

## EMPLOYMENT LAW CONFERENCE-2007

PAPER 3.1

# **Dismissing the Probationary and Short-Term Employee: Has the Court Recognized the Imbalance of Power or Have Judges Simply Gone Too Far?**

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## **Dismissing the Probationary and Short-Term Employee: Has the Court Recognized the Imbalance of Power or Have Judges Simply Gone Too Far?<sup>1</sup>**

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### **I. Introduction**

Lawyers have long advised their employer clients that absent unusual circumstances such as inducement, short term and probationary employees would not be entitled at common law to long notice periods upon dismissal. This was particularly true in cases where a contract of employment stipulated short notice to the probationary employee.

However, in the 1995 BC Supreme Court case of *Jadot v. Concert Industries*,<sup>2</sup> it was acknowledged by the Court that the extent of an employer's obligation when dismissing an employee during a probationary period of employment, was not settled.<sup>3</sup> Since *Jadot*, Canadian courts have struggled to balance the interests of employers (who have a right to find suitable employees for their workplace) with the interests of probationary or short term employees (who have legitimate expectations of long term employment).

Today, a dismissed probationary or short term employee in BC may well have greater success in wrongful dismissal litigation than some of their longer term employee counterparts. Short term senior employees are increasingly awarded a minimum of six months or more of severance.

With respect to probationary employees, BC judges seem to have adopted a collective sympathy which has manifested itself in decisions awarding longer notice periods where the employer failed to prove good faith in dismissal--even when valid contracts of employment stipulate short notice periods. An even more striking trend is that some judges are not relying upon the infamous *Wallace* decision to find an increase in damages.

Also, it is likely that the increase in the monetary jurisdiction of the BC Provincial Court may prompt more wrongful dismissal claims to be heard in that court. It would be interesting to know whether judges in that court are expanding the trend.

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<sup>2</sup> *Jadot v. Concert Industries*, [1995] B.C. No. 158, aff'd at B.C.C.A. [1997] B.C. No. 2403 (CA.).

<sup>3</sup> *Jadot v. Concert Industries* (BCSC) *ibid.*, para. 38.

While the authors of this paper have differing views on the wisdom of this new trend to award longer notice periods to short term and/or probationary employees, they agree that plaintiff and employer counsel need to revamp their respective list of requirements in drafting or responding to a proposed employment agreement.

Employees ought to ensure that any contract of employment addresses a mutual view of long term employment. If no contract exists, the employee should embody his or her understanding of the whole of the contract in writing to the employer.

For employers, contracts of employment, even for entry level positions, should clearly set out the parameters of probation and the intent of the parties. Each employer should have a stringent probation policy which is incorporated into employment contracts prior to hiring.

In this paper, we will identify the test for dismissal of a probationary and/or short term employee and provide practical tips for employees and employers in beginning an employment relationship.

## II. **Jadot—A New Beginning of Employee Rights**

Employers may have cheered at the time of the *Jadot* decision because it seemed to uphold a low standard of "suitability" to be applied when dismissing a probationary employee. Who could have anticipated that when the BC Supreme Court (as affirmed on appeal) decided against Ms. Jadot in January 1995, ruling that her employment had been lawfully terminated, it had created a new low threshold to measure against when increasing damages for wrongful dismissal of a probationary employee.

Ms. Jadot was a secretary of a company. Due to personality conflicts with others, she was terminated after one and one half months of employment, during a probationary period. The Court considered the existing jurisprudence. It adopted the reasoning of the Saskatchewan Q.B. in *Ritchie v. Intercontinental Packers Ltd.* which was decided in 1982,<sup>4</sup> and in doing so, broadened the obligations upon employers in dismissing probationary employees.

The parties disputed whether Ms. Jadot was a probationary employee. The Court determined that she was. Although Ms. Jadot was not provided notice of her deficiencies, she clearly understood that "fitting in" was a priority to the company. It was determined that Ms. Jadot was lawfully terminated.

In reaching its conclusion, the Court adopted the following principles:

1. An employer, during a probationary period, has the implied contractual right to dismiss a probationary employee without notice and without giving reasons, based upon certain provisos which include that:
  - a. The onus rests upon an employer to justify the dismissal;
  - b. In order to justify the dismissal, the Employer must evidence that it assessed the employee's suitability;
  - c. In evidencing that it undertook an assessment of suitability, the Employer must prove that it acted fairly and with reasonable diligence in assessing whether or not the proposed employee was suitable in the job for which s/he was being tested;
  - d. Suitability may be determined in the context of a probationary employee's character and ability to work harmoniously within the team.

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4 (1982),16 B.D.R. 74 at 78.

The Judge in *Jadot* found as a matter of fact that both parties understood that probation was a test of whether the employee fit into the small work environment and was able to get along with the team. It examined closely the employer's active investigation into complaints that Ms. Jadot could not work well with others. It determined that the employer had taken reasonable steps and reached the opinion in good faith that the plaintiff was not compatible within the organization.'

In deciding in favour of the employer, it nevertheless set the stage for similar inquiries into the employer's good faith, which enquiry has served to broaden the scope of damages for probationary employees.

### III. Post *Jadot*: A Broad View of Bad Faith

Canadian courts rallied around the decision in *Jadot* and in identifying the vulnerable nature of probationary and short term employees, broadened the provisos set out in *Jadot*.

Shortly after the trial judge's ruling in *Jadot*, the BC Supreme Court had the opportunity to apply its reasoning, in the case of *Longshaw v. Monarch Beauty Supply Co.*<sup>6</sup>

The employer in that case had created a new management position of Sales/Marketing Manager for its Vancouver office. Mr. Longshaw was hired on September 1, 1992 and dismissed on November 26, 1992. He was provided two weeks salary upon his termination.

For its part, the employer argued that the plaintiff was hired as a sales representative, who might, after a period of probation, be considered for appointment to the position of Sales Manager. In dismissing that notion, the Judge examined the factual realities of the work performed and the context within the workplace. It also scrutinized the written offer of employment which was described by the Court as "muddled"! and determined that there were enough qualifying phrases to establish that the appointment was as Sales Manager, but was also probationary.

The Employer argued that Mr. Longshaw did not perform to company standards. In dismissing this argument, the Court stated that:

The concept of probationary employment means just what it says: that the suitability of the new employee will be reviewed, evaluated and will be the basis on which the ultimate decision whether to hire is made. Very much in dispute in this case is the standard that an employer is entitled to use in dismissing a probationary employee.... the good faith issue in this case, based on the conventional jurisprudence, has to do with the fact that Mr. Longshaw was never told that these impressions would be the basis on which he was to be judged. Moreover, Mr. Bauer told Mr. Longshaw that the sales target was not critical, that is, he gave Mr. Longshaw assurances that the very thing which turned out to be crucial for Mr. Evans and Mr. Lindholm was not crucial ...<sup>8</sup>

The Court went further than in *Jadot*, by stating clearly that short term and probationary employees, being more vulnerable to the employer, should be awarded proportionally more damages than a long term employee:

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5 *Ibid.*, para. 55

6 [1995] B.C. J. No. 2362.

7 *Ibid.*, para. 14.

8 *Ibid.*, paras. 38 and 46.

### 3.1.4

An assessment of good faith involves more than the conscious motives of the employer. What has to be looked at are both sides of the situation, in light of what happened. What happened in this case is that Mr. Longshaw was misled as to the basis on which he would be judged, both by the hiring letter and by Mr. Bauer. In the circumstances, the dismissal cannot be said to have been made in good faith.

I would be prepared to go further. It does seem to me that Mr. Longshaw was never given an opportunity to demonstrate his fitness for the position of Sales Manager ... What the judgment of Noble J. in the Ritchie case recognized, it seems to me, is that taking a person out of the situation of looking for a job and hiring that person on probation must involve a realistic possibility that the person will be hired.

The case of a probationary employee, by definition, involves a short term of employment. Weighed against this is the reality that the probationary employee has given up other job finding opportunities. This explains, I think, why the proportion between damages awarded to the probationary employees and their length of employment differs from typical awards where an established employee has been dismissed.<sup>9</sup>

The Court heard detailed evidence about the inter-relationships in the workplace. In awarding six months of severance, the Court relied heavily upon the fact that senior employees may have acted in a sinister way as against *Nlr.* Longshaw. The fact that performance standards were not clearly provided to the plaintiff also weighed upon the Court.

Based upon the facts, the Judge in effect expanded the principles set out in *Jadot* by imposing one more proviso: that employers provide employees with a reasonable opportunity to succeed. In this case, good faith could not be proved because the employer's investigation into suitability fell short. Thus, unlike *in Jadot*, the employer's expectations were unrealistic and the employee was not clear on the expected standards. These actions amounted to bad faith and an increased award of damages.

The Appeal Division of the P.E.I. Superior Court in *Alexander v. Padinox Inc* went one step further. It stated that a greater fairness being embraced by Canadian courts is meaningless unless there is a positive duty upon an employer to exercise discretion on some objective standard." Implementing an objective standard, stated the Court, can only be achieved with periodic evaluations which are discussed with the probationary employee. Failing to implement this objective standard results in a finding of bad faith:

While an employee in accepting employment with a probationary period attached, agrees to a less secure tenure of employment than an employee hired permanently, both parties enter into an employment contract with a spirit of reciprocity which would indicate the employee expects a reasonable and objective assessment of his performance and suitability for the position permanently. The employee expects the relevant aspects of his employment to be evaluated regularly by the employer and discussed with the employee so as to give the employee an opportunity to correct any defective action. The scope of the evaluations and assessments, as well as the number of opportunities a probationary employee would have to alter his or her performance, will, naturally, depend on the length of the probationary period. However, in this case where the probationary period is up to one year, there was adequate time for a process of extensive evaluation and assessment as to the employee's suitability for permanent employment. Furthermore, there was adequate time for discussion between the employer and the employee as to the suitability and performance of the employee ...

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<sup>9</sup> *Ibid.*, paras. 49, 50 and 53.

<sup>10</sup> *Alexander v. Padinox Inc.*, [1999] P.E.I.]. No. 88.

### 3.1.5

Characteristics such as attitude, competence, conduct and compatibility with others in the workplace are all measurable by an objective standard. A reasonable opportunity for an employee to demonstrate he or she is suitable is measurable on an objective standard in that it should be the subject of periodic evaluations or assessments by the employer which are discussed with the probationary employee ...

I would not be prepared to find that Padinox, its servants or agents, acted in bad faith in the pejorative sense of having acted with malice. On the evidence, the company simply failed to communicate adequately with Mr. Alexander as to his suitability for permanent employment. It did not have in place a process for the evaluation of probationary employees which, given the reciprocity each of the parties should expect from a contract of probationary employment, is an indication the company may not have been fully aware of its obligations to Mr. Alexander as a probationary employee ... If Padinox was not prepared to take the time to formally evaluate Mr. Alexander's performance and discuss this with him, it should have been prepared to provide Mr. Alexander with reasonable notice of termination, commensurate with the circumstances of his employment. In this sense the company exercised bad faith, and this must be considered in determining the length of notice to which Mr. Alexander is entitled ...<sup>11</sup>

The dismissed employee was awarded five months notice and some reimbursement for relocation expenses. This objective standard and a requirement for a pro-active evaluation process when employment is subject to suitability has been affirmed in

Since the decision in *Jadot*, Canadian courts are finding bad faith without any reference to the case of *Wallace*. If employers do not meet the rigorous standards now imposed upon them in proving unsuitability and good faith in the dismissal of a probationary employee, they will find themselves paying damages which may far exceed damages for a longer term employee.

In order to prove good faith or to refute the claim, wrongful dismissal trials may need to be lengthy because each detail of the probationary employee's tenure and contract of employment must be examined. At issue will be whether the employer had policies or a written contract regarding probation, and its parameters. With respect to managers, these policies will have to be determined to apply to them. The degree to which an employee prepared for the job, for example, by relocating, will shed light where no written contract exists. Even advertisements of hiring published in a daily newspaper may provide insight as to the intention of the parties regarding whether a probationary period exists.<sup>13</sup>

While the increase in the monetary jurisdiction of the BC Provincial Court is fairly new, it follows that dismissed probationary employees may have their day in court less expensively and more expeditiously than in Supreme Court, notwithstanding that more evidence is required. Provincial Court judges will increasingly determine these matters and have already adopted the trend toward fairness.

Some employers argue that the courts in Canada have gone too far. They are concerned that the test for good faith seems to be evasive--it evolves with each new case. Employees on the other hand are welcoming their ever increasing ability to be compensated for wrongful dismissal during probation. For them, the movement toward fairness has just begun.

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11 *Ibid.*, paras. 24 to 38.

12 *Dang v. North American Tea, Coffee & Herbs Trading Co* [2002] B.C.] No. 1593 (see also *Duprey v. Seanix Technology(Canada) Inc.*, [2002] B.C.] No. 2118 (S.c.)).

13 *Athey v. Steve Marshall Motors Ltd.*, [1996] B.C.] No. 1965.

#### IV. The Six Month Rule

The old adage of "one month per year of service" as a means to determine severance for short term employees is officially out-of-date. It clearly no longer applies.

Today, counsel for dismissed short term employees will need to review, in meticulous detail, the facts, characteristics and circumstances of the job to opine on reasonable notice.

**In** dismissing a short term (but not probationary) employee, employers will have to show that they investigated the performance of a new employee objectively and without ulterior motives such as their finding of a better suited candidate." Often, credibility between the parties and the content of oral employment agreements will be at issue. For more senior short term employees, the notice will be increased.

Indeed, a minimum amount of notice seems to have been set by the courts. **In** *Beglaw v. Archmetal Industries Corp.*,<sup>14</sup> the BC Supreme Court adopted a floor for assessing damages for a wrongfully dismissed short term senior employee.

Mr. Beglaw, a 49-year-old Manager, was terminated from his employment at Archmetal Industries Corp. five months after commencing the position and after having a dispute with a superior.

The employer claimed just cause. However, the Court concluded that any deficiency had not been brought to the attention of the employee. After reviewing the evidence of the dispute in great detail, the Court preferred the evidence of Beglaw that circumstances were not as alleged by the employer. The Employer could not prove cause for dismissal.

**In** calculating the length of appropriate notice for the five month employee, the Judge in that case awarded six months notice and acknowledged authority for his position in the text *Wrongful Dismissal* by David Harris, B.A.L.L.B. of the Ontario Bar, Volume 1:

Accordingly, it appears, barring any unusual circumstances, that a notice period of approximately six months would be applicable to senior level employees with only a short period of employment. The all-too-usual factor that tends to lengthen the notice period is inducement of the Plaintiff to leave previous secure employment in order to take a position that is foreseeably of short duration, whether because of the volatility of the industry or otherwise.<sup>16</sup>

While the decision to apply a six month minimum has not been uniformly applied, it also has not been overturned. The new "six month rule" has in fact been applied by Canadian courts in similar cases."

We have not examined cases where inducement played a role, but courts have traditionally been more generous in severance awards in those cases.

#### V. Tips for Employers and Employees

Employers must act pro-actively to avoid successful wrongful dismissal claims by probationary or short term employees. Employers need to accept that their credibility will be tested and that they will

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<sup>14</sup> *Ibid.*

<sup>15</sup> [2004] B.C.] No. 2220.

<sup>16</sup> *Ibid.*, paras. 77 and 78.

<sup>17</sup> *Paradis v. Skyreach Equipment Ltd.*, [2002] B.C.] No. 28 (S.C); *Taggart v. K.D.N Distribution and Warehousing Ltd.*, [1997] N.S.] No. 197 (S.c.); *Ashby v. EPI Environmental Products Inc.*, 2005 B.C.S.C. 1190.

### 3.1.7

have the onus of proof when an employment relationship sours. As lawyers, we need to impress upon employers the need to document the employment relationship.

For the employer wishing to temper their wrongful dismissal liability, the simple act of incorporating workplace requirements and standards into their employment contracts may help alleviate such risk. From the jurisprudence, we can assist our employer clients in bullet-proofing their employment contracts. Here are some tips:

- (1) Restate the employer's mission statement or mandate in the employment agreement. For example, if team work is essential to the job, say so. This could become a key factor in dismissing a probationary employee as unsuitable.
- (2) Ensure that the employee has ample opportunity to negotiate the terms of employment with you. The *contra proferentum* rule will have less of an impact if the employee contributed to the terms of a contract. Negotiations will evidence the employee's full understanding of the terms of an employment agreement.
- (3) Include a probation period for each new employee. The length of the probation should be clearly stated. Avoid extensions of probation as these often lead to disputes about whether the employee acquiesced or agreed to the extension and place doubt upon the employee's probationary status.
- (4) The employer's right to dismiss an employee during probation for unsuitability, should be highlighted in an agreement and ought to be detailed in its criteria for suitability.
- (5) Create simple review forms for use in employee performance evaluations during probation. The form may be simple but will be evidence of any unsuitable performance or characteristics.
- (6) Undertake periodic reviews of the employee during a probationary period.
- (7) Ensure that prospective employees have copies of any relevant policies of the employer, which ought to be incorporated into an employment contract.
- (8) Make sure the employee executes a written agreement before commencing work and after ample opportunity to review the terms of employment.
- (9) Employers should have on hand a checklist to follow when they undertake a determination of suitability in dismissals. Ensure that the checklist is consistently applied to employees.
- (10) Ensure that the agreement addresses the issue of whether the parties contemplated long term employment. The probationary employee must understand that their employment could end if written criteria and standards are not met.

Employees need to be advised on how to negotiate with prospective employers regarding probation periods. **I**n our current hot job market, employees may want to take the position that either there be no probation period or that there be a substantial severance amount paid to them if they are found "unsuitable" while on probation. Employees can also work with the prospective employer to work out the details of how the employee's performance will be measured during the probation period. The more that the employee and employer can agree up front about the criteria used to measure and how it will be undertaken, the less likely disputes will arise.

The reality for most employees is that they will suffer more harm if terminated early than if terminated after years of service. Particularly for senior managers, employee counsel need to be vigilant in attempting to negotiate longer severance periods in the first two years of service. **I**f a probation period must exist, include a statement evidencing the employer's representations of long term service or other benefits.

Ultimately, employees will be at a disadvantage in negotiating terms of employment in tight job markets. By negotiating a few seemingly non-substantive sentences evidencing the true representations made by the employer, the probationary employee can help to insulate him/herself from early termination.