Are Probationary Periods Legal in Canada?



Employees and employers are frequently mistaken about the legality of probationary periods as they relate to non-unionized employees. Terminated employees who are advised that they failed to pass the probationary period rarely take legal action to counter such assertion – but some do. Employers terminate employees and offer nothing under the same belief, only to be proven wrong when an employee successfully sues them. Such misconception, often ending up in the courtroom, proves costly for the uninformed party.

The mistake lies in the misunderstanding of the application of provincial legislation to the employment context. Provincial legislation mandates that every employer honour minimum employment standards. Under these standards an employee who fails to meet the requirements expected of him during the probationary period can be fired without any notice or liability. The simplicity of this legislation gives both employers and employees the confidence that such use of the probationary period is legal and applicable – which in many cases it is not.

The reason that the legislation regarding probationary periods is not so simple is because of another, more obscure section of employment standards legislation, which qualifies the above. That phrase, the downfall of many employers, is that “a contract can provide for a greater right or benefit”.

The absence of any language regarding probation in the employment contract is interpreted to mean that the employer does not wish to impose any probationary terms on the employee. The result is that the “greater benefit” applies, that being – that the probationary term is not applicable to that employee. A probationary period will not be automatically incorporated into the employee’s contract as it is judicially accepted that if the employer wanted to rely on this tool, it would have specified so.

In the absence of language asserting that the employer will rely on the probationary term, the courts treat the terminated employee like any other. An employee, who does not meet performance standards and is terminated without cause, is then entitled to severance determined by a court.

Even if the employer has specified that the employment be subject to a probationary period, how it has been imposed will scrutinized. An employer must act in good faith. An arbitrary imposition of termination, not consistent with the true intent of the probationary term, will not be lawful. The employer could be found to be liable for termination pay and possible punitive damages.

Many employers have a further misconception about their ability to impose probation on an employee as a disciplinary action. If the original contract of employment does not permit the use of probation as discipline, then it cannot be. An employee subject to probation can claim constructive dismissal and sue for severance. If, however, an employee is presented with a letter of probation and agrees to its terms, then the use of probation becomes legal. An employee faced with the option of being fired or being placed on probation, may willing accept the opportunity to modify his performance in the hopes of meeting the requirements for continued employment.

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