The Utility Of Probationary Periods Called Into Question By Recent BCSC Decision

April 03, 2017

A new British Columbia Supreme Court decision calls into question whether probationary periods will provide the flexibility and protections they are intended to address. In Ly v. Interior Health Authority, 2017 BCSC 42, the Court concluded that a probationary term contained in the plaintiff's employment contract was valid and enforceable. However, the Court went on to find that the defendant Interior Health Authority had failed to meet its obligation to carry out a good faith assessment of Mr. Ly's suitability for continued employment. Therefore, Mr. Ly was awarded damages in lieu of reasonable notice.

The Probationary Term
Mr. Ly commenced work with the Interior Health Authority on November 6, 2014 as the Manager of Quality and Patient Safety and Client Experience. Prior to commencing employment, he signed an offer letter that included the following provision:

"Employees are required to serve an initial probationary period of six (6) months for new positions."

Mr. Ly was dismissed on January 8, 2015, without notice, during the probationary period.

The plaintiff submitted that the bare reference to probation in his offer of employment was not sufficient to create a valid probationary period. However, the Court concluded that the term probation is well understood in business and industry and determined that as an experienced manager, Mr. Ly understood that it meant a period of assessment during which a new employee's suitability and performance is assessed. The plaintiff also argued that he did not believe the probationary period applied to him, even though the offer letter was specifically addressed to him, and he had reviewed and signed it. However, the court was unsympathetic to this argument, and found that if he thought that was the case, Mr. Ly could have questioned the need for its inclusion or requested that it be removed. The evidence was that he had negotiated other terms of the offer, but chose not to question the probationary period. Therefore, he did not, and could not later, take issue with its applicability.

A question before the Court was whether employers could have probationary periods longer than three months, without breaching the British Columbia Employment Standards Act (the “ESA”). The Court was clear that the statutory entitlements found in section 63(1) of the ESA (termination notice/pay) could not be circumvented or breached by the terms of probation. In this case, the Court concluded that the probationary period did not breach the ESA, and therefore, was valid.

Good Faith Assessment of Suitability
Relying on the British Columbia Court of Appeal's decision in Jadot v. Concert Industries Ltd . [1997] BCJ No. 2403 (CA), the Court commented as follows:

"...the test for dismissal in the context of probationary employment is suitability. Just cause need not be established. An employer needs only to establish that it acted in good faith in its assessment of the probationary employee's suitability."

The Court went on to indicate that while an employer is not obligated to give reasons for the dismissal of a probationary employee, the employer's conduct in assessing an employee should be considered in light of the following factors (the "legal standard of suitability"):

whether the probationary employee was made aware of the basis for the employer's assessment of the employee before or at the commencement of employment;
whether the employer acted fairly and with reasonable diligence in assessing suitability;
whether the employee was given a reasonable opportunity to demonstrate his or her suitability for the position; and
whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but also character, judgement, compatibility and reliability (at para 58).
In applying that test, the Court concluded that Mr. Ly had not been given a fair opportunity to demonstrate his suitability for the position. The Court accepted Mr. Ly's evidence that he had attempted early on in the relationship to understand the employer's expectations but the employer did not respond with clarity, or give him a fair opportunity to demonstrate his suitability for the manager position.

Accordingly, the Interior Health Authority had not met the requisite standard of good faith in assessing Mr. Ly's suitability for the position. He was awarded three months' pay in lieu of reasonable notice.

This decision is a valuable lesson for employers when assessing probationary employees. Courts will recognize the validity of probationary periods (provided they do not circumvent minimum employment standards), allowing employers to dismiss for unsuitability. However, the assessment of suitability must be carried out in good faith. The Ly case demonstrates that Courts may be prepared to evaluate whether an employer has done enough to clearly outline the expectations of the role and provide the employee with an opportunity to be successful in the position. It would be wise for

employers to document the progress of probationary employees and engage in regular reviews with such employees, as employers must be prepared to defend their decision to dismiss during a probationary period, if challenged.

By

Jennifer M. Fantini

Expertise

Labour & Employment

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.