Contractual Probationary Period Cannot Save an Employer from a Sloppy just Cause Termination Process

by Jeff C. Hopkins

It is safe to say that most employers who have alleged a just cause termination have discovered the hard way, whether through an out-of-court settlement, or worse, at trial, that if the termination process was in any way flawed, even if in a minor way, the termination will not hold up under scrutiny. Over the years, the courts have shown a willingness (if not eagerness) to put the employer and its decision-making process under the microscope when judging a just cause dismissal. That trend has continued in *Cao v. SBLR LLP,* 2012 CarswellOnt 9184, 217 A.C.W.S (3d) 871 (Ont. S.C.J.), in which the court found that, given all the circumstances, the defendant fell well short of the just cause threshold, despite the plaintiff's very brief tenure and an express contractual probationary period.

In the spring of 2008, while employed as a Tax Accountant, Ms. Cao responded to an advertisement from a recruiter for a Financial Analyst position. However, when she went for the interview she was informed by the recruiter about a Tax Accountant position available with the defendant. After reviewing the defendant's job posting, Ms. Cao submitted her resume to the recruiter, who passed it on to the defendant. Ms. Cads resume included the statement. "CGA — Currently Enrolled in CGA Level 4 and PACE Level Course - *in progress"* [emphasis added].

After a preliminary interview, Ms. Cao met with Frank Bilotta, the defendant's Tax Manager, along with the defendant's Managing and Senior Partners. Following the successful completion of the interview process, Ms. Cao was offered a job as a Team Accountant, and signed a written employment contract on July 13, 2008. While the contract contained the standard terms of employment, it also included a 90-day probationary period clause. The court also noted that the contract lacked any obligation on Ms. Cao to obtain her CGA designation or complete the Canadian Institute of Chartered Accountants' in-depth tax course within a specific time period. Moreover, the contract included a warm welcome, stating: "Our offer is affirmation of our collective vote of confidence in your technical knowledge, interpersonal skills and fit with the team and culture."

Ms. Cao commenced employment on August 18, 2008, reporting to Mr. Bilotta. During her brief employment, Ms. Cao was provided with various tax-related tasks.

However, after approximately four weeks, on September 25, 2008, Ms. Cao was called into a meeting with Mr. Bilotta and advised that her employment was terminated effective immediately and that she would not receive any pay in lieu of notice. She was further advised that:

> *(a) She was not performing at the required "intermediate level"; and*
> *(b) She would not be able to obtain her CGA designation by the summer of 2009.*

At trial, the defendant argued that Ms. Cao had been verbally terminated for just cause, for these reasons. Ms. Cao testified that this was the first instance in which she heard she was an "intermediate" level Tax Accountant or that the defendant had concerns about her job performance. Mr. Bilotta admitted that, contrary to the defendant's employee handbook, which required periodic meetings to review an employee's performance and offer suggestions for improvement, this was the first time the defendant expressed any concern in this regard and no suggestions had been made for improvement. By letter dated September 25, 2008. Ms. Cao's termination was confirmed, although the letter did not specify that the termination was for just cause, despite the (alleged) reasons given by Mr. Bilotta at the termination meeting. Furthermore, Ms. Cao's Record of Employment contained a handwritten note stating "involuntary termination without cause".

On the issue or Ms. Cao obtaining her CGA designation, the trial judge accepted Ms. Cao's testimony that she had explained to Mr. Bilotta during the interview process that, while she "hoped to obtain [her] designation by the summer of 2009, the courses were offered by York University, which had not yet released its course calendar". She successfully argued that, since her ability to complete the designation depended on the availability of the qualifying courses, she could not have guaranteed to Mr. Bilotta any specific completion date. Moreover, the trial judge noted the lack of any express requirement to obtain her CGA designation in the contract.

There was no dispute that Ms. Cao was on probation when she was terminated. The defendant argued that Ms. Cao clearly knew she was on probation, and could therefore be terminated without notice or compensation in lieu of notice during the first 90 days of her employment. The trial judge, however, found that, while an employer may conclude that a probationary employee is unsuitable for the position hired, such a conclusion must be reasonable and be reached after the employee has been given a fair opportunity to demonstrate his or her ability.

With respect to the defendant's argument that the 90-day probationary period provided it with the contractual right to terminate Ms. Cao without notice or pay in lieu, while it was not specifically mentioned in the trial judge's reasons, it is well established that in order for a contractual probationary period to successfully limit an employee to the employment standards minimum (which in this case would have been no notice or pay in lieu within the first 90 days of employment), this limitation must be expressly outlined in the probationary period clause.

In finding that, on a balance of probabilities, the defendant did not have just cause, the trial judge focused on the defendant not having provided Ms. Cao with a reasonable or fair opportunity to demonstrate her fitness for the position for which she was hired. Had the defendant any reservations, it should have relayed them to Ms. Cao and provided her with an opportunity to improve, as outlined in the defendant's own written policies. In fact, the trial judge found that calling Ms. Cao into a meeting for the first time only to inform her that she would be terminated, allegedly for just cause, and not offering any opportunity to improve, was tantamount to her termination being in had faith. Luckily for the defendant, however, it does not appear that Ms. Cao alleged bad faith or moral damages as part of her claim.

Moreover, the court found that once a termination document is issued to the employee without citing any just cause, no such cause can be subsequently asserted by the employer unless: I) such cause is an after-acquired just cause; and 2) it was not known or it could not have been reasonably known or discovered at the time of termination even if the employer had exercised all reasonable due diligence.

With respect to Ms. Cao's common law period of reasonable notice, the trial judge found that four months was appropriate, taking into account Ms. Cao's age of 30, brief length of service, position and specialized skill set.

This decision reaffirms that a court will closely scrutinize a just cause dismissal and, in doing so, hold employers to a very high standard when assessing that decision, despite an employee's extremely brief length of service and the existence of a contractual probationary period. This is particularly true when the reason for dismissal is poor job performance. Even with a very brief tenure, the employer must provide an employee with a reasonable opportunity to succeed and advise the employee of the reason(s) why it believes the employee is not succeeding in his or her role. Finally, if an employer wishes to avoid having to provide any notice of termination (or pay in lieu) during a contractual 90-day probationary period, the probationary clause must expressly state that lack of notice, or at least state that any entitlement to notice (or pay in lieu) is limited to employment standards legislation.