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Supreme Court of Canada Majority Rules "Unjust Dismissal" Provisions of *Canada Labour Code* Prohibit Without Cause Dismissals of Non-Unionized Employees

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In an important decision for federally regulated employers, Wilson v. Atomic Energy of Canada Limited, a majority of the Supreme Court of Canada has found the "unjust dismissal" provisions of Part III of the *Canada Labour Code* (*Code*) prohibit "without cause" dismissal of non-managerial, non-unionized employees with at least 12 months of consecutive service, thereby allowing those employees to access the remedial relief (reasons, reinstatement, equitable relief) available under the *Code*. The Federal Court of Appeal had found that "without cause" dismissals were permitted under the *Code*. That decision was overturned and the decision of the adjudicator was restored.

Significantly, the majority of the Supreme Court held that the *Code*'s unjust dismissal provisions completely displace the common law right to dismiss employees without cause and provide employees with protection analogous to the just cause protection enjoyed by unionized employees under collective agreements.

In this *FTR Now* we review the decision and its implications for federally regulated employers.

Background

Joseph Wilson had been employed in a procurement capacity with Atomic Energy of Canada Limited ("AECL") for four and a half years when his employment was terminated without cause. He was provided with six months' severance pay (an amount that exceeded the statutory minimum requirements in the *Code*) in exchange for a release. Mr. Wilson, who had a clean disciplinary record, brought a complaint under section 240 of the *Code*, arguing that his dismissal was a reprisal for complaining about improper procurement practices at AECL. He further argued that the *Code* prohibits a federal employer from dismissing an employee unless just cause for dismissal exists and he was, therefore, unjustly dismissed and entitled to a remedy under the *Code*. The adjudicator agreed and directed the parties to arrive at an appropriate remedy failing which he would determine the remedy.

AECL applied for judicial review and the adjudicator adjourned the remedial aspect of his decision pending judicial review. The Federal Court found that the adjudicator's interpretation of the *Code* was unreasonable and remitted the matter back to him for determination. Mr. Wilson appealed that decision to the Federal Court of Appeal.

The Federal Court of Appeal Found "Without Cause" Terminations Permissible under *Code*

The Federal Court of Appeal noted that adjudicators have disagreed on whether "without cause" dismissals are permitted under the *Code* and "persistent discord […] has existed over many years." It stated that the meaning of the law should not depend on the identity of an adjudicator and hence it applied a standard of review of correctness, concluding that "a dismissal without cause is not automatically "unjust" under Part III of the *Code*." The circumstances of the particular case must be examined. Moreover, the Federal Court of Appeal held that Part III of the *Code* does not operate to oust the common law that allows an employer to dismiss a non-unionized employee upon providing reasonable notice or pay in lieu. The Court also found that nothing in the *Code* guarantees non-unionized employees a "right to a job" or puts them in a similar position as unionized employees. [For a discussion of the Federal Court of Appeal decision, see our *FTR Now* of January 28, 2015, Federal Court of Appeal Breaks the Tie: Without Cause Dismissals Permitted Under Canada Labour Code]

The Supreme Court of Canada Overturns Federal Court of Appeal

A majority of the Supreme Court of Canada overturned the Federal Court of Appeal decision and restored the decision of the adjudicator, finding it was reasonable.

Writing for the majority, Abella J. reviewed the history and the statutory framework of the applicable provisions of the *Code*. Changes to the *Code* in 1978 established the "unjust dismissal" provisions (sections 240 – 246), which were intended, according to the Minister of Labour at the time, to "give at least to the unorganized workers *some of the minimum standards*" which organized workers had [para 45]. To this end, the majority held that Parliament's intent was "to expand the dismissal rights of non-unionized federal employees in a way that, if not identically, then certainly analogously matched those held by unionized employees" [para 44].

The majority of the Supreme Court held that the continued existence of the termination and severance provisions at section 230(1) and 235(1) of the *Code* "are not an alternative to the Unjust Dismissal provisions" but that they "apply only to those who do not or cannot avail themselves of those provisions" [para 47]. The majority found that adjudicators and courts had viewed the unjust dismissal provisions as "a statutory alternative to the common law of dismissals" and that they gave "unorganized workers protection against unjust dismissal *somewhat comparable to that enjoyed by unionized workers under collective agreements*" [para 49].

The majority of the Supreme Court noted that of the 1740 unjust dismissal decisions rendered since the provisions came into force, only 28 found that the provisions permitted "without cause" terminations. Of those, 10 were rendered after the Federal Court decision and three were issued by a single adjudicator. This constituted "a drop in the bucket which is being elevated to a jurisprudential parting of the waters" [para 61]. Abella J. concluded that the unjust dismissal provisions completely displaced the common law right to dismiss employees without cause:

[63] In fact, the foundational premise of the common law scheme — that there is a right to dismiss on reasonable notice without cause or reasons — has been completely replaced under the *Code* by a regime *requiring* reasons for dismissal. In addition, the galaxy of discretionary remedies, including, most notably, reinstatement, as well as the open-ended equitable relief available under s. 242(4)(c), are also utterly inconsistent with the right to dismiss without cause. If an employer can continue to dismiss without cause under the *Code* simply by providing adequate severance pay, there is virtually no role for the plurality of remedies available to the adjudicator under ss. 240 to 245.

[…]

[69] That is how the 1978 provisions have been almost universally applied, including — reasonably — by the Adjudicator hearing Mr. Wilson's complaint. It is an outcome that is anchored in parliamentary intention, statutory language, arbitral jurisprudence, and labour relations practice. To decide otherwise would fundamentally undermine Parliament's remedial purpose. I would allow the appeal with costs throughout and restore the decision of the Adjudicator.

The majority of the Court rejected the alternative interpretation put forward by AECL and adopted by the lower courts, holding that it was "[only] by interpreting ss. 240 to 246 as representing a displacement of the employer's ability at common law to fire an employee without reasons if reasonable notice is given, does the scheme and its remedial package make sense" [para 68].

On the standard of review issue, the Supreme Court held that the standard of review was reasonableness. Abella J. noted that "a handful of adjudicators" had taken a different approach from the overwhelmingly consistent approach of adjudicators that the unjust dismissal provisions permitted "without cause" dismissals of non-unionized employees. That fact, however, did not "justify deviating from a reasonableness standard", as the Federal Court of Appeal had done. She proceeded, in *obiter*, to provide some commentary on revisiting the standard of review established in *Dunsmuir*. In two separate sets of concurring reasons, five justices agreed with the reasoning of Madame Justice Abella on the merits but did not agree that *Dunsmuir* should be revisited.

The Dissent Would Have Permitted Without Cause Terminations

The three dissenting justices would have upheld the Federal Court of Appeal finding, including applying a standard of review of correctness due to the lingering disagreement between adjudicators on the issue. They held that a "dismissal without cause is not *per se* unjust, so long as adequate notice is provided" and noted that in any event, the employer could not "escape the scrutiny of an adjudicator or the courts if the employee chooses to challenge the lawfulness of the dismissal" [para 75]. They disagreed with the majority's assertion that the remedies provided in the unjust dismissal provisions were incompatible with "without cause" dismissals, finding that the common law of wrongful dismissal continued to apply [para 143].

Implications for Federal Employers

Given the majority of the Court's clear rejection of "without cause" dismissals for employees with unjust dismissal protection, federal employers should ensure that proper reasons for all dismissals are documented. Dismissals due to lack of work or the discontinuance of a function continue to be permitted. Employers are permitted to dismiss employees for performance reasons and misconduct, if properly supported based on the principles of progressive discipline.

Employers should also note that that managerial employees or employees with less than 12 months of consecutive service do not have the protection of the *Code*'s unjust dismissal provisions, so the principles in this decision have no application to termination of employees in those groups.

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