

Terminate Probationary Employees Properly To Avoid Court Actions



Many organizations elect to bring on board new employees under a probationary period of employment. The probationary period enables the organization to evaluate the performance and fit of an employee with the option to terminate if the employee does not achieve the standard or fit sought by the employer.

The advantage to the employer is the potential ability to terminate the employee with minimal cost by providing only the statutory minimums in terms of notice or severance.

Recently the Court of Appeal in Ontario overturned a lower court ruling and upheld an organization's right to provide only the minimum standards when terminating a probationary employee. In *Nagribianko v Select Wine Merchants Ltd.* the terminated employee filed a wrongful dismissal action after being terminated from his employment without severance or pay in lieu. A lower court first ruled that the employee was entitled to a reasonable notice of termination and awarded the employee damages equal to 4 months pay and benefits. The lower court referenced the fact that the employee had been induced away from stable employment to join the organization. The organization argued that their agreement with the employee included a probationary period of employment in which they could terminate employment without notice or pay in lieu of notice.

In overturning the lower court ruling the Appeals Court held that “ . . . unlike a non-probationary employee, the standard for dismissal of a probationary employee is “suitability”. In other words, there was no wrongful dismissal because the organization terminated due to unsuitability within the probationary period. The court indicated that the organization had to show it acted fairly in determining if the employee was unsuitable and provided the employee with the ability to demonstrate suitability during the probationary period.

This decision has lead to a 3-part test that can be applied to the decision to terminate a probationary employee.

1. Did the employer set job performance criteria that were reasonable in connection to the employment?

2. Did the employer inform the probationary employee of these criteria and allow him or her fair and reasonable opportunity to satisfy the criteria?
3. Did the employer meet with the employee to discuss job performance?

What Does This Mean For Employers?

When hiring an employee, including when inducing away an employee from another organization, clarity around the application of a probationary period of employment should be clearly discussed. This probationary period should also be put in writing in the employment agreement or contract as well as appearing on the organization's policy handbook.

Note that the probationary period is not presumed by common law and as such if it is not spelled out terminating the employee during the probationary period will leave the organization open to claims of wrongful termination. In this current case the employee agreement and employee handbook spelled out the 6-month probationary period. Had this not clearly been spelled out it is reasonable to presume that the organization could have been faced with having to provide a longer period or notice or pay in lieu of notice and possibly other damages, as the lower court first ruled.

4 Tips For Hiring Probationary Employees

1. When seeking to attract a candidate away from another organization, bring on board any new employee or transfer an employee from one role to another it is smart business to spell out the period of probation in the employment contract and communicate to the employee what this means.
2. Include specifically in writing that this period of probation is to determine the suitability of the employee for employment with the organization. Do not leave the definition of "probationary employee" ambiguous.
3. Be certain that the probationary period is reasonable (3 months is common and up to 6 months may be reasonable) because if it is excessive this may be seen as unlawful contracting out of the Employment Standards Act (ESA in Ontario).
4. Provide the probationary employee with job performance feedback, job performance coaching and an opportunity to improve during the period of employment and before termination to demonstrate you offered the employee a fair and reasonable opportunity to demonstrate suitability.

You may find that a senior or highly coveted employee wants to negotiate this element out of the contract. Take care to consider if this is something you are willing to negotiate away and if you are, consider well what you will offer to the employee to minimize any financial loss should you discover the employee is not suitable after all.