Employment Probationary Period – Terminations

It is quite common for new employees to undergo a 3-month probationary period when beginning new employment. But when an employer terminates an employee within the 3-month probation period, is the employee entitled to any termination pay?

Yes. While the employee may not be entitled to reasonable notice or termination pay in lieu of notice under Ontario's *Employment Standards Act* *("ESA")*, the employee is entitled under common law.

In the recent Small Claims Court decision of *Deacon v. Moxey*, 2013 CarswellOnt 5354, Deputy Justice J. Sebastion Winny decided this issue. 46 year old Mr. Deacon was fired by his employer from his sales position just 2 weeks after commencing employment. The employer defended Mr. Deacon's claim for wrongful dismissal claiming an entitlement to dismiss Mr. Deacon without cause during a probationary period of 3 months. The employer argued that section 54 of the ESA provides that an employer has a general right to terminate an employee without notice if the employment has not yet reached 3 months' duration:

54. No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,

(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or

(b) has complied with section 61.

Justice Winny held that section 54 does not refer to a probationary period and does not say that an employee working less than 3 months can be terminated without cause. Section 8(1) of the ESA provides that civil remedies are not affected by the ESA. Section 54 cannot displace the common law obligation on an employer who dismisses an employee to give either reasonable notice or pay in lieu of notice. Justice Winny went on to award Mr. Deacon 3 months' pay in lieu of notice which was somewhat reduced as Mr. Deacon became re-employed 7 weeks later.

While the ESA does not provide for a probationary period, an employment contract entered into between the employer and the employee can resolve this issue. The contract can provide for a 3 month probation period during which the employee can be fired without cause, without providing reasonable notice or pay in lieu of notice.

Section 5(2) of the ESA indicates that if a contractual term in an employment contract provides a greater benefit than an applicable employment standard, the contractual term prevails. In other words, as long as the contract provides for as much as or more than the ESA standards, the agreement between the parties is binding.

Article by Christina J. Wallis

Dale & Lessmann LLP