

What's New in HR Law

COURT FINDS PROBATIONARY EMPLOYEE IS ENTITLED TO REASONABLE NOTICE OF TERMINATION

Ly v. British Columbia (Interior Health Authority), 2017 BCSC 42

Facts of the Case

Mr. Phuc Ly was hired by the Interior Health Authority (the "IHA") in British Columbia, but the employment relationship was short-lived. The IHA terminated his employment approximately two months after he started working. The IHA did not provide any notice of termination as a result of the language in Mr. Ly's employment offer, which stated that "[e]mployees are required to serve an initial probationary period of six (6) months for new positions." Mr. Ly sued for wrongful dismissal damages and claimed that he was entitled to reasonable notice of termination despite his status as a probationary employee.

Effect of the Probationary Period

In determining whether Mr. Ly was entitled to damages, the Court recognized the well-accepted principle that "in the absence of just cause, there is a presumption in all contracts of employment that reasonable notice will be required in order to lawfully terminate the contract."

The Court found, however, that a probationary period was expressly established by Mr. Ly's employment contract. The Court considered the effect of the probationary period and explained as follows:

[50] Absent any express language to the contrary, a probationary term of employment is best understood as part of a contract of employment where: a) the employee is held to the requirement that for a specific period of time that employee must demonstrate certain suitability requirements set by the employer; and b) the employee may be dismissed without reasonable notice (subject to statutory minimums) if he or she does not meet the suitability requirements. If the employee meets the suitability requirements then, after that period of probationary assessment, the employee's contract continues as a contract of employment wherein the requirements of just cause and reasonable notice apply.

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The Court also explained that an employer must carry out a good faith assessment of suitability in order to establish that a probationary employee was not suitable.

Assessment of Suitability

Given that the IHA terminated Mr. Ly's employment during his probationary period, the Court analyzed whether the IHA conducted a good faith assessment. The Court identified the following considerations to guide its analysis:

- 1) whether the probationary employee was made aware of the basis for the employer's assessment of suitability before, or at the commencement of, employment;
- 2) whether the employer acted fairly and with reasonable diligence in assessing suitability;
- 3) whether the employee was given a reasonable opportunity to demonstrate his suitability for the position; and
- 4) whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but also character, judgment, compatibility, and reliability.

After considering the evidence, the Court found that Mr. Ly had made genuine and concerted attempts to better understand the basis for the IHA's assessment of his suitability, but the IHA did not respond to his efforts with clarity.

As a result, the Court determined that the IHA failed to inform Mr. Ly about the basis for the assessment. The Court also found that the IHA did not provide Mr. Ly with a fair opportunity to demonstrate his suitability. Accordingly, the Court concluded that the IHA had wrongfully dismissed Mr. Ly by failing to provide reasonable notice of termination.

Damages for Failure to Provide Reasonable Notice

When determining the amount of damages to award, the Court explained that pay in lieu of reasonable notice is the logical measure for damages when a probationary employee is wrongfully dismissed.

The Court quantified the amount of reasonable notice by considering Mr. Ly's age, experience, training, and qualifications. The Court also considered the character of his employment, the availability of his employment, and the length of his employment, including the probationary term of his employment. Based on these factors, the Court found that Mr. Ly was entitled to three months' pay in lieu of reasonable notice.

Takeaways for Employers

Probationary periods can limit an employer's obligations and exposure to risk during the initial months of employment. However, probationary periods do not provide an employer with *carte blanche*. In order to rely on an employee's probationary status as a basis for terminating without notice, the employer must be able to establish the following:

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- the employer conducted a good faith assessment of the employee's suitability; and
- as a result of that assessment, the employer reasonably determined that the employee was not suitable.

In light of these two pre-conditions, employers should consider whether it is in their best interest to provide employees with an "official" probationary period. For example, a written employment contract can have the effect of establishing an "unofficial" probationary period in Ontario by limiting an employee's entitlements to the minimum employment standards. The "unofficial" probationary period results from the lack of a statutory obligation in Ontario to provide notice of termination to an employee who has been employed for less than three months. More importantly, however, there is no statutory obligation to conduct a good faith assessment of suitability. In other words, official probationary periods can be beneficial, but there are alternatives that an employer may wish to consider.

For further information, please contact Anthony Panacci at 416-408-5568 or your regular lawyer at the firm.