Termination Of Probationary Employees Under Labour And Employment Law

Recently, the Prince Edward Island Supreme Court in IUOE Local 942 v. Health P.E.I., 2014 PESC 31 (CanLII) heard an application by a union for judicial review. The Court reviewed a decision of the Prince Edward Island Labour Arbitration Board (the "Board"), which upheld the termination of unionized probationary employee.

Generally in a labour law context, collective agreements provide that probationary employees do not enjoy just cause protection, and thus, there is no onus on a unionized employer to establish just cause upon termination. Likewise in this collective agreement, permanent employees were given the protection of being dismissed only for just cause, but probationary employees were not.

Notwithstanding the Employer's right to terminate probationary employees at its sole discretion, it is well-settled that the decision to terminate cannot be arbitrary, discriminatory, or made in bad faith. In this case, the Court found that the majority of the Board was reasonable in finding that the Employer did not act in an unjust or unfair manner in terminating the Employee, and thus the Union's application was dismissed.

This decision also recaps the law concerning termination of probationary employees in a non-unionized workplace. The Court disagreed with the Union's position that the decision of Alexander v. Padinox Inc. (1999), 181 Nfld. & P.E.I.R. 317 (an employment law wrongful dismissal case) was a persuasive authority in a labour law context. The Court of Appeal in Alexander v. Padinox succinctly summarized the law in an employment context as follows at paragraph 16:

"It is now settled law that the cause necessary to provide the justification required to terminate a probationary employee is less than the cause necessary to terminate a permanent employee. Cause will be established if the employee is found to be unsuitable for permanent employment. Similarly, if the dismissal of a probationary employee is found to be unjust, the notice period or the amount of compensation, in lieu of notice, together with claims for other damages, will be calculated accordingly." [Emphasis added.]

Overall, this decision reiterates that unionized employers are not likely required to prove just cause in terminating probationary employees (pursuant to the terms of most collective agreements) but the decision to terminate cannot be arbitrary, discriminatory, or made in bad faith. Non-unionized employers have the onus of

proving just cause for probationary employees, however, the justification is less onerous than it would be in terminating a permanent employee.

Lessons for Non-Unionized Employers

In determining whether the employee is suitable for permanent employment, a non-unionized employer has the onus of demonstrating that it acted fairly and was reasonably diligent in determining the person’s suitability for a permanent position.

The employer always has the inherent right, aside from human rights legislation, to terminate the employment of an employee, and is only required to give reasonable notice, or pay in lieu of notice. However, to establish just cause, the employer should ensure it has afforded the following opportunities to the probationary employee:

Review the conditions of probationary employment with the employee at hiring and have the employee sign off on their understanding and acceptance of these conditions.
Assess the employee’s performance and suitability for the position during the probationary period in relation to the requirements of the specific position.Suitability for the position may include an assessment of character and compatibility in the workplace.
Notify the employee during the probationary period of any deficiencies and give the employee a reasonable opportunity to improve performance/meet expectations.The employee should be informed that failure to improve may result in termination of their probationary employment. The scope of the evaluations and assessments will depend on the length of the probationary period.
Furthermore, it is always prudent to enter into a written contract of employment with a new employee that clearly sets forth the probationary period, and the notice period to be given for termination in the probationary period.