Insight

IN-DEPTH DISCUSSION

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Supreme Court of Canada Holds Private-Sector Federal Employers Must Have Just Cause to Dismiss Non-Managerial Employees

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Part III of the *Canada Labour Code* (the "Code") contains unjust dismissal provisions that apply to private Canadian employers subject to federal jurisdiction. Where a complaint of unjust dismissal is filed by a dismissed employee and the Minister of Labour decides to appoint an adjudicator, then that adjudicator determines whether or not the dismissal is "unjust". The Supreme Court of Canada's ("SCC") recent decision in *Wilson v. Atomic Energy* confirms that private-sector federal employers must have just cause to dismiss non-managerial employees. Failure to do so will likely subject the employer to an order for reinstatement.

Wilson v. Atomic Energy of Canada Limited 2016 SCC 29

Canadian employers are subject to either provincial law or federal law with respect to employment and labour matters. There is a judicial presumption of provincial jurisdiction, subjecting an employer to provincial statutes. If an employer can establish that it is within the federal jurisdiction, the provisions of the Code are applicable to that employer and its employment and labour matters. Private-sector employers subject to federal jurisdiction employ only about 10% of the working population in Canada, and include airlines, railways, banks, telecommunications, shipping and inter-provincial transportation. This case involved a federally regulated employer, the Atomic Energy of Canada ("Atomic Energy").

The Code's unjust dismissal provisions create an employee complaint process for claims alleging the dismissal was "unjust". Those provisions also confirm that either the employee or a government inspector can require the employer to provide written reasons for the employee's dismissal.

All federally regulated private-sector employees have access to the complaint process with the following exceptions: (1) managers; (2) an

employee subject to a collective agreement; (3) an employee with less than 12 months of continuous service; (4) an employee who was laid off because of a lack of work or discontinuance of a function; or (5) in circumstances where a procedure for redress has been provided elsewhere in the Code or in another federal statute (e.g. the *Canadian Human Rights Act*).

The Federal Minister of Labour has discretion whether or not to appoint an adjudicator to hear a complaint of unjust dismissal (and almost always does so unless there is a lack of jurisdiction). If an adjudicator decides that a dismissal is "unjust", then the adjudicator has very broad remedial authority to grant an appropriate remedy, including reinstatement to employment (often with "full back pay" and other compensation/ damages flowing from the unjust dismissal). Adjudicators are generally guided in their decision-making by the awards of labour arbitrators under collective agreements (and less so by common law Court decisions).

Over the years, the majority of adjudicators under the Code have decided that just cause is required for the termination of a federal employee covered by the Code notwithstanding the employer's willingness to provide a reasonable severance package. There have been some adjudicators who have taken a contrary view. The Atomic Energy case puts to rest that difference of opinion in the case law.

In Atomic Energy, the employee worked in an administrative role for more than four years until his employment was terminated in November 2009. He filed an "unjust dismissal" complaint alleging that his dismissal was a reprisal for filing a complaint of improper procurement practices by his employer. The employee requested the reasons for his dismissal and the employer advised that the employee was "terminated on a non-cause basis and was provided a generous dismissal package". An adjudicator was appointed in this case and Atomic Energy pursued a preliminary ruling by the adjudicator as to whether a dismissal without cause coupled with a reasonable severance package leads to the conclusion that the dismissal is a "just" one.

The adjudicator decided that an employer cannot rely on a severance payment, regardless of how generous it is, to avoid a determination under the Code as to whether or not the dismissal was "unjust". In this case, Atomic Energy did not rely on any cause to terminate employment; as a result, the employee's complaint was allowed by the adjudicator.

Atomic Energy sought judicial review of the adjudicator's decision in the Federal Court. The application Judge found the adjudicator's decision to be unreasonable because in his view, nothing in Part III of the Code prevents an employer from dismissing an employee on a "without cause" basis (provided that the employee receives appropriate notice or compensation). On appeal, the Federal Court of Appeal agreed with the Federal Court. On further appeal by the employee to the SCC, the appeal was allowed, the Federal Court of Appeal was overruled and the decision of the adjudicator was restored.

The SCC majority decision made a number of important findings, including the following:

1. With the enactment of the unjust dismissal provisions of the Code, Parliament intended to expand the dismissal rights of non-unionized federal employees in a way that, if not identically, then certainly analogously match those held by unionized employees, particularly by requiring just cause for dismissal.
2. The Canadian common law right to dismiss on reasonable notice without cause and without reasons has been completely replaced under the Code by a regime requiring reasons for dismissal.
3. The galaxy of discretionary remedies (most notably reinstatement), as well as the open-ended equitable relief available under the Code, are inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the Code by simply providing appropriate notice or pay in lieu of notice, then there is virtually no role for the plurality of remedies available to adjudicators and those remedies become meaningless or redundant. The scheme under the Code and

its remedies only make sense if they are interpreted as representing a displacement of the employer's common law ability to dismiss an employee without reasons if reasonable notice or compensation is given.

Takeaway for Federally Regulated Employers

The *Atomic Energy* decision puts a significant spotlight on the need for private-sector federal employers to adopt appropriate probationary periods and performance review procedures because of the just cause requirement. Federal employers should consider longer probationary periods (6 months), as well as further performance reviews thereafter, say after 9 months and/or 11 months of service. If a poor performer or an employee who lacks proper "fit" is not terminated before 12 months of continuous service, then it will be very difficult, if not impossible, to terminate that employee after 12 months. This is because of the employee's access to the unjust dismissal complaint process at 12 months and the just cause requirement for upholding the dismissal (assuming that a layoff for lack of work, or a discontinuance of a function, does not apply). Due diligence in assessing employees' job performance remains the order of the day for a federal employer with respect to all of its first-year employees.