COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Egan v. Harbour Air Seaplanes LLP,* 2024 BCCA 222

Date: 20240617
Docket: CA49510

Between:

Gerard Michael Egan

Appellant
(Plaintiff)

And

Harbour Air Seaplanes LLP

Respondent
(Defendant)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated November 1, 2023 (*Egan v. Harbour Air Seaplanes LLP*, 2023 BCSC 1916, Vancouver Docket S205180).

Counsel for the Appellant:	S.W. Tevlin
Counsel for the Respondent:	N.C. Toye O.E. Startup
Place and Date of Hearing:	Vancouver, British Columbia April 22, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 17, 2024

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

This is an appeal from the dismissal of the appellant's action for wrongful dismissal on a summary trial. That dismissal turned on the judge's conclusion that an enforceable termination clause contained in the appellant's contract of employment, which referentially incorporated the notice and severance provisions of the Canada Labour Code, operates to preclude a claim for common law damages. On appeal, the appellant asserts error in the judge's conclusion on the basis that the termination clause is either ambiguous or excludes benefits that are required to be paid to him pursuant to the Code.

Held: Appeal dismissed. Although the judge erred in her approach to contractual interpretation, she reached the correct conclusion. On a proper interpretation of the termination clause, there is no ambiguity in the parties' intentions to displace common law notice with the statutory requirements of the Code. The clause is sufficiently clear to rebut the presumption of common law reasonable notice. There is no basis on which to find the termination clause unenforceable as statutorily non-compliant as it does not permit the employer to contract out of any statutory obligations with respect to the payment of benefits during the notice period.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] The appellant, Gerard Michael Egan, was employed by the respondent, Harbour Air Seaplanes LLP (Harbour Air), as Vice President, Maintenance Operations. His employment was terminated without cause and effective immediately on March 30, 2020, due to a downturn in business caused by the Covid-19 pandemic. Relying on the terms of Mr. Egan's employment contract, which purported to incorporate the notice and severance provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 [*Code*], Harbour Air paid him $10,203.93, based on two weeks of salary in lieu of notice and five days of severance pay.

[2] Mr. Egan brought an action for wrongful dismissal and sought entitlement to reasonable notice at common law. Harbour Air applied for judgment by way of a summary trial and sought dismissal of Mr. Egan's action on the basis that the termination clause in his employment contract precluded a claim for common law damages. That application was successful, and the summary trial judge dismissed Mr. Egan's action. Mr. Egan appeals that dismissal.

[3] At issue in this appeal is the enforceability of the termination clause in Mr. Egan's contract of employment, and more broadly, the ability of employers to rebut the common law presumption of reasonable notice through the use of termination clauses that incorporate by reference statutory notice periods.

[4] For the reasons that follow, I would dismiss the appeal, but I do so for reasons that differ from those of the summary trial judge. Although I consider the judge's approach to contractual interpretation to have been flawed, she nonetheless reached the correct conclusion. Applying the practical, common-sense approach to contractual interpretation, the termination clause in Mr. Egan's contract was neither ambiguous nor non-compliant with the *Code* and was therefore sufficient to rebut the presumption of reasonable notice.

Background

[5] Mr. Egan began his employment with Harbour Air on May 1, 2017. His annual salary was $170,000 plus benefits that included group health and dental insurance, long term disability, accident and life insurance, and "hospitality and tourism perks". He was also eligible to receive a bonus under Harbour Air's Executive Bonus share program. Under that program, Mr. Egan received a bonus of $84,180 in 2018 and $84,193 in 2019.

[6] Harbour Air is a federally regulated business governed by the *Code*. The employment contract Mr. Egan entered into with Harbour Air contained the following provision for termination (the Termination 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.

[7] Mr. Egan was notified of his termination in a letter dated March 30, 2020, which stated in part:

> 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 … has been terminated without cause effective today. …
>
> 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. …
>
> 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.
>
> [Emphasis added.]

[8] Section 230(1) of the *Code*, as it was in force at the time Mr. Egan's contract was signed[1], required notice of termination to be given as follows:

> **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
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> > (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.

[9] Section 235(1) of the *Code* provides for severance pay:

> **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
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> > (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.

[1] Section 230(1) was amended by the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27, s. 485, effective February 1, 2024.

[10] Harbour Air purported to comply with these provisions in paying Mr. Egan two weeks salary in lieu of notice and five days of severance pay, as described above.

The decision below

[11] Before the summary trial judge, Mr. Egan argued that the Termination Clause was unenforceable because (1) it did not define with certainty his termination entitlement and was therefore ambiguous; or (2) it allowed Harbour Air to change his employment conditions, by not continuing his benefits in the period of pay in lieu of notice, contrary to s. 231 of the *Code*.

[12] The judge found the Termination Clause was not ambiguous and was "sufficient to rebut the common principles regarding reasonable notice": at para. 23. In doing so, she relied on the principle established in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 [*Machtinger*], that 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, such as a notice period that "referentially incorporates" minimum notice periods set out in employment legislation: at paras. 14–15.

[13] The judge also relied on *U.B.C. v. The Association of Administrative and Professional Staff on Behalf of Bill Wong*, 2006 BCCA 491 [*Wong*], which held (at para. 34) that a termination provision which incorporates the notice provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*B.C. ESA*] effectively becomes part of the contract: at paras. 16–17. She referred to other decisions that "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": *Miller v. Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589, aff'd 2014 BCCA 311 [*Miller*]; *Brown v. Utopia Day Spas and Salons Ltd.*, 2014 BCSC 1400 [*Brown*] and *Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235 [*Bailey*]. She found "no principled reason why such reasoning would not apply to an employment contract governed by the Code": at paras. 18–19.

[14] The summary trial judge rejected Mr. Egan's argument that the Termination Clause failed to rebut the common law presumption because s. 230(1) of the *Code*, which requires an employer to give "at least" two weeks notice of termination in paragraph (a), only set a floor for his termination entitlement rather than a ceiling. She noted that Harbour Air gave notice only under paragraph (b), which does not contain the words "at least", and which she considered to be "extremely clear and unambiguous": at para. 22.

[15] The judge also rejected Mr. Egan's argument that the Termination Clause allowed Harbour Air to change the terms or conditions of his employment contract. Section 231 of the *Code* addresses conditions of employment in the event of a termination:

> **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.

[16] She held that s. 231 of the *Code* applies only where an employee is given working notice under s. 230(1)(a) and had no application in this case, where Mr. Egan had received wages in lieu of notice under s. 230(1)(b): at para. 32. She refused to follow *Sager v. TFI International Inc.*, 2020 ONSC 6608 [*Sager*], which found an employer's failure to continue all benefits as part of a lump sum package offered to an employee upon dismissal to be a change in that employee's terms of employment and inconsistent with s. 231(a) of the *Code*: at paras. 27–30. In her view, s. 231 ensured that "an employer cannot change any employment terms during the period of working notice": at para. 31.

[17] The judge therefore dismissed Mr. Egan's claim on the basis that Harbour Air had paid him "two weeks wages in lieu of notice, consistent with s. 230(1)(b) and s. 235 of the Code, as incorporated into [his] employment contract": at para. 35.

On appeal

[18] Mr. Egan raises three issues in this appeal. He submits the summary trial judge erred by: (1) finding that Harbour Air paid two weeks "wages" pursuant to the Termination Clause and that this complied with its legal obligations on termination; (2) finding the Termination Clause to be unambiguous and failing to assess enforceability at the time the contract was executed; and (3) failing to find s. 230(1)(b) was ambiguous and that this ambiguity rendered the Termination Clause unenforceable.

[19] Each of these errors, he says, rendered the Termination Clause null and void. In the event he is successful in this argument, he asks this Court to assess his damages on the basis of common law reasonable notice.

[20] Harbour Air submits that the Termination Clause, by referencing the requirements of the *Code*, is sufficient to displace the presumption of reasonable notice and limit Mr. Egan's entitlement to the minimum statutory requirements. It also says that the first asserted error was not addressed by the summary trial judge and raises a new issue on appeal, but in any event does not establish a reviewable error because the Termination Clause complies with the *Code*.

[21] I would re-phrase the issues raised by Mr. Egan as asserting error by the summary trial judge in concluding that the Termination Clause is enforceable because: (1) it clearly expresses the parties' intention to displace the presumption of common law reasonable notice by incorporating by reference the notice and severance provisions of the *Code*, and (2) it does not exclude benefits that are required to be paid pursuant to s. 231 of the *Code*.

Standard of review

[22] Contractual interpretation involves questions of mixed fact and law that are reviewed on the standard of palpable and overriding error, absent an extricable error of law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at paras. 50–53; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 28–29, 36. Statutory

interpretation involves questions of law that are reviewed on the standard of correctness: *Zongshen (Canada) Environtech Ltd. v. Bowen Island (Municipality)*, 2017 BCCA 267 at para. 35; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 30.

[23] In this case, the Termination Clause incorporated the provisions of the *Code* providing for notice, pay in lieu of notice and severance into the employment contract. The interpretation of these statutory provisions is an extricable question of law reviewable on a correctness standard.

Principles governing enforceability of termination provisions

[24] There is a presumption at common law that an employer cannot terminate an employee without providing "reasonable notice". That presumption is rebuttable "if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly": *Machtinger* at 998. Any such agreement must comply with the minimum notice periods in applicable employment standards legislation, otherwise the termination clause will be null and void and the presumption of reasonable notice will not be rebutted: *Machtinger* at 1001, 1004.

[25] The rationale for this approach was described by Justice Iacobucci in *Machtinger* as being consistent with the objects of the statute under consideration[2] and its express intention to preserve civil remedies:

> … 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…
>
> 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. This point was

[2] The *Employment Standards Act*, R.S.O. 1980, c. 137.

> recognized by Lysyk J. in *Suleman* … [*Suleman v. British Columbia Research Council* (1989), 38 B.C.L.R. (2d) 208] at p. 214:
>
> > An employer who wishes to guard against being called upon to give any more notice or severance pay than legislation demands can readily draw a contractual clause which, in effect, converts the statutory floor into a ceiling…

[26] The principle of referentially incorporating minimum statutory notice periods into employment contracts was applied by this Court in *Wong*, where the termination clause in issue provided that an employee terminated for reasons other than just cause was entitled to receive "notice or pay in lieu of notice in accordance with the provisions of the [*B.C. ESA*]". The Court agreed with the judge below that a plain reading of this clause was that the notice provisions in the statute were incorporated into the contract:

> [34] … 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.

[27] Whether termination clauses that do no more than referentially incorporate statutory provisions into an employment contract are sufficiently clear to displace the common law presumption of reasonable notice appears to be a matter of some controversy across Canada. The controversy arises, in large part, from the differences between provincial employment standards legislation — more specifically whether the legislation provides for prescriptive periods of notice depending on an employee's length of service (as in British Columbia)[3] or provides

[3] The *B.C. ESA* provides, in s. 63:

> **63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
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> (2) The employer's liability for compensation for length of service increases as follows:
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> > (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
> >
> > (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee

for only minimum periods of notice, using language requiring "at least" specified periods rather than prescriptive ones (as in Ontario and Alberta).[4]

[28] In this province, decisions following *Wong* have concluded that termination clauses providing for notice "in accordance with" or "as required under" the *B.C. ESA* are sufficiently clear to rebut the presumption and are therefore enforceable: see *Miller*, *Brown* and *Bailey*. In *Miller*, which was affirmed on appeal, the trial judge interpreted the termination clause in issue to incorporate the minimum notice provided for in the *B.C. ESA* despite the absence of express contractual language limiting the employee's entitlement to the statutory minimum: at paras. 41–43. The issue of express limiting language was not addressed in either *Brown* or *Bailey*.

[29] Some decisions in other provinces have taken a different approach in relation to legislation that uses "at least" language, by requiring that a termination clause clearly state the parties' intention to limit an employee's notice entitlement to the minimum statutory period — i.e., by using words that convert "the statutory floor to a ceiling" as noted in the passage of *Suleman* endorsed in *Machtinger*: see, for example, *Holm v. AGAT Laboratories Ltd*, 2018 ABCA 23 [*Holm*]; *Movati Athletic (Group) Inc. v. Bergeron*, 2018 ONSC 7258 [*Movati*]; *Bellini v. Ausenco Engineering Alberta Inc*., 2016 NSSC 237 [*Bellini*]. However, some courts have not required such precision: see, for example, *Clarke v. Insight Components (Canada) Inc.*,

> (a) is given written notice of termination as follows:
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> (i) one week's notice after 3 consecutive months of employment;
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> (ii) 2 weeks' notice after 12 consecutive months of employment;
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> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
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> (b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or
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> (c) terminates the employment, retires from employment, or is dismissed for just cause.

[4] The *Employment Standards Act, 2000*, S.O. 2000, c. 41, provides in s. 57 that notice of termination shall be given "at least" a specified number of weeks prior to termination depending on the length of employment. A similarly worded provision is contained in s. 56 of the *Employment Standards Code*, R.S.A. 2000, c. E-9.

2008 ONCA 837 [*Clarke*]; *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508 [*Stevens*]; *Cook v. Hatch Ltd.*, 2017 ONSC 47 [*Cook*]; and *Nemeth v. Hatch Ltd.*, 2018 ONCA 7 [*Nemeth*].

[30] This difference in approach may not be surprising given differences in the particular termination clauses in issue in each case. The parties in this appeal did not canvas the jurisprudence comprehensively but rather advocated for opposite approaches to be applied in this case. However, based on a brief review of the cases cited above, there is some division of opinion as to the enforceability of the simpler termination clauses that do no more than referentially incorporate statutory, non-prescriptive notice provisions. These different opinions were canvassed to some extent in both *Stevens* and *Bellini*, each coming to different conclusions. I will come back to some of these decisions in the analysis that follows.

Ambiguity

[31] There is no question that parties may displace the presumption of reasonable notice through a provision in a contract of employment that clearly specifies “some other period of notice”. There is also no question that the intention of the parties to do so must be expressed clearly and unambiguously: *Machtinger* at 998; *Nemeth* at para. 8. The more precise question in this appeal is whether a termination clause that referentially incorporates statutory notice provisions but does not expressly limit an entitlement to the *minimum* statutory notice (i.e., does not convert the statutory floor to a ceiling) clearly specifies “some other period of notice”.

[32] Mr. Egan submits, as he did before the summary trial judge, that s. 230(1) of the *Code* does not clearly fix his entitlement to the minimum two weeks’ notice due to the words “at least” in s. 230(1)(a). He submits that the different wording in the notice provisions of the *Code*, as compared to the *B.C. ESA*, provides a principled reason why the British Columbia authorities such as *Wong*, *Miller, Brown* and *Bailey* should not be applied to his employment contract, contrary to the view of the summary trial judge. Because the *B.C. ESA* provides for definite periods of notice depending on an employee’s length of service, he says there was no need in those

cases for a contractual term expressly limiting the employee's entitlement to the minimum statutory standard.

[33] Mr. Egan relies on cases in which the underlying legislation used "at least" language: *Holm* and *Movati,* decisions from Alberta and Ontario respectively, and *McLennan v. Apollo Forest Products Ltd*., 1993 CanLII 2093 (B.C.S.C.), a decision based on a previous version of the *B.C. ESA*. In each of these cases, termination clauses that did not clearly limit an employee's notice entitlement to the minimum statutory period were found to be unenforceable in that they did not clearly displace the common law presumption of reasonable notice.

[34] The summary trial judge briefly dispensed with Mr. Egan's argument. After concluding that the reasoning in the British Columbia cases applied, she observed that s. 230(1) of the *Code* requires the employee to give *either* at least two weeks' working notice (s. 230(1)(a)) *or* two weeks' wages in lieu of working notice (s. 230(1)(b)). The extent of her reasoning was as follows:

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

[35] In my view, the judge's reasoning demonstrates a flawed analysis in contractual interpretation. I agree with Mr. Egan's submission that she erred in interpreting the Termination Clause at the time of termination, rather than execution, and also erred in interpreting s. 230(1)(b) of the *Code* in isolation from s. 230(1)(a), as all of s. 230(1) was incorporated as a term of the employment contract.

[36] The practical, common-sense approach to contractual interpretation required the judge to read the employment contract as a whole, consistent with the surrounding circumstances, or factual matrix, known to the parties at the time they entered into the contract: *Sattva* at para. 47. Instead of interpreting the language of the Termination Clause in that context, the judge focused on Harbour Air's *ex post*

conduct upon Mr. Egan's termination (paying two weeks' wages in lieu of notice, rather than giving working notice). It is of no moment that Harbour Air did not rely on s. 230(1)(a), as incorporated into the employment contract. The court must determine enforceability of a termination provision as at the time the agreement was executed and non-reliance on an allegedly ambiguous provision is irrelevant: see *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 at para. 11.

[37] A similar error in principle in contractual interpretation was identified by Justice Laskin in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 [*Wood*], where the issue was whether a termination clause complied with the requirement in Ontario's employment standards legislation for employers to continue contributions to an employee's benefit plan during the notice period:

> [43] … The motion judge made an "extricable error of law" in holding that Deeley's actual contributions to Wood's benefit plans were material to the interpretation of the termination clause. Its contributions on termination should have no bearing on whether the termination clause itself contravenes the *ESA*. The wording of the clause alone must be looked at to decide whether it contravenes or complies with the *ESA*.
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> [44] That the enforceability of the termination clause depends only on the wording of the clause itself, and not on what the employer may have done on termination, is implicit in the judgment of Iacobucci J. in *Machtinger* …
>
> [Emphasis added.]

[38] The summary trial judge's focus on Harbour Air's choice on termination led her into further error by interpreting s. 230(1)(b) of the *Code* in isolation. While acknowledging that s. 230(1)(a) contains "allegedly ambiguous language", she failed to appreciate that the Termination Clause entitled Harbour Air to give Mr. Egan notice in accordance with *either* s. 230(1)(a) *or* (b), more particularly either (a) working notice of at least two weeks, or (b) payment of two weeks' wages in lieu. Thus, if the language of s. 230(1)(a) created any entitlement uncertainty, it, too, was incorporated into the Termination Clause, irrespective of what Harbour Air ultimately chose to do on termination.

[39] Harbour Air concedes that the judge did not do a proper contractual analysis but submits the British Columbia cases illustrate that a reference to the requirements

of the employment standards legislation is sufficient to evidence the parties' intention to contract out of the presumption of reasonable notice and to limit termination entitlements to the minimum statutory requirements. It says no special limiting words such as "only" or "limited to" or "minimum" are required to give effect to the intention to limit notice to the statutory minimum requirements. So long as the parties' intentions are discernible, even imperfect language that does not create ambiguity regarding the parties' intentions is not material.

[40] In my opinion, the summary trial judge's error in contractual analysis makes no difference to the outcome, as a proper analysis of the Termination Clause leads to the same result. I interpret the Termination Clause to clearly specify a period of notice other than common law notice by incorporating the notice and severance provisions of the *Code*.

[41] Respectfully, I do not agree with Mr. Egan that the "at least" language in s. 230(1)(a) of the *Code* renders the Termination Clause ambiguous. Nor do I agree that the word "appropriate" in the Termination Clause imputes a term of reasonableness into the assessment of the notice. The words "appropriate notice and severance" in the context of this Termination Clause clearly refer to the statutory requirements for notice and severance in the *Code*.

[42] It bears mentioning that the *Code* provision in issue here differs from both the *B.C. ESA* and the legislation in other provinces, as s. 230(1) uses the "at least" language only in respect of working notice and provides a prescriptive two weeks for wages in lieu of notice. In Alberta and Ontario, *all* notice requirements are expressed as minimum standards; whereas in British Columbia *all* notice periods are prescribed. The *Code*, as it existed at all material times for the purposes of this appeal, provided, in effect, a hybrid approach.

[43] What does this mean? Mr. Egan suggests that the "at least" language in s. 230(1)(a) should also apply to s. 230(b) given the word "or" between the two paragraphs. He refers to recent amendments to s. 230(1), which use language that no longer draws this distinction and instead requires either working notice or wages

in lieu of notice, or any combination of the two, to be "at least" the applicable time periods set out in s. 230(1.1) (which increase from two weeks to eight weeks depending on the employee's length of employment at termination): see *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27, s. 485. He submits this amendment can be interpreted as "polishing" in that Parliament's intent was not to insert new language into the legislation.

[44] Respectfully, I do not read s. 230(1)(b), as it existed pre-amendment, as incorporating the "at least" language in s. 230(1)(a). For such language to apply to both paragraphs, the words "at least" would preface both (a) and (b). Moreover, I do not find the amendments helpful in the interpretation exercise. While it may be permissible to use a subsequent amendment as an aid in interpreting the former provision, I am not satisfied that the amendment here provides a sufficiently clear indication of legislative intent to do so: see *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101 at para. 64.

[45] At the time Mr. Egan entered into the employment contract with Harbour Air, he knew that his entitlements on termination were to be governed by the *Code*, which provided a minimum two weeks' working notice or two weeks' wages in lieu of notice. There may be good reason to provide for some flexibility in providing working notice since this involves the continuation of the employment relationship in a variety of circumstances. While the "at least" language in s. 230(1)(a) does not foreclose an employee receiving more than the minimum working notice mandated by the *Code*, I cannot see that this renders this Termination Clause ambiguous. Under this clause, whether the employee receives two weeks working notice or something more, or receives two weeks wages in lieu of the notice, his entitlements are clearly intended to be governed by the notice and severance provisions of the *Code*. Section 231, which on its face applies where notice is given under s. 230(1)(a) or (b), protects the employee's rate of wages and conditions of employment during the notice period. On this latter point, I find some merit to Mr. Egan's submission that the summary trial judge's interpretation of s. 231, which restricted its application to working notice under s. 230(1)(a), was incorrect. Such an interpretation appears to conflict with the

plain wording of s. 231. However, for the purpose of this analysis, it is not necessary to resolve this issue.

[46] I do not read *Machtinger* as establishing only one way to rebut the presumption of reasonable notice by referential incorporation of statutory notice requirements. Employers may draw contractual clauses that effectively convert "the statutory floor into a ceiling" but they may also draw clauses that specify some other period of notice by simply incorporating the requirements of the applicable employment standards legislation, which may provide for something more than the minimum standard. In either circumstance, the parties' intentions must be assessed by applying the practical, common-sense approach to contractual interpretation.

[47] Mr. Egan's approach is inconsistent with this. Rather than focusing on reading the contract as a whole in the context of the surrounding circumstances at the time of execution, it parses the words "at least" in s. 230(1)(a) in isolation, suggesting that they alone create an ambiguity as to his entitlement. Proper contractual interpretation that seeks to determine the true intentions of the parties is not accomplished by disaggregating the words in a termination clause looking for ambiguity as a means to find the clause unenforceable: see *Asgari Sereshk v. Peter Kiewet Sons ULC*, 2021 BCSC 2570 at para. 72, citing *Cook* at para. 25; see also *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 at para. 63.

[48] That *Machtinger* confirms that employers can make contracts that referentially incorporate minimum statutory notice periods and also take into account later changes to the statute suggests that such incorporation of statutory notice provisions does not necessarily rely on the specific wording of the applicable statute. Other cases go further by confirming that a general reference in a termination clause to the applicable employment standards legislation is sufficient to displace the common law presumption.

[49] I do not purport to resolve the conflicting authorities in other provinces. To do so would require a comprehensive review in relation to employment legislation that

is fully non-prescriptive and such arguments were not provided to us. Nor is the legislation in issue here fully non-prescriptive.

[50] I will say, however, that I do not find the Alberta and Ontario decisions relied on by Mr. Egan to be persuasive with respect to the precise question to be answered on this appeal. Neither referred to the jurisprudence in British Columbia and both turned on a determination by an appellate court that no palpable and overriding error had been made in the interpretation of the termination clause at issue, an exercise which is necessarily context specific and fact-dependent.

[51] In *Holm*, the termination clause provided:

> In the event we wish to terminate your employment without just cause, we agree that we will give you notice of the termination of your employment, or at our absolute discretion, we will pay you, in lieu of such notice, a severance payment equal to the wages only that you would have received during the applicable notice period. This will be in accordance with the provincial legislation for the province of employment.

[52] The Alberta Court of Appeal framed the issue as "whether it was palpably and overridingly in error" for the chambers judge to have read the language of the contract as recognizing the employee's entitlement to the minimum rights under the applicable legislation but not clearly excluding the possibility of an additional remedy as might exist at common law: at para. 18.

[53] The Court agreed that the wording of this clause did not clearly restrict the applicable notice period to the statutory minimum and did not bar the employee from pursuing payment in lieu of reasonable notice at common law:

> [29] … This contractual wording establishes a floor—section 57 of the [Alberta employment standards legislation] requires pay in lieu of notice to be "at least" equal to the wages the employee would have earned during the applicable notice period. Put another way, in order to be *Act*-compliant in this case, the amount of compensation paid to the respondent in lieu of notice must be at least one week, not less than this amount. The contractual requirement that notice or payment in lieu of notice be "in accordance with the provincial legislation for the province of employment" does not, however, create a ceiling that legally limits the respondent's notice entitlement only to the statutory minimum notice requirements.
>
> [Emphasis added.]

[54] Noting that the standard of review was "ultimately determinative" of the appeal (at para. 16), the Court applied deference to the chambers judge's interpretation that the wording of the termination clause was not clear:

> [35] At its essence, an enforceable employment contract must contain clear and unequivocal language to extinguish, or limit, an employee's common law rights. Where a chambers judge concludes that an employment contract does not meet this threshold, as here, and that as a result an employee remains free to pursue common law remedies, that does not engage an area of determination for which no deference would apply.
>
> [36] The chambers judge found that "at best, the wording is not clear". That conclusion is defensible on the facts and the law in this jurisdiction.
>
> [Emphasis added.]

[55] In *Movati*, the termination clause permitted the employer to terminate the employment without cause by providing the employee:

> … with notice or pay in lieu of notice, and severance, if applicable, pursuant to the *Employment Standards Act,* 2000 and subject to the continuation of your group benefits coverage, if applicable, for the minimum period required by the *Employment Standards Act*, 2000 as amended from time to time.

[56] On appeal to the Divisional Court, the issue of whether this wording displaced the common law right was also framed as subject to the deferential standard of palpable and overriding error: see paras. 20–21. Despite the parties' agreement that the termination clause met the minimum requirements in the Ontario employment standards legislation, the motion judge found it was not sufficiently clear to rebut the presumption of common law reasonable notice. The Divisional Court framed the question as whether the termination clause clearly specified "some period of notice, which meets or exceeds the minimum requirements set out in the legislation so as to rebut the presumption": at para. 35.

[57] In concluding there was no palpable and overriding error in the motion judge's decision that the parties' intention to rebut the presumption was not "readily gleaned" from the language of the termination clause, the Divisional Court considered the wording of the relevant legislation (which required, in s. 57, notice to be given "at least two weeks before the termination") and the termination clause, both on its own and in the context of the employment agreement as a whole. It found that the words

"pursuant to the *Employment Standards Act*" could be interpreted to mean simply that the notice period in the termination clause complies with the minimum requirements in the legislation. It found ambiguity in that the words "for the minimum period required by the *Employment Standards Act*" could refer either to both the notice provision and group benefits coverage, or only to the group benefits coverage. It also compared the termination clause with the notice provision in a separate probation clause which provided for payment on termination "only" for the "minimum notice necessary". The Court found that the presence of these words reflected "a difference in the intention of the drafter".

[58] It is apparent from the Court's reasoning that significant emphasis was placed on the specific language of the termination clause at issue, as well as the broader context within which that clause existed. The Court ultimately concluded:

> [42] Based on the wording of the termination clause as seen in the context of the Agreement as a whole, the motion judge made no palpable and overriding error in concluding that the termination clause was not sufficiently clear and unequivocal to rebut the presumption that the reasonable notice requirements at common law apply…

[59] In *Movati*, Thorburn J. (as she then was) succinctly set out the "steps to be followed" in determining whether a contractual provision is sufficient to displace the presumptive common law right to reasonable notice, relying primarily on *Machtinger*: at para. 24. I agree with the principles set out for each "step", and would place some emphasis on the following statement as being consistent with my interpretation of *Machtinger*:

> 4. The presumption that an employee is entitled to reasonable notice at common law may be rebutted if the contract specifies some other period of notice as long as that other notice period meets or exceeds the minimum requirements in the [applicable legislation]: *Machtinger supra,* at p. 998…
>
> [Emphasis added.]

[60] While in many cases employers do seek to limit an employee's entitlement on termination to the minimum notice periods in employment standards legislation, they may also seek to limit such entitlement to statutory — as opposed to common law — notice periods that exceed the minimum standards. Either way, they must do so with

clear and unambiguous contractual language. 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. In such circumstances it may properly be said that the parties have made a contract of employment which clearly specifies some other period of notice, thereby displacing the presumption as per *Machtinger*.

[61] As noted above, there are Ontario decisions that have found termination clauses that do not expressly limit notice entitlement to statutory minimums to be enforceable: see, for example, *Clarke*; *Nemeth*; *Cook*; and *Stevens*. The controversy about this issue was discussed at some length in *Stevens* at paras. 30–50. In that case, Justice Leach rejected the argument that notice provisions in termination clauses will not displace the common law presumption if they ensure only minimum notice in accordance with legislative requirements, without also converting the statutory floor to a ceiling. The opposite conclusion was drawn after a similar discussion by the Supreme Court of Nova Scotia in *Bellini.* No appellate authority comprehensively addressing this issue has been brought to our attention.

[62] In any event, no doubt many of these cases turn on the language used in the particular termination clause at issue. These reasons should not be interpreted as settling this controversy in relation to employment standards legislation that provides only for minimum, non-prescriptive periods of notice.

[63] In this case, the Termination Clause requires Harbour Air to give Mr. Egan "appropriate notice and severance in accordance with the requirements of the *Canada Labour Code*". This language clearly incorporates the notice requirements in s. 230(1) and the severance requirements in s. 235(1). In Mr. Egan's circumstances, those provisions provide "some other period of notice": either a minimum of two

weeks' working notice or a prescriptive two weeks' wages in lieu of notice, as well as five days wages in severance pay. In my opinion, there is no ambiguity in the parties' intentions to displace common law notice with the statutory requirements of the *Code*. I therefore conclude that the Termination Clause is sufficiently clear to rebut the presumption of common law reasonable notice.

Non-compliance with the *Code*

[64] Mr. Egan further submits that the Termination Clause is unenforceable because it permits Harbour Air to change the terms of his employment by paying him only his salary during the notice period (and not his bonus and other benefits) and therefore does not comply with the *Code*.

[65] Termination clauses may be unenforceable if they exclude benefits an employer is required to pay during the notice period under the applicable employment standards legislation. This is what occurred in *Wood*, where the termination clause excluded the employer's statutory obligation to contribute to the employee's benefit plan during the notice period: see paras. 16, 21, 37–38.

[66] The issue raised by Mr. Egan involves his entitlement to a bonus under Harbour Air's Executive Bonus share program as well as other benefits, all of which were part of his remuneration. Before the summary trial judge, he contended that Harbour Air was required under the *Code* to pay him these benefits in addition to his base salary, in lieu of notice. By not doing so, he said the Termination Clause permitted Harbour Air to change the terms of his employment, contrary to s. 231 of the *Code*, which prohibits an employer who has given notice pursuant to s. 230(1) from reducing the employee's rate of wages or altering any other term or condition of employment. This, he submitted, rendered the Termination Clause unenforceable.

[67] The summary trial judge rejected this argument on the basis that s. 231 applies only to working notice given under s. 230(1)(a) and not to pay in lieu of notice that Harbour Air gave under s. 230(1)(b), an interpretation that appears to conflict with the wording of s. 231, as noted above.

[68] Mr. Egan's argument on appeal is broader than that put forward below. In addition to his reliance on s. 231 of the *Code*, he contends that Harbour Air failed to pay him two weeks' "wages", as defined in s. 166 of the *Code*, in lieu of notice. Because "wages" are defined in s. 166 as including "every form of remuneration for work performed" (other than tips or other gratuities), Harbour Air was obligated to include his bonus entitlement and other benefits, which formed part of his remuneration, into the wages paid to him in lieu of notice pursuant to s. 230(1)(b). He also contends that s. 247, which requires employers to pay wages "or other amounts to which the employee is entitled" within 30 days from the time when the entitlement arose, supports this argument.

[69] Apart from the judge's possible error in interpreting the applicability of s. 231, her analysis here suffers from the same flaw as her analysis of the ambiguity question. Rather than interpreting the Termination Clause by looking only to its language in the context of the factual matrix at the time the contract was made, the judge again looked at the conduct of the employer on termination. However, it is also my view that Mr. Egan's arguments on this issue, as expanded on appeal, suffer from the same analytical error.

[70] As discussed above, the Termination Clause simply incorporates the notice and severance provisions of the *Code*, effectively guaranteeing Mr. Egan with all that is statutorily required in relation to those provisions. It is silent about Harbour Air's obligations in respect of bonuses and other benefits. This silence cannot be construed as permitting Harbour Air to contract out of any statutory obligations. To the contrary, the Termination Clause obliges Harbour Air to comply with the requirements of the *Code* in this regard. This is similar to the termination clause considered in *Roden v. Toronto Humane Society* (2005), 259 D.L.R. (4th) 89 (Ont. C.A.) [*Roden*], and I would adopt the reasoning of Gillese J.A. at para. 62:

> … The without cause provisions do not attempt to provide something less than the legislated minimum standards; rather, they expressly require the Society to comply with those standards. As I have said, in my view, the provisions do not purport to limit the Society's obligations to payment of such amounts. That is, they do not attempt to contract out of the requirement to make benefit plan contributions. Because the contracts are silent about the

> Society's obligations in respect of benefit plan contributions, the Society was obliged to – and did – comply with the requirements of the [*The Employment Standards Act*, 2000, S.O. 2000, c. 41] in that regard.

[71] This can be distinguished from *Sager*, a case heavily relied on by Mr. Egan. *Sager* involved the application of s. 231 of the *Code* to a termination clause that was found to be "not simply silent on the issue of benefits and bonus". The employee had received payment of three months' base salary, excluding benefits, on termination without cause. The termination clause provided that the payment "shall be inclusive of any and all requirements" owed to the employee under the *Code*. The judge distinguished *Roden* on the basis that the clause attempted to contract out of the requirement to maintain the conditions of employment during the notice period. He reasoned as follows:

> [19] The termination clause of Mr. Sager's contract intends to limit TFI's obligation to a single lump sum payment. The clause does not say that it is intended to be inclusive of the statutory requirements for severance and termination pay only. It says the lump sum payment is inclusive of all requirements under the [*Code*]. If the lump sum payment is treated as inclusive of *all requirements* under the [*Code*], it excludes any payment on termination for Mr. Sager's pension, car allowance or bonus, which were all the terms and conditions of Mr. Sager's employment. It would also exclude the continuation of Mr. Sager's benefits during the notice period. In my view, the meaning of the agreement it clear: Mr. Sager was entitled to a payment equal to three months of his base salary and nothing more during the notice period. This amounts to a change in Mr. Sager's terms of employment during the notice period, which is inconsistent with s. 231(a) of the [*Code*].
>
> [Emphasis in original.]

[72] Regardless of whether s. 231 of the *Code* applies to both forms of notice under s. 230(1) or to only working notice, *Sager* does not assist Mr. Egan in light of the differences between the Termination Clause here, which is silent on the issue of bonuses and benefits, and the specific terms of the termination clause as interpreted by the court in that case, which was not. A similar result to *Sager* occurred in *Wood,* where the termination clause was "not merely silent" about the employer's obligation to contribute to the employee's benefit plan during the notice period, but rather used language which expressly excluded that obligation and therefore did not comply with the minimum statutory requirements: see paras. 37–38, 56.

[73] Accordingly, there is no basis on which to find the Termination Clause in Mr. Egan's contract unenforceable as being non-compliant with the *Code*.

[74] In my view, these issues really go to the question of whether Harbour Air discharged its obligations under the Termination Clause by paying Mr. Egan amounts in lieu of notice and severance that did not include his bonus and other benefits. However, Mr. Egan has not argued in the alternative that if the Termination Clause is enforceable, Harbour Air failed to comply with it. Nor did he raise this issue in his pleadings or at the summary trial.

[75] At the summary trial, Mr. Egan did not dispute Harbour Air's calculation of his salary for the two-week notice period and the five days of severance pay. While he argued that he ought to have been paid his bonus and other benefits in accordance with s. 231 of the *Code*, he did so in support of his argument that the Termination Clause was unenforceable. He did not focus on the definition of "wages" in s. 166 or on the payment requirements in s. 247, nor did he make an alternative argument.

[76] This argument is not a new issue on appeal, as suggested by Harbour Air. It is simply not an issue before this Court.

[77] Indeed, Mr. Egan's only argument before us in relation to Harbour Air's compliance with the contract was predicated on whether Harbour Air "concedes" that the Termination Clause entitled him to all his remuneration, benefits and bonus during a two-week notice period. On that basis, he submits that Harbour Air is not entitled to rely on the Termination Clause to limit his damages for wrongful dismissal, either because too much time has passed (four years) or because of the seriousness of the breach.

[78] No authority was cited to support the first point and those cited on the latter point deal with fundamental or very serious breaches of employment contracts in very different circumstances: *Donaghy v. Seasons Retirement Communities*, 2021 ONSC 6197 and *Humphrey v. Mene Inc.*, 2021 ONSC 2539, varied 2022 ONCA 531. In this regard, I agree with the observations of Griffin J. (as she

then was) in *Bailey* (at paras. 153–155 and 162). An employer's failure to comply with a contractual notice requirement does not render a termination clause unenforceable, it constitutes a breach of contract. What flows from that is not a finding that the contract is void but rather a measure of damages for the breach.

[79] Most importantly, this entire submission is predicated upon a concession of non-compliance, and nowhere seeks resolution on this point.

[80] I would not therefore accede to this ground of appeal.

Conclusion

[81] For all of these reasons, I would dismiss the appeal.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"