Federal Post

Federal Post – Sixth Edition

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Dear Friends,

We are pleased to bring you this promised *Federal Post* edition on recent case law updates of significance to employers in the federal sector.

Laila Karimi Hendry and Amy Tibble, both of our Toronto office, write about two unjust dismissal cases "post-*Wilson*" that you should know about.

David Foster of our London office provides a summary of recent cases interpreting the new test for "danger" under the *Canada Labour Code.*

We hope you will find these cases of interest, and wish you a pleasant and relaxing summer!

Regards,

George G. Vuicic
Editor

Recent Unjust Dismissal Cases of Note

1. *Randhawa v The Bank of Nova Scotia*

By Laila Karimi Hendry

In the banking world, honesty and integrity in the performance of duties – especially for those employees handling cash and other negotiable instruments – are of paramount importance. In the recent decision of *Randhawa v. The Bank of Nova Scotia*, we are reminded that the employer's burden of proof to establish cause for dishonesty is a heavy one that, if unmet, can come with lasting consequences.

Background

In *Randhawa v The Bank of Nova Scotia,* 2017 CarswellNat 230, the Complainant was terminated for dishonesty and poor performance in her duties as a Customer Service Supervisor, a role in

which she supervised customer service representatives (tellers).

Following a branch review (essentially an audit of the branch's adherence to Bank policy), a number of 'cash and custody' concerns were identified which resulted in the branch effectively failing the review. As part of the action plan following the review, branch management was expected to conduct spot checks and monitor the situation to ensure policy compliance.

Although the complainant was on a leave of absence during the branch review, many of the issues identified related to duties for which the complainant was directly responsible. As such, when she returned from leave, she was advised of the issues and told that she was expected to ensure that both she and those she supervised appropriately followed cash and custody policies and procedures.

During a spot check, it was identified that the complainant and some of the tellers she was supervising were not following cash and custody policies (e.g. leaving cash unattended at a wicket), which were putting the branch at risk. When questioned about the failure to follow policy, the complainant repeatedly maintained that she always followed proper policy and procedures. After advising the complainant of the Bank's video evidence to the contrary, the complainant eventually admitted to failing to follow policy.

After this, an additional incident occurred (for which the Bank did not have video evidence at the hearing) where the complainant failed to follow cash and custody policies, by not having a lookout officer when moving cash in the Bank. At the time, the complainant refused to admit that she failed to follow policy and, at the hearing, completely denied that the final incident occurred at all. The Bank determined that it could no longer trust her in the role and proceeded to terminate her employment for cause.

After the termination, the complainant brought an unjust dismissal complaint under the *Canada Labour Code* (Code). She argued that she was targeted as a result of making an internal whistleblower complaint about her Branch Manager, which occurred shortly before the performance issues arose.

The Decision and Remedy

In assessing the credibility of the witnesses, Adjudicator Slotnick concluded that none of the witnesses (neither the complainant nor the Bank's witnesses) were credible in their testimony. Yet, upon review of the evidence, and given that the complainant had no previous performance issues, Adjudicator Slotnick held that the dismissal was unjust and that the Bank had other methods of discipline available to it, such as performance management, warnings or suspensions, and demotion (p. 39). Additionally, the Adjudicator found that that the decision to terminate the complainant's employment was "tainted" by management's knowledge of the whistleblower complaint.

Commenting on termination for dishonesty, Adjudicator Slotnick stated:

…[termination] must be reserved for those egregious situations where a single incident has ruptured the employment relationship to a point where it cannot be salvaged. To the extent that Ms. Randhawa's conduct can be said to have been dishonest – a key part of the bank's case – that "dishonesty" did not involve any deception regarding clients (unlike in the cases cited by the bank) but rather a failure to take full responsibility for procedural breaches mainly committed by the employees she was charged with supervising, denial of some of those breaches in the face of clear evidence, and a pattern of somewhat exaggerated assertions that procedures were always being followed. **While the importance of the bank's policies was not disputed, it is also not disputed that the breaches involving Ms. Randhawa and her tellers did not cause any actual harm.** [emphasis added] (p. 39)

The Adjudicator then commented on the recommendation for termination by the Bank's employee relations manager, where the recommendation relied upon the complainant's breach of the Bank's 'Guidelines for Business Conduct.' He noted that the guidelines dealt with issues such as "misappropriation, creating false records, corruption, insider trading, accepting gifts, and dealing ethically with customers", none of which applied to the Complainant's conduct (p. 41).

In deciding on remedy, the Adjudicator referred to the recent Supreme Court of Canada decision in *Wilson v. Atomic Energy*. He interpreted the *Wilson* decision as confirming that reinstatement is the default remedy when an unjust dismissal is found under the Code:

This is the clear implication of the Supreme Court's analysis in the *Wilson v. Atomic Energy* case, in which the court agreed that the unjust dismissal provisions were meant to give non-unionized non-management employees in federally regulated workplaces "expansive protections much like those available to employees covered by a collective agreement." (p. 42-43)

In ordering reinstatement, the Adjudicator found that the complainant's dishonesty did not rise to the level that destroyed the employment relationship. Specifically, since her two other managers were no longer at her previous branch, he determined that there would be no reason not to return her to work. During the hearing, the Bank adduced evidence that the complainant's position was likely to be eliminated in the near future. As a result, the Adjudicator reinstated the complainant to a lower level position, that of a Customer Representative (teller).

Subject to a one-week unpaid suspension, the Adjudicator then ordered full back pay and costs on a substantial indemnity basis. Although sought by the complainant, the Adjudicator did not award punitive or aggravated damages.

This decision is in the process of being judicially reviewed.

Key Considerations

This case is one of the first to interpret and apply the unjust dismissal provisions in the Code post-*Wilson v. Atomic Energy*. It paints very broad strokes and has serious implications not only for the banking sector, but the entire federal sector as well.

Adjudicator Slotnick very clearly interpreted *Wilson* as upholding the proposition that reinstatement is the presumptive remedy for an unjust dismissal, subject to very minor exceptions (such as where the employment relationship is no longer viable).

Interestingly, despite being faced with clear evidence of dishonesty, Arbitrator Slotnick essentially determined that there are levels of dishonesty and that the complainant's dishonesty was not strong enough to uphold cause for termination.

Additionally, as discussed above, Adjudicator Slotnick seemed to de-emphasize the importance of following Bank policy or being forthright when questioned, in the absence of 'actual harm.' Such comments are quite concerning – does the legal risk of terminating an employee before the employer suffers tangible harm outweigh the business risk of the employer actually suffering such harm?

Given this decision and the reality of reinstatement, employers in the federal sector should tread cautiously when terminating for cause for dishonesty or poor performance.

2. *Bradley Weed v. Royal Bank of Canada*

By Amy R. Tibble

Adjudicator Michelle Somers recently found that a complainant had been unjustly dismissed under the Code, but declined to award reinstatement; rather, she awarded lost wages. The case provides helpful guidance to federal employers on when reinstatement will not be considered the appropriate remedy in a finding of unjust dismissal.

In *Bradley Weed v. Royal Bank of Canada,* 2017 CarswellNat 343, the Complainant, Mr. Weed, had been employed with RBC for a period of 9.5 years in a variety of roles including Personal Banking Officer, Branch Compliance Officer, Branch Manager, and most recently a Financial Planner. For the majority of his employment, Mr. Weed had achieved a high rating on his quarterly and annual performance appraisals. His performance in 2012 was rated at the highest level.

In 2013, a new program for financial planners, Your Future by Design (YFBD), became mandatory and was implemented following extensive training. YFBD quotas became part of the financial planners' performance ratings. After the YFBD quotas were implemented, Mr. Weed's 2013 performance was assessed as having "weaknesses not evident in 2012" and his rating was downgraded from "Achieving" to "Does Not Meet."

At the end of 2013 and up to the date of his termination, Mr. Weed began reporting to a new manager. Around this time, both Mr. Weed and another financial planner were investigated for a reciprocal arrangement whereby they would each make manual RSP deposits for the other, which counted towards their sales "solution." This activity affected their variable compensation, an activity that was a breach of RBC's Code of Conduct. As a result, both were given Final Written Warnings at which point they immediately ceased this activity.

Mr. Weed's numbers had improved in early 2014. However, his new manager found his reporting of his YFBD assessments over the month of February 2014 to be questionable. At this point management "lost confidence" in Mr. Weed's integrity and he was terminated for cause. Mr. Weed then brought this unjust dismissal complaint under the Code.

RBC argued that termination for cause was appropriate as the Complainant had acted in a deceitful manner regarding his use of YFBD assessments. In addition, he contacted several of his RBC clients after termination (contrary to the Code of Conduct), and he had mischaracterized two vacation days.

The Adjudicator concluded the termination was not just.

First, she considered the reciprocal arrangement between the Complainant and the other planner, an issue RBC had relied on for evidence of its loss of confidence in the Complainant but not for the cause itself. The Adjudicator found:

- the reciprocal arrangement, while contrary to RBC policy, was not an attempt to inflate the sales records. It did not constitute a "deliberate fraud or misappropriation of funds that would automatically justify dismissal" nor did the manual transactions amount to falsification of a sales record
- the reciprocal arrangement immediately ended when the Final Written Warning was received and the Complainant continued to work at RBC. Therefore, RBC could not rely on this "conduct to support its loss of faith in his integrity, which was ostensibly restored by its acceptance of his continued employment."

With respect to the specific issue RBC relied on for cause, the questionable reporting of YFBD planning activities, the Adjudicator found:

- the Complainant was a solid performer whose performance began to slide from November 2013 to termination in March 2014, during which period a new manager was on-boarded
- around this period, evidence established there was a culture change at RBC and the Complainant testified he wanted to focus on client service over sales
- the Complainant struggled with RBC's method of evaluating performance
- within the space of one year, the Complainant had three managers, all of whom had different styles.

The Adjudicator concluded, among other things, that "RBC has not met the burden of proving that [the Complainant's] conduct involved a degree of dishonesty that was severely fraudulent and sufficient to justify dismissal without prior warning." However, his conduct merited discipline because he was resistant to the use of the new sales platform, he was hesitant to change his approach to client service and he was negligent in complying with requests on the issues of vacation records and standing orders.

With respect to remedy, the Adjudicator found that reinstatement was not an option because the relationship between the parties was irreparably damaged. She awarded damages in an amount the Complainant would have earned from the date of termination to the date of the award, plus interest, less any monies earned and less a mitigation deduction of 15% for dismal mitigation efforts. In all the Adjudicator awarded the Complainant $230,873.12. No costs were awarded as the Adjudicator stated the Complainant "has much to answer for in this matter."

It is noteworthy as well that the Complainant initially requested that the Adjudicator issue an order to address the Notice of Termination that RBC made to its mutual fund licensing body. RBC argued that the Adjudicator lacked jurisdiction to make an order related to this Notice and the Complainant withdrew his request.

Although the damages awarded by the Adjudicator were significant, the decision is nonetheless helpful for federal employers for the following reasons:

1. The decision was issued after Wilson v. Atomic Energy and yet it did not award reinstatement, relying instead on the employer's submission that the employment relationship was so irreparably damaged that reinstatement was not appropriate.
2. The Adjudicator did not make a finding that it had jurisdiction to make an order with respect to the Notice of Termination made by RBC to its licensing body.

Finally, while cases of unjust dismissal are fact-specific, this case is a helpful reminder to federal employers to be cautious when relying too heavily on past conduct alone in support of a termination for cause, particularly where an employee has received discipline for such past conduct.

Tribunal Confirms New Test for "Danger" under the *Canada Labour Code*

On October 31, 2014, a new definition of "danger" under the Code came into effect, that impacts work refusals in the federal jurisdiction. Under the new definition, "danger" is defined as:

… any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered.

This was a significant departure from the previous definition, where “danger” was defined as:

… any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

In an important decision for all federally regulated employers, the Occupational Health and Safety Tribunal of Canada (OHSTC) released its first decision interpreting this new definition of “danger.” In Correctional Service of Canada v. Ketcheson, Appeals Officer Strahlendorf considered the new definition, through reference to the historical definitions of danger, including an earlier, more restrictive definition that was in place prior to 2000, and the common meaning of the words present in the new definition.

He identified two distinct forms of danger under the new definition – where the hazard in question presents an “imminent threat” or where it presents a “serious threat.” The Appeals Officer defined these concepts:

[197] Imminent threats from hazards mean those hazards are less likely to be corrected than hazards resulting in serious threats can be corrected. There is simply very little time to correct hazards whose risks are imminent. The level of harm can be quite low (but not trivial) but the risk is still an imminent threat where the hazard cannot be corrected in time. A serious threat, not being imminent, means that the hazard that produces the serious threat is more likely to be corrected than hazards resulting in imminent threats can be corrected.

Importantly, he also recognized the concept of a minimum threshold to establish danger, regardless of the seriousness of the potential threat, stating:

[198] … a threat entails the probability of a certain level of harm. Some risks are threats and some are not. A very low risk, either because of low probability or because of low severity, is not a threat. Both probability and severity each have to reach a minimum threshold before the risk can be called a threat. It is clear that a low risk hazard is not a danger. A high risk hazard is a danger.

The Appeals Officer set out a three-part test for assessing whether there is a “danger.” The test incorporates the two distinct forms of danger found in the new definition:

1. What is the alleged hazard, condition or activity?

(a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it? OR

(b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?

2. Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered? (at para 199)

The respondent in this case was a Correctional Manager at a maximum security institution. He requested that he be allowed to carry a debilitating spray to subdue inmates as needed, as well as handcuffs. When he did not receive a response to this request, he instituted a work refusal.

The Appeals Officer applied this new test and found that the threat in question lacked the requisite "immediacy" to meet the requirement for 2(a), and a serious threat as contemplated under 2(b) did not exist. He concluded that the respondent was not exposed to a danger on the day he exercised his work refusal.

The test from *Ketcheson* has since been adopted in other decisions of the OHSTC. In Arva Flour Mills Limited, an official delegate of the Minister of Labour, Michelle Sterling, performed a random inspection of the Arva Flour Mill (Mill), an historic, artisanal mill that had been operating in its current state for almost 200 years.

Ms. Sterling issued a direction of danger under the Code, ordering a stop to milling operations, citing moving and rotating parts as a danger to the millers. The employer appealed the decision and a hearing *de novo* was conducted by Appeals Officer Michael Wiwchar.

The Appeals Officer's inquiry assessed several relevant facts that the Inspector had not considered in her process, including: the two millers' extensive experience operating the milling equipment; that the belts driving the roller mills rotate away from the pinch points; that the miller's hands are a reasonable distance from the rotating parts during the milling process; and, that the milling facility does not operate for long hours or even on a daily basis.

The Appeals Officer found that the millers' exposure to the moving and rotating parts during the milling process did not amount to an imminent or serious threat posed to life or health of the millers, and that as such, the Inspector's finding of danger was unfounded. He concluded:

- a reasonable possibility that the employees would get injured within minutes or hours on the day of the inspection was not established
- only a small number of knowledgeable employees operate the milling equipment in accordance with established processes and procedures in order to ensure their safety
- the Inspector's delay of more than two weeks between the date of her finding that the Mill constituted a danger and the issuance of the direction was inconsistent with her findings that there was an imminent threat to the life or health of the employees
- to conclude that the employees were exposed to a serious threat, the evidence would have

to show that there was a reasonable possibility that the employees' exposure to the moving and rotating parts could cause severe or substantial injury or illness at some point in the future
- the Inspector's conclusion that the Mill posed a danger was based on her own speculations that an employee could get caught up in the moving and rotating parts, rather than any objective facts.

The Inspector's direction was rescinded and replaced with a varied direction ordering that guarding contraventions under the Code be remedied within a set period of time.

Federally regulated employers will want to review the principles established in these recent decisions, in considering whether a "danger" within the meaning of the Code exists in the workplace.

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