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Dismissal without cause under federal law: The Supreme Court of Canada closes the door

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The case of *Wilson* v. *Atomic Energy of Canada Limited*[1] came to a close on July 14, 2016, when the Supreme Court of Canada (the "Supreme Court") reversed a controversial Federal Court of Appeal decision in which it had been held that a dismissal without cause was not necessarily an "unjust dismissal" under the Canada Labour Code ("the Code").[2]

The facts

Wilson, a procurement supervisor, was terminated without cause after working for Atomic Energy of Canada Limited (AECL), Canada's largest nuclear science and technology laboratory, for four and a half years. He had an unblemished disciplinary record at the time. AECL offered him close to the equivalent of six months of severance pay, but he declined, and then filed an unjust dismissal complaint under section 240(1) of the Code. AECL continued to pay him his salary for six months, so he received the severance pay he had initially been offered — an offer AECL considered generous.

History of the proceedings

The adjudicator, who was the first decision-maker to hear the case, had two questions before him:

1. Could AECL lawfully terminate Wilson's employment without cause?
2. If so, was the severance pay sufficient so as to render the dismissal "just"?

The adjudicator held that the payment of severance by the employer does not render moot the issue of whether a dismissal was just. Thus, an employer is not allowed to dismiss an employee without cause simply because he offered severance.

AECL applied to the Federal Court for judicial review of this decision. It succeeded: The Federal

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Court reversed the earlier decision on the basis that it was unreasonable. The Federal Court held that an employer can dismiss an employee without cause, provided it provides pay in lieu of reasonable notice, as permitted by the common law.

The Federal Court of Appeal upheld this decision. It held that the Code does not limit an employer's right to dismiss an employee without cause at common law. It is worth noting that the Federal Court of Appeal reviewed the Federal Court's decision based on the "correctness" standard of review.

The parties' positions

Before the Supreme Court, AECL argued that an employer governed by federal law can dismiss an employee without cause, provided it pays the employee pay in lieu of reasonable notice as required by the common law. Wilson disagreed, arguing that such an employer cannot dismiss an employee without cause, and that severance pay does not make a dismissal "just." Nonetheless, both parties agreed that the reasonableness standard was the applicable standard of review.

The applicable standard of review

Despite the parties' agreement on the applicable standard of review, Justice Abella wrote a lengthy obiter on the issue. Expressing the view that the reforms brought by the *Dunsmuir* decision[3] had not simplified the judicial review of administrative decisions, she argued that another administrative law reform is needed. She proposed to abolish the correctness standard, leaving only a reasonableness standard. However, her colleagues were not prepared to reform the standards of review applicable in administrative law matters.

The Supreme Court's decision

The issue to be decided was whether the adjudicator's interpretation of sections 240 to 246 of the Code was reasonable. A majority of the Justices held that it was. Analysing the drafting of the Code, the context in which the provisions were enacted, and the opinions of a majority of adjudicators and federal labour law scholars, the Court noted that the main objective of the provisions is to provide non-unionized employees with protection against dismissal without cause similar to the protection enjoyed by employees governed by a collective agreement. Furthermore, at common law, or, where applicable, the *Civil Code of Québec*, an employer may, unless a statutory provision prohibits it, dismiss an employee without cause as long as it provides the employee with pay in lieu of reasonable notice. For example, in Quebec and Nova Scotia, the law expressly provides that an employer cannot dismiss an employee without cause. In Quebec, section 124 of the *Act Respecting Labour Standards*[4] states that an employee with more than two years of continuous service can only be dismissed for good and sufficient cause. Unlike the Federal Court of Appeal, the Supreme Court held that, in federal employment law matters, sections 240 to 246 of the Code completely replace the common law principles.

To hold otherwise would lead to incoherent results: the remedies set out in sections 240 to 245 would be of no benefit if an employer could dismiss an employee without cause and simply pay the employee severance. Furthermore, it would be incongruous to allow the protections the Code makes available to employees to be superseded by an employer's right to dismiss an employee without cause under common law principles. Accordingly, the only sensible conclusion is that the scheme set out in the Code completely ousts the common law, and that, under federal law, an employer cannot dismiss an employee without cause simply by paying the employee pay in lieu of reasonable notice.

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In its decision, the Federal Court of Appeal justified its use of the correctness standard based on the existence of conflicting case law on the question to be decided. Justice Abella addressed this subject with the following remarks:

> [60] O ut of the over 1,740 adjudications and decisions since the Unjust Dismissal scheme was enacted, my colleagues have identified only 28 decisions that are said to have followed the Wakeling approach … [References omitted.] Of these 28 decisions, 10 were rendered after this case was decided at the Federal Court and are therefore not relevant to determining the degree of "discord" amongst adjudicators before this case was heard … [References omitted.]
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> [61] That leaves 18 cases that have applied the Wakeling approach. Three of them were decided by Adjudicator Wakeling himself. In other words, the "disagreement [that] has persisted for at least two decades" referred to by my colleagues consists of, at most, 18 cases out of over 1,700. What we have here is a drop in the bucket which is being elevated to a jurisprudential parting of the waters.
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> [*Emphasis added*]

Ultimately, the approach taken by the Federal Court of Appeal was completely set aside by the Supreme Court, given that the controversy in the case law was not as significant as it seemed.

It is also worth noting that the Supreme Court underscored some important similarities between the federal principles and Quebec's scheme prohibiting dismissal without just and sufficient cause:

> [65] It is worth noting that the Code's scheme, which was enacted in 1978, was preceded by similar Unjust Dismissal protection in Nova Scotia in 1975, and followed by a similar scheme in Quebec in 1979. [References omitted.] Unlike other provinces, the Nova Scotia and Quebec schemes display significant structural similarities to the federal statute. They apply only after an employee has completed a certain period of service and do not apply in cases of termination for economic reasons or layoffs. Like the federal scheme, the two provincial ones have been consistently applied as prohibiting dismissals without cause, and grant a wide range of remedies such as reinstatement and compensation.
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> [66] I t seems to me to be significant that in *Syndicat de la fonction publique du Québec* v. *Quebec (Attorney General)*, [...] [2010] 2 S.C.R. 61, interpreting the Unjust Dismissal provision in the Quebec Act, this Court concluded that "[a]lthough procedural in form", the provision creates "a substantive labour standard" (para. 10). It would be untenable not to apply the same approach to the Unjust Dismissal provision in the federal Code, and instead to characterize the provision as a mere procedural mechanism.
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> [*Emphasis added*]

Finally, the dissent of Justices Moldaver, Côté and Brown is worth mentioning. Citing the rule of law, they conclude that the correctness standard applies, given the existence of conflicting lines of case law. In their view, the scheme created by sections 240 to 246 of the Code is simply another procedural mechanism available to employees who dispute the legality of their dismissal, and those provisions do not oust the common law. Such reasoning does not, in their view, deprive the Code's remedies of their utility.

Our view

This Supreme Court decision puts a definitive end to the debate about dismissal without cause in federal law. In the future, employers can no longer seek to justify a dismissal without cause by paying severance, however generous it might be. This decision also marks an important

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convergence between the rules governing dismissal under Federal and Quebec law.

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1. 2016 SCC 29.
2. R.S.C. 1985, c. L-2.
3. *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190.
4. R.S.Q., c. N-1.1.

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