

# Employee Probation in Court

written by Tina Tsonis | September 28, 2021



In its recent *Dalton vs. Fraser Valley Fire Protection Ltd.*, 2021 BCPC 146 decision, the BC Provincial Court awarded three months' reasonable notice to an employee who was dismissed from his employment after only three days on the job.

## **Background**

In March 2018, William Dalton began employment with Fraser Valley Fire Protection (FVFP) as a registered fire protection technician. Almost immediately, employees assigned to work with Dalton reported problems with his behaviour. On Dalton's first day, a co-worker complained that he would not take advice, that he was loud and argumentative and that he went "off on tangents."

FVFP noted these concerns, but did not raise them with Dalton nor give him an opportunity to improve his behaviour.

The next day, another employee reported having a personality conflict with Dalton. The employee also complained that Dalton worked too slowly and did not follow direction. Again, FVFP noted these concerns, but did not raise them with Dalton or give him an opportunity to improve his behaviour.

Then, on his third day, FVFP terminated Dalton's employment without cause. FVFP told Dalton that he was being fired as a result of his lack of productivity, his inability or refusal to follow direction and his argumentative nature. FVFP provided Dalton with a cheque for the work he had done and sent him home.

Dalton subsequently launched an action against FVFP for wrongful dismissal.

## **Wrongful dismissal**

Judge Kenneth Skilnick found that while FVFP had reasons to find fault with Dalton's work performance, it also had a duty at law to give him "an opportunity to rectify his substandard conduct."

Judge Skilnick commented that almost every new employee can be expected to have a period of adjustment to learn his or her new job and understand what is expected, and if performance is initially below what should reasonably be expected, the employee should be warned and given a reasonable period of time to meet the expected standard.

In this case, FVFP did not warn Dalton that his conduct was falling short of what was expected of him, nor did it give Dalton an opportunity to remedy the problem. Instead, it summarily dismissed Dalton's employment.

Judge Skilnick held that if FVFP wanted to fire Dalton after only three days on the job, it was required to provide him with notice or pay in lieu of notice. In this case, FVFP did neither.

## **Probationary employee**

At trial, FVFP argued that it was entitled to summarily dismiss Dalton's employment, without notice or severance, because he was a probationary employee. Generally, employers are entitled to dismiss an employee in the first three months of employment without advance notice or severance, as long as there is a probationary term in the employment agreement.

Judge Skilnick held that FVFP never communicated to Dalton that there would be a three-month probationary period. The court held that FVFP could not unilaterally impose this term into the employment contract. For a probationary term to apply, there must be evidence that the employee accepted this term, either expressly or by conduct.

Judge Skilnick held there was no such evidence in this case. Accordingly, Dalton was entitled to reasonable notice of termination or pay in lieu thereof.

## **Damages**

Applying the traditional Bardal factors, which are used to assess reasonable notice of termination at common law, Judge Skilnick held that Dalton was entitled to three months reasonable notice. Factors supporting a longer notice period included Dalton's age at the time of dismissal (67) and the availability of similar employment. Dalton was awarded a total of \$11,636.

## **Takeaways for employers**

This case serves as a valuable reminder to employers that an employment agreement must contain a clear probationary term. Probationary periods cannot be assumed. Employers may face significant liability if they summarily dismiss a non-probationary employee without cause and without notice or pay in lieu.

If issues arise early on, employers must advise employees about these issues and provide them with an opportunity to correct or improve their behaviour. If an employee asks for help, employers should meet with the employee to provide necessary training or assistance.

If a probationary employee is given a reasonable opportunity to remedy the problem, but the problem persists and affects the employer's business, the employer may be justified in dismissing the employee's employment, without notice or pay in lieu.

Court award underscores importance of employee probationary term.

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