lavery
Lawyers

Dismissal without cause makes its way to the *Canada Labour Code*: The Federal Court of Appeal decides

March 10, 2015

Author

Brittany Carson

Partner, Lawyer

On January 22, 2015, the Federal Court of Appeal rendered an extremely important decision,[1] unanimously holding that dismissal on a without cause basis does not necessarily constitute "unjust dismissal" under the *Canada Labour Code* (the "Code").[2] With its decision in *Wilson* v. *Atomic Energy of Canada Limited*, the Federal Court of Appeal has seemingly ended a debate which has persisted since the adoption of unjust dismissal legislation in the late 1970's. Indeed, this decision overturns a line of case law to the effect that federal employees could only be dismissed for just cause, lack of work or the elimination of the employee's position.

THE FACTS

Atomic Energy of Canada Limited ("AECL") is Canada's largest nuclear science and technology laboratory. Wilson had been employed by AECL for 4 ½ years and in his most recently held position, he was the Procurement Supervisor and was not considered to hold a management position. In November 2009, Wilson was terminated without cause. AECL offered Wilson a severance package roughly equal to six months' pay. Wilson refused the package and filed a complaint for unjust dismissal under section 240 of the Code which reads as follows:

> 240. (1) Subject to subsections (2) and 242(3.1), any person
>
> (a) who has completed twelve consecutive months of continuous employment by an employer, and
>
> (b) who is not a member of a group of employees subject to a collective agreement, may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

> (2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.
>
> (3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.
>
> [*Emphasis ours*]

Wilson nonetheless remained on AECL's payroll for a further six months, ultimately receiving the full amount of the severance package initially offered to him.

An adjudicator was appointed to hear the complaint under the Code. The parties raised two issues before the adjudicator:

1. Was AECL entitled to lawfully terminate Wilson's employment on a "without cause" basis; and,

2. If the answer to the first question is yes, did the severance package paid amount to a "just" dismissal?

Wilson argued that the Code prohibits employers from dismissing an employee unless there is just cause. AECL submitted that dismissals without cause are not automatically unjust dismissals under the Code. The adjudicator agreed with Wilson, throwing his support behind the view that employees could only be dismissed for just cause, lack of work or the elimination of the employee's position. AECL applied to the Federal Court for a review of the decision. The Court disagreed with the adjudicator and quashed the initial decision. Wilson then appealed to the Federal Court of Appeal.

THE DECISION

The Court's ability to intervene to settle disputes in the case law of an administrative tribunal

One point of interest in this case is the basis of the Court's decision for intervening in hopes of addressing once and for all two conflicting streams of case law being followed by an administrative tribunal.

Since the Supreme Court of Canada's decision in *Domtar Inc*. v. *Quebec (Commission d'appel en matière de lésions professionnelles)*,[3] it has been relatively trite law that the fact that a tribunal is rendering inconsistent decisions on a specific issue is not an independent justification for judicial review.

In this context, the Court's decision to intervene in this matter is rather surprising. Justice Stratas addressed this issue as follows:

> [53] In the case of some tribunals that sit in panels, one panel may legitimately disagree with another on an issue of statutory interpretation. Over time, it may be expected that differing panels will sort out the disagreement through the development of tribunal jurisprudence or through the type of institutional discussions approved in *IWA* v. *Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524. It may be that at least in the initial stages of discord, without other considerations bearing upon the matter, the rule of law concerns do not predominate and so reviewing courts should lay off and give the tribunal the opportunity to work out its jurisprudence, as Parliament has authorized it to do.
>
> [54] However, here, we are not dealing with initial discord on a point of statutory interpretation at the administrative level. Instead, we are dealing with persistent discord that has existed for many years. Further, because no one adjudicator binds another and because adjudicators operate

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

> independently and not within an institutional umbrella such as a tribunal, there is no prospect that the discord will be eliminated. There is every expectation that adjudicators, acting individually, will continue to disagree on this point, perhaps forever.
>
> [55] As a result, at a conceptual level, the rule of law concern predominates in this case and warrants this Court intervening to end the discord and determine the legal point once and for all. We have to act as a tie-breaker.
>
> [*Emphasis ours*]

Given the persistent and seemingly irresolvable dispute among adjudicators on this issue of statutory interpretation, Justice Stratas concluded that the Court was entitled to intervene and the standard of review would be one of correctness.[4]

The Federal Court of Appeal therefore seems to be taking the approach that where disagreement on a point of law endures over an extended period of time with no end in sight, reviewing courts can and should intervene in the interests of maintaining the rule of law.

Indeed, this seems to mark an important departure from earlier case law on the jurisdiction of higher courts to intervene in hopes of addressing conflicting administrative case law.

Dismissal without cause under the Code

After disposing of a preliminary objection based on the alleged prematurity of the initial motion for judicial review before the Federal Court, Justice Stratas, delivering the majority opinion of the Court of Appeal, ultimately dismisses the appeal.

Agreeing with the Federal Court, the Federal Court of Appeal found that the Code permits dismissals without cause. The Court concluded that a dismissal without cause is not automatically "unjust" and that an adjudicator should examine the circumstances of each particular case in order to determine whether a dismissal is unjust.[5]

In reaching its decision, the Court analysed the relationship between the common law of employment and the Code. At common law, an employer can dismiss a non-unionized employee without cause, but is liable to provide reasonable notice or compensation for doing so. The Code, on the other hand, provides a complaint mechanism and remedies for unjust dismissal, without defining the meaning of "unjust". The Court concluded that the relevant provisions of the Code do not oust the common law doctrine of reasonable notice. Rather, the Code supplements the common law and builds upon it. Simply put, the wording of the Code does not imply that an employee has a "right to a job" in the sense that any dismissal without cause is automatically unjust. On this point, Justice Stratas stated as follows:

> [70] But there is nothing in the Code or in its purpose that suggests that Parliament was granting non-unionized employees a "right to the job" or was trying to place unionized and non-unionized employees in the same position: protected from being dismissed without cause. To the contrary, subsections 230(1) and 235(1) expressly allow an employer to terminate an employment relationship even without cause and require that notice or compensation be given.
>
> [71] If Parliament intended to limit the right of an employer to terminate an employment relationship to cases where just cause existed, it could have said so quite explicitly. After all, before Parliament passed the provisions in issue before us, the Nova Scotia Legislature did just that. It amended its labour legislation to provide that an "employer shall not discharge … [an] employee without just cause": Labour Standards Act, S.N.S. 1975, c. 50, section 4. […]
>
> [*Emphasis ours*]

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

The Court reasoned that since the Code does not explicitly limit the right of an employer to terminate an employment relationship to cases where just cause existed, the common law doctrine of reasonable notice applied. Had Parliament intended to implement a legal order in which common law principles played no role, it would have said so in plain language. The *Labour Code* simply creates another forum besides the courts for hearing complaints of unjust dismissal and grants adjudicators remedial powers that common law judges do not have.[6]

The Court also addressed Wilson's claim that if the court followed AECL's reasoning, employers would be able to dismiss employees without cause, pay them an amount of money the employers think is adequate and leave the employees with no meaningful right of recourse under the *Labour Code*. The Court noted that this was simply not the case, stating instead that "*[i]t will always be for the adjudicator to assess the circumstances and determine whether the dismissal, whether or not for cause, was unjust*".[7]

Justice Stratas and the Court relied on the adjudicator's decision in *Klein* v. *Royal Canadian Mint*.[8] While the adjudicator in *Klein* rejected the submission that the dismissal of an employee without cause was automatically unjust, he did not assume that the dismissal of an employee who had been paid a severance package was automatically just. The Court made it clear that "*the fact that an employer has paid an employee severance pay does not preclude an adjudicator from granting further relief where the adjudicator concludes that the dismissal was unjust.*"[9] However, the Court was careful to note that an adjudicator under the Code does not have free reign to conclude that a dismissal is unjust on "any basis."[10] In determining whether a dismissal is just or unjust, adjudicators will need to look to well-established common law principles and arbitral cases concerning dismissal.

CONCLUSION

With this decision, the Federal Court of Appeal seems to have put an end to the decades-long debate over whether dismissal without cause necessarily constitutes unjust dismissal under the Code. Like employers in many provinces, federal employers can now terminate their employees on a "without-case basis", provided they offer sufficient notice, pay in lieu thereof and severance pay, where applicable. Employers should nonetheless ensure that dismissed employees are treated fairly. Although not automatically unjust, a dismissal without cause can still be held to be unjust where reasonable notice, or a reasonable severance package, is not provided. If the dismissed employee files a complaint under the Code, it will be up to the adjudicator to determine whether a termination package is reasonable based on the circumstances of each case.

Only time will tell what the real-world impact of this decision will be. However, at first glance, the Federal Court of Appeal has seemingly delivered an important victory for federally-regulated employers.

As of the publication of this article, the appellant, Mr. Wilson, has not sought leave to appeal this decision to the Supreme Court of Canada.

---

1 2015 FCA 17 (CanLII), http://canlii.ca/t/gg41h [Wilson].

2 R.S.C., 1985, c. L-2.

3 [1993] 2 SCR 756.

4 *Ibid* at para 57.

5 *Ibid* at para 62.

6 *Ibid* at para 74.

7 *Ibid* at para 94.

8 *Klein* v. *Royal Canadian Mint*, [2012] C.L.A.D. No. 358.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

[9] *Wilson*, supra note 1 at para 99.
[10] *Ibid* at para 100.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.