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Western Canada Employment Litigation Roundup

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This litigation roundup provides guidance on recent and noteworthy cases in British Columbia and Alberta, including how these cases may impact employers in Western Canada.

Share Buy-back Clause Limits Profit Sharing Entitlement During Notice Period

The Alberta Court of Appeal in *Kirke v Spartan Controls Ltd.*,[1] confirmed that a properly worded share buy-back clause limited an employee's profit-sharing entitlement to ninety days after termination, even though the employee was entitled to twenty months of common law reasonable notice. The employee's shares were subject to a shareholder's agreement, which gave the employer the right to buy back the shares within ninety days after termination, thereby limiting the employee's damages with respect to profit sharing payments during the reasonable notice period.

This case once again confirms the importance of drafting compensation provisions carefully and to clearly address what happens on termination. The Supreme Court of Canada has held that provisions which seek to limit an employee's compensation entitlements during a reasonable notice period must be clear and unambiguous to be enforceable. Any ambiguity will be interpreted in favour of the employee and could significantly increase an employer's liability for wrongful termination damages.

Limit Multiple Employment Claims

Our employment & labour team in Western Canada recently successfully applied to stay an employment standards complaint pending the adjudication of a wrongful termination claim by the same employee. The Alberta Labour Board confirmed in *Harvard Park Business Centre Ltd. v Henwood*,[2] that an employee cannot pursue claims in multiple forums when the complaints/claims involve similar issues and remedies.

The employee in this case filed an employment standards complaint with the Labour Board seeking statutory termination pay and a wrongful termination claim in the civil Courts seeking common law reasonable notice remedies. The central issue in both the employment standards complaint and the wrongful termination claim is whether the employee was terminated by the employer and entitled to termination notice. We successfully argued that it would be a waste of judicial time and resources for the

Labour Board to adjudicate a complaint when the wrongful termination claim would address the same legal issue and involve the same remedies and in circumstances where the civil litigation process had already progressed to the discoveries stage. We also argued that there was a risk of contradicting outcomes since both the Labour Board and the civil Courts were being asked to determine the same legal issue.

This case is a helpful reminder that a stay of proceedings is a useful tool to avoid defending multiple complaints and claims by the same employee involving the same issues.

Avoid Probation Clauses

The Alberta Court of Justice in *Sprong v Chinook Lifecare Association*[3] reaffirmed a well-established principle that probation clauses in employment contracts create additional obligations on termination of employment which can cost employers money. In provinces like Alberta and British Columbia, Courts have confirmed that employers cannot terminate probationary employees unless the employer has established that the employee is not suitable for continued employment (which is generally the stated purpose of a probation clause). A probationary employee will have recourse to file a wrongful termination claim for damages if an employer fails to satisfy the applicable test (which is what happened in *Ly v. British Columbia*,[4] where a probationary employee was awarded damages equal to three months' compensation).

Alberta and British Columbia Courts apply similar tests to establish whether an employer has satisfied the onus of proving unsuitability. While slightly different, the employer must prove that the employee was informed of the required performance standards, that the employee was given an opportunity to meet those standards, and that the employee has not achieved the required standards despite assistance to do so.

The above issues can be avoided by simply including a properly drafted termination provision in the employment contract which allows the employer to terminate the employee's employment in accordance with minimum employment standards legislation. Employment standards legislation generally allows an employer to terminate an employee in the first three months without any advance notice and without any additional obligation to prove suitability.

Don't Use Separate Offer Letters

An argument often made by employees in wrongful termination claims is that the employment contract is not enforceable because no consideration was provided for the contract. Employees advance this argument to escape a termination provision which limits how much severance they are entitled to on termination. We often see this argument when the employee, at the start of the employment relationship, was asked to sign an initial basic offer letter (which includes very limited terms and does not include a termination provision), and was later asked to sign a detailed employment contract (which includes new substantive terms not

included in the initial offer letter, such as the termination provision). Unless consideration was provided for the detailed employment contract, the initial offer letter could be the governing employment contract.

This is what happened in *Adams v. Thinkific Labs Inc*.[5] The Supreme Court confirmed that an initial offer letter was a binding employment contract. The Court refused to enforce an employment contract that was signed by the employee after the initial offer letter because the employer had not provided fresh consideration. Since the initial offer letter did not include a termination provision limiting the employee's entitlements on termination, the employee was entitled to common law reasonable notice.

To mitigate this risk, employers should streamline their offers of employment into one document. This document should contain all terms of employment and most importantly, an enforceable termination provision.

Please do not hesitate to reach out to Michelle McKinnon, Jahaan Premji, or any member of our Employment & Labour Group in Western Canada, if you have questions about the cases discussed in this article.

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[1] 2025 ABCA 40

[2] 2025 ABESAB 8

[3] 2024 ABCJ 163

[4] 2017 BCSC No. 43

[5] 2024 BCSC 1129
