Probationary Employees: Three Things Every Employer Needs to Know

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Introduction

The law surrounding probationary employees is deceptively complex. Typically thought of as a period when an employer can terminate "just 'cuz" (that is, without needing "just cause)", this view is antiquated and no longer followed by our courts.

While courts do recognize the probation period as a time in which an employee's suitability can be judged against the employer's specified criteria, it only gives legal effect to this when certain criteria are met.

While not an exhaustive list, what follows are the three most common pitfalls associated with probation periods.

#1 – The Probationary Period Must Be Express, Not Implied

Employers often think that the *Employment Standards Act, 2000* imposes a probation period on all employees with less than three months of service, given that these individuals are not entitled to statutory termination pay. Indeed, entitlement to statutory notice or pay-in-lieu of notices under the *Act* arises only after three months of service.

This view, however, is incorrect as it conflates the notion of termination pay with probation periods, and ignores an employee's entitlement to common law termination pay over and above those statutory amounts (remember, the *Employment Standards Act, 2000* is a "floor" and not a "ceiling").

Instead, courts require that any period of probation be expressly spelt out in an offer of employment, as it essentially contracts-out of an employee's presumptive entitlement to common law termination pay. This is important because short-service employees are generally entitled to more termination pay at common law than what one might expect.

Note, however, that a valid probation period will not be established if the term is merely referenced in orientation materials, an employee handbook, or in some other policy. This is because the employee will have been unaware of the probation period when he or she accepted the offer of employment. As a result, whatever document used to create the probation period must be cited and enclosed with said offer.

#2 – A Probationary Period Must Not Violate the *Employment Standards Act, 2000*

When employers do include probation periods in their employment agreements, some are prone to overreaching with a clause that exceeds three months. Depending on its wording, this can violate the *Employment Standards Act, 2000*.

Why? Recall that employees with three months or more service are entitled to one week of statutory notice or pay-in-lieu of notice. A probation period that extends into that timeframe but purports to give the employer the right to terminate without notice or pay-in-lieu of notice will be void for contracting-out of the *Act*.

Therefore as a precaution and best practice, employers should structure their clauses to provide employees who fail their probation periods with at least one week of termination pay if the probation period is three months, and with at least two weeks of termination pay if the period is six months. Doing so will not only keep the employer's probation period compliant with the *Employment Standards Act, 2000*, but it will also allow the employer to require a Full and Final Release from the employee in exchange for said payments.

#3 – The Probationary Period Must Be Fair

As stated above, while employers do not need "just cause" to terminate a probationary employee, they also cannot terminate simply "just 'cuz". Instead, the standard for summarily terminating a probationary employee is "unsuitability" as measured against the employer's specified criteria.

While the employer is free to set the criteria for suitability, its discretion for judging a probationary employee against same is not unfettered. The classic statement on this point is that employers must "[act] fairly and with reasonable diligence in determining whether or not the proposed employee is given reasonable opportunity to demonstrate his ability to meet the standards [set out at hiring]".

This statement has been unpacked into the following three-part test for determining whether a probationary period can be relied on at termination:

1. Did the employer set job performance criteria that were reasonable in connection to the nature of the employment in question?;

2. Did the employer inform the probationary employee of this criteria and allow him or her a fair and reasonably opportunity to satisfy said criteria?; and

3. Did the employer meet with the employee to discuss job performance?

If all three of these points are met, the presumption of common law pay in lieu of notice is rebutted and replaced with the terms set out in the probation clause.

Conclusion

Given the requirement to be fair and reasonable, probationary periods present an unusual exception to an employer's otherwise largely unfettered right to terminate without cause. However, when viewed as an attempt to contract-out of a short-service employee's entitlement to more common law termination pay than one might expect, the need for probationary periods to be fair and reasonable becomes clear.

To that end, employers should ensure that the fact of a probationary period and its requirements are made clear to an employee upon hiring, that the period itself does not overreach and violate the *Employment Standards Act, 2000*, and that the employee is given a fair opportunity to prove him or herself.

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