

SETTING THE RECORD STRAIGHT ON PROBATION CLAUSES

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Probation in the employment context is generally understood as a period during which the employee's suitability for continued employment is assessed. Some employers mistakenly believe that a probation clause in an employment contract allows them to terminate a probationary employee during the probation period for any reason without notice or other obligation. Unfortunately, that is not the case in British Columbia.

Good faith assessment of suitability

While an employer need not establish just cause to terminate a probationary employee, an employer would need to show that it undertook a good faith assessment of the probationary employee's suitability for continued employment.

In *Ly v. British Columbia*, 2017 BCSC No. 43, the Court confirmed that in assessing whether an employer has acted in good faith, the Court will consider the employer's conduct in assessing the employee's suitability for continued employment in light of various factors, including:

- Whether the employee was made aware of the basis for the employer's assessment of suitability 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, judgment, compatibility and reliability.

The Courts in British Columbia have therefore implied a great onus on an employer to demonstrate good faith in evaluating a probationary employee's suitability for continued employment before being able to terminate the employee. Failing to do so may expose an employer to a wrongful termination claim.

Termination provision instead of probation clause

The process to assess the suitability of a probationary employee is a lot more onerous than simply terminating

an employee on a without cause basis which requires only the giving of notice or pay in lieu of notice. Instead of a probation period, an employer can simply include a properly drafted termination provision in the employment contract that complies with the BC *Employment Standards Act (ESA)*. The ESA provides that an employer can terminate an employee's employment during the first 3 months with no notice obligation. After 3 months, the minimum termination provisions in the ESA will apply, that provides for up to 8 weeks' notice depending on the employee's length of service.

The other benefit of having a properly drafted termination provision in an employment contract is that an employer can limit an employee's severance entitlements on termination to the minimums in the ESA (i.e. up to 8 weeks' notice). The employee will then not be entitled to common law reasonable notice, which is typically much higher.

Conclusion

There is no need for a probation clause if the employment contract contains a properly drafted termination provision (i.e. one that complies with the ESA). Employers should review their employment contracts to ensure their termination provisions are drafted in compliance with the ESA to avoid common law entitlements on termination.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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