BC COURT OF APPEAL IMPROVES PREDICTABILITY FOR EMPLOYERS RELYING ON TERMINATION PROVISIONS

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Decisions across Canada over the past decade have cast doubt on the enforceability of termination provisions in employment contracts. These decisions have resulted in a lack of predictability when drafting and relying on employment terms, creating uncertainty and risking unexpected liability for employers. In *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222, the British Columbia Court of Appeal provides the clarity sought by employers and employees alike for what is needed for an enforceable termination provision.

In *Harbour Air*, the employer terminated the employee without cause and paid him a sum covering two weeks' salary and five days' severance. The employee sued for wrongful dismissal, seeking common law reasonable notice and asserting that the termination provision in his employment agreement was unenforceable on the grounds that it was ambiguous and allowed the employer to change his employment conditions. This employer responded that they were limited to the termination provisions and notice period set out in the employment contract, which bound the parties to the standards set out in the *Canada Labour Code*.

Principles Governing Enforceability of Termination Provisions

At common law, employers must provide reasonable notice to terminate an employee. However, this reasonable notice presumption can be overridden if an employment contract clearly and unambiguously specifies a different notice period, so long as the notice period is compliant with minimum statutory notice requirements. Employers can include clauses in contracts that incorporate these statutory minimums, effectively making them the maximum required notice.

There is debate across Canada on whether contractual termination provisions that merely reference statutory minimum notice provisions are clear enough to displace the common law reasonable notice presumption. In British Columbia, such provisions have been upheld by the courts as sufficient in multiple cases. Meanwhile, other provinces like Ontario and Alberta may require more explicit limiting language due to their statutory wording.

Interpreting a Termination Provision

In Harbour Air, the British Columbia Court of Appeal confirms that a "practical, common sense approach" should be applied when interpreting termination provisions – the same standard used broadly in contractual interpretation –to determine whether the termination provision was enforceable at the time the employment contract was signed. The Court of Appeal underscores that the intention of the parties should be determined by examining the contract as a whole and in the context of the surrounding circumstances at the time of execution.

Drafting an Enforceable Termination Provision

In following this decision, employers can limit an employee's termination entitlement to statutory notice periods that may exceed the minimum standards, as long as the contractual language is clear and unambiguous. The bar for "ambiguity" requires that the provision create ambiguity regarding the parties' intentions; the Court of Appeal is clear that imperfect language is immaterial so long as the parties' intentions can be discerned from the language of the contract.

Provincial Differences

The British Columbia Court of Appeal also considers authorities from Alberta and Ontario that were raised by the employee, discussing the controversy and different approaches taken across Canada. It does not attempt to resolve the conflicting authorities across Canada but notes that decisions from Alberta and Ontario are not persuasive in determining the enforceability of a termination provision in British Columbia.

The Court of Appeal affirms the position that, in British Columbia, a termination provision that refers to statutory notice provisions, without expressly limiting an employee's entitlement to the statutory minimum, was sufficient to displace the presumption of reasonable notice under common law.

It did so while noting a clear legislative divide: notice periods are prescriptive in British Columbia, as opposed to the language requiring "at least" minimum notice, as found in Alberta and Ontario.

This means that a termination clause in British Columbia does not need to explicitly convert a statutory minimum into a ceiling to rebut the presumption of reasonable notice. It also does not need special limiting words such as "only" or "minimum". As long as the clause clearly incorporates the applicable employment standards legislation's notice provisions, it can effectively displace the common law presumption.

Interpretation of the Termination Provision in *Harbour Air*

When turning to the contract in question, the Court of Appeal finds that the termination provision was unambiguous and therefore valid. It rejects the employee's attempt to read language in the termination provision in isolation, emphasizing that proper contractual interpretation is not accomplished when individual

words or phrases are disaggregated in a search for ambiguity.

Rather, the Court of Appeal finds that when reading the contract as a whole and in the circumstances when it was signed, the parties' intentions were clear. The contractual language was sufficiently clear to rebut the presumption of common law reasonable notice.

Key takeaways

This case highlights differing rulings across Canada on the language required for enforceable termination provisions, with British Columbia taking a divergent approach to some other provinces. In British Columbia, an employment agreement, and the termination provisions within it, are interpreted as any other contract would be – based on a purposive and holistic approach.

Employers can limit termination entitlements so long as they exceed minimum standards, and the language is clear. A termination provision does not need to explicitly state that statutory minimums are a ceiling to rebut reasonable notice. It need not contain special limiting words. The language must only be sufficiently clear so that the parties' intentions can be easily discerned.

The Court of Appeal's decision in *Harbour Air* creates much-desired predictability and certainty for assessing termination provisions and affirms that drafting enforceable terminations provisions is entirely attainable for employers.

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A Cautionary Note