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CAUSE NO LONGER REQUIRED FOR CANADA LABOUR CODE DISMISSALS

A recent CLC decision changes the game with respect to dismissing federally-regulated employees

Traditionally, the Canada Labour Code (the "Code") has not been very employer friendly for dismissals.

It was well accepted that the Code was designed to give employees protection akin to a collective agreement when it came to the termination of employment. As such, federally-regulated employers were effectively prohibited from dismissing a non-unionized employee by simply providing him/her with a severance package.

Employers who dismissed an employee without cause, and paid the notice and severance required by the Code, still ran the risk of a complaint of "unjust dismissal".

Atomic Energy Case

Very recently, the Federal Court of Canada (the "Court") turned this thinking on its ear. It confirmed that a federally-regulated employer is permitted to dismiss a non-unionized employee without the need for just cause. See *Wilson v. Atomic Energy of Canada Ltd.* ("AECL") 2013 FC 733 ("Atomic Energy").

The Unjust Dismissal Complaint

In *Atomic Energy*, the employee, Mr. Wilson, worked for four and a half years. The employer dismissed him and offered him six months' notice in the form of a severance package. Wilson launched a complaint under the Code alleging unjust dismissal.

Atomic Energy denied that it terminated Wilson unjustly. It argued that the termination was far from unjust as it had provided him with a generous severance package which exceeded his statutory notice and severance entitlements.

The adjudicator determined that Wilson had been unjustly dismissed on the basis that Atomic Energy was not simply allowed to offer Wilson a generous severance package and pretend the dismissal was just. The adjudicator upheld the generally accepted state of the law, determining that the employer was not lawfully permitted to end Wilson's employment without just cause under the Code.

The Court Decision

On judicial review, the Court overturned the arbitrator's decision as "unreasonable" because it failed to take into consideration the termination and severance provisions of the Code. Overturning years of previous theory and jurisprudence, the Court determined that the Code contains termination and severance provisions for a reason and that an employer ought to be able to rely on those provisions without the dismissal being automatically unjust.

A positive development with a side of salt

As long as the Court decision is upheld, a federally-regulated employer may now dismiss an employee without cause so long as it pays at least the notice and severance pay pursuant to the Code.

This is a positive development, but it must be taken with a grain of salt. An employer will still likely face a complaint of unjust dismissal, even if it complied with the Code's notice and severance obligations, if, for example, the employer alleged culpable misconduct where

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none existed, or if the decision to terminate was made arbitrarily, in bad faith, or for discriminatory reasons.

We will continue to monitor this case and its application. In the interim, our federally regulated employers would be wise to remember that an employee's entitlements on termination without cause arise from three sources: (1) the notice and severance provisions of the Code; (2) the right to reasonable notice of termination at common law; and (3) the termination provisions in an enforceable employment contract.

Practical tips

In light of the above:

- have a contract with each employee, which clearly delineates his/her entitlements in the event of a without cause termination;
- ensure that the contract is not only properly drafted, but also properly implemented, and satisfies at least the minimum statutory obligations for termination pursuant to the Code; and
- internally document your reason(s) for the termination, be it economic, performance, or otherwise and take notes during the termination meeting in order to rebut a complaint that the dismissal was arbitrary, in bad faith, discriminatory, or otherwise unjust.

UPCOMING EVENTS

David Whitten will be speaking about executive employment agreements at the Human Resources Professionals Association's Annual Conference and Trade Show, January 24th, 2014, in Toronto.

Learning objectives include:

- Understand the various provisions found within executive employment agreements, including equity incentive plans, change in control provisions and post-employment restrictions
- Review effective provisions in executive employment agreements from both the executive's and the employers' perspective
- Understand the dynamics of negotiating executive employment agreements
- Know when to use certain provisions and when not to
- Learn how to address common issues that arise in enforcing executive employment agreements

For more information please visit HRPAs website

IN THE MEDIA

Daniel Lublin and The Globe and Mail's video series explore severance, where Daniel Lublin explains when and if an employee is entitled to severance, how to calculate and negotiate it and much more. To learn about severance and the possible entitlements, watch Daniel's videos on The Globe and Mail's website:

When can my company refuse to pay me severance?

Should I sign a release if my job's been terminated?

Should I negotiate for more severance?

How do I calculate how much severance I'm entitled to?

Sorry, you're not entitled to a right of continued employment

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