirement in the *ESA* not to alter terms or conditions of employment during the statutory notice period, are thus void pursuant to s. 5 of the *ESA*, and do not validly contract out of Dr. Wigdor's common law notice entitlements.

iii. Interpretation of ss. 60 and 61 of the *ESA*

[76] I agree with Dr. Wigdor that, properly interpreted, s. 61(1)(a) of the *ESA* requires that the lump sum payment to which an employee is entitled where pay is provided in lieu of working notice must be calculated on the basis that there are no alterations to the terms or conditions of employment during the statutory notice period.

[77] It is well-established that the words of a statutory provision must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting Professor Driedger. In the more recent formulation, the court must consider the text, context, and purpose of a legislative provision in interpreting it: *Canada (Minister of*

Citizenship and Immigration) v. *Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 117-18.

[78] As I will explain, in my view, the application judge fell into error by reading ss. 60 and 61 of the *ESA* disjunctively, rather than reading them together, which is required both by the text of both sections and by the general requirement that a judge engaging in statutory interpretation must consider the context of the other provisions in legislation in interpreting individual provisions.

[79] I begin with the text. For ease of reference, I reproduce the portions of ss. 60 and 61 of the *ESA* relevant to this appeal:

Requirements during notice period

60 (1) During a notice period under section 57 or 58, the employer,

(a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

(b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and

(c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period.

...

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. [Emphasis added.]

[80] Section 61(1)(a) defines the lump sum payment to which an employee is entitled if termination is without notice or is with less notice than required under ss. 57 or 58 of the ESA.³ Section 61(1)(a) clearly defines the amount of the payment in lieu of notice as: “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” (emphasis added). The text of s. 61(1)(a) is clear that the lump sum must be “equal to” the amount the employee would have been entitled to had they been given working notice under s. 60.

[81] Three things are apparent from the text. First, it incorporates by reference the content of s. 60. This includes the obligation in s. 60(1)(a) that an employer shall not “alter any term or condition of employment” during the statutory notice period. In other words, the calculation of the amount payable under s. 61(1)(a) when pay in lieu of notice is given, must be done on the basis that there are no

³ An employee is also entitled to continuation of benefit plan contributions under s. 61(1)(b), but that is not at issue in this appeal.

alterations in the terms or conditions of employment during the statutory notice period.

[82] Second, the language in s. 61(1)(a) of a lump sum “equal to” the amount that the employee would have been entitled to had they been given working notice under s. 60 signals that the ss. 60 and 61 are to be read together. Taken together, ss. 60 and 61 are intended to place the employee in the same financial position whether they are given working notice or pay in lieu of notice. I return to this issue in examining the purpose of the *ESA*, and of ss. 60 and 61, in particular.

[83] Third, the use of the general word “amount” in s. 61(1)(a) – “a lump sum equal to the amount” the employee would have been entitled to had working notice been given – supports the conclusion that the entitlement to a lump sum is not limited to regular wages, but includes any compensation the employee would have been entitled to if they had been given working notice rather than pay in lieu of notice.

[84] Turning to context – and this flows from the text – ss. 60 and 61 of the *ESA* must be read together. Section 61(1)(a) specifically incorporates the entitlements for working notice under s. 60(1)(a) into the determination of the amount of pay in lieu of notice. Quite apart from the clarity of the text of s. 61(1)(a) expressly incorporating the entitlements under s. 60, the principles of statutory interpretation require that ss. 60 and 61 be read together because they both address employee

entitlements on termination: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022) (online), at § 13.02. The context of reading ss. 60 and 61 together supports that the entitlement to pay in lieu of notice in s. 61(1)(a) incorporates the obligation in s. 60(1)(a) that an employer may not alter terms or conditions of employment during the statutory notice period.

[85] Finally, the purpose of the *ESA* in general, and of ss. 60 and 61 in particular, supports interpreting the language in s. 61(1)(a) of “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” as meaning the amount the employee would have been entitled to during the notice period in the absence of alterations to terms or conditions of employment.

[86] As already mentioned, the *ESA* is remedial legislation intended to protect the interests of employees by requiring employers to comply with certain minimum employment standards: *Wood*, at para. 28; *Machtinger*, at pp. 1002-03.

[87] Read together – including the specific incorporation in s. 61(1)(a) of the amount the employee would have been entitled to under s. 60 had working notice been given – ss. 60 and 61 are intended to create a harmonious scheme to ensure that employees are entitled to the same financial compensation whether their employment is terminated with working notice or with pay in lieu of notice. In other words, one of the purposes of the provisions is to ensure that employees are not

worse off under either mode of termination. This conclusion is supported by decisions of the Superior Court, which, in my view, correctly interpret the interplay between ss. 60 and 61 of the *ESA*: *Wilds v. 195612 Ontario Inc.*, 2024 ONSC 3452, at para. 63(a); *Groves v. UTS Consultants Inc.*, 2019 ONSC 5605, at paras. 56-57; aff'd 2020 ONCA 630; *Sandhu v. Solutions 2 go Inc.*, 2012 ONSC 2073, at para. 35.⁴

[88] In summary, an employee's entitlement under s. 61(1)(a) where pay is given in lieu of notice to "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" means that the lump sum payment must be based on terms and conditions of employment not being altered during the statutory notice period.

iv. The application judge erred in finding that the obligation on employers not to alter terms or conditions of employment during the statutory notice period in the *ESA* did not apply to Dr. Wigdor's RSU entitlements

[89] As outlined above, Dr. Wigdor argues that the application judge made two errors in finding that the obligation in the *ESA* on an employer not to alter terms or

⁴ The application judge considered *Sandhu* and found that it was inconsistent with this court's decision in *North v. Metaswitch Networks Corporation*, 2017 ONCA 790, 417 D.L.R. (4th) 429. Respectfully, the application judge misread *North*. In a parenthetical comment at para. 11 of *North*, Feldman J.A. summarized the entitlement under s. 60 as "(i.e., based on regular wages)". The court in *North* was not considering the obligation in s. 60 on an employer not to "alter any term or condition of employment". The parenthetical comment at para. 11 of *North* is summary and not intended to be an exhaustive interpretation of entitlements under s. 60 of the *ESA*.

conditions of employment during the statutory notice period did not apply to his RSU entitlements. I agree with Dr. Wigdor and address each argument in turn.

[90] First, the application judge erred by approaching her consideration of whether the RSU Agreements complied with the *ESA* from the perspective of events at the time of termination, rather than at the time the contract was entered into. She approached the consideration of whether the RSU Agreements contravened *ESA* minimum standards by considering the issue only from the perspective of a termination with pay in lieu of notice – i.e., the manner in which Dr. Wigdor was actually terminated.

[91] This was an error. The legality and enforceability of terms in an employment contract must be assessed at the time the contract is entered into, not at the time of termination. The wording of the termination clause alone must be considered in deciding whether it complies with *ESA* minimum standards. What the employer actually did at the time of termination is irrelevant to whether the termination clause complies with the *ESA*: *Wood*, at paras. 28, 43-51; *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, at para. 8.

[92] The application judge only considered whether the RSU termination provisions complied with the *ESA* through the lens of a termination where pay in lieu of notice is given because, apart from four days of working notice, Dr. Wigdor was given pay in lieu. By focusing only on circumstances where pay in lieu is given,

the application judge failed to consider the effect of the terms of the contract at the time the contract was entered into. In other words, in this case, if the terms of the RSU Agreements purporting to deprive terminated employees of vesting of RSUs during the notice period for a termination contravene the *ESA* because they alter a term or condition of employment, they do so at the time the employment contract is entered into whether for a particular employee a later termination is with working notice or pay in lieu.

[93] The second error made by the application judge is that she misinterpreted ss. 60 and 61 of the *ESA*. The interpretation of ss. 60 and 61 applied by the application judge is contrary to the statutory interpretation of the provisions I have outlined above.

[94] The application judge found that s. 60 of the *ESA* governs working notice and that s. 61 governs pay in lieu of notice. She found that s. 60 requires that in addition to paying wages and benefits during working notice, an employer may not “alter any term or condition of employment.” However, reading s. 61 disjunctively from s. 60, she found that s. 61 did not place an obligation on employers not to alter any term or condition of employment during the statutory notice period. Thus, the calculation of the lump sum for pay in lieu of notice under s. 61 was not required to be done on the basis that there could be no alteration of any term or condition of employment. She then went on to consider whether the RSU entitlements were “benefits” under s. 61(1)(b), which requires an employer to continue “benefit plan

contributions” during the statutory notice period. She found that the RSU entitlements were not benefits within the meaning of s. 61(1)(b). She further found that s. 61(1.1), which provides for the calculation of the lump sum of pay in lieu of notice in circumstances where an employee does not have a regular work week. She found that s. 61(1.1) was not applicable to the RSU entitlements because they were not “wages”.

[95] The application judge erred by reading ss. 60 and 61 disjunctively and holding that the entitlement to a lump sum of pay in lieu of working notice was to be calculated without reference to the obligation on an employer in s. 60(1)(a) not to alter terms and conditions of employment during the statutory notice period.

[96] The application judge failed entirely to consider Dr. Wigdor’s argument that the language in s. 61(1)(a) that requires an employer to pay a lump sum “equal to the amount” the employee would have been entitled to receive “under section 60” had working notice been given incorporates the requirement from s. 60(1)(a) that the employer may not “alter any term or condition of employment”. Rather, she erroneously focussed on s. 61(1.1), which specifies the calculation of the lump sum where an employee does not have a regular work week, and whether the RSUs were somehow benefit plan contributions under s. 61(1)(b). Dr. Wigdor did not base his entitlement to damages for the RSU entitlements on either of these provisions.

[97] Because the application judge erred in her interpretation of ss. 60 and 61 of the *ESA*, she failed to consider whether the terms of the RSU Agreements incorporated as part of Dr. Wigdor’s employment contract contravened the *ESA* by purporting to alter a term or condition of employment during the statutory notice period. I turn to that issue in the next section of these reasons.

[98] Before concluding on this issue, I address the arguments made by the intervener, Canadian Association of Counsel to Employers. The intervener urges the court to hold that any form of equity-based compensation can never constitute “wages” within the definition in s. 1(1) of the *ESA*.

[99] It is not necessary to address this issue to decide this appeal, and I decline to do so. Dr. Wigdor’s argument is that the entitlement to RSUs constitutes a “term or condition of employment” within the meaning of s. 60(1)(a) of the *ESA*.⁵ As outlined above, I would decide the appeal on this basis. Whether the RSU entitlement also constitutes “wages” need not be decided. The question of whether equity-based compensation falls within the definition of “wages” in the *ESA* is better left to an appeal where its resolution is determinative. I would add that, depending on the evidentiary record, it may be the case that the answer is more

⁵ Dr. Wigdor made submissions, in the alternative and in response to the intervener’s submissions, on the “wages” issue. However, his primary position was that it is not necessary to decide if equity-based compensation is “wages” to decide this appeal.

nuanced than a blanket determination that all forms of equity-based compensation are or are not “wages” under the *ESA*.

v. The RSU Agreements contravene the *ESA* and as a result are void and do not remove Dr. Wigdor’s common law right to reasonable notice

[100] Applying the interpretation of ss. 60 and 61 of the *ESA* set out above, the RSU Agreements contravene the *ESA* because they purport to alter a “term or condition of employment” during the notice period under the *ESA* by depriving employees of ongoing vesting during that period. As a result, the provisions of the RSU Agreements relating to termination are void and do not remove Dr. Wigdor’s common law rights. Dr. Wigdor is entitled to damages for the RSUs that would have vested during the common law reasonable notice period.

[101] Dr. Wigdor’s entitlement to the RSUs was governed by the employment agreement and by the Respondents’ RSU Agreements for 2020 and 2021-2023. These are incorporated by reference into the employment agreement. In addition to providing for a base salary and entitlement to a discretionary bonus, the employment agreement provided that Dr. Wigdor would receive an initial grant of 43,380 RSUs and refresher grants (as outlined in the chart at para. 65 above). This was set out in a letter enclosed with the employment agreement as follows:

This letter is to confirm that your employer intends to recommend to the Board of Directors of Facebook, Inc. that you be granted restricted stock units (“**RSUs**”) by

Facebook, Inc. under the terms of the 2012 Equity Incentive Plan (as amended and restated on June 20, 2016) (the “**Plan**”). Subject to the approval of Facebook, Inc. Board of Directors or committee thereof (the “**Board**”), you will be granted 43,380 RSUs under the Plan. [Emphasis in original.]

The letter went on to state that that Dr. Wigdor’s entitlement to RSUs was “subject to and conditional upon”, *inter alia*, his “having previously entered into a contract with [his] local employer”. It further provided: “Unlike traditional stock options, you need not pay any exercise price for the Shares subject to the RSUs. They are simply delivered to you following vesting (assuming the vesting conditions are met).”

[102] This letter formed part of the employment agreement. Section 9 of the employment agreements provides that “the Agreement and its enclosures contain our entire understanding regarding your employment with the Company.”

[103] RSUs are governed by the 2012 Equity Incentive Plan (referenced in the letter included as part of the employment agreement) with additional terms set out in the RSU Agreements. As noted above, there are four RSU Agreements for different time periods in this appeal: the 2020 RSU Agreement and the agreements for each of 2021, 2022, and 2023.

[104] All RSUs vest in quarterly increments over a four-year span. RSUs have no value until they vest. When they vest, the employee automatically receives the corresponding number of common shares of Meta without having to pay for them

(thus, as noted in the chart above at para. 65, the value of the RSUs on the vesting date is based on the value of Meta common shares on that date).

[105] RSU grants are an element of employee compensation, according to one of the Respondents' affiants. They are intended to compensate employees for continued service and to aid in employee retention over time. Meta's 2023 Annual Report describes the 2012 Equity Incentive Plan, which is the foundation for the RSU entitlements, as a "share-based employee compensation plan".

[106] Dr. Wigdor's RSUs were taxed as employment income. His pay stubs listed his income from vested RSUs as "RSU Taxable Benefit".

[107] There can be no real doubt that Dr. Wigdor's RSU entitlements were a "term or condition" of his employment within the meaning of s. 60(1)(a) of the *ESA*. Dr. Wigdor's entitlement to the RSUs was outlined in the letter incorporated into his employment agreement. The Respondents' affiant agreed that RSU entitlements were part of employee compensation. Meta's 2023 Annual Report describes the 2012 Equity Incentive Plan, which is the foundation for the RSU entitlements, as a "share-based employee compensation plan". During Dr. Wigdor's employment with the Respondents, his RSU entitlements vested quarterly, in accordance with the RSU Agreements. The vested RSUs were treated as taxable benefits in the Respondents' records of payment to Dr. Wigdor.

[108] Both the 2020 RSU Agreement and the 2021-2023 RSU Agreements purport to alter an employee's entitlement to RSUs in a manner that constitutes an alteration of a term or condition of employment during the statutory notice period, contrary to s. 60(1)(a) of the *ESA*.

[109] Both the 2020 RSU Agreement and the 2021-2023 RSU Agreements provide that if an employee was terminated for any reason, "all unvested RSUs shall be forfeited to the Company forthwith", and all rights of the employee to RSUs "shall immediately terminate." In addition, each agreement has more specific language that references notice periods. The 2020 RSU Agreement specifically provides that:

[N]o vesting shall continue during any notice period in relation to his/her Termination, whether specified under contract or statutorily, regulatory or common law.

The 2021-2023 RSU Agreements specifically provide:

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 common or civil law). [Emphasis added.]

[110] Returning to the analysis in *Matthews*, there is no dispute that, but for Dr. Wigdor's termination, 9,405 RSUs would have vested during the common law

notice period, with a value of approximately US\$4.7 million (calculated by the Meta share price on vesting dates). The issue is whether under the second branch of the *Matthews* test, the RSU Agreements, part of the employment agreement, lawfully removed these rights or were contrary to the *ESA* and thus, could not validly contract out of common law rights.

[111] The 2020 RSU Agreement unequivocally states that no vesting shall continue during, *inter alia*, the statutory notice period. This is contrary to the obligation on an employer in s. 60(1)(a) of the *ESA* not to alter “any term or condition of employment” during the statutory notice period. It is thus void, pursuant to s. 5(1) of the *ESA*, and cannot validly contract out of Dr. Wigdor’s common law rights.

[112] The 2021-2023 RSU Agreements also purport to end vesting immediately upon termination. Although the 2021-2023 RSU Agreements appear to attempt to include a saving provision with the language “unless explicitly required by applicable legislation”, there is nothing “explicit” in the *ESA* about continued vesting of RSUs during the statutory notice period. The saving language is not engaged.

[113] But even assuming, taken at its highest, the provision is ambiguous about how explicit saving language in employment standards legislation needs to be, that ambiguity must be resolved in favour of the employee. Thus, the 2021-2023

RSU Agreements are also contrary to s. 60(1)(a) of the *ESA* because they purport to alter a “term or condition of employment” during the statutory notice period. The clauses are thus void, pursuant to s. 5(1) of the *ESA*, and do not contract out of Dr. Wigdor’s common law rights.

[114] Because the RSU Agreements purport to alter a term or condition of employment by denying terminated employees continued vesting of RSUs during the statutory notice period, they are contrary to the *ESA*, void, and incapable of contracting out of common law notice entitlements: *Matthews* at para. 76; *Machtinger*, at pp. 1004.

[115] For these reasons, Dr. Wigdor was entitled to have the value of RSUs that would have vested during the 10-month common law notice period included in his damages for the common law right to reasonable notice. The damages award should be increased by US\$4,711,647.29.

b. The application judge erred in finding that the *ESA* did not apply at all to the RSU entitlements

[116] After holding that Dr. Wigdor was not entitled to damages for the RSUs that would have vested during the common law notice period because only s. 61 of the *ESA* applied and its provisions for pay in lieu of notice did not include a protection against alteration of terms or conditions of employment during the notice period, the application judge went on to find that Dr. Wigdor’s RSU entitlements were governed by separate agreements, and thus, not subject to the *ESA* at all:

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.

[117] Dr. Wigdor argues this was an error. Dr. Wigdor argues that this conclusion is inconsistent with the balance of the application judge's reasons, rests on a misapprehension of the Respondents' position below in relation to the 2021-2023 RSU entitlements, is contrary to the application provisions of the *ESA* and binding authority of this court, and rests on a misreading of *Mikelsteins*.

[118] The Respondents concede that the application judge erred in reaching the conclusion that the *ESA* did not apply to the 2021-2023 RSU entitlements. The Respondents had argued before the application judge, and maintain on appeal, that the 2020 RSU entitlements were part of the deal to purchase Chatham, and thus not employment related. But the Respondents accepted, both in this court and below, that the 2021-2023 RSU entitlements were employment compensation. Thus, the Respondents accept that the application judge misapprehended their argument, to the extent that she applied it to the 2021-2023 RSU entitlements. However, the Respondents argue that the application judge's misapprehension of their position is not material because the 2021-2023 RSU Agreements are compliant with the *ESA*. The Respondents maintain their position that the RSUs

subject to the 2020 RSU Agreement were part of the purchase transaction of Chatham and were not employment compensation, and thus not subject to the *ESA*.

[119] I agree with Dr. Wigdor that the application judge erred in finding that his RSU entitlements were not subject to the *ESA*. I begin by noting that the application judge's conclusion that Dr. Wigdor's RSU entitlements were not subject to the *ESA* appears inconsistent with her earlier finding that s. 61 of the *ESA* applied to the RSU entitlements but that the terms of the RSU Agreements were not contrary to s. 61 (based on her erroneous interpretation of ss. 60 and 61).

[120] Further, the application judge made three errors in reaching the conclusion that the *ESA* did not apply to the RSU entitlements.

[121] First, as the Respondents concede, the application judge misapprehended their argument by holding that the 2021-2023 RSU entitlements were not employment compensation and not subject to the *ESA*. While the Respondents argued before the application judge (and again on appeal) that the RSUs subject to the 2020 RSU Agreement were not employment compensation, but rather were part of the deal to purchase Chatham, they conceded that the RSUs subject to the 2021-2023 RSU Agreements were employment compensation subject to the *ESA*. Instead, they took the position that the 2021-2023 RSU Agreements were compliant with the *ESA*, a position I have considered and rejected above.

[122] I address the 2020 RSU entitlements below. But as it relates to the 2021-2023 RSU entitlements, I reject the Respondents' position that the application judge's misapprehension of their position was not material. I have explained above that the 2021-2023 RSU Agreements contravene *ESA* minimum standards. As such, they are void and incapable of validly contracting out of Dr. Wigdor's right to common law reasonable notice, which includes damages for RSUs that would have vested during the common law notice period.

[123] Second, the application judge's conclusion that the *ESA* did not apply to Dr. Wigdor's RSU entitlements is contrary to the application provision of the *ESA*, the record in this case, and authority of this court.

[124] Section 3 of the *ESA* provides (with certain exceptions that are not applicable in this case) that:

... the employment standards set out in this Act apply with respect to an employee and his employer if

(a) The employee's work is to be performed in Ontario; or

(b) The employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

[125] This language speaks to the broad application of the *ESA* to employees who perform work in Ontario. This is consistent with the *ESA*'s purpose as remedial legislation, designed to extend its protections to "as many employees as possible": *Machtinger*, at p. 1003; *Wood* at para. 28.

[126] The only reasonable conclusion on the record in this appeal is that Dr. Wigdor's RSU entitlements were part of his employment compensation. As I have outlined above at paras. 107, 118-19, the employment agreement and the RSU Agreements structure Dr. Wigdor's RSU entitlements as employment compensation. Further, the RSUs that vested during the time Dr. Wigdor was employed by the Respondents were treated as employment income. Thus, the *ESA* applies to the RSU entitlements.

[127] The Respondents' submission that the *ESA* does not apply to the RSU entitlements that were subject to the 2020 RSU Agreement amounts to an argument that because the 2020 RSU entitlements are connected to the purchase of Chatham, the *ESA* does not apply, despite the fact that the documents in relation to Dr. Wigdor's employment and RSU entitlements structure the RSUs as employment compensation.

[128] This court rejected that argument in *Groves*. *Groves* involved circumstances where a shareholder, officer, and director of a corporation sold his shares to another corporation, resigned as an officer and director, and then became an employee of the purchaser corporation. His employment was subsequently terminated without cause. In the appeal in wrongful dismissal action, one of the arguments made by the employer was that the summary judgment motion judge erred by failing to interpret the employment contract in the context of the commercial sale of the shares and that the principles from *Wood* – and the *ESA* –

were not applicable because the circumstances involved a commercial transaction. This court rejected the argument that the motion judge failed to consider the full factual context. The court also rejected the argument that the *ESA* did not apply, stating at para. 13:

To the extent that UTS is advancing an argument that in the context of a commercial contract, the *ESA* provisions do not apply, we disagree. There is nothing in the *ESA* that indicates that it is inapplicable in employment relationships connected to commercial transactions.

[129] In this case, the parties chose to make the purchase of Chatham contingent on Dr. Wigdor becoming an employee of the Respondents, and chose to structure the purchase deal and the employment agreement with the RSU entitlements as employment compensation for Dr. Wigdor. The choice to structure the RSU entitlements as employment compensation, including the 2020 entitlements, means the *ESA* applies. The Respondents must live with that choice.

[130] Third, the application judge's reliance on *Mikelsteins* was misplaced.

[131] *Mikelsteins* is distinguishable from the circumstances of this appeal. *Mikelsteins* concerned an "employee-owned engineering firm" that allowed certain employees to purchase shares in the parent corporation using their own funds. When an employee decided to purchase shares, their rights regarding the shares were determined by the terms of the shareholders agreement. This court held that receipt of shares was not employment compensation subject to the *ESA* for two

reasons: (1) because the employee had to purchase the shares using their own funds; and (2) because the employee's rights as a shareholder in relation to the shares, once the employee made the choice to purchase the shares, were determined under the shareholders agreement, not the employment contract: *Mikelsteins v. Morrison Hershfield Limited*, 2019 ONCA 515, at paras. 2-6, 12-19; *Mikelsteins v. Morrison Hershfield Limited*, 2021 ONCA 155, at paras. 11-13, leave to appeal refused, [2019] S.C.C.A. No. 363.

[132] By contrast, as I have outlined above, in this case the RSU entitlements were a form of employment compensation that automatically vested in consideration of ongoing employment.

[133] For these reasons, I conclude that the application judge erred in finding that the *ESA* did not apply to the RSU entitlements. I have explained earlier in these reasons why the RSU Agreements do not meet *ESA* minimum standards and are not capable of validly contracting out of Dr. Wigdor's common law right to reasonable notice.

c. Did the application judge err in declining to award Dr. Wigdor punitive damages

[134] Dr. Wigdor argues that the application judge erred in declining to award punitive damages. He argues that her findings amounted to a finding of a deliberate breach of the *ESA* by the Respondents, seemingly in an effort to pressure him into signing a release and/or as a reprisal for his refusal to do so.

Dr. Wigdor further argues that punitive damages were particularly appropriate given the size and sophistication of the Respondents, who, he argues, should be expected to model compliance with employment standards.

[135] The Respondents argue that the application judge made no error in declining to award punitive damages. The application judge found that the Respondents' conduct "[fell] short of reprehensible conduct" and did not "rise to the level of 'harsh' or 'malicious'." She was entitled to exercise her discretion to make this finding, which was rationally supported by the record and the case law.

[136] The application judge made the following findings in declining to award punitive damages:

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 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.

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.

[137] Punitive damages are restricted to “advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own”: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at paras. 62 and 68.

[138] The application judge properly adverted to the high standard to award punitive damages set out in *Keays*. While the application judge’s finding in relation to the Respondents’ conduct in not paying the pay in lieu of notice for 10 months – and not until the application was commenced – approaches a finding of intentional misconduct, it is not such a finding. I am not persuaded that she made any palpable and overriding error in her fact-finding on this issue.

[139] In light of the discretionary nature of the assessment of whether punitive damages are appropriate, and given the nature of the application judge’s factual findings on this issue, I see no reviewable error and no basis to intervene in her decision not to award punitive damages.

E. DISPOSITION

[140] I would allow the appeal, except with respect to punitive damages. I would strike out paragraph 2 of the Amended Order of the application judge and vary the order to increase Dr. Wigdor’s damages by US\$4,711,647.29 to account for the lost value of the RSUs that would have vested during the 10-month common law reasonable notice period.

[141] I would dismiss the cross-appeal.

[142] At the close of the hearing, the parties advised that they had an agreement on costs of the appeal. However, the agreement was premised on one party being successful on all issues. Because we did not allow the appeal with respect to the denial of punitive damages, the agreement does not apply. Counsel were optimistic that, if the result was mixed, they could reach another agreement on costs of the appeal. We leave it to the parties to have that discussion, both in relation to costs of the appeal and whether the result of the appeal has any impact on the costs of the application.

[143] If the parties are unable to reach agreement on costs, they may file written submissions limited to three pages, plus a costs outline. Dr. Wigdor's submissions shall be filed within 10 days of the release of these reasons. The Respondents' submissions shall be filed within 10 days of the filing of Dr. Wigdor's submissions. There is no right of reply.

Released: August 7, 2026 "J.G."

"J. Copeland J.A."
"I agree. J. George J.A."
"I agree. S. Gomery J.A."