Canada's "New Clear" Termination Laws:

The *Atomic Energy* Fallout

By Adam J.C. Norget

Mr. Joseph Wilson was an employee of a federally-regulated employer (Atomic Energy of Canada Ltd.) whose employment was terminated on November 16, 2009 on a "without cause" basis. His employer, Atomic Energy, provided him with a severance package equal to 24 weeks' pay, which was well in excess of the statutory notice and severance requirements mandated by sections 230 and 235 of the *Canada Labour Code*, RSC 1985, c L-2 (the "*Code*"). Mr. Wilson filed a complaint of "unjust dismissal" pursuant to section 240 of the *Code.*

The *Code* applies to employees and employers which fall under federal jurisdiction. Under sections 240-246 of the *Code*, any person who has completed 12 consecutive months of continuous employment with an employer and who is not subject to a collective agreement may bring an unjust dismissal complaint, which is subject to formal adjudication. An adjudicator's available discretionary remedies are very broad and include reinstatement of employment, equitable remedies, and general "make whole" remedies similar to those enjoyed by arbitrators in the organized labour realm.

The Adjudicator in Mr. Wilson's case ruled that a federally-regulated employer could not avoid the unjust dismissal provisions of the *Code* by simply resorting to the provision of severance pay. Following a lengthy series of appeals, the Supreme Court of Canada issued its decision (*Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 ["*Wilson*"]) in which a narrow 5-4 majority ruled in Wilson's favour, finding that the purpose of sections 240-246 of the *Code* is to provide non-unionized employees who are subject to federal jurisdiction with protection against arbitrary dismissal; in other words, protection analogous to that held by unionized employees.

In short, following the ruling in *Wilson*, persons who meet the requirements of section 240 of the *Code* can only be terminated where "just cause" is established, unless they fall within one of the other narrow statutory exceptions (s.242(3.1): lack of work / discontinuance of a function / procedure for alternative statutory redress is available).

While the immediate impact of *Wilson* was significant and is still felt by federally-regulated employers, the full scope of its effect is only just emerging. The following are a few examples of recent legal developments following in the wake of *Wilson*.

Dependent Contractors

In the 2018 Federal Court case of *Peepeekisis Cree Nation No. 81 v Dieter* (2018 FC 411), the applicant employer sought judicial review of an Adjudicator's decision in which he found the respondent, Mr. Dieter, had been unjustly dismissed and awarded damages pursuant to section 242 of the *Code*. Of significant note was the Adjudicator's finding that Mr. Dieter was a dependent contractor and yet properly fell within the scope of "person" for the purposes of bringing an unjust dismissal complaint under section 240. While the definition of "employee" for the purposes of Part I of the *Code* includes dependent contractors, Part III of the *Code* (including unjust dismissal provisions) contains no such definition.

The Federal Court upheld the Adjudicator's decision on the basis of the principles set out in *Wilson*, stating that *Wilson* supports a conclusion that section 240 and Part III of the *Code* can be interpreted "analogously" to Part I. Accordingly, the Court held that dependent contractors are afforded the same protections as employees against unjust dismissal in the wake of the *Wilson* decision.

Progressive Discipline

In the 2017 Federal Court case of *Bird v White Bear First Nation* (2017 FC 477), the applicant employee sought judicial review of an Adjudicator's decision dismissing his unjust dismissal complaint. The Adjudicator had found that the employee, a school principal, had been dismissed for just cause. Specifically, the Adjudicator found that the employee had exhibited incompetence, insubordination, financial mismanagement resulting in losses to the employer, had sexually harassed two female staff members on several occasions in front of other staff members, and had used derogatory language in reference to persons of homosexual orientation.

Notwithstanding these findings, the Federal Court granted the employee's application (with costs) on the basis of new analytical requirements arising from *Wilson*, stating:

> "*Wilson* heightens the requirement for analysis under the *Code*, including the need to address progressive discipline… Therefore, the law post-*Wilson* requires that an Adjudicator at minimum turn his or her mind to whether the dismissal was just, which entails engaging with the mitigating factors, including progressive discipline, and weighing these against the conduct. If cause is established due to sufficiently egregious conduct which obviates the need for mitigation by the employer, then that needs to be explained by the Adjudicator."

The Federal Court echoed this sentiment in *Bank of Nova Scotia v Randhawa* (2018 FC 487), stating that "[i]t is now confirmed that the doctrine of progressive discipline is part of the law under Part III of the *Code*, and that this applies to the banking sector: *Wilson*".

Statutory Termination Pay / Severance Pay

In the 2017 Wage Recovery Appeal case of *SCAMP Transport Ltd. v Marcille* (2017 CanLII 85802 (CALA)), the employer appealed a ruling in favour of an employee awarding damages for termination pay and severance pay under the *Code*. The employee had filed a Monetary Complaint which included a claim for termination pay and severance pay under sections 230 and 235 of the *Code* following the termination of his employment. Although the employer consistently took the position that it had "just cause" for dismissal, the assigned Inspector determined that the dismissal was "without cause" and ruled that the employee was entitled to termination pay and severance pay pursuant to sections 230 and 235.

In finding in favour of the employer on appeal, the Referee stated that "in the wake of the … recent decision in *Wilson*", the employee was not entitled to termination and severance pay under sections 230 and 235 of the *Code* as those sections are not available to an individual who has access to – but chooses not to use – the unjust dismissal process (sections 240-246). The Referee made particular note of the majority's finding in *Wilson* that sections 230 and 235 "apply only to those who do not or cannot avail themselves of [the unjust dismissal] provisions" and ultimately ruled:

> "In summary, in view of the decision in *Wilson…* I find that Mr. Marcille was not entitled to be paid termination and severance pay pursuant to section 230 and 235 of the *Code*, even if it were accepted his termination was "unjust". If Mr. Marcille maintained his dismissal was "without cause", the Unjust Dismissal procedure offered him his remedy."

Key Takeaways / Practical Tips for Employers

1. Employers under federal jurisdiction can only terminate an employee for just cause, unless:

    a. The employee is a manager;
    b. The employee has been continuously employed for fewer than 12 months;
    c. The employee is subject to a collective agreement;
    d. The employee is terminated due to lack of work;
    e. The employee is terminated because of the discontinuance of a function; or
    f. An alternative statutory procedure for redress is available to the employee.

2. Dependent contractors are also now protected from unjust dismissal – so employers should ensure that applicable consulting agreements and related contracts are carefully drafted to minimize the risk of a finding that the contractor is not truly "independent".

3. Progressive discipline considerations are now an integral part of the assessment of the "justness" of a termination – so employers should ensure that, even in cases involving a culminating incident or a single egregious incident of misconduct, they prepare a comprehensive case with respect to:

    a. Their efforts towards the implementation of progressive discipline; or
    b. Explaining how progressive discipline was considered and determined to be inappropriate in the circumstances.

4. Termination pay and severance pay obligations under sections 230 and 235 of the *Code* may not apply in the majority of unjust dismissal cases and are not an appropriate consideration for assessing damages where an employee has commenced an alternative claim (e.g. Wage Recovery Claim).

5. To further minimize exposure to unjust dismissal claims, employers should consider:

    a. The use of fixed-term contracts (shorter than 12 months in duration);
    b. Carefully documenting evidence supporting a "lack of work" or "discontinuance of function", both before and after effecting a related termination;
    c. Implementing and maintaining a progressive discipline policy, regardless of the nature of their particular industry; and
    d. Conduct comprehensive reviews of an employee's performance and fit within the organization prior to consecutive employment of 12 months.

Contact the Author
Adam J.C. Norget
Neuman Thompson
Edmonton, Alberta, Canada
1-780-733-6561
anorget@neumanthompson.com