
PROBATIONARY EMPLOYEES: WHAT EMPLOYERS NEED TO KNOW

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A. INTRODUCTION

Many charities and non-profit organizations prefer to hire new employees on a “probationary” basis in order to assess their suitability for the position. This *Charity Law Bulletin* discusses the rights and duties of employers with respect to these probationary employees, and provides some guidance concerning how to properly implement the probationary period in order to assist in protecting the employer from potential liability.

B. WHAT IS A PROBATIONARY EMPLOYEE?

Essentially, probation is a trial period ensuring which the employer will assess and evaluate the employee to determine if he or she is suitable for long term employment with the organization. In *Mitchell v. The Queen* (1979) 23 O.R. (2d) 65 (H.C.J.), Van Camp J. describes the probationary employee in these words, at page 83:

“The term is well understood in business and industry as an employee, who is being tested to enable the employer to ascertain the suitability of the employee for its purposes. Probation is a period when the employee may prove that he is suitable for regular employment as a permanent employee and will meet the standards set by the employer.”

Probation must be expressed as a term of the employment contract. When hiring an employee who will be probationary for a period of time, it is important that the employees’ probationary status be set out in either

the employment contract or the offer letter prior to the employee commencing work. This is because a probationary term will not be implied into an employment contract. There must be an agreement between the employer and the employee that the employee will be subject to a probationary term. While many employees will not object to being on probation others may not wish to do so, especially if they are being recruited away from a secure position by the new employer. Thus, probation may be a subject of negotiation between the employer and employee. As with other contractual terms, it is advisable to reduce the probationary term in the contract to writing, so there is no dispute later on.

When drafting the employment contract or offer letter, it is important to specifically use the term “probation.” For example, a reference in an employee handbook to a “ninety day introductory period for all employees” will likely not suffice to create probationary status. Likewise, a statement in the offer letter providing “your employment will be reviewed at the end of six months in accordance with company policy” will also likely not suffice to create a probationary term, as such wording would not be considered sufficiently clear to the employee that he is she is on a probationary status.

C. LENGTH OF PROBATIONARY TERM

The common law does not impose any limit on how long a probationary period may be. However, many employers choose a three month probationary period, as this period often coincides with the eligibility for group benefits. Also, while the *Employment Standards Act, 2000* (Ontario) (“the ESA”) does not create a probationary status for employees, it does provide that no minimum pay in lieu of notice is required for employees with less than three months of service. After that three month period of service, the minimum notice requirements for termination of employment under section 57 of the ESA become operative.

Therefore, it is important to note that should the employees probationary period exceed three months, the probationary employee may not be terminated without providing at least the minimum notice, or pay in lieu thereof provided by the ESA. For example, if a probationary term of six months is agreed to between the employer and employee and the employer wishes to terminate the employee after five months, the employer will be required to provide, at a minimum, one week of notice or pay in lieu at the time of dismissal.

D. DRAFTING THE PROBATIONARY TERM CLAUSE IN THE OFFER LETTER OR EMPLOYMENT CONTRACT

Careful thought must be given to drafting a probationary clause that will comply with the ESA and will protect the employer from wrongful termination claims in the event that the employee is terminated during the probationary term. The purpose of the probationary term should be set out in the letter or contract. As well, the clause should provide that the employer may terminate the employment without cause or any form of termination payment within the first three months of probation and may terminate employment after the three months of probation by providing the minimum notice or pay in lieu of notice provided by the ESA.

There have been cases in Canada where probationary employees who have been terminated have successfully sued their employer for wrongful dismissal. Because of their typically short terms of service, the amounts awarded for successful wrongful dismissal claims by terminated probationary employees have not been that high compared to longer term employees. However, there have been cases where employees have been awarded six months damages at common law, which, depending on the employees pay, could represent a substantial liability to the organization. Typically, these damages awarded of several months have been awarded in cases where the employee was recruited from other secure employment and suffered prolonged unemployment after termination.

E. THE EMPLOYER'S DUTIES TO PROBATIONARY EMPLOYEES

The hiring of an employee on a probationary term by no means absolves an employer from legal duties with respect to that employee. As noted above, the provisions of the ESA apply to that employee, notwithstanding that there is no requirement to pay termination pay under the statute during the first three months of work. Additionally, various judicial decisions have found that an employer has the following duties:

- Management must assess the employee in a manner that is not arbitrary, discriminatory or in bad faith;
- The employer must impose reasonable standards of conduct and the employee must be measured against the standards which are made known to the employee;
- The employee must be provided with a fair opportunity to demonstrate his or her ability to do the job;

- The employer must provide a fair, honest and valid assessment of the employee's competence and suitability for ongoing employment.

Should the employer fail to meet any of the above duties, it may be faced with a wrongful termination claim. Absent a term in the employment contract stating otherwise, an employer cannot terminate a probationary employee without just cause. While the test for just cause for probationary employees is lower than that of a regular employee, the employer still bears the onus of proving that just cause existed for termination.

F. STANDARD OF CAUSE ON TERMINATION OF PROBATIONARY EMPLOYEES

The test with respect to the termination of an employee who is still within the probationary period was succinctly expressed by Noble J. of the Saskatchewan Court of Queen's Bench in *Ritchie v. Intercontinental Packers Ltd.* (1982), 14 Sask. R. 206, at p. 212:

“Thus where an employee is fired, it seems to me that the only onus that rests on an employer to justify the dismissal is that he show the court that he acted fairly and with reasonable diligence in determining whether or not the proposed employee is suitable in the job for which he was being tested. So long as the probationary employee is given a reasonable opportunity to demonstrate his ability to meet the standards the employer sets out when he is hired, including not only testing of his skills, but also his ability to work in harmony with others, his potential usefulness to the employer in the future, and such other factors as the employer deems essential to the viable performance of the position, then he has no complaint. As for the employer, he cannot be held liable if his assessment of the probationary employee's suitability for the job is based on such criteria and a fair and reasonable determination of the question. In my opinion the law does not require the employer to do anything more.”

The above standard has been applied in other provinces, including Ontario, in such decisions as *Miguna v. African Canadian Legal Clinic* [1996] O.J. No. 821 (O.C.G.D.).

G. CONCLUSION

A period of probation for a new employee will provide an organization with the time required to fairly assess the suitability of that person for longer term employment within an organization. However, legal duties do arise at the point of hiring and continue through the probationary period. A properly drafted offer letter or employment contract will clarify both the employer's and the employee's responsibilities during the probationary period and will provide legal protection to the organization in the event that the employer determines that the person is not suitable for the organization for the longer term.