Federal employees protected against without cause dismissal

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Introduction

In *Wilson v AECL* a sharply divided Supreme Court of Canada overruled the Federal Court of Appeal and held that, subject to narrow exceptions, federal employers are not entitled to terminate non-unionised employees without cause. This prohibition applies even if the employer is willing to provide generous notice and severance pay.

This approach to the 'unjust dismissal' provisions in Part III of the Canada Labour Code is in line with that taken by some adjudicators in the past. However, the Supreme Court majority's reasons are incredibly broad and may have far-reaching implications for federal employers' human resources practices.

Common law "completely replaced", but wrongful dismissal still available

Writing for a six-judge majority on this issue, Justice Abella concluded that the "entire purpose" of the unjust dismissal provisions is to protect non-unionised federal employees from being dismissed without cause. In her view, the legislative intent of these provisions was to expand the dismissal rights of non-unionised employees in a way that made them "analogous" to those held by unionised employees. Related to this, she concluded that the unjust dismissal provisions "completely replaced" the basic common law principles that permitted an employer to terminate without cause.

However, in notably vague reasons, Abella went on to conclude that if a federal employee does not wish to make an unjust dismissal complaint, he or she can choose to launch a wrongful dismissal claim in the civil courts seeking damages for common law reasonable notice.

Not all employees are entitled to notice and severance pay

Abella also specifically found that the notice and severance pay provisions in Part III of the code do not apply to employees who are covered by the unjust dismissal provisions. Rather, the notice and severance pay provisions apply only to:

- managers;
- those laid off due to lack of work or discontinuance of a function;
- employees with service of between three and 12 months; and
- any other employees who are not covered by the unjust dismissal provisions.

Dissent

In a sharply worded dissent, a three-judge minority held that federal employers are entitled to

dismiss employees without cause as long as they provide appropriate notice and severance pay. In their view, the common law still applies; the unjust dismissal provisions merely provide dismissed employees who wish to challenge their termination with an additional, more efficient litigation procedure and other possible remedies (eg, reinstatement).

Writing for the minority, Justices Cote and Brown emphasised that the majority's approach was seriously flawed. Among other reasons, they pointed out that the majority's approach effectively allows an employee to determine what legal regime applies – the unjust dismissal provisions or the common law – after he or she has been terminated. In their view, this results in an "absurd" situation in which an employer cannot know its legal obligations in advance, since those obligations will depend on whether the employee chooses to challenge dismissal through an unjust dismissal complaint (under which dismissal without cause is prohibited) or through an action for wrongful dismissal (under which the employee will be entitled to common law reasonable notice).

The minority's conclusions and reasoning were largely in line with the Federal Court of Appeal's decision and the submissions of the Federally Regulated Employers – Transportation and Communications and the Canadian Association of Counsel to Employers, which intervened before the Supreme Court.

Comment

The majority's reasons and conclusions in *Wilson v AECL* are extremely broad and, in some areas, very confusing. It is therefore difficult to determine what practical consequences this decision will have for federal employers moving forward. At this early stage, the following consequences appear to flow from the decision:

- Federal employers do not have a right to terminate without cause non-unionised, non-managerial employees with 12 months' service or more, even if they are prepared to provide generous notice and severance pay. However, employers may still lay off such workers due to lack of work or the discontinuance of a function.
- An employee may choose to challenge his or her dismissal under the unjust dismissal provisions or through a wrongful dismissal action in civil court that seeks common law reasonable notice.
- Only employees who are not covered by the unjust dismissal provisions are entitled to statutory notice and severance pay under Part III of the code.
- Protection against without cause dismissal may now be a "minimum standard" under Part III of the code. Accordingly, it is an open question whether an employment contract or separation agreement that contemplates a without cause dismissal could be challenged by an employee as an impermissible attempt to contract out of the code.

Unfortunately, the majority's reasons do not provide clear guidance on a variety of practical questions that arise from these principles – for example, are there circumstances under which an employee can pursue both an unjust dismissal complaint and a civil claim for reasonable notice? It is hoped that these issues will be clarified as the Supreme Court's decision is interpreted and applied.

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