Termination Clauses: Getting It Right

The recent BC Court of Appeal case of *Egan v Harbour Air Seaplanes LLP,* 2024 BCCA 222 falls into a rare but welcome line of cases for employers, as it provides some predictability on the validity of termination clauses in employment contracts.

Background

In this case, the employee, Mr. Egan, brought an action for wrongful dismissal against his employer, Harbour Air Seaplanes LLP ("Harbour Air"), after being terminated without cause. The case turned on the enforceability of the termination clause contained in the employment contract. The relevant termination clause stated as follows:

The Harbour Air group may terminate your employment at any time without cause ***so long as it provides appropriate notice and severance in accordance with the requirements of the*** *Canada Labour Code.*

Arguments

Mr. Egan argued that the termination clause was unenforceable as it was ambiguous for not specifying whether the minimum entitlement under the *Canada Labour Code* (the *"Code"*) constituted a ceiling or floor to the employee's entitlement to notice.

Harbour Air argued that incorporation by reference to the *Code* in the termination clause was sufficient to displace the presumption of common law reasonable notice and limit Mr. Egan's entitlement to minimum statutory requirements.

Trial Decision

At a summary trial, the trial judge found the termination clause to be clear, unambiguous, and successful at rebutting the common law principles governing reasonable notice.

Although the matter dealt with an employment contract governed by the *Code*, the trial judge relied on the line of BC cases dealing with the *Employment Standards Act* of BC (the "*Act*"), which consistently confirmed the ability of employees and employers to rebut the common law principles that govern common law reasonable notice through incorporating by reference, the provincial statutory minimum notice period.

On Appeal

The Court of Appeal upheld the trial decision and dismissed the appeal.

The Court acknowledged the array of incongruent decisions across the provinces in regard to whether referential incorporation of statutory provisions into the employment contract is sufficient to displace the common law presumption of reasonable notice. However, the Court attributed this controversy largely to the difference in wording in each provincial employment standards legislation. For example, in B.C., the legislation provides prescriptive periods of notice whereas in Ontario and Alberta, the legislation provides a minimum period of notice. The *Code* was found to use "hybrid" wording, with a minimum period provided only in respect of working notice and a prescriptive period for wages in lieu of notice.

Regardless of the differences in each legislation, Justice Fisher emphasized that the primary consideration should be the parties' intentions, ascertained by applying the "practical, common-sense approach". Applying this approach, the court determined that "based on a reading of the contract as a whole in the context of surrounding circumstances at the time of execution", the parties clearly intended to be governed by the notice and severance provisions of the *Code* and Mr. Egan knew that his entitlements would be governed as such.

Notably, the Court stated:

[60] …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 of the applicable employment standards legislation into the parties' contract, which provide for "some other period of notice", should be sufficient to displace the presumption…

However, the Court did caution that the outlined reasons should not be interpreted as settling the controversy in relation to employment standards legislation using only minimum or non-prescriptive notice periods.

Takeaways

This case serves as a sigh of relief for employers who have been watching Ontario courts strike down one termination clause after another. This case confirms that, for employers in provinces that provide only or partially prescriptive notice periods in their employment standards legislation, referential incorporation to the legislation can be sufficient to limit liability at common law.

In addition, by accepting the termination clause containing the language "at any time", the case also suggests that B.C. courts may be diverging from the most recent approach adopted in the Ontario case of *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029, where the court struck down a termination clause allowing the employer to terminate the employee, without cause, at its "sole discretion" and "at any time" as being unenforceable.

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.

Authors: Sarah Hentschel, Kelley Cho

Watson Goepel LLP