Probation Meant as an Opportunity to Demonstrate Skills

By Robert Smithson

I sometimes refer to the probation period as the Rodney Dangerfield of employment law (for those of you not old enough to know, that means it gets no respect). But few legal mechanisms can be more effective in getting employers out of employment relationships which seemingly have no future.

I've written previously that the probation period can be viewed as one long audition for a job, revealing an individual's true skills, attitude, and ability to fit in. In my view, there simply is no substitute for viewing an individual on the job in real work situations.

But probation periods don't just happen by magic. The employer must take certain steps to ensure it has gained the benefit of a probation period.

The employer and employee should agree, in writing, prior to the commencement of the employment, on the terms of a binding probationary period. There are numerous preferred components of an enforceable probation clause.

First, the parties should define the standard of review – often the standard adopted will be "suitability" for ongoing employment. That's a bit of a fancied-up way of saying the employee must be a good fit for the job.

Second, because suitability is a somewhat hazy standard, the parties should then go a step further and set out the primary criteria by which the employee will be measured. These might include, for instance, attitude, compatibility with co-workers and clients, ability to follow directions, demonstrated progress in acquiring the necessary skills of the job, good attendance, overall efficiency and output, adherence to company policies, etc.

Third, the length of the probation period should be clearly stated. The period is sometimes defined in terms of time worked rather than just the passage of calendar time (because time on the job is what's required to assess the individual's suitability for continued employment).

I prefer to define the probation period using the words found in the B.C. *Employment Standards Act*, being the first "3 consecutive months of employment". It is critical to ensure that the contractual terms, including the probation period, are compliant

with the applicable employment standards legislation.

Fourth, documentation should be kept, during the probation period, of the employee's progress in relation to the agreed-upon criteria. A good rule of thumb is that there should be at least one interim review of the employee's performance and conduct before the final decision on suitability is made.

During the probation period, the employer should be pro-active in counseling the employee on her shortcomings. This eliminates surprises for the employee when the final review is performed. Specific instructions should be provided to the employee on achieving the desired standard. All of this should, of course, be documented.

Finally, the employer should conduct a final review, making a reasonable decision about suitability, prior to the expiry of the probation period. Court decisions indicate employers should, to whatever degree is possible, apply objective criteria in performing a good faith assessment of the probationary employee.

A recent B.C. Supreme Court decision demonstrates that a probation period doesn't give the employer a carte blanche entitlement to ditch the employee at the first opportunity.

Geller was hired on probationary status by Sable Resources Ltd. in 2010 after completing a pre-apprenticeship program in heavy mechanics. While Sable was aware that Geller did not yet have his heavy duty mechanic's journeyman ticket, it seemed to think he was farther along in that process than he actually was.

Sable's hiring letter for Geller stated "Your first three months of employment is considered probationary. Permanent employment will be determined based on mutual satisfaction and job performance."

A situation soon arose in which Sable needed Geller to work in unsupervised circumstances. This would have been contrary to industry requirements that an apprentice receive training and practical experience under the direction of a qualified, certified tradesperson.

Geller informed Sable that he was willing to continue to work in a situation in which there was a qualified heavy duty mechanic available to give him the "agreed apprentice training and practical experience." Sable terminated Geller's probationary employment and, in turn, Geller sued for wrongful dismissal.

The B.C. Supreme Court stated that "a probationary employee must be given an opportunity to demonstrate his ability to meet the standard the employer set out" at the time of hiring. It found that Sable and Geller did not have a common understanding of their respective "roles relative to the apprenticeship or the degree of supervision available or required."

The Court went on to state that it was incumbent upon Sable to "make its expectations clearer to [Geller] than it did". Geller, it found, did not "have a reasonable opportunity to demonstrate his suitability for the job". His claim of wrongful dismissal was upheld and damages were awarded.

The point the Geller and Sable Resources Ltd. case drives home is that the employer can't make an arbitrary decision to terminate a probationary employment relationship. It must apply rational thought to the decision and make a reasonable decision, in all the circumstances, about the employee's future.

Utilized properly, the probation period is a powerful legal mechanism in the employer's favour. Applied poorly, it's a basis for a claim for damages by a jilted

former employee.

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