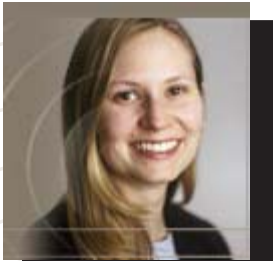


You Raise the Issue

KARA GILLESPIE

Question: If an employee files a complaint alleging wrongful dismissal with the Employment Standards Commission, can they also sue for wrongful dismissal in court?



Kara Gillespie

The purpose of the Employment Standards Code is to set out the minimum standards which employers must meet in order to protect all employees governed by the Code. Therefore, the notice of termination provisions set out in the Code are only the least amount of notice which an employer is required to provide an employee when terminating their employment without just cause. If the parties have an employment contract granting greater provisions or benefits to an employee, then the employer is bound by those terms.

An employee has rights both under the Code and in general law to receive reasonable notice of termination. The amount of notice provided for in the Code is all that the Employment Standards Commission can award. What a reasonable period of notice is in general law depends on the facts and the circumstances of each case, however, it will almost always be more than the minimum period set out in the Code.

According to the Employment Standards Commission, an employee cannot make a claim under the Code and pursue a civil action for wrongful dismissal at the same time. If an employee did this, the Commission would refuse to investigate the claim. If an employee first pursued the claim in court and received judgement, the Commission's policy is again to discontinue any investigation and to refuse to hear the claim as it has already been dealt with by another binding decision maker.

The confusion arises when an employee first makes a claim under the Code and then later wishes to pursue a civil action. Section 3 of the Code specifically states that the Code does not affect any civil remedies to which an employee is entitled. This implies that even if the employee was awarded a sum of money equivalent to the minimum notice of termination period required, that he or she is not then barred from proceeding to claim the difference in money they are entitled to in general law. However, the courts may find that they continue to have the power to dismiss the claim on the legal principle of *res judicata*, meaning that the claim has already been resolved by another binding decision maker and cannot be heard again.

The courts have held that to find that the claim is *res judicata* there needs to be the same parties involved, the same issues being argued and a final and binding decision must have already been made. The wording of the Code was amended to state that decisions of the Director of the Commission cannot be appealed, as opposed to the previous wording that the decisions were "final and binding".

In cases considering the previous wording, the court has held that the legislature has provided employees with a choice of forum. Section 3 can be interpreted as permitting employees to file a civil claim instead of pursuing their rights

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under the Code but that both avenues do not co-exist. There have been no cases reported considering the amended wording, therefore the law remains uncertain whether a civil claim can be brought after the same issue has been resolved by the Commission. The argument may still exist that, if the parties and issues are still the same and a decision was made, the issue is *res judicata*.

It is less expensive and much faster for an employee to make a complaint under the Code than to go to court. Therefore, if the employee is in immediate need of relief and cannot afford the expense of going to court, it may be in their best interest to file a complaint under the Code.

If you are an employee, you should seek legal advice before choosing a forum in which to file a claim, as filing in one may foreclose greater awards or preferred options in another.

If you are an employer, you should seek legal advice when served with either a complaint from the Commission or a claim in civil court. Engaging in the arguments or the complaint could limit the case to one forum and negatively impact your arguments in another.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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