

Are Contracts for Probationary Employees Enforceable: The Ontario Court of Appeal in *Nagribianko v. Select Wine Merchants Ltd.*

Employment & Labour | Employment Agreements | Employment Law | Employment Standards Act | Litigation | Litigation & Dispute Resolution | Ontario | Reasonable Notice

26 July 2017

Employers often rely on a probationary period to determine whether a new employee is suitable for an employment position. If an employer determines that an employee is not suitable for the employment position they often rely on the terms of a probation period to terminate the employee without notice or cause.

In the recent case of *Nagribianko v Select Wine Merchants Ltd*, an employee and employer entered into an employment contract that included a probationary period of 6 months. Within the 6 month probationary period, the employer terminated the employee on the grounds that he was 'unsuitable' and provided the employee with one week's notice in accordance with the *Employment Standards Act* ("ESA").

The employee sought damages in connection with the termination. However, the court rejected his claim and an appeal to the Ontario Court of Appeal was dismissed.

In finding in favour of the employer, the appellate court stated:

Unless the employment contract specifies otherwise, probationary status enables an employee to be terminated without notice during the probationary period if the employer makes a good faith determination that the employee is unsuitable for permanent employment, and provided the probationary employee was given a fair and reasonable opportunity to demonstrate their suitability.

The Ontario Court of Appeal's decision provides clarity on some of the factors that an employer must consider if they intend to rely on a probationary clause to terminate without cause or notice:

- (a) Employers should ensure that when a probationary period is included in an employment contract it is clear and unambiguous. To avoid any uncertainty, the employer should draw the probationary period to the employee's attention.
- (b) Employers should ensure that when a probationary period is included in an employment contract it does not contravene the ESA. If the probationary period is less than three months the ESA provides that no statutory notice is required. However, if the probationary period is longer the employee is entitled to statutory notice as provided for in the ESA.
- (c) Employers cannot terminate an employee for any reason during a probationary period. During the probationary period, the employer must provide the employee with a fair and reasonable opportunity to demonstrate their suitability and the decision to terminate must be done in good faith.

Gardiner Roberts

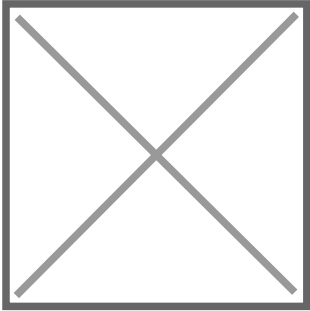
Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

While these are not the only factors that an employer must consider when terminating an employee during the probationary period, the Ontario Court of Appeal decision demonstrates that the court is willing to accept probationary periods as meaningful tools that employers can rely on.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Stephanie Clark