

Member's Quarterly

Winter 2020 Edition

Feature

Made to Measure: 90 Days of Probation Suitability

Draft a termination clause that works

With two recent Alberta decisions regarding probationary periods in *Dalskog v. Crowsnest Pass Ecomuseum Trust Society*, 2019 ABPC 36, and *Christensen v. Tollcorp Enterprises Inc.*, 2019 ABPC 49, it is time for a refresher on probationary periods. Some employers believe they can simply end a probationary relationship without repercussion, because section 55(2)(b) of the Alberta *Employment Standards Code* (the "Code") states that termination notice is not required when an employee has been employed by the employer for 90 days or less (note that this recently changed from 3 months to 90 days). However, this may not be so simple and employers need to be careful in drafting employment agreements.

The Common Law Creature

The merging of section 55(2)(b) of the Code and probationary periods is common, but inaccurate. The two are distinct concepts. In fact, the word "probation" does not even exist in the Code. Probationary periods exist in the realm of the common law and come with their own set of rules.

What is the Common Law Test?

Under the common law, there is a presumption of reasonable notice even for employees with 90 days of service or less. However, an employer can rebut this presumption. An employee will not be entitled to common law reasonable notice if their employment was terminated during a probationary period, subject to the following suitability test:

- (1) The employer had given the probationary employee a reasonable opportunity to demonstrate their suitability for the job;
- (2) The employer decided that the employee was not suitable for the job;
- (3) The decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but character, judgment, compatibility, reliability and future with the company.

If the employer fails to satisfy the above requirements, the employee will be entitled to common law reasonable notice, despite the fact that the employee may not be entitled to statutory notice. For example, an employee who had worked for the employer for just over two months would not be entitled to any statutory notice, but they could still be entitled to months of common law reasonable notice if the employer fails to meet the suitability test.

Can probationary periods be longer than 90 days?

Because probationary periods and statutory notice are distinct concepts, employers can establish a probationary period longer than 90 days. In *Van Wyngaarden v. Thumper Massager Inc.*, 2018 ONSC 6622, the probationary period was set at six months, and since the employer met the suitability test, the employee was not entitled to common law reasonable notice.



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The Statutory Being

Although section 55(2)(b) of the Code has nothing to do with probationary periods, where the Code comes into play is when the probationary period is longer than 90 days. Under common law, an employee may not be entitled to any notice if the suitability test is satisfied, but the common law cannot oust statutory minimums established by the Code. For that reason, in *Van Wyngaarden*, although the employee was not entitled to common law reasonable notice, the employee was still entitled to one week's statutory notice.

Takeaways for the Employer

In conclusion, an employer may be attracting further hurdles for itself by describing the 90 day period as a probationary period since it will need to satisfy the suitability test. On the other hand, if the employer does not characterize the 90 day period as a probationary period, it will not be able to rebut the common law presumption of reasonable notice.

One option to mitigate against this "between a rock and a hard place" scenario is to draft a proper termination clause. A valid termination clause also rebuts the common law presumption of reasonable notice. This concept was demonstrated in *Sullivan v KSD Enterprises Ltd.*, 2018 CanLII 109751, where the employer relied on both a probation clause and a termination clause. In that decision, the court found that the employer engaged in a good faith assessment of suitability and was entitled to terminate based on suitability. The court also found that the employer was entitled to use the termination clause as the basis for calculating the employee's notice period.

By having a properly drafted termination clause, the employer will have an additional defence against unexpected common law reasonable notice exposure.

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