Avoiding The "Long-Haul" Begins With The Agreement

It all starts with the agreement.

Probationary periods are a useful tool for employers assessing the suitability of new hires.

Generally, a valid agreement setting out a probationary period allows the employer to dismiss an employee during the probationary period without meeting the high threshold of just cause. The decision to terminate a probationary employee will typically be upheld if the decision was not arbitrary, discriminatory or done in bad faith (subject to the terms of any applicable collective agreement or possible human rights issues).

Although it is easier to terminate the employment of a probationary employee, a probationary period can only be relied on if it is properly set out within the initial employment agreement.

Imposing the probationary period

The probationary period must be clearly set out in a (preferably written) contract prior to the employee commencing work and the employee must explicitly consent to this arrangement.

The probationary period can either be set out in the offer of employment, a contract of employment or a stand-alone probationary agreement. Either way, it is important that the employee agree to the arrangement in exchange for the offer of employment (i.e. before the employee commences work). If the employer offers employment without mentioning the probationary period, and the employee accepts, it is unlikely that an employer can subsequently impose or rely on a probationary period.

In *Rejdak v. Fight Network Inc.*, an Ontario court considered a situation whereby an employee was offered a job over the phone, no mention of the probationary period was made, the employee accepted and a few days later the employee signed an employment contract, including a provision for a probationary period. The court held that when the offer was made and the employee accepted the position over the phone, an employment contract was formed which could not subsequently be unilaterally altered by the employer. In legal terms, the probationary agreement failed for lack of consideration.

Further, any ambiguity in the agreement will be construed against the employer, so it is important to ensure the agreement is simple and to the point. For example, it is important that the period of probation be clearly spelled out (i.e. from a specified start and end date, subject to the employee working a certain number of full shifts). Otherwise, the agreement could be subject to various interpretations such as whether the agreement meant to include only calendar days, full working days, etc. Since it is the employer who typically drafts the agreement, any ambiguities will be resolved in the employee's favour.

When drafting the agreement, it is also important to be mindful of employment standards legislation. For example, under New Brunswick's *Employment Standards Act*, when an employee is employed for longer than six months, the employee will be owed at least two weeks' notice upon dismissal. If the agreement setting out the probationary period infringes this provision (e.g. by indicating that the probationer can be terminated without notice at any time for a period that extends beyond six months) the agreement will be deemed null and void and the employee will be entitled to common law reasonable notice.

Extending the probationary period

There may be a situation where an employer wants to extend the probationary period to better evaluate an employee's suitability and help provide more coaching.

Unless the agreement provides for such an extension, employers will not likely be able to extend probation beyond the initial period. It is good practice for employers to reserve the right to extend the probationary period in the initial agreement. Even if the employer imposes an extended period, if that period exceeds the statutorily defined probationary period, the employee will have to be considered a "regular" employee with all the related rights and privileges.

Imposing a probationary period on an existing employee

An employer must be careful when using a probationary period on an existing employee – as any such attempt may be construed as a fundamental change to the employment relationship – thereby exposing the employer to a constructive dismissal action.

Additionally, courts have demonstrated a reluctance to uphold such an agreement, absent a clear intention to do so.

In the 2014 decision *Miller v. Convergys CMG Canada Ltd.*, the British Columbia Court of Appeal considered a situation whereby an employee was dismissed after the employee had been promoted to a new position and signed a new employment contract providing for a 90-day probationary period. Both the trial judge and the British Columbia Court of Appeal held that the 90-day probationary period did not apply to the employee, finding that the parties did not intend for this 90-day period to apply to an existing employee who had already proven themselves to be suitable. The case demonstrates that attempting to impose a probationary period on an existing employee can be complicated and should be tailored to the specific employee at hand.

What this means for employers

1. Probationary periods must be entered into at the inception of the employment relationship (i.e. as an understood condition of the employee accepting the offer of employment).
2. The agreement should reserve the right for the employer to extend the probationary period (appreciating that this will have very little practical legal effect).

3. The agreement should be simple, easy to understand and avoid any ambiguity.
4. Employers should ensure that the agreement complies with minimum employment standards requirements.
5. Employers should be cautious when seeking to impose a probationary period on an existing employee, and where the employer does so, it should draft the agreement to reflect the particular circumstances of the relationship with the employee and avoid using a “boilerplate” probationary agreement.

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Article by Chad Sullivan