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## **TERMINATING PROBATIONARY EMPLOYEES**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

Many employees are hired subject to the successful completion of a probationary period. However, courts have ruled in several decisions that the right to terminate a “probationary employee” without notice or compensation is not absolute. Therefore, it is important that employers, including charities and not-for-profits, are aware that the assessment of and, if necessary, the termination of probationary employees is something that must be handled diligently and with care. The recent decision of the Ontario Superior Court of Justice, *Cao v. SBLR LLP*, 2012 O.J. No. 3328,<sup>1</sup> has confirmed that an employee may be found to have been wrongfully dismissed if the employer did not act in good faith during the probationary employee’s employment and termination process. Although the Ontario *Employment Standards Act, 2000* (“ESA”) does not provide for a notice period to be given to employees who have been employed for less than three months, courts are not prohibited from applying common law reasonable notice periods when appropriate. This *Charity Law Bulletin* discusses this decision, and analyzes how it may affect Ontario employers.

### **B. THE FACTS**

In the spring of 2008, Suyi Cao was employed as a Tax Accountant at an accounting firm when she responded to a job recruitment advertisement for a Financial Analyst position. When Ms. Cao went to interview for the position, she was informed by the recruiter that his close friend was a partner at an

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<sup>1</sup> *Cao v SBLR LLP*, 2012 OJ No 3328.

accounting firm, SBLR LLP, and that if she was interested they might have a tax position available for her there.

The job posting for that position stated that SBLR LLP required the successful candidate to have a post-secondary education, be working towards completing a professional designation, have a minimum of two years experience in a tax role and be able to prepare and review corporate, personal and trust tax returns. Given these qualifications, Ms. Cao subsequently passed on her résumé to the recruiter and an interview was arranged with the firm.

Ms. Cao's résumé stated that she ensured timely and accurate preparation of detailed tax returns (personal, trust, corporate, GST); voluntary disclosures and clearance certificate applications using Taxrep and FormulaTrix; prepared financial statements; and was currently enrolled and in the process of completing her CGA Level 4 and PACE Level Course. During the interview process, Ms. Cao met with the Tax Manager of the firm along with the managing partner and a senior partner of the firm (who were to determine the overall fit of Ms. Cao with the firm). Following the completion of the interview process, Ms. Cao was offered a job as a Team Accountant, Tax, and her contract was finalized on July 16, 2008. Ms. Cao's contract was for an indefinite term, set out a base salary of \$60,000 per year, had a 90 day probationary period, three weeks' vacation, participation in an incentive program, and an entitlement to benefits after three months.

Ms. Cao started work on August 18, 2008 and reported to the Tax Manager of the firm who assigned her various tasks each week. During her brief employment time, Ms. Cao was given several different tasks to work on and did not receive any negative feedback on her work. On September 25, 2008, Ms. Cao was called into a meeting with the Tax Manager and a senior partner and informed that she was being terminated, due to her not performing at the required "intermediate level" and due to the fact that she would not be completing her CGA designation by the summer of 2009.

In court, Ms. Cao stated that she had no knowledge that she was to be performing as an "intermediate level" Accountant and that she had never been informed by her employer that they had concerns about her work. Also, the Tax Manager did acknowledge that, contrary to the firm's Team Handbook, he had not met for periodic meetings to review Ms. Cao's performance and to offer suggestions for improvements. The termination meeting had been the first meeting that he, or anyone else at the firm, had had with her.

Furthermore, nowhere in Ms. Cao's contract did it state that there was an obligation on Ms. Cao to complete her CGA designation within a specified time.

Following her termination meeting, Ms. Cao received a letter dated September 25, 2008 confirming her termination. The termination letter did not allege cause or raise performance issues, despite the verbal reasons given at the termination meeting. Also, The Record of Employment (ROE) submitted to Service Canada stated that Ms. Cao's termination was due to "involuntary termination without cause."

After hearing the evidence at trial, the court held that Ms. Cao was wrongfully dismissed, in that the employer was found to have not given Ms. Cao a reasonable or fair opportunity to demonstrate her fitness for the position for which she was hired. Nor did the employer communicate any reservations about her performance, or provide her with the opportunity to improve prior to the termination.<sup>2</sup> Ms. Cao was awarded a payment equal to four months of reasonable notice.

### C. WRONGFUL DISMISSAL AND PROBATIONARY EMPLOYEES

A lower legal standard exists for what constitutes just cause in cases of termination of probationary employees. Even so, the onus is on the employer to show that it has just cause, even if that just cause is simply that the employee is "unsuitable for the job."<sup>3</sup> This unsuitability factor can have much lower standards and can "include such considerations as character, compatibility, as well as ability to meet the present and future production standards expected by the employer."<sup>4</sup> If an employer chooses to terminate for unsuitability, their judgment cannot be questioned, but they must still prove that the termination was due to the employee not being suitable for the position and not for another "reason or improper motive which would not justify a dismissal."<sup>5</sup>

Furthermore, an employer must be able to show the court that they "acted fairly and with reasonable diligence" when determining whether the employee was suitable for the position. The probationary employee must be "given a reasonable opportunity to demonstrate his ability to meet the standards the employer sets out when he is hired, including not only a testing of his skills, but also his ability to work in

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<sup>2</sup> *Cao*, *supra* note 1 at 95.

<sup>3</sup> *Mison v Bank of Nova Scotia*, [1994] OJ No 2068 (Ont Gen Div) at 41.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

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.”<sup>6</sup> If employees are misled upon the basis on which they will be evaluated, or if the employee did not do the required evaluation, their dismissal will not be found to be in good faith, resulting in a possible wrongful dismissal lawsuit.<sup>7</sup>

## D. REASONABLE NOTICE

When there is dismissal without cause of an employee hired on an indefinite term the common law requires an employer to provide reasonable notice (or, compensation in lieu of notice) to an employee upon termination (unless there is language in the contract to provide otherwise). Although Section 57 of the ESA does not provide for notice to those individuals employed less than three months, this section does not preclude a court from applying a common law reasonable notice period.<sup>8</sup> If the probationary employee is wrongfully dismissed, they will also have a right to monetary damages based on reasonable notice. In order to assess the length of the notice period the court will “keep in mind that a probationary employee has taken a risk and given up a previous job or other job finding opportunities to accept the new position,” and subsequently evaluate the appropriate notice period.<sup>9</sup> Therefore, depending upon the nature of the position, a wrongful dismissal claim could be fairly substantial. While a short length of service will mitigate against very long notice periods, other relevant factors, such as the employee’s age, education, experience, and the seniority of the position are all matters that a court will assess in determining an appropriate notice period.

## E. CONCLUSION

For employers, including charities and not-for-profits, the *Cao* decision illustrates the need to be aware of the duty to assess, and if necessary, terminate probationary employees in a fair and just manner. In order to avoid wrongful dismissal claims by terminated probationary employees, employers should regularly assess the performance of the employees during the probationary period, and provide written and verbal feedback, so that the employee may attempt to improve in areas where he or she may be found wanting. In the event a terminated probationary employee does commence a claim, such feedback will be important in proving that the employer acted reasonably and fairly.

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<sup>6</sup> *Mison*, *supra* note 3 at 42.

<sup>7</sup> *Cao*, *supra* note 1 at 75.

<sup>8</sup> *Ibid* at 113-4.

<sup>9</sup> *Ibid* at 119.

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