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Feature

Living in a Post-Atomic World

Tools you always needed for managing federally-regulated employees

Jenelle Butler
LL.B.
Associate, Brownlee LLP

Last summer, the Supreme Court of Canada delivered the final word on the years-long debate about whether non-unionized, federally-regulated employees could be terminated on a without-cause basis. The decision, delivered by the majority of the Supreme Court, affirmed the position overwhelmingly represented in the case law, precluding termination of employees governed by the *Canada Labour Code* in the absence of just cause for termination.

In November 2009, Joseph Wilson was terminated on a without-cause basis by his employer, Atomic Energy Canada Ltd. At the time of the conclusion of his employment, Wilson was provided with a severance package in excess of the minimums required by the *Canada Labour Code* (the "*Code*"), which governed Wilson's employment. Wilson challenged his termination using the unjust dismissal provisions under section 240 of the *Code*, and the Adjudicator concluded that his employer did not have just cause for his termination, and payment of severance, however generous, would not help the employer avoid application of the *Code*. On judicial review, the Application Judge held that the Adjudicator's decision was unreasonable on the basis that nothing in the *Code* precluded a without-cause dismissal. The Federal Court of Appeal agreed with the Application Judge's interpretation of the *Code*.

The Supreme Court ultimately found that the Adjudicator's decision was reasonable and consistent with the approach overwhelmingly applied in the case law that had developed under the *Code* since the enactment of the unjust dismissal provisions in 1978. This interpretation of the *Code* was consistent with the approach taken by the vast majority of adjudicators; the debate with respect to the permissibility of without-cause terminations arose solely from what the Court termed a "drop in the bucket", a total of 18 decisions out of over 1,700. The Court noted that the goal of the unjust dismissal provisions of the *Code* was to align the protections of non-unionized, federally-regulated employees with unionized employees. To this end, the very use of the term "unjust dismissal" was intended to invite the application of interpretations from arbitral jurisprudence, and specifically, that terminations could not be conducted without just cause. While sections 230 and 235 of the *Code* addressed the severance to be provided to employees in the event of the conclusion of their employment, these sections did not support the interpretation that without-cause terminations were permitted by the *Code*, but rather, apply to those who are excluded from the application of the unjust dismissal provisions. In sum, the Supreme Court concluded that the Adjudicator's rejection of Wilson's termination was an outcome that was "anchored in parliamentary intention, statutory language, arbitral jurisprudence and labour relations practice".

Employers need to be aware of the following sections of the *Code* relevant to termination of non-unionized employees: section 240 precludes termination of employees who have completed 12 consecutive months of continuous employment unless just cause for termination exists. Employees whose employment has been concluded due to lack of work or the discontinuance of a function (section 242(3.1)) cannot use the unjust dismissal provisions to challenge their terminations, nor can employees who are "managers" (section 167). Section 230 of the *Code* addresses the notice or severance to be provided to an employee and applies in the event of the without-cause conclusion of an employee's employment where the employee has been employed by the employer for greater than 3 months. Section 230 will apply to those employees employed for more than 3 months but less than 12 months, and those employees whose terminations resulted from lack of work or discontinuance of a function, or employees occupying a

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Feature continued

managerial role. Section 235 provides for severance pay in addition to that prescribed by section 230 for employees whose employment is concluded on a without-cause basis and who have completed 12 consecutive months of continuous employment.

In terms of practical tips for management of non-unionized employees who are governed by the *Code*, we recommend that employers develop a proactive management "tool kit" with the following components:

- Written warnings for disciplinary issues which capture the nature of the misconduct, set out expectations for future behaviour and outline consequences for future misconduct. Terminations for cause as a result of a single incident of misconduct are significantly more rare than those arising from an accumulation of concerns about an employee's conduct or performance, making a "paper trail" very important.
- Explicitly implementing a probationary period and using a system which ensures that a review of the employee's fit and performance is assessed prior to the conclusion of the probationary period, during which the ability to terminate on a without-cause basis still exists. While the probationary period may only be three or six months depending on the nature of the employee's role, we strongly recommend that further review of the employee be conducted *prior* to the 12-month mark and a decision about their future with your organization be made in advance of that date, including a termination, if necessary.
- Use of fixed-term contracts where appropriate, such as in cases where the work is necessarily time-limited, rather than continuous term employment. In the event that the contracts are properly worded and executed by the employee in advance of the commencement of their employment, their employment can be concluded at a specified and agreed upon date without application of the Code's unjust dismissal provisions. This is *not* an approach to use in cases where the employee's employment is not truly fixed-term in nature; an adjudicator will not hesitate to look past lengthy contracts or sequential renewals to determine that the employment is in fact continuous in nature rather than fixed-term.

Jenelle Butler is an Associate with Brownlee LLP in Edmonton and can be reached at jbutler@brownleelaw.com.