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DON'T YOU WANT ME? B.C. SUPREME COURT AWARDS SEVERANCE TO AN EMPLOYEE AFTER EMPLOYER RETRACTS OFFER OF EMPLOYMENT

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In the recent decision of *Buchanan v. Introjunction Ltd.*, 2017 BCSC 1002, the B.C. Supreme Court found that the plaintiff employee was wrongfully dismissed when his employment was terminated shortly after his contract of employment with the defendant employer was executed but before he actually started work. The Court awarded him six weeks' severance pay.

THE FACTS

The plaintiff, Colton Buchanan ("Buchanan") brought a wrongful dismissal action against the defendant, Introjunction Ltd ("Introjunction") when his offer of employment was retracted shortly after he signed a written contract of employment with the defendant (the "Employment Agreement").

In mid-July 2016, while employed by a company known as LocalSphere Digital Media, Buchanan applied for employment with Introjunction. Following receipt of Buchanan's job application, he was invited to meet with representatives of Introjunction.

After a series of meetings, Introjunction provided Buchanan with a letter dated September 29, 2016. In mid-October 2016, after some discussion pertaining to the terms of employment, Buchanan received and executed an Employment Agreement. On October 16, 2016, he returned the Employment Agreement to Introjunction.

On October 29, 2016, Introjunction's Chief Executive Officer, Mike Nabavi ("Nabavi") met with Buchanan and advised him that Introjunction was "retracting" its offer of employment.

The Employment Agreement provided that Buchanan would start his employment with Introjunction effective November 1, 2016 in the position of senior software engineer at an annual salary of \$125,000. He was also eligible to participate in a stock option plan and to receive a company-wide bonus. The Employment Agreement also contained the following probation clause:

Employee's employment shall be subject to a probation period of three months beginning on the Effective



Date during which time the Employer may terminate the employment without notice or cause.

Subsequent to Introjunction's "retraction" of the Employment Agreement, Nabavi, on behalf of Introjunction, suggested to Buchanan that Introjunction may be able to assist him financially or with some short-term employment. Buchanan did not pursue any short-term work with Introjunction.

On December 19, 2016, Buchanan commenced employment with another company.

THE ISSUES

The issues before the Court were three-fold:

1. Did Introjunction's "retraction" of the Employment Agreement constitute a wrongful dismissal entitling Buchanan to seek damages in lieu of reasonable notice? Included in this issue was the question of whether Introjunction could rely on the probation clause to terminate Buchanan's employment without obligation;
2. If Buchanan was entitled to reasonable notice, what was the appropriate period? and
3. Did Buchanan fail to mitigate his losses?

THE DECISION

Regarding the first issue, Justice Skolrood held that Introjunction could not rely on the probation clause to support its termination of Buchanan without notice. The Court reached this conclusion for the following reasons:

[18] First, on its face, the probation clause provides that the three month probation period commences as of the effective date of November 1, 2016. Thus, it was not in force on October 29, 2016 when the defendant retracted the Contract. Had the defendant intended to maintain a right to terminate the Contract without notice at any time after execution, it could have included a term to that effect. In DeGagne, Madam Justice Dardi similarly found that a probation clause had no application prior to the employee actually starting work (at para. 45).

[19] Second, I reject the defendant's argument that had the probation clause applied, it gave the defendant an unfettered right to terminate the plaintiff without notice or cause. The purpose of a probationary period is to permit the employer to engage in a good faith assessment of the employee's suitability for the position in issue.



The Court found that Introjunction could not rely on the probation clause to escape its obligation to pay damages in lieu of notice. There was no good faith assessment by Introjunction of Buchanan's suitability for the job for which he was hired. Suitability played no role.

The Court further held that Introjunction's "retraction" of the Employment Agreement amounted to a repudiation which, based on the parties' communications, was accepted by Buchanan. Introjunction stated a clear intention not to be bound by the Employment Agreement and it was open to Buchanan to treat the Employment Agreement as at an end and to sue for damages.

Buchanan was wrongfully dismissed from his employment and was awarded damages equivalent to six weeks' notice.

As to whether Buchanan failed to mitigate his losses by not accepting Nabavi's offer of short-term work; on this particular point, the Court stated that Buchanan was not unreasonable for declining to pursue an *"ill-defined job"* for unknown hours at a reduced salary from Introjunction who had recently advised him that there was no need for his services.

The Court did note that Nabavi acted *"honourably and had a genuine interest in helping"* Buchanan, however, his offers of assistance were not ones that a reasonable person would have accepted given all of the prevailing circumstances.

LESSONS FROM BUCHANAN

For employers the lessons from Buchanan are clear: if you decide to terminate an employment agreement without cause, you must provide notice, even in situations where the contract is terminated before an employee starts work. Another key point to remember is that probationary clauses are not to be viewed as a mechanism to deny an employee his or her entitlement to notice, or pay in lieu of notice. Rather, the rationale behind incorporating a probation provision into an employment agreement is to permit the employer to engage in a good faith assessment of the employee's suitability for the position.