

Well, What Did You Expect? Setting Expectations For Probationary Employees



Hiring employees on a probationary basis allows employers to ensure they hire the right people. While implementing trial periods for new employees has many advantages, employers should be aware of key rules applying to probationary employees to avoid potential costly liability should the relationship not work out.

In particular, employers need to clearly establish expectations. The standards used to evaluate suitability are not limited to job performance and may include an employee's trustworthiness, ability to work with others, suitability and fit. During the probationary period, employers have to provide a fair, honest and valid assessment of the employee's competence with regard to the standards set. Critically, any decision to discontinue with the employment relationship must not be connected to a ground protected under human rights legislation. A decision not to continue employment beyond the probationary period must be based on a reasonable conclusion that the employee failed to meet any expected standard(s).

The need to clearly establish and communicate expectations for probationary employees was outlined in *Re West Kootenay Power & Light Co. and Office & Technical Employees' Union, Local 378* (1989), 4 L.A.C. (4th) 172 (Greyell). In that case, the employee was hired as a probationary programmer/analyst. The employer was seeking an experienced person who could acquire the programmer/analyst skills after a reasonable familiarization period. Although the employee had never seen the posting, he was aware that the employer was seeking an experienced individual. After 19 days on the job he was terminated on the basis that his level of competence did not meet the threshold for the position.

Although the termination was upheld, the case provides useful guidance for employers for avoiding liability when terminating probationary employees. Here, the arbitrator found that the employee's orientation session, which consisted of his spending two hours with a colleague being briefed on the employer's operations, was "lacking", and that the employer hired the employee realizing that he did not meet all of the requirements originally set for the position. Nevertheless, when the employee applied for the position, he "was aware that he was to bring the expertise of a senior programmer/analyst to the position", and the employee's understanding of this was reaffirmed in the hiring process by holding himself out as an experienced programmer/analyst. Therefore, the reasonable skill level for the position was a construct of mutual expectations.

Similarly, employers cannot rely on goals that are arbitrary and only clear in retrospect. In *Longshaw v. Monarch Beauty Supply Co Ltd.* (1995 CanLII 551 (BCSC)), a sales manager was dismissed after 10 weeks with a beauty supply store and was given two weeks' salary. The employer testified that his termination was on the basis that his sales were insufficient. Notwithstanding a probationary clause in his offer of employment, the court found that Mr. Longshaw was not properly advised of the criteria and factors on which he would be evaluated. In the circumstances, the employer did not meet the good faith obligation owed to employees during the probationary period and the court awarded six months' notice. While such a large amount of notice is exceptional for such a short service employee, this case demonstrates the importance of clearly establishing the standards applicable to probationary relationships.

What this means for employers

Ideally, expectations for a probation period should be reduced to writing. This is advisable particularly because the absence of a written agreement leaves room for disagreement on essential terms. When communicating the terms and expectations of probation, it is necessary to ensure that the prospective employee understands that they will be subject to a probationary period when hired and the consequences of not meeting the employer's standards. Failure to set clear expectations about the probationary period and job requirements will place an employer at risk for reasonable notice. As such, employers who wish to use and enforce probationary periods need to be mindful of setting clear and reasonable expectations for probationary employees. If your business uses probationary periods, the following suggestions may be of assistance when setting expectations with prospective employees:

1. Ensure the prospective employee understands that the probationary period is to evaluate them for suitability of permanent employment. It is advisable to do so in writing and obtain agreement to the probationary period from the prospective employee.
2. Provide the prospective employee with information on the length and terms of the probationary period. Specify what will happen if the employee fails to meet the employer's expectations and the employee is terminated.
3. Ensure the prospective employee knows how they will be evaluated during the probationary period and evaluate the probationary employee regularly throughout the term of probation. Consider providing a full orientation and assistance through coaching and instruction.
4. Do not wait until the last day to conduct an assessment of the employee. An assessment must be fair, honest and valid and should provide the probationary employee an opportunity to address any concerns the employer has regarding the employee's suitability for permanent employment. Deficiencies in an employee's performance should be brought to their attention and reasonable time and opportunity to correct them should be provided.
5. Before the expiry of the probationary period make a determination about the probationary employee's future with your company. If possible, do not wait until the probationary period is over to end the employment relationship.

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