FIELD LAW
100TH ANNIVERSARY

Labour and Employment

Workwise Newsletter

July 8, 2015

# Canada Labour Code Does not Grant Non-Unionized Employees a "Right to the Job"

By Joël Michaud

In *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17 ("*Wilson*"), the Federal Court of Appeal (FCA) made a game-changing decision when they unanimously found that without-cause dismissals of non-unionized employees are permissible under Part III of the *Canada Labour Code* (the Code).[1] Previously, adjudicators had been split into two camps: some held dismissals without-cause to be inherently unjust, and some deemed them to be just provided that reasonable notice (or wages in lieu) and severance under the Code was given.

On November 16, 2009, Mr. Joseph Wilson was dismissed without cause from his employment with Atomic Energy of Canada Limited (AECL). As a federally-regulated employer, AECL is governed by the Code. Prior to dismissal, Mr. Wilson had been working at AECL for four and a half years. AECL offered a severance package equal to roughly six months' pay in exchange for a full and final release, despite the fact that under the Code Mr. Wilson was entitled to only 18 days severance pay. Mr. Wilson did not sign the release. Instead, he alleged that he had been unjustly dismissed contrary to section 240(1) of the Code.

The adjudicator ruled that the Code does not permit without-cause dismissals, and held Mr. Wilson's without-cause dismissal to be inherently unjust. The FCA upheld the Federal Court's finding that a dismissal without cause is not on its face unjust if reasonable notice (or wages in lieu) and severance is given. Instead, it will always be for the adjudicator to assess all of the circumstances and determine if the dismissal, whether or not for cause, was unjust.

In reaching their decision, the FCA relied on the common law of employment. At common law, an employer can dismiss a non-unionized employee without cause so long as it provides reasonable notice of termination or compensation in lieu. In creating statutes, such as the *Canada Labour Code*, Parliament can only oust the common law by way of explicit language or necessary implication.

The FCA found that the Code was enacted against the backdrop of the common law and, as such, does not override it. The FCA held that there is nothing in the

Code that suggests that it was the intention of Parliament to grant non-unionized employees a "right to the job", or to place them in the same position as non-unionized employees whom cannot be dismissed without cause.

Mr. Wilson has sought leave to appeal to the Supreme Court of Canada (SCC). If the SCC accepts to hear the case, we will have to wait to see if it will uphold the FCA's decision. However, if the FCA's decision is not overturned, it is potentially significant for four main reasons. First, it may change the nature of employer-employee relations at the federal level. On one hand, it gives federally-regulated employers the ability to better manage their human resources: whereas in the past they may have been reluctant to dismiss employees unless they could prove just cause, the decision provides a basis to terminate without cause by providing reasonable notice (or wages in lieu) and severance. On the other hand, it gives incentive to federally-regulated employers to not provide a reason for dismissal. Employers can take the position the dismissal is on a without-cause basis because if an employer does provide a reason then there is a greater risk that reason, and by extension the dismissal, will be questioned and potentially deemed unjust.

The second reason *Wilson* is noteworthy is because, if the FCA's decision stands, it brings the Code in line with provincial employment standards legislation. In Alberta, for example, an employer is able to terminate on a without-cause basis. Third, the FCA's decision reaffirms the common law principles of employment for federally-regulated employers, as it deems Part III of the Code to work alongside the common law.

Finally, the FCA's decision in *Wilson* is potentially significant as it may negate the remedy of reinstatement. If a without-cause dismissal is found to be unjust, the Code permits an adjudicator to apply one of three potential remedies: 1) payment of compensation, 2) reinstatement in employment, or 3) any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

The purpose of the Code's remedies for unjust dismissal is to "make whole" the complainant such that he is restored to the material position he would have enjoyed had he not been dismissed.[2] Reinstatement has often been deemed the most appropriate remedy for an unjustly dismissed complainant as it best fulfills the Code's "make whole" purpose.[3] However, in the aftermath of *Wilson*, it is possible that the remedy of reinstatement will cease to be a viable remedy.[4] For example, where a without-cause dismissal is deemed unjust and reinstatement is ordered, the employer could again dismiss the employee without cause by providing reasonable notice of termination (or wages in lieu) and a more generous severance package. However, it is possible that Mr. Wilson will be granted leave to appeal to the SCC and that the SCC could overturn the FCA's decision, which could alter the outcomes of *Wilson* and their significance.

---

[1] Wilson v Atomic Energy of Canada Limited, 2015 FCA 17, [2015] FCJ No 44.

[2] *Sprint Canada v. Lancaster*, [2004] CLAD No 105 at paras 29-30, 2004 CarswellNat 6003.

[3] D Doorey, "Wilson v. Atomic Energy: Has the Court Read Out the Federal Reinstatement Power?" (2015) online at: <http://lawofwork.ca/?p=7922>.

[4] See note 3.

**SHARE THIS ARTICLE**


**CALGARY**
400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

**EDMONTON**
2000 - 10235 101 ST NW
Edmonton AB T5J 3G1
780-423-3003

**YELLOWKNIFE**
601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542