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Wilson v. AECL: At the Supreme Court of Canada, What was Old is New Again

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As labour and employment lawyers, one of the very first things we must do when dealing with a new client, whether it be an employer or an employee, is to determine whether or not the employment relationship at issue is one that falls under provincial or federal jurisdiction. The distinction between the two is not generally well understood, and yet the implications for the resolution of all sorts of matters ranging from human rights and occupational health and safety rights through to terminations of employment, are significant.

In the context of terminations of employment, it is necessary from the outset to determine which regime applies in order to correctly identify the means of redress that an employee might properly pursue. In the context of this discussion, we are dealing strictly with non-unionized employees (although unionized employees have different regulatory regimes as well, depending on the federal-provincial jurisdictional distinction). If the employer falls under provincial regulation (as the majority of employers do) then employee redress is limited to the minimum notice and severance provisions of Ontario's *Employment Standards Act, 2000* or to a court claim for wrongful dismissal. On the other hand, federally regulated employees (industries engaged in telecommunications, interprovincial transportation, or atomic energy, to name a few) are faced with a choice between the same sort of court action, or an "Unjust Dismissal" application under the *Canada Labour Code*.

The distinctions have always been seen as rather clear. Provincially-regulated employees that have redress to the *Employment Standards Act, 2000* are entitled as a matter of right to more significant minimum payments by way of notice (or pay in lieu) and severance pay (if applicable) than federally regulated employees. Federally regulated employees, however, have access to the "Unjust Dismissal" provisions of the *Canada Labour Code*, which provide for a streamlined adjudicative process as an alternative to the court process, with adjudicators who have the authority to reinstate the employee in the job from which they had been terminated. In other words, federally regulated employees who were not managers, and were let go for reasons

other than lack of work or discontinuance of a job function could be reinstated in their jobs in addition to receiving financial compensation. This is a remedy that is not available for provincially-regulated employees unless they are represented by a union in a collective bargaining relationship.

But all of these expectations were set on their ear early last year when the Federal Court Appeal decided the case of *Wilson v. Atomic Energy of Canada Limited*. This was a case where a federally-regulated employer, AECL, terminated its employee, Mr. Wilson, provided to him what has been described as a generous severance package and then argued in response to an Unjust Dismissal complaint that he had not been "unjustly dismissed" because a dismissal that provided such a generous termination arrangement was not, by definition, "unjust".

While the adjudicator who initially addressed the case rejected that argument, in keeping with the overwhelming majority of decisions by adjudicators in similar circumstances in the past, AECL pursued judicial review before the Federal Court of Canada. The Federal Court, to the surprise of employment lawyers throughout the country, concluded that the *Canada Labour Code* does in fact permit dismissals without cause where the financial compensation provided for loss of employment is sufficiently generous. For slightly different reasons, the Federal Court of Appeal came to the same conclusion in early 2015, leading to a situation where the distinction between federal and provincial jurisdiction seemed largely to have evaporated. With the Federal Court of Appeal's decision as the law of the land, federally-regulated employees were limited to very modest minimum separation payments under the *Canada Labour Code*, and if they wanted to pursue a better remedy, they were left with the common law court system and an Unjust Dismissal regime that could be undermined by a sufficiently generous termination package, making the goal of reinstatement under the *Canada Labour Code* somewhat nebulous.

In July of this year, the Supreme Court of Canada settled the issue. Reversing the decisions of the Federal Court and the Federal Court of Appeal, the Supreme Court of Canada reinstated the adjudicator's original decision that he had jurisdiction to deal with the matter despite the severance package that had been proffered. In making its decision, the Supreme Court looked at the evolution of the Unjust Dismissal regime under federal law, and in particular the comments made in Parliament at the time these provisions were brought into place in the late 1970s, where the Minister indicated that the remedies available to the affected employees would be similar to those available to unionized employees (who have always had a right of reinstatement in cases of unjust dismissal). Since the Unjust Dismissal provisions allow a broader range of remedies for employees than are available in the courts, the Supreme Court concluded that if employers can dismiss with pay in lieu of reasonable notice, then these additional rights, including both the right to reinstatement, and the right to full financial compensation for all economic losses that resulted from the termination (for example where the period of unemployment was well in excess of the reasonable notice period), could not be avoided by an employer who makes a simple severance payment.

Accordingly, the law as we had always understood it to be has been reinstated. Why then is this news?

The *Wilson* case highlights the difference between the federal and the provincial regimes that relate to the termination of non-unionized employees. While recognizing that, from to time over the 35+ years that the Unjust Dismissal provisions had been in place, some adjudicators had also concluded that reasonable notice was sufficient, the Supreme Court has done away with any doubt as the correct interpretation of the law. In doing that, it has provided a reminder of importance to federally regulated employers that employees who want to hold onto their jobs cannot simply be paid out, unless the employees agree. In other words, it is not enough to provide pay in lieu of reasonable notice to such employees; an employer that wishes to get rid of an employee without cause can only do so by providing a sufficient payment such that the employee will agree to the separation and give up the right to apply for reinstatement under the *Code*.

Employees who have been terminated, as well as employers who have any doubt at all whether or not they fall under federal or provincial jurisdiction, should always seek qualified legal assistance to determine whether or not a particular dismissal could give rise to a reinstatement order under the *Canada Labour Code*.