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LAWYERS FOR EMPLOYERS

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Federal Employers Can Dismiss Without Cause

In a recent and ground-breaking case, the Federal Court upheld a federal government agency's dismissal of an employee without cause.

Atomic Energy of Canada Limited (AECL) dismissed an employee without alleging cause, but with a payment of six months' severance pay in lieu of notice. The employee protested that the dismissal was unjust.

An adjudicator under the *Canada Labour Code* was appointed to determine the case on its merits. The adjudicator determined that the *Code* only permits dismissals for cause and, as no cause was alleged, the complaint of unjust dismissal was valid. In other words, under the *Code,* the provision of severance pay does not relieve an employer of the requirement to allege and establish cause for dismissal.

The employer sought judicial review of the adjudicator's decision on the basis that the adjudicator's interpretation of the *Code* was erroneous. Meanwhile, the employee opposed the judicial review on the basis that the *Code* does not permit dismissals without just cause under any circumstances and that, since the adjudicator had not issued a decision regarding the appropriate remedy, an application for judicial review was premature.

The Federal Court addressed each of these issues in turn.

First, on the issue of prematurity, Justice O'Reilly stated that parties are generally encouraged to complete the adjudication of their dispute in its entirety before appearing in court. However, there are exceptions to this rule. One such exception occurs when, as in this case, the adjudicator has made a final determination on the substantive issue and there is thus no risk of additional costs or delays. Furthermore, the Court stated, had the compensation already paid been declared sufficient before a judicial review was permitted, the issue may have been declared moot, rendering the employer unable to bring these substantive issues before the Court.

Second, and most significantly, Justice O'Reilly established that the *Code* does not prevent an employer from dismissing an employee without alleging or establishing just cause. He found this position to be consistent with existing jurisprudence regarding dismissals without cause pursuant to the *Code*.

Rather, the jurisprudence reviewed provides only that, where an adjudicator concludes that the employer's reason for dismissing an employee cannot be substantiated, the employee may be entitled to compensation in an amount greater than the statutory entitlement to severance pay.

Justice O'Reilly then went on to clearly delineate the regime that governs dismissals in the federal sphere:

- An employee may be dismissed without just cause, provided that notice or severance is paid pursuant to sections 230 and 235 of the *Code*. These sections are included in the *Code* for the sole purpose of governing dismissals without cause; any other interpretation would render these sections meaningless.
- Where an employee is dismissed for just cause, he or she may file a claim pursuant to section 240 alleging an unjust dismissal, for reasons such as reprisal or a failure to establish the facts of alleged misconduct, amongst others.
- Where an employee is dismissed due to layoff for lack of work or a discontinuance of the employee's position, a claim pursuant to section 240 is not appropriate.
- Finally, on the issue of a suitable remedy, regardless of which of the above claims are brought forward, where an adjudicator concludes that the dismissal was unjust, he or she has broad remedial powers to compensate or reinstate the employee, as well as to grant other appropriate remedies.

In light of all the foregoing, the Court concluded that the adjudicator's decision was unreasonable, and the application for judicial review was allowed.

This case is of assistance to all federal employers, as it establishes that employees of federally-regulated entities may be dismissed without just cause, provided that notice and severance pay is paid wherever applicable.

Arbitrator Clarifies Rule on Subsequent-Event Evidence

A recent arbitration decision confirmed that the admissibility of subsequent-event evidence is dependent on its relevance to the merits of the case.

The grievor, a Labourer/Truck Driver for the City of Hamilton, underwent surgery. As a result of the procedure, he developed ongoing foot pain and chronic back pain. These ailments kept the grievor from attending at his employer's labour-intensive workplace.

The City accepted the grievor's absences as sick leave until his claim for long term disability (LTD) benefits was denied, at which time it was requested that he return to work. The grievor did not do so; instead, he submitted contradictory medical certificates, some stating that he was fit to return to work and others stating that he suffered from ongoing pain and was under the care of a surgeon and physician.

The City requested on three occasions that the grievor complete an independent medical examination as well as a functional abilities examination to determine under which conditions a return to work would be possible. However, the grievor did not attend at any of these assessments, nor communicate with his employer. It was alleged that a medical certificate of inability to attend work due to psychiatric/psychological stress was submitted, but this was never confirmed.

In due course, a non-disciplinary termination was effected in accordance with the collective agreement. The collective agreement provided that an employee may be terminated for being absent without leave without sufficient reason, frustrating the employment contract, and abandoning a position.

The Canadian Union of Public Employees, Local 5167 grieved the denial of LTD benefits and the termination.

At arbitration, the employer raised a preliminary objection to the admittance of subsequent-event evidence: psychiatric or psychological assessments of the employee that had been completed post-termination. The City argued that it would be prejudiced by not having seen the evidence previously and by not having had the opportunity to test its veracity. It also submitted that such evidence was irrelevant, as it did not speak to the reasonableness of the decision to terminate the grievor and deny his LTD benefits at the time these decisions were made.

For its part, the Union sought reinstatement of the grievor without a return to work based on the position that the grievor is totally disabled. The Union also stated that pre- and post- termination evidence, which demonstrated that the employer was aware of the grievor's psychological/psy-

chiatric conditions, was relevant to establish that the grievor suffered from certain disabilities.

Ultimately, Arbitrator Surdykowski determined that any evidence of the grievor's psychological condition that shed light on the reasonableness of the employer's decisions was admissible, even if this evidence was generated subsequent to the events in question.

The importance of this decision lies in the Arbitrator's treatment of a well-established principle applicable to both labour and employment dispute resolution. In *Cie minière Québec Cartier* v. *Quebec (Grievances arbitrator)*, the Supreme Court of Canada established that in order to preserve finality and fairness for all parties involved, evidence that is generated subsequent to the impugned decision is inadmissible for the purposes of determining the justness or reasonableness of the decision in issue, unless it sheds light on that decision at the time the decision was made and implemented. Previously, this rule had generally been applied only to disciplinary grievances. Arbitrator Surdykowski has now clarified that the rule applies equally to non-disciplinary grievances.

This decision is of assistance to employers as it serves to clarify the application of the principle in *Québec Cartier*. It also provides certainty to employers that post-discharge evidence will only be considered where it sheds light on the decision to terminate at the time that decision was made.

Zero Tolerance of Sexual Harassment in the Workplace

Sexual harassment in the workplace continues to cause employers several legal and financial challenges. In a recent decision, Justice Sachs of the Divisional Court assuaged a few of these problems by taking a zero tolerance approach to a grievance arising from a case of sexual harassment and assault.

It had been alleged that, on June 14th, 2012 a mail room clerk sexually harassed a cleaner employed by a cleaning contractor. The complainant reported the incident to the clerk's employer, the Professional Institute of the Public Service of Canada (PIPSC), stating that such behaviour had been going on for a long time without her consent. The accused clerk did not deny the allegation, but protested that the complainant had consented to his advances.

After a brief period of investigation, during which time the clerk was placed on administrative leave, his employment was terminated. The Communications, Energy and Paperworkers' Union of Canada, Local 3011 (CEP) grieved the termination on his behalf.

At arbitration, it was established that the clerk had sexually harassed and assaulted the complainant on an ongoing basis. In determining the appropriate penalty, the Arbitrator considered the clerk's blameless employment record, six years of service, and conduct during the investigation. The Arbitrator also considered the testimony of another cleaner who was the victim of the same harassment until she successfully demanded that the behaviour come to an end. The Arbitrator then considered the testimony of the complainant, who stated that she did not necessarily want to see the grievor's employment terminated; she simply wanted an end to the harassment. Ultimately, a lengthy suspension was substituted for the termination.

PIPSC filed for judicial review, requesting that the Arbitrator's award be overturned and the termination reinstated.

The Court confirmed that the ongoing nature of the misconduct was egregious, and that while there was no formal discipline on the clerk's record, this was likely because, as witnesses had established, his misconduct had not been previously reported to the employer. The grievor was unremorseful and refused to take responsibility for his actions, there was also no evidence that, if reinstated, he would not continue to abuse other employees in the same manner.

Most importantly, the Court found the Arbitrator's decision to be unreasonable in relying on the complainant not wanting the grievor to be dismissed, and another employee successfully forcing the clerk to stop harassing her as factors favouring reinstatement. The Court confirmed that a complainant is not in a position to decide the appropriate penalty; rather, the onus to establish a harassment-free workplace is to be borne by employers, not employees.

This decision represents an endorsement of the move towards a zero tolerance approach to workplace violence. At the time of print, this matter had not been appealed to a higher court. Accordingly, this decision is a helpful precedent in support of an employer's efforts to establish and maintain a workplace that is free of sexual harassment and sexual assault, as required by law.

Termination Provisions in Employment Contracts: Are Yours Still Enforceable?

The termination clause is one of the most important, and yet one of the most vulnerable portions of an employment contract. Such clauses have come under increasing judicial scrutiny in recent years, and will be subject to even greater scrutiny by courts following the Ontario Superior Court's decision in *Stevens v. Sifton Properties Ltd*. In this case, the Court held that, if a termination clause does not specify that benefits will be continued during the notice period prescribed by statute, the termination provision is unenforceable, and common law entitlements may apply.

Stevens had been employed by Sifton as the Head Golf Professional at a golf course in London, Ontario. After three and a half years, her contract was terminated without cause, as per the termination clause in her letter of offer. With respect to termination without cause, the termination clause provided as follows:

> "The Corporation may terminate your employment without cause at any time by providing you with notice or payment in lieu of notice, and/or severance pay, in accordance with the *Employment Standards Act* of Ontario;
>
> "You agree to accept the notice or payment in lieu of notice and/or severance pay referenced in paragraph 13(b) herein in satisfaction of all claims and demands against the Corporation which may arise out of statute or common law with respect to the termination of your employment with the Corporation."

Sifton indicated at the time of termination that it would also continue Stevens' benefits (namely, vacation pay, health benefits and pension plan contributions and benefits) for a period of three weeks, which corresponded to the three week statutory notice period, and that it would pay her a discretionary bonus.

Stevens brought a claim of wrongful dismissal, in which she alleged that the termination clause in the employment agreement was unenforceable, and that she was therefore entitled to reasonable notice in accordance with the common law. Several arguments were made to support this position, but the Court ultimately accepted the reasoning that, since the termination provision did not explicitly provide that benefits would be continued during the notice period, the contract was contrary to the *Employment Standards Act, 2000* (*ESA*) and was therefore null and void.

Stevens argued, and the Court agreed, that the excerpted portion of the employment agreement was exhaustive of the payments to be made to the employee in the event of termination without cause, given that the last paragraph of the provision stated that the payments referenced were in satisfaction of all statutory and common law entitlements. As such, Stevens would be unable to make any further claims in regard to a continuation of benefits. Accordingly, and notwithstanding that Sifton had chosen to provide for the continuation of benefits in any event, the provisions of the termination clause itself contravened the *ESA*, which rendered them null and void and allowed Stevens to claim common law reasonable notice.

This case is important for employers as it reiterates that, in order to be upheld by the Court, a termination clause must comply with all aspects of the *ESA*, including the obligation to continue benefits during the statutory notice period. Ambiguous language in a termination clause that may give rise to an interpretation that the employee could receive something less than the minimum legislative requirement could render the provision void, and open the door to the application of much more expensive common law reasonable notice requirements.

A periodic review of employment contracts is good practice to ensure that its language remains enforceable as the law evolves.

Supreme Court of Canada to Determine Waiver of Notice Issue

As reported in the Summer 2013 issue of EMPlawyer's Update, the Quebec Court of Appeal recently held that an employer does not have to provide pay during the notice period if it waives an employee's notice of resignation, pursuant to section 82 of the *Act Respecting Labour Standards*. Similar reasoning has not yet been applied in Ontario courts.

In September 2013, the Supreme Court of Canada granted leave to appeal, setting the stage for an eventual pronouncement by the Supreme Court on this issue. We will continue to keep readers apprised of the progress of this case.

Upcoming Seminar on Workplace Privacy

Please join presenters Alanna Twohey and Katherine Symonds on October 22, 2013 at the Ottawa Convention Centre for a discussion of privacy in the workplace.

This complimentary seminar will focus on:

- Whether and which privacy legislation applies to your organization;
- Recent case law developments, including:
  - updates on the newly-created cause of action for invasion of privacy – the first cases to apply *Jones* v. *Tsige*; and,
  - the Supreme Court of Canada's decision *R.* v. *Cole*.
- Meeting your operational needs without running afoul of employee privacy rights, including:
  - conducting workplace surveillance;
  - monitoring employees' computer and internet use; and
  - using newer technologies, such as GPS and biometrics software.

For further details and to register, please visit our website.