Wrongful Dismissal Damages Awarded to an Employee with No Service

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Most employers are aware of the general requirement to provide notice or pay in lieu of notice to an employee who is being terminated without just cause during the employment relationship. However, the B.C Supreme Court decision in *Buchanan v Introjunction Ltd.*, 2017 BCSC 1002 ("*Buchanan*") highlights that this obligation may arise even before the employee has worked a single day for the employer.

Background

Mr. Buchanan applied for and was offered a full-time job with Introjunction Ltd. (the "Company"), which was scheduled to commence on November 1, 2016. The parties entered into a written employment agreement on October 16, 2016 and Mr. Buchanan quit his current job. However, the Company changed its mind about its business and staffing needs and two days before Mr. Buchanan's scheduled start date, it attempted to retract the offer of employment. The Company instead offered him short-term work to help him financially, with little details. Mr. Buchanan did not respond to that offer and proceeded to bring a claim for wrongful dismissal damages.

The Court's Decision

The Court confirmed that absent an express contractual provision providing otherwise, an employee who is terminated without cause even before starting work is entitled to reasonable notice or pay in lieu thereof. There was a clause in the employment agreement providing for "a probation period of three months beginning on the Effective Date" during which the employment could be terminated without notice. The Company sought to rely on this to argue that Mr. Buchanan was not entitled to any notice of termination; however, this was rejected by the Court on two grounds.

First, the Court held that the probation period did not commence until the "Effective Date" of November 1, 2016. Since the offer was retracted prior to that date, that clause had no application prior to Mr. Buchanan starting work. Second, even absent that language, the Court concluded that the clause could not have been applied to defeat Mr. Buchanan's claim. In determining this, the Court noted that the probation clause did not give an unrestricted right to terminate without notice; rather, the purpose of a probation period is to allow an employer to partake in a good faith assessment of an

employee's suitability for the job. That was not possible here since Mr. Buchanan had not worked a single day for the Company.

As a result, the Court concluded that Mr. Buchanan had been wrongfully dismissed and was entitled to six weeks' pay in lieu of notice. The Court refused to find that Mr. Buchanan failed to mitigate his damages by not accepting the Company's offer for short-term work as it was for an ill-defined job with unknown hours and less pay than had previously been offered to him.

As this case demonstrates, there can be potentially costly risks associated with terminating the employment relationship even before an employee has commenced work. Although the Court restricted reasonable notice damages to six weeks' pay in *Buchanan*, this is still significant given that no work was performed for the Company at all by Mr. Buchanan. Further, the damages imposed could be a lot higher in a similar situation where the new employee has been actively recruited away from secure employment, rather than applied on his own. A properly drafted termination clause can help protect against risks associated with a termination occurring prior to an employee's first day of work, as well as at any other time during the employment relationship

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