

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Egan v. Harbour Air Seaplanes LLP*,
2023 BCSC 1916

Date: 20231101
Docket: S205180
Registry: Vancouver

Between:

Gerard Michael Egan

Plaintiff

And

Harbour Air Seaplanes LLP

Defendant

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

S. Tevlin

Counsel for Defendant:

N. Toye
O. Startup, Articled Student

Place and Date of Hearing:

Vancouver, B.C.
May 29, 2023

Place and Date of Judgment:

Vancouver, B.C.
November 1, 2023

Introduction

[1] This was an application for judgment pursuant to Rule 9-7. The defendant Harbour Air Seaplanes LLP (“Harbour Air”) seeks a dismissal of the action brought by Mr. Egan for wrongful dismissal. The application is focussed on the enforceability of the termination clause in Mr. Egan’s employment contract.

[2] Mr. Egan did not file a cross application. However, the parties agree that, should I determine that the termination clause in Mr. Egan’s contract does not bar Mr. Egan’s claim, I can proceed to determine whether there was wrongful termination of Mr. Egan and assess any resulting damages.

Issues

[3] The issues for determination are:

- a) Are these matters suitable for summary determination?
- b) Does the termination clause in Mr. Egan’s employment contract limit his termination entitlements to the minimum requirements in the *Canada Labour Code*, R.S.C. 1985, c. L-2 [the Code]?
- c) If the termination clause is not effective to limit Mr. Egan’s termination entitlements, what is a reasonable notice period and what are Mr. Egan’s damages?

Are these matters suitable for summary determination?

[4] The parties agree that this matter is suitable for summary trial on all issues.

[5] The key facts necessary to resolve this dispute are not in dispute. There are no issues of credibility or fact which require a full trial to allow for a fair determination.

[6] The key issues are contract interpretation and quantum of damages.

[7] I am satisfied that it would be just and efficient to determine the issues raised on this application by way of the summary trial rule.

Does the termination clause in Mr. Egan’s employment contract limit his termination entitlement to the minimum requirements in the *Canada Labour Code*?

[8] Section 2(e) of the *Code* defines “aerodromes, aircraft, or a line of air transportation” as a “federal work, undertaking or business”. Harbour Air is a federal work, undertaking or business, as defined in the *Code*.

[9] Sections 230 and 231 of the *Code* set out the obligations of Harbour Air on termination of employees. The relevant portions are:

Notice or wages in lieu of notice

230 (1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

- (a) notice in writing, at least two weeks before a date specified in the notice, of the employer’s intention to terminate his employment on that date, or
- (b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

...

Minimum rate

235 (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

- (a) two days wages at the employee’s regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee’s continuous employment by the employer, and
- (b) five days wages at the employee’s regular rate of wages for his regular hours of work.

[10] On March 22, 2017 Mr. Egan entered into an employment contract with Harbour Air. The employment contract included the following clause:

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.

[11] Mr. Egan was hired as vice president, maintenance operations with Harbour Air. It was a key position in the organisation.

[12] On March 30, 2020 Harbour Air wrote to Mr. Egan terminating his employment. The letter stated:

I regret to inform you that, due to the significant downturn in our business and loss of revenue caused by the current pandemic and our current closure, we need to eliminate your position of Vice-President, Maintenance Operations. As a result, your employment with Harbour Air Seaplanes LLP (“Harbour Air”) has been terminated without cause effective today. This decision is not a reflection of your past work performance, but is simply the result of the unprecedented situation in which we now find ourselves.

Please note that because of this decision, your salary and all benefits (except those included in the offer below) have now ceased. All of your earned salary and vacation days will be paid up to and including today. This will be provided to you by way of direct deposit on the next payroll date.

In accordance with your written employment agreement which you signed on March 24, 2017 and your entitlement under the Canada Labour Code (the “Code”), based on your slightly less than 3 years of service, you will be provided 2 weeks’ salary pursuant to section 230(1) of the Code, as well as 5 days of severance pay pursuant to section 235(1) of the Code. These amounts will be paid to you on the next payroll date as well.

...

Given that all your benefits (except for your dental and extended health coverage) have now ceased. Please contact Susan Poudel if you would like a copy of the Conversion of Benefits package with information on how to apply for individual coverage once your benefits end under the Harbour Air group plan.

...

[13] Harbour Air paid Mr. Egan two weeks wages, and five days of severance pay, totalling \$10,203.93. Mr. Egan does not dispute the calculation of pay pursuant to the Code.

[14] Harbour Air argues that, pursuant to *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at paras 20 and 34, the presumption of reasonable notice to which an employee is entitled upon termination may be rebutted if the employment contract specifies some other notice period.

[15] In *Machtinger* the court addressed provincial employment standards legislation, and a fact pattern where the employer sought to provide less notice than set out in the legislation. The court held:

34 In my view, an approach more consistent with the objects of the Act is that, if an employment contract fails to comply with the minimum statutory notice provisions of the Act, then the presumption of reasonable notice will not have been rebutted. Employers will have an incentive to comply with the Act to avoid the potentially longer notice periods required by the common law, and in consequence more employees are likely to receive the benefit of the minimum notice requirements. Such an approach is also more consistent with the legislative intention expressed by s. 6 of the Act, which expressly preserves the civil remedies otherwise available to an employee against his or her employer.

35 Moreover, this approach provides protection for employees in a manner that does not disproportionately burden employers. Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice. ...

[Emphasis added]

[16] The court of appeal in *University of British Columbia v. Wong*, 2006 BCCA 491 addressed the validity of a contractual term which set notice or pay in lieu of notice in accordance with the provincial employment standards legislation. The court of appeal upheld the trial judge who found that “Article 9.3.1. of the ACTE [agreement on conditions and terms of employment] incorporates by reference the entitlement to notice and pay in lieu found the *ESA* [Employment Standards Act] with the intention of binding the parties to such statutory provisions.” At para 34 the court held:

[34] I agree with the conclusion of the chambers judge that a plain reading of Article 9.3.1 is that the provisions of the *ESA* providing for notice or pay in lieu of notice are incorporated into the contract in issue. The effect is that the

language of the *ESA* concerning notice or pay in lieu of notice is part of the contract. It is as if the draftsman included the words either in the text of or as a schedule to the contract.

[17] As such, the employee was not entitled to common law reasonable notice, and was only entitled to the minimum notice set out in the Act.

[18] In numerous cases the BC courts have confirmed the ability of parties to rebut the common law principles that govern reasonable notice through incorporating by reference the provincial statutory minimum notice period. These cases include *Miller v. Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, aff'd 2014 BCCA 311; *Brown v. Utopia Day Spas and Salons Ltd.*, 2014 BCSC 1400 and *Bailey v. Service Corp. International (Canada) ULC*, 2018 BCSC 235.

[19] While these BC cases all rely on the provincial employment standards legislation, there is no principled reason why such reasoning would not apply to an employment contract governed by the Code.

[20] Mr. Egan argues that the termination clause is ambiguous because s. 230(1) of the Code states that an employer must give an employee “at least” two weeks notice of termination, and an employment contract must specify whether the two weeks so referenced are a ceiling or a floor to the employee’s entitlement.

[21] This argument of Mr. Egan may be dispensed with for the following reason. Section 230(1) of the Code states that the employer must give the employee **either**

- a) notice in writing, at least two weeks before a date specified in the notice, of the employer’s intention to terminate his employment on that date, **or**
- b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

[Emphasis added]

[22] Harbour Air did not give notice pursuant to s. 230(1)(a), which contains the allegedly ambiguous language. Harbour Air gave notice pursuant to s. 230(1)(b)

which is extremely clear and unambiguous, namely the employer is entitled to pay out the employee for two weeks wages in lieu of notice.

[23] As such, I find that the termination provision is not ambiguous, and is sufficient to rebut the common principles regarding reasonable notice.

Is the termination provision unenforceable because it allowed Harbour Air to change the terms of Mr. Egan’s employment contract?

[24] Mr. Egan argues that for a termination provision to be valid, it must not only comply with s. 230(1), it must also comply with s. 231 of the Code.

[25] Section 231 of the Code reads:

Conditions of employment

231 Where notice is given by an employer pursuant to subsection 230(1), the employer

(a) shall not thereafter reduce the rate of wages or alter any other term or condition of employment of the employee to whom the notice was given except with the written consent of the employee; and

(b) shall, between the time when the notice is given and the date specified therein, pay to the employee his regular rate of wages for his regular hours of work.

[26] Mr. Egan argues that s. 231 requires Harbour Air to pay Mr. Egan wages during the notice period, and all benefits which were included in Mr. Egan’s terms of employment. Mr. Egan submits that the conditions of Mr. Egan’s employment included wages, an annual bonus, dental and health coverage, various extended insurance plans, cell phone, work clothing allowance, Christmas bonus, RRSP matching program, participation in a Tourism Perks program, health and wellness spending accounts, and CPP and EI contributions. Mr. Egan submits that Harbour Air failed to comply with s. 231 because all of these benefits were not continued during the notice period.

[27] Mr. Egan relies on *Sager v. TFI International Inc.*, 2020 ONSC 6608 in support of his position. In *Sager*, the applicable employment legislation was the Code, as in the case before me. The defendant in *Sager* did not continue all of the plaintiff’s benefits, including such things a car allowance and bonus, as a part of the

lump sum package offered the plaintiff upon dismissal. The court found that the defendant's failure to continue all benefits was a change in the plaintiff's terms of employment which was inconsistent with s. 231(a) of the Code, rendering the termination clause in the plaintiff's employment contract invalid.

[28] The court in *Sager* relied on three decisions from Ontario in reaching its decision. I note that the three Ontario decisions all arose in the context of the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41 [ESA]. The Ontario legislation mandates a continuation of benefits during a notice period and where payment in lieu of notice is given. The *ESA* is substantively different from the Code, and the Ontario cases applying the *ESA* are not directly applicable to cases involving the Code.

[29] Harbour Air argues that *Sager* is wrongly decided and should not be followed.

[30] I am not satisfied that the reasoning in *Sager* ought to be applied to the case before me. Section 230 of the Code describes notice or wages in lieu of notice. Harbour Air did not give notice pursuant to s. 231(1)(a). Rather, Harbour Air gave payment in lieu of notice pursuant to s. 231(1)(b).

[31] Section 231 describes conditions of employment, i.e. what an employer is obliged to do "where notice is given". In other words, where an employee is given a certain length of working notice of termination, s. 231 ensures that an employer cannot change any employment terms during the period of working notice.

[32] In the case before me, Mr. Egan was given wages in lieu of notice, and was not employed during a notice period. As such, I find that s. 231 has no application to the case before me.

[33] As of March 30, 2020, Mr. Egan was no longer an employee of Harbour Air, and the conditions of employment stipulated in s. 231 were no longer applicable.

[34] I find there was no breach of s. 231 in this case, and the termination clause remains in force.

If the termination clause is not effective to limit Mr. Egan’s termination entitlements, what is a reasonable notice period and what are Mr. Egan’s damages?

[35] For the reasons already expressed, I find Harbour Air paid Mr. Egan two weeks of wages in lieu of notice, consistent with s. 230(1)(b) and s. 235 of the Code, as incorporated into Mr. Egan’s employment contract. As such, Mr. Egan’s claim for damages is dismissed.

Disposition

[36] Harbour Air’s application for dismissal of this action is allowed.

[37] The parties may make submissions on costs, to be provided to me in writing, through the registry. The parties shall determine between themselves a schedule for all submissions be provided no later than December 31, 2023.

“W.A Baker J.”