May 2017

BRIEFING NOTE

We're just not that into you - how to terminate a probationary employee - *Ly v. Interior Health Authority*

The concept of "probation" in an employment contract is often taken for granted. The mistaken assumption is that, during the probation period, an employee can be fired at will, without any liability for reasonable notice or payment in lieu. As demonstrated in the recent decision in *Ly v. British Columbia (Interior Health Authority),* 2017 BCSC 42, even in the presence of a valid and enforceable probation clause, an employer can be found liable for wrongful termination, and reasonable notice damages arising therefrom, depending on the basis for the dismissal.

In *Ly*, the Court considered the effect of a 6-month term of probation in a contract of employment, and whether the plaintiff was entitled to any damages arising from his termination during the probation period.

The Plaintiff was hired into a high-level managerial position and his employment contract contained a 6 month probation clause. A month and a half into his employment, he was summarily dismissed, primarily due to concerns expressed by various colleagues who had a long history with the employer and were not happy with his management style. Importantly, despite the various performance and interpersonal concerns, the Court found as a fact that the Plaintiff had made genuine and concerted efforts to learn about the position and had sought feedback from his employer on how to improve.

Upon termination, the Plaintiff sought reasonable notice damages, and argued, among other things, that the probation clause was invalid on account of an apparent violation of the minimum standards in the *Employment Standards Act* ("*ESA*"), or unenforceable due to ambiguity regarding the term "probation". Alternatively, he argued that the employer had failed in its duty to evaluate the Plaintiff's suitability during the probationary period, which entitled the Plaintiff to damages for wrongful dismissal.

The main points of the case are as follows:

1) A contract of employment must expressly provide for a probationary period.

   Since it takes away an employee's usual rights, a probation period must be expressly agreed to by the employee. The Courts will not imply a "probation period" into a contract. Also, an employer must clearly indicate, in the contract, what will happen if the employment relationship ends before the probation period terminates.

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2) In the absence of a clear definition of what constitutes "probation" for the purposes of the contract, the Court will imply a definition.

   The definition accepted by the Court in *Ly* is that "probation is a period when the employee may prove that he is suitable for regular employment as a permanent employee and will meet the standards set by the employer." If an employer wishes to define probation differently, then this must be in writing within the contract.

3) During the probation period, an employer has the implied contractual right to dismiss a probationary employee without notice and without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position.

   An employer cannot terminate an employee for any reason during the probation period. In order to avoid liability for wrongful dismissal, an employer must demonstrate that it engaged in a bona fide analysis of the suitability of that employee for the permanent position. In doing so, an employer must demonstrate that:

   - The probationary employee is made aware before the commencement of employment of the standards or expectations upon which he or she would be assessed;
   - The employer engaged in a good faith assessment of the employee's suitability by reference to that criteria; and
   - The decision to dismiss the employee was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but character, judgment, compatibility, reliability, and future with the company.

   Although in theory the test for suitability is meant to be a much lower threshold than the "just cause" requirement that applies subsequent to the probation period, what the *Ly* decision demonstrates is that, in practice, the suitability assessment is fairly onerous. Even where the evidence demonstrates that an employee is not a "good fit", a subjective assessment by co-workers is not sufficient for an employer to discharge its obligations to evaluate a probationary employee's suitability.

4) A probation clause that is longer than 3 months will be valid, so long as it does not remove an employee's entitlement to notice or severance under the *ESA*.

   A party cannot contract out or exempt themselves from the application of the *ESA*. At a minimum, all employment contracts must comply with the minimum standards of the *ESA*. Any term that could, or would at some point, violate those minimum standards is void and cannot be relied upon by an employer.

   Section 63 of the *ESA* provides for liability to provide notice, or severance, of 1 week following 3 months of continued employment, and the notice period increases thereafter to a maximum of 8 weeks. Although the 3 month "notice free" period may seem to constitute a probation period, the *ESA* does not expressly define that period as "probation". In fact, the *ESA* does not expressly reference "probation" at all.

   As such, the Court in *Ly* confirmed that a probation clause can be longer than 3 months, without running afoul of the *ESA*. However, the probation clause

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cannot remove the employee's entitlements under the *ESA*. For example, if the probation clause is longer than 3 months and states that an employee is not entitled to any notice or severance upon termination during that probation period, the clause will not be valid, as it will violate the minimum standards in the *ESA*.

Implications from the Ly decision:

If an employer desires a probation period, the employment contract must expressly reference probation. To be valid, a probation clause of longer than 3 months cannot oust the minimum standards in the *ESA*.

Employer A	Employer B	Employer C
No Probation Clause in the contract	Probation clause < 3 months	Probation clause > 3 months
No Probation Period. If no termination clause, employer can only terminate for just cause or upon providing reasonable notice.	During Probation period, employer can dismiss employee due to unsuitability. Under ESA, no severance or notice is required. Probation clause can provide for no notice or severance upon termination and still be valid.	During probation period, employer can dismiss employee due to unsuitability. Under ESA, minimum of 1 week of severance or notice after 3 months. To be valid, probation clause must provide for the minimum standards in the Act.

In addition, as confirmed in *Ly,* the "suitability" test applies when considering the dismissal of an employee during the probation period. In practice, one queries what benefits there is to an employer of having a "probation term" at all.

Generally speaking, a more effective and practical means of minimizing the employer's exposure for liability for wrongful dismissal, and to avoid the uncertainty associated with the "suitability" analysis, is to have a properly drafted termination clause, which adopts or complies with the minimum standards in the *ESA*, and which sets out the notice or severance that will be provided upon termination. In doing so, the employer can choose to cap its liability for notice of termination by reference to the minimum standards in the *ESA*, which apply in any event to any length of term, including a "probation" term.

Although an employer will lose the benefit of the lower standard for summary dismissal (which is "suitability" during the probation period as compared to "just cause"), capping the liability of an employer for notice or severance will have the desirable result of providing certainty as to the employer's obligations upon termination.

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