Alberta Employers – Time To Update Your Employment Contracts!

The Alberta Court of Justice in *Sprong v Chinook Lifecare Association*, 2024 ABCJ 163 (Chinook) recently reaffirmed a well-established, but often not a well understood principle, that probation clauses in employment contracts create additional obligations on termination of employment. Some employers mistakenly believe that a probation clause allows them to terminate a probationary employee during the probation period for any reason and without any obligation, but that is not the case in Alberta (and some other provinces like British Columbia).

Good Faith Assessment of Suitability

The Court in *Chinook* confirmed that a probationary employee can only be terminated during the probation period for "cause." Cause in the context of a probationary employee requires the employer to establish that they had "proper justification" for the termination.

The Alberta Court of Appeal[1] previously confirmed that "proper justification" for a probationary termination means:

1. The probationary employee was given a reasonable opportunity to demonstrate their suitability for the job;
2. The employer's assessment is that the employee was not suitable for the job; and
3. The decision to terminate 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, comparability, reliability, and future with the employer.

Where an employer terminates a probationary employee without undertaking the above assessment, the employee can commence a wrongful termination claim and seek damages for breach of the employment contract.

Termination Provision Instead of Probation Clause

Including a probation clause in the employment contract imposes on the employer additional obligations which are not required under the Alberta *Employment Standards Code* (the Code). Employers can avoid these additional obligations by including appropriate language in the employment contract that allows the employer to terminate an employee in accordance with the Code. The Code does not require any termination

notice, severance or other obligation during the first 90 days of employment. After 90 days of employment, a terminated employee would be entitled to only the minimum amount of termination notice under the Code (which is a maximum of eight weeks for employees with more than 10 years of employment).

The other benefit of having a properly drafted termination provision in an employment contract is that an employer can limit an employee's severance entitlements on termination to the minimums in the Code. With the right termination language, an employer can effectively remove an employee's entitlement to receive additional severance under the common law (which can go up to around 24 months depending on certain factors).

Conclusion

We recommend that employers review their employment contracts to ensure they effectively limit termination entitlements and do not create unnecessary additional obligations.

Footnote

1 Higginson v Rocky Credit Union Ltd, 1995 ABCA 132

Author: Michelle McKinnon

Cassels Brock & Blackwell LLP