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Supreme Court Issues Final Word on Code Protections Against Without Cause Dismissal

After decades of debate, the highest court in Canada has answered the long-standing question as to whether non-unionized employees within federal jurisdiction can be dismissed "without cause". In *Wilson v. Atomic Energy of Canada Limited,* 2016 SCC 29, the Supreme Court of Canada ("SCC") concluded that the unjust dismissal provisions, sections 240 to 246, of the Canada Labour Code ("Code") displace the ability of employers at common law to dismiss federally-regulated employees without cause.

Background

Wilson was a former procurement supervisor for Atomic Energy of Canada Limited ("AECL"), a federally-regulated nuclear science and technology laboratory. His employment was terminated by AECL, on a without cause basis, following four and one-half years of service. Even though AECL paid Wilson six months' severance pay, he complained under section 240 of the Code[1] that he was "unjustly dismissed" and sought an order reinstating him in his employ with AECL.

[1] The Code applies to those industries in which the federal government has jurisdiction. These industries include, but are not limited to: chartered banking, telecommunications, airports and air transportation, and interprovincial and international transportation.

Section 240 provides that non-union employee (except where that employee is a manager) with at least 12 consecutive months of employment may make a complaint if the employee considers his or her dismissal to be unjust. Dismissed employees may choose to pursue a complaint under the Code, which has more extensive remedies than the common law, rather than pursue the common law remedy of reasonable notice. However, the Code provides that no complaint shall be considered if the employee was dismissed because of lack of work or the discontinuance of a function. The commonly held view amongst jurists has been that most federally-regulated employees can only be dismissed for just cause.

A subscriber to the commonly held view, the adjudicator hearing Wilson's case found that Wilson had made out his complaint of unjust dismissal under the Code because he was not dismissed for just cause, lack of work or the discontinuance of a function. The Federal Court overturned the adjudicator's decision on judicial review. Wilson appealed to the Federal Court of Appeal ("FCA").

In a previous bulletin, Paul Boshyk commented on the FCA's decision, in which the FCA reviewed the adjudicator's decision on a standard of correctness and held that without cause dismissals are not automatically unjust under section 240. Rather, the FCA concluded that the Code requires adjudicators to examine the specific facts of each case to determine whether the dismissal was unjust in all of the circumstances.

Wilson subsequently appealed the FCA's decision to the SCC.

Supreme Court of Canada

The SCC allowed Wilson's appeal and restored the adjudicator's decision. The SCC noted that the appropriate standard of review of the adjudicator's decision was reasonableness, as the decisions of labour adjudicators or arbitrators interpreting statutes or agreements within their expertise attract a standard of reasonableness.

The SCC confirmed that the purpose of the unjust dismissal provisions of the Code is to offer a statutory alternative to the common law of dismissals, and to ensure that non-unionized

federally-regulated employees have protections from being dismissed without cause that are akin to or analogously match those protections available to unionized employees. These protections include the concept of progressive discipline, which requires employers to make employees aware of performance problems, work with employees to rectify the problems, and impose graduated sanctions before resorting to dismissal.

The SCC noted that the foundational premise of the common law of dismissals, which is the right to dismiss on reasonable notice without cause or reasons, has been completely replaced under the Code, which requires employers to provide reasons for dismissal. The SCC held that the alternative approach of providing severance pay for without cause dismissals undermines the purpose of the Code's unjust dismissal regime by permitting employers, at their option, to deprive employees of the full remedial package (including reinstatement) that Parliament created for them.

With respect to the notice requirements in section 230(1) and the minimum severance provisions in section 235(1) of the Code, the SCC noted that these sections are not an alternative to the Code's unjust dismissal provisions but apply only to those employees who do not or cannot avail themselves of those provisions.

The SCC concluded that interpreting the unjust dismissal provisions of the Code as displacing the employer's ability at common law to dismiss an employee without cause is supported by parliamentary intention, statutory language, the majority of arbitral jurisprudence and labour relations practice.

What Does It All Mean?

It is important to note that the unjust dismissal provisions of the Code are not available to managers or when dismissal is for lack of work or the discontinuance of a function. Managers and employees dismissed for these reasons can seek remedies under sections 230 and 235 of the Code. However, when dismissal is based on other reasons such as poor performance or lack of competency, the employer will need to show that it has provided the employee with progressive discipline, as is the case with unionized employees.

The SCC has now clearly stated the protections against without cause dismissal afforded to non-unionized federally-regulated employees under the Code are akin to those granted to employees under collective agreements. There is a significant risk that reinstatement will be awarded where employers fail to establish that they made employees aware of performance problems, worked with employees to rectify the problems, and imposed graduated sanctions before resorting to dismissal.

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a cautionary note