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Employee fired before first day of work awarded 6 weeks' notice

Employer changed its mind but contract said probationary period started on employee's first day on the job

BY DAVID MASTER

SOMETIMES, it becomes evident fairly quickly that a new employee isn't going to work out. But can an employer decide that before the employee even starts work?

In *Buchanan v. Introjunction Ltd.*, an employer retracted a written offer of employment about two weeks after it was signed, but prior to the employee's first day of work. As a result, the employee commenced an action for wrongful dismissal.

Colton Buchanan, 27, was set to earn an annual salary of $125,000 with Introjunction — a federally incorporated company in the high-tech industry — held a certificate in new media design and web development and had been in the field of web design for more than five years. He was not recruited or solicited by Introjunction, although he did leave secure employment at a digital media company to join the company.

The key issues in this case were:

- Did the employer's retraction of the executed employment agreement constitute a wrongful dismissal entitling the employee to damages in lieu of reasonable notice?
- If the employee was entitled to reasonable notice, what is the appropriate notice period?

Retraction and probationary periods

The law is clear that absent a contractual provision to the contrary, an employee who is terminated without cause is entitled to reasonable notice or damages in lieu of reasonable notice. This principle stands whether or not the employee has actually begun working. In other words, retraction of an executed employment agreement is akin to a termination.

Therefore, the central issue in the case was whether Introjunction could rely on the probation clause in the employment agreement with Buchanan to negate its obligation to pay damages in lieu of reasonable notice.

In B.C. and Ontario, employers who insert clear probation clauses into employment agreements retain the flexibility to terminate an employee without notice or cause for up to three months.

In that regard, Introjunction argued that it must be able to rely on the probation clause because it would be illogical for the employee to have greater rights before, rather than after, he commenced work and that the probationary clause granted it unfettered discretion to terminate Buchanan without notice or cause.

However, the court found that Introjunction could not rely on the probation clause and was obligated to pay damages in lieu of reasonable notice. It decision was based on two key reasons.

Probationary period commenced on first day of employment. The court explained that on its face, the employment agreement clearly stated that the three-month probationary period began on Nov. 1, 2016, which was the employee's first day of scheduled work. However, Buchanan, who executed the agreement in mid-October, was terminated on Oct. 29. As a result, the court found that the probationary period not to be in force at that time and it could not be relied on for this reason.

> The employment agreement clearly stated that the 3-month probationary period began on Nov. 1, but the worker was fired Oct. 29.

Purpose of probationary periods. The court also explained that had the probation clause applied, its decision would have been the same because probation clauses do not grant employers unfettered discretion to terminate without notice or cause. It affirmed the enduring principle that the purpose of the probationary period is to permit the employer to engage in a good-faith assessment of the employee's suitability for the job.

In this case, Introjunction retracted the offer simply because it changed its mind about its business and staffing needs.

The reasonable notice period

Buchanan sought a reasonable notice period of four months, while Introjunction argued for two weeks to one month.

The court explained factors in favour of a longer notice period were the nature of the position, high salary, and the fact Buchanan had left secure employment to join Injunction. Factors in favour of a shorter notice period were the precariousness of the position, availability of similar employment and, of course, length of service.

The court, without saying much more than taking the above into consideration, settled on six weeks' pay in lieu of reasonable notice as the appropriate notice period.

Despite the court's brief analysis regarding the appropriate notice, it is noteworthy because while length of service is only one factor ordinarily considered by courts, the notice period is still relatively long.

One possible explanation is that in this case, the employee was successful in finding alternate employment six weeks later and the court found his mitigation efforts to be reasonable. Therefore, given the purpose of

reasonable notice — essentially make the employee whole for a reasonable amount of time until she is able to secure alternate employment — six weeks' reasonable notice makes sense.

It is also noteworthy because generally, courts will cite inducement by an employer as a factor contributing toward a higher notice period. There was no dispute that the employee was not induced and simply left secure employment, but the court still found this to be a factor in support of an increased notice period.

Tips for employers

It would be misguided for employers to rely on this decision as justification to modify their employment contracts to extend the application of probation periods to the date the employee executes the employment agreement. While it would likely overcome the first hurdle in this case, unless something drastic happened between the time of execution and employment affecting suitability — such as finding out the employee lied about credentials for the job — a court would likely find that the employer failed in its duty to act in good faith and still award damages.

In that regard, a decision released just a couple of months prior from the same court, *Ly v. British Columbia (Interior Health Authority)*, offered some guidance to employers on factors it will consider in determining whether the employer acted in good faith when terminating a probationary employee:

- The employee was made aware of the basis for the employer's assessment of suitability before or at the commencement of employment
- The employer acted fairly and with reasonable diligence in assessing suitability
- The employee was given a reasonable opportunity to demonstrate suitability
- The employer's decision was based on an honest, fair and reasonable assessment of suitability.

In short, employers' discretion to dismiss probationary employees is not unfettered and they must actually assess employees during the probationary period. It would be prudent for employers to maintain records, as opposed to verbal assessments, which can be referred to and relied on in the event that a probationary employee who does not make it into full-time employment seeks to challenge the termination.

For more information see:

- *Buchanan v. Introjunction Ltd.*, 2017 CarswellBC 1627 (B.C. S.C.).
- *Ly v. Interior Health Authority*, 2017 CarswellBC 37 (B.C. S.C.).