Focus

LABOUR & EMPLOYMENT

Limits of the probation clause

Employees owed a good faith assessment of their job suitability

Monty Verlint

Employers often believe that employees who are considered "probationary" can be terminated at any time and without notice. However, a recent decision of the Supreme Court of British Columbia in *Ly v. British Columbia (Interior Health Authority)* 2017 BCSC 42 offers a useful lesson to suggest otherwise. Even though the court found the employee to be subject to a valid probationary term, it also found that the employer did not conduct a good faith assessment of the employee's suitability for continued employment. Therefore, the employee was entitled to "reasonable notice of termination" at common law.

In this case, the plaintiff, Phuc Ly (the employee) sued for wrongful dismissal. He commenced his employment with the defendant, Interior Health Authority (the employer) on Nov. 4, 2014, and was terminated on Jan. 8, 2015, without notice. The probationary clause in his offer letter simply stated that "Employees are required to serve an initial probationary period of six (6) months for new positions." The employee argued that the "bare reference" to probation in his offer letter was not sufficient to create a valid contractual probationary period. The court disagreed, holding that the term "probation" is well understood in business and industry as one where an employee is being assessed by the employer to ascertain their suitability as a permanent employee.

The court reviewed additional agreements titled "2008" and "2014 Terms and Conditions of Employment" that included similar probationary terms. Among other things, the agreements stated that an "employee terminated within the probationary period is not entitled to notice or payment in lieu of notice." The employee argued that this particular term of probation was invalid because it offended s. 63(1) of the B.C. *Employment Standards Act* (ESA), which required payment of one week's wages after three months of consecutive employment. However, the court held that neither document was actually "incorporated" into the plaintiff's employment agreement; therefore, the court did not need to decide the question of invalidity of the clause because of the ESA.

However, the court analyzed whether the ESA applied at all to the employment agreement. It stated that even if an employee did not expressly agree to specific terms and conditions that negated reasonable notice under common law, there was nonetheless an "implied contractual right" to dismiss without notice during an employee's

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Why those 'winter blues' should be accommodated

Sean O'Donnell

Winter has been long, dark and bitter; the Leafs will not make the playoffs (I assume, at the time of writing) and the POTUS is wreaking havoc. Despite how bad we think we have it, spring is around the corner; the dark days of winter will soon be over.

However, there are many who continue to suffer from the mood disorder formerly known as seasonal affective disorder (SAD).

SAD is classified in the DSM-5 as a major depressive disorder "with seasonal pattern." Sufferers exhibit sleep disturbance, feelings of hopelessness and suicidal thoughts, most likely caused by lack of daylight in the winter months resulting in increased melatonin and decreased serotonin. Employees, particularly those who work long hours (the current audience) in offices with little natural light, can experience symptoms all year round.

Employers who, when faced with a request for accommodation, dismiss SAD as simply "the winter blues," do so at their peril; failure to accommodate SAD may be a violation of the *Human Rights Code* (the code).

Is SAD considered a disability? Guidance from the Human Rights Tribunal of Ontario (HRTO) and elsewhere is that "disability" should be interpreted broadly. However, "common ailments" such as the flu (a clear problem in the winter months) are temporary and have been deemed not to be "disabilities" protected by the code, lest the protections therein become trivialized. (*Valmossi v. Canadian Electrocoating Inc.* 2014 HRTO 701; *Burgess v. College of Massage Therapists of Ontario* 2013 HRTO 1960).

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>
> **Sean O'Donnell**
> SJO Legal

While there are no HRTO decisions finding a failure to accommodate SAD specifically, as a major depressive disorder it should be protected under the code as a disability.

One U.S. decision provides guidance: *Ekstrand v. Somerset School District* 683 F.3d 826 (7th Cir. 2012). *Ekstrand* reversed summary judgment in favour of a school district on a claim that it violated the *Americans With Disabilities Act* (ADA) by failing to accommodate an elementary school teacher suffering from SAD. Renae Ekstrand claimed the school district failed to accommodate by denying her repeated requests to relocate her class to a classroom with exterior windows. Ekstrand provided the school district with written notice of her disability and a request for accommodation from her psychiatrist, who stated that it was "crucial" to her recovery that she work in an environment with natural sunlight. The court found that when the school district was provided with notice of these circumstances, it was required to accommodate her disability unless it could establish the accommodation would create an "undue hardship" upon the school district (similar to the test under the code). The court found that the costs associated with a room change were not significant enough to constitute an undue hardship and affirmed a nominal award of damages.

In this time of heightened awareness of mental health disabilities and discrimination issues, employers should take SAD, and mental health issues in general, seriously by taking the appropriate steps to accommodate them.

But why?

First, the benevolent employer may wish to assist employees suffering from mental health disabilities to cope with such afflictions for altruistic motives, i.e. to the personal benefit of the employee.

Second, the economical employer will recognize that having effective accommodation programs in place to address mental health disabilities may (i) lessen the effects of that mental health disability (allowing the employee to focus on getting well, to the economic benefit of the employer); and (ii) may reduce the need for short-term and long-term disability leaves and their associated costs to the employer.

Third, and often most important, the image-conscious employer may reduce its chances of being named in a human rights application, which is never good for a company's reputation or bottom line.

What should an employer bear in mind when developing an accommodation program? As a first step, employers should educate themselves on the issues involved with mental health disabilities, particularly the surrounding stigma and the lack of reporting of mental health disabilities in the workplace as a consequence thereof. Second, employers must train their HR professionals and management to recognize the red flags of mental illness and not succumb to ostrich syndrome (not worthy of protection under the code). Third, employers should draft clear policies and procedures for dealing with mental health disabilities in the workplace, while bearing in mind that there is no "one size fits all" for those suffering from mental health disabilities and mental illness in general.

And if employers don't pay heed to the above? Well, they will be very "sad" when they are the next "evil" employer profiled in the media.

Sean O'Donnell is principal of SJO Legal, practising employment, human rights and civil litigation in Yorkville, Toronto.

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probationary period. This sufficiently rebutted the presumption of reasonable notice at common law. At the same time, the common law would not imply a term into the employment contract that is inconsistent with the legislative requirements of the ESA. Therefore, even a probationary employee will be entitled to the benefits described in the ESA.

Having decided that the probationary clause was valid, the court went on to hold that an employer must still carry out a "good faith assessment" of the employee's suitability for continued employment and relied on the B.C. Court of Appeal decision of *Jadot v. Concert Industries Ltd.* [1997] B.C.J. No. 2403 (*Jadot*) for this proposition. It stated that while an employer is not required to give reasons for the dismissal of a probationary employee, the employer's conduct will still be reviewed by the court in light of various factors such as: 1) whether the probationary employee was made aware of the basis for the employer's assessment of suitability before, or at the commencement of, employment; 2) whether the employer acted fairly and with reasonable diligence in assessing suitability; 3) whether the employee was given a reasonable opportunity to demonstrate his suitability for the position; and 4) whether the employer's decision was based on an honest, fair and reasonable assessment of the suitability of the employee, including not only job skills and performance but also character, judgment, compatibility and reliability.

In the *Ly* case, the court concluded that the employer did not meet the requisite standard of good faith in assessing the employee's suitability for the position. He was not given a reasonable opportunity to demonstrate his suitability for his job as manager. As a result, the court awarded three months' pay in lieu of reasonable notice plus unpaid expenses.

This case suggests that a brief reference to a probationary period, however long it is, will be sufficient to rebut the presumption of reasonable notice at common law. However, the employer will still need to satisfy the minimum requirements of employment standards legislation and should not include any terms that violate the applicable statutory notice periods (for example, by stating that an employee can be terminated without notice where the probationary period is more than three months).

In addition, it is likely not sufficient for the employer to decide on a whim whether the employee's performance is suitable. Instead, the case advises that employers should review whether the employee was aware of the requirements; the employer provided a reasonable opportunity for the employee to demonstrate suitability; and the employer made a fair assessment. Therefore, documenting communications to the employee about employment requirements, arranging performance reviews and meetings and providing a reasonable time frame for performance will go a long way in demonstrating good faith.

Monty Verlint is a partner in the Toronto office of Littler LLP. He is in the hiring, performance management and termination practice.