Egan v Harbour Air Seaplanes LLP, Will B.C Case Takeoff In Alberta?

Damages for reasonable notice can often be significantly higher than what an employee would be entitled to under a notice of termination or severance pay. Accordingly, whether you are an employee or an employer, all parties can benefit from a better understanding of the validity of the termination clause in an employment contract.

When terminated without cause, employees in Canada are owed a common law period of reasonable notice. This period of notice, however, is a presumption that can be rebutted through the presence of a termination clause in their employment contract. It is in rebutting this presumption that legal ambiguity and disputes between parties arise. Although the recent 2024 Court of Appeal of British Columbia decision of *Egan v Harbour Air Seaplanes LLP , 2024 BCCA 222 ("Egan")* does not reinvent the proverbial wheel when it comes to termination clauses, it could help clarify when a termination clause will or will not be held as valid if challenged before a court.

The Case

In *Egan*, the Court sought to determine whether an employer's reference to the *Canada Labour Code RSC 1985, c L-2* was sufficient to displace the common law presumption of reasonable notice. Though the Court's finding that the reference to legislation a valid rebuttal is hardly a new development, the Court's reasoning does warrant attention. The Court clarified that the validity of a termination clause is determined on the facts known to the parties at time of contracting, and not on the conduct of the parties during their execution of the termination clause. Further, the decision in *Egan* was guided by the Court's focus on clarity of intention to dispense with common law notice, rather than solely examining the clarity of contractual language. The Court's focus on clarity of intention, over clarity of contractual language, is particularly notable.

In a pre-*Egan* legal landscape, clarity of contractual terms was often the key issue which determined the validity of a termination clause. Reference to legislation was a valid method of dispensing with common law notice, provided that there was clear language displacing the notice period, and the termination clause complied with legislative minimums of required notice that had to be provided to an employee. However, whether or not reference to legislation alone has sufficiently clarity to displace common law notice has been the subject of ongoing debate across Canada.

Legal Ambiguity Surrounding References to Legislation

The legal debate around referenced legislation in termination clauses roughly breaks down along Provincial lines, as Provincial legislation directly impacts how a court construes termination clauses. Different pieces of Provincial legislation can be roughly characterized as either 'prescriptive' or 'at least'/'minimal'. Prescriptive legislation outlines a specific and fixed time of notice, as under the B.C *Employment Standards Act, RSBC 1996, c113.* Minimal or 'at least' legislation, like our Albertan *Employment Standards Code, RSA 2000, c E-9* ("the *Code*"), stipulates only that the notice must be 'at least' a certain length. This 'at least' legislation leaves open the possibility that notice can be a greater duration than the legislative minimum duration of notice. As a result, there is jurisprudence from 'at least' jurisdictions like Alberta, suggests that without further contractual language, reference to 'at least' legislation can be unclear and therefore inoperative. Specifically, the 2018 Alberta Court of Appeal decision of *Holm v AGAT Laboratories LTD, 2018 ABCA 23 ("Holm")* affirms the peril of the vagueness inherent in 'at least' legislation.

In *Holm* the court found that although the contract had referenced the Albertan 'at least' legislation, creating a proverbial "floor", the lack of any contractual language making a "ceiling" rendered the clause unclear. With courts interpreting contracts through the principle of *contra proferentem*, the contractual vagueness was decided against the employers in *Holm*. Given that *Holm* is still good law, it is clear to see just how important understanding clarity in termination clause can be.

Egan's Focus on Intention

Yet across Canadian, different jurisdictions can provide contradictory decisions as to the operability of references to 'at least' legislation. It is completely possible for both sides of a dispute to provide valid decisions that suggests that the mere reference to legislation is, or is not, sufficient to rebut common law notice. However, *Egan* now suggests that a Court may refocus their attention from clarity of contractual provision in rebutting the common law notice, to clarity of intention to rebut notice:

"Simply because a termination clause does not convert a statutory floor to a contractual ceiling does not necessarily mean that the clause is insufficient to rebut the presumption of reasonable notice. Nor are specific words or phrases required. A termination clause that clearly evinces an intention to incorporate the notice provisions…which provide for "some other period of notice", should be sufficient to displace the presumption."

This would, at a first glance, suggest that *Egan* has finally put to rest the differences between 'at least' and prescriptive jurisdictions, as focus on the intention of parties becomes the determining factor in assessing validity. Sadly, the influence of *Egan* is not so clear cut.

The Court in *Egan* specifically calls out the fact that they "do not proport to resolve the conflicting authorities in other provinces". Further, the Court states that "these reasons should not be interpreted as settling this controversy in relation to employment standards legislation that provides only for a minimum, non-prescriptive periods of notice". Given that these statements seemingly directly counter the impact that *Egan* would have on any dispute outside of B.C, how does it help us in an Albertan context?

Impact of Egan in Alberta

These statements leave us with a decision that illustrates support for an alternative avenue of advocacy, that does not yet fundamentally change the law in Alberta surrounding termination clauses. Applied to the *Code, Egan* suggests that a termination clause that only cites our 'at least' legislation, and does not include a "ceiling", could still be valid if the intention to displace common law notice is sufficiently clear. Clarity of intention may become an important factor in the future when courts are determining when a contract has or has not replaced common law periods of notice. Though not binding on any Albertan Court, the decision in *Egan* does provide strong judicial reasoning which could potentially help find a termination clause valid.

However, as Albertan courts continue to rule along the lines of requiring clarity of contractual language in a termination clause, the best approach to this issue is a properly constructed termination clause.

For help with drafting a termination clause that can give both employee and employer certainty as to their rights, or for assistance in any other legal matter, Bishop & McKenzie is here for you.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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