

Probationary Employee Awarded Three (3) Months Reasonable Notice

Many employers rely on a probationary period to ensure that a newly hired employee is the right fit for their organization. A recent case in British Columbia shows that absent a legally enforceable termination provision that ousts the common law employers cannot simply rely on a probationary period clause to terminate without notice/pay in lieu of notice. Without a termination provision, employers must establish that they acted in good faith when assessing the new employee's suitability.

Mr. Ly signed an employment contract with the Interior Health Authority ("IHA") which included a six (6) month probationary period but no termination provision. IHA terminated Mr. Ly's employment after approximately 2.5 months of service and did not provide notice of termination or pay in lieu of notice of termination since none was required under minimum employment standards legislation. Mr. Ly sued for common law reasonable notice.

In hearing the case, since there was no termination provision, Judge Morellato was forced to examine whether Ly was entitled to common law reasonable notice. In particular, the Judge noted that while an employer is not required to prove "just cause" to terminate Ly during the probationary period without notice/pay in lieu of notice, it was required to act in good faith when assessing Mr. Ly's suitability during the probationary period. To determine whether the employer acted in good faith, Judge Morellato considered factors such as whether the employee was made aware of the basis for the employer's assessment of suitability, whether the employer acted fairly and with reasonable diligence in assessing suitability, and whether the employee was given a reasonable opportunity to demonstrate his suitability for the position.

Based on the Judge's assessment of the facts, it was determined that IHA did not act in good faith and since Mr. Ly's employment contract did not include a termination provision, he was entitled to common law reasonable notice, which was calculated to be three (3) months.



The key takeaway for employers is first and foremost to always include an enforceable termination provision. If such a provision is not included, common law reasonable notice will be owed to a probationary employee (even if the contract contains a probationary period clause) unless the employer can show that it assessed the employee's performance and suitability in good faith prior to termination.

If you have any questions about this particular case or generally relating to employment agreements, probationary periods and terminations, please do not hesitate to contact an e2r® Advisor.

