FTR Now

Federal Court of Appeal Breaks the Tie: Without Cause Dismissals Permitted Under *Canada Labour Code*

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The Federal Court of Appeal has acted as a "tie-breaker" on a "nagging legal point" as to whether Part III of the *Canada Labour Code* ("Code") permits dismissals on a without cause basis. In *Wilson v. Atomic Energy of Canada Limited*, the Court unanimously held that it does, bringing welcome clarity to an area of the law which has involved "persistent discord – quite irresolvable among adjudicators."

In this *FTR Now*, we discuss the decision and its implications for federal employers.

BACKGROUND

The facts involved a federal employee of Atomic Energy of Canada Limited ("AECL") who was dismissed from his employment without cause and with six months' severance pay. He argued that he was unjustly dismissed pursuant to section 240 of the Code. The adjudicator agreed with the employee's claim and allowed the complaint, holding that the Code *only* permitted dismissals for just cause, lack of work or discontinuance of a function. This interpretation of the Code significantly limited federal employers' discretion to dismiss without cause pursuant to the common law. The adjudicator then adjourned the matter before holding a hearing into the issue of remedy.

AECL brought an application for judicial review of that award. As we previously reported, the Federal Court rejected an argument that the application was premature, and quashed the adjudicator's interpretation of the Code for being unreasonable. The Federal Court found that the Code did permit termination of employment without cause. The employee appealed.

THE FEDERAL COURT OF APPEAL CLARIFIES THE LAW

On January 22, 2015, the Federal Court of Appeal released its decision, bringing finality to an area of law that had previously received inconsistent treatment at the adjudicator level. On the merits of the decision, Mr. Justice David Stratas, on behalf of the Federal Court of Appeal, agreed with the Federal Court "that a dismissal without cause is not automatically "unjust" under Part III of the Code." Part III of the Code does not operate to oust the common law, which allows an employer to dismiss a non-unionized employee upon provision of reasonable notice or pay in lieu thereof. To find otherwise would require "irresistible clearness," through the statutory text or through necessary implication. Neither the Code nor its purpose indicates that the legislative intent was to provide non-unionized employees with a "right to a job" or put them on the same footing as unionized employees.

In response to the argument that this conclusion would leave employees with no meaningful recourse under section 240, the Court stated that it would always remain open for the adjudicator to assess the circumstances of a dismissal and determine if it was unjust, whether or not it was for cause. However, the Court did not elaborate further on the meaning of "unjust", and left it open to the adjudicators to develop this area of the jurisprudence.

The Federal Court of Appeal also considered certain preliminary issues. The employee in this case had argued that the judicial review was premature because the question of remedy had not yet been decided. On this issue, the Federal Court of Appeal noted that in the circumstances of this case, "the adjudicator's decisions to adjourn and to remain adjourned while judicial review was ongoing were discretionary procedural choices suffused by factual and policy appreciation that deserve

respect." The adjudicator was well aware of the divergent legal interpretations of the legal issue before him and that a review "would settle once and for all this nagging legal point." It upheld this aspect of the adjudicator's decision.

On the question of standard of review of the adjudicator's decision, the Federal Court of Appeal found that a standard of correctness would apply. Given the divergent adjudication decisions on this issue, "*Dunsmuir* … formulated a presumptive rule to be applied in circumstances such as these. Where a question of law is of "central importance to the legal system … and outside the … specialized area of expertise" of the administrative decision-maker, correctness is presumed to be the standard of review."

Notwithstanding this finding, the Court also noted that even on a standard of review of reasonableness, the outcome of this decision would be the same.

IMPLICATIONS FOR FEDERAL EMPLOYERS

The Federal Court of Appeal's decision provides much needed clarification on the fundamental question of whether the Code permits employers to dismiss employees without cause. By confirming that the Code has not ousted the common law of employment, which therefore continues to co-exist along with the specific provisions of the Code, the Court's decision has effectively dismissed the line of reasoning under which non-union employees covered by the Code enjoy the same job security as unionized employees.

At the same time, the Federal Court of Appeal emphasized that adjudicators have the authority to determine, in any particular case, whether the dismissal was "unjust". This determination will typically involve an assessment of the employee's specific terms and conditions of employment. In at least one of the earlier decisions referred to by the Federal Court of Appeal, the finding that the employer had the ability to terminate without cause was based in large part on a term of the employee's contract of employment, which expressly provided for that possibility. As such, employers subject to the *Canada Labour Code* should review carefully the terms and conditions of employment of their non-union employees to ensure that they do not conflict with, or place limits upon, the ability to dismiss employees without cause that the Federal Court of Appeal has now confirmed.

For more information on this decision, please contact George G. Vuicic at 613.369.2103, Cheryl A. Waram at 613.369.2120 or your regular Hicks Morley lawyer.
