

Unjust Dismissal and Non-Unionized Employees

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Before 1978, if non-unionized employees believed that they had been wrongly dismissed, they had to resort to the courts to get relief. However, because the courts generally refused to order reinstatement, the only remedy they were able to get for unjust dismissal was monetary compensation.

In 1978, the *Canada Labour Code (Code)* was amended to change this situation. Sections 240 to 246 introduced a new procedure that allows non-unionized workers who work in federal jurisdictions to seek redress where they have been dismissed without just cause, a situation called "unjust dismissal." Essentially, the *Code* now provides non-unionized employees with the same protections against unjust dismissal that unionized employees enjoy under a collective agreement. It achieves this by curing two shortcomings in the law that previously governed non-unionized employees. First, it sets standards for determining what is "just cause" that are more in line with modern industrial relations practice than with outdated common law standards. The *Code* also permits the Minister of Labour to appoint an adjudicator to determine, according to those standards, whether or not an employee has been dismissed for just cause. Second, it makes reinstatement rather than monetary compensation the primary remedy for unjustly dismissed employees. It does, however, also authorize adjudicators to order various other awards including back pay and damages that are not limited to those that would otherwise be payable according to an employee's contract. In fact, it effectively allows adjudicators to order an employer to take whatever steps the adjudicator believes are necessary to counteract the consequences of the wrongful dismissal.

It is important to keep in mind that the unjust dismissal provisions of the *Code* do not abolish the civil remedies that are otherwise available to employees at common law. These remain available to unjustly dismissed employees apart from the *Code*. At the same time, the courts have held that once an adjudicator who has been appointed under the *Code* has made a final decision, an employee can no longer commence a separate civil action concerning the same issue. The employee will be "estopped" from doing so, meaning that when

case has already been heard under the *Code*, they will be barred from seeking a different ruling in court.

The amendments to the *Code* have received broad support. For example, Madam Justice Wilson of the Supreme Court of Canada stated that "[t]he *Code* represents a comprehensive scheme for the protection of non-unionized workers. It provides what I would classify as both substantive and procedural protections and benefits to such workers"

What does the Code require in order for Individuals to enjoy its protection?

A worker will be eligible to receive protection from unjust dismissal under the *Code* provided that he or she:

- (i) is an employee; and
- (ii) is not a manager; and
- (iii) has engaged in 12 months of "consecutive employment" with his or her employer; and
- (iv) has made a timely application, meaning within 90 days of the dismissal; and
- (v) has been dismissed; but
- (vi) has not been laid off; and
- (vii) is not covered by a collective agreement; and
- (viii) has engaged in pre-adjudication conciliation; and
- (ix) has been approved for adjudication by the Minister.

Before an adjudicator can even begin to consider a complaint under section 240, they must be satisfied that all of these requirements have been met. If they are not, the adjudicator will not have "jurisdiction," meaning the power to hear the complaint and rule on the dismissal. This will be true even if the Minister referred the case to the adjudicator. At the same time, however, the courts have applied these requirements flexibly so as to

ensure that the employment standards protection will be applicable where it should be. Minor and insignificant inconsistencies between the case and the requirements of the legislation will not always bar a case from being heard by an adjudicator. We will now look at each of these requirements in more detail.

(i) The person must be an employee

When the Canadian Legislature enacted s.240 of the *Code*, it deliberately avoided using the word "employee." Instead, the drafters used the word "person" so that section 240 would be read broadly to cover both supervisory as well as non-supervisory workers. It is the responsibility of arbitrators to determine on the facts of each case whether a complainant is a "person" within the meaning of section 240(1).

(ii) The person cannot be a manager

The only people that have been expressly excluded from the protection of section 240 the *Code* are "managers." There is no definition of the term "manager" in the *Code* and many cases have been launched over the issue of whether or not a particular individual is a manager. However, both adjudicators and the courts have interpreted this term very narrowly with the result being that only a small number of workers will not enjoy the protections of section 240. When there is a dispute as to whether or not a particular worker is a manager, the onus is on the employer to prove that the complainant was a manager.

In order to determine whether or not a particular individual is a manager, the important question to ask is not how the employer describes the person's job, but instead what that person actually does in daily practice. If that person has the authority to make final decisions about important matters within the enterprise, they will likely be identified as managers. That person should likewise have significant autonomy in decision-making generally, and have the mandate to direct other employees on how to fulfill their duties.

It is also necessary to consider the individual's position in the company hierarchy. They must, for example, participate at a senior level in the

"common control or direction." Finally, under section 245 of the *Code*, the Governor-in-Council is empowered to make regulations about other interruptions of employment that will, pursuant to those regulations, be deemed

direction of the enterprise. job descriptions, titles and contracts of employment that describe an individual as having managerial functions are insufficient to make that person a manager for the purpose of the *Code*. Similarly, the simple fact that an individual exercises some management functions or attends management meetings will not be enough to make that person a manager and thereby exclude them from protection under section 240.

(iii) The person must have served twelve months of continuous employment

An employee can only bring a claim under s.240 if they have worked "twelve consecutive months of continuous employment" with the same employer. The purpose of this threshold is threefold:

1. to limit the number of complaints lodged under the *Code*;
2. to permit the employer to have a probationary period during which they can assess the performance of the employee; and
3. to create an equal standard in determining the period of reasonable notice of termination between non-unionized employees and employees who operate under a collective agreement.

An employee may still be eligible to lodge a complaint under the *Code* even if they have not been engaged in active work with the employer for the full 12 months. For example, if the employee is absent due to verified illness for a number of weeks, it will not break the continuity of the 12-month period. This will also be the case where an employee's service is interrupted by periods of vacation, maternity leave, or other leaves of absence such as those permitted under worker's compensation legislation.

The continuity of the employment period may likewise not be broken where an employee leaves one federal employer to join another due to a sale or merger, or because they are transferred. This occurs because section 255 of the *Code* grants the Minister discretion to declare two or more employers to be a "single employer" for the purpose of section 240. However, this will only be the case where the two employers are "associated or related federal works, undertakings or businesses" that are under not to have interrupted the continuity of employment.

It is also important to keep in mind the effect of strikes, lay-offs and notice periods when

calculating the employee's employment period. For example, if the employee is discharged during a strike, and a collective agreement is negotiated as a result of that strike, the employee may still file a complaint for unjust dismissal under section 240. This will not be possible, however, if the terms of the collective agreement apply retroactively to cover the period during which the strike took place. Annual or routine, seasonal lay-offs will similarly not affect the continuity of the 12-month period. Finally, if an employee is given notice of termination, and the notice period runs beyond the anniversary of the date on which the employee began working for that employer, there will still be 12 consecutive months of employment for the purpose of the *Code*.

There is one important common situation in which the employment period will be broken. Specifically, if an employee resigns and then subsequently returns to work, the time earned in the first phase of employment cannot be credited in calculating that employee's employment period. This employee can only use the time spent working for the employer during the second term of service. If this second term is less than 12 continuous months, the employee will not meet the requirements necessary to invoke the unjust dismissal provisions of the *Code*.

(iv) The application must be timely

Section 240(2) of the *Code* stipulates that complaints about unjust dismissal must be filed with an inspector of the Federal Department of Human Resource Development Canada within 90 days from the date on which the employee was dismissed. Further, the complaint must be made directly to an inspector and must specify that the person is lodging a complaint regarding unjust dismissal under section 240. Simply applying for employment insurance benefits does not constitute a "complaint" for the purpose of this subsection.

The only time that there might be an exception to the 90-day time limit is if the complainant

mistakenly filed the complaint with a government employee who did not have the authority to deal with the complaint. The complainant must have believed, however, that the person who they filed it with did in fact have such authority. In these cases, the Minister has the discretion to extend the deadline, and he or she will issue an official notice specifying the new time limit. The complainant must then re-file the complaint, if necessary, within the new period. In addition, when making such a decision, the Minister must respect the rules of natural justice that were discussed in Part Two. This means that he or she will tell the parties what information his or her decision will be based on, and both sides will have the opportunity to make written statements about their positions regarding that information before the Minister finalizes his or her decision. This gives both the employer and complainant a fair opportunity to correct or contradict any relevant statements that might be prejudicial to their position.

(v) The person must have been dismissed

The *Code* does not define the term "dismissal". However, the courts have interpreted this term to mean "termination of employment by act of the employer without the voluntary and informed consent of the employee." It is the employee's responsibility to prove that they were dismissed in this way. If they cannot do so, the adjudicator will not have the power to hear the complaint.

There are some situations that don't exactly seem to meet these requirements but will still be subject to section 240. For example, if an employee gives an employer notice of resignation, and the employer subsequently dismisses the employee before the period of notice of resignation expires, the employee will still have been "dismissed" for the purposes of the *Code*. This is true because the employment contract would not have ended until the expiry of the notice of resignation. Even employees who have signed termination agreements that waive the right of the employee to take future legal action against the employer will not be precluded from filing a complaint under section 240.

It is important to recognize, however, that not all dismissals will result in penalties being levied against the employer under s.240 of the *Code*. Before this can occur, the adjudicator must determine not only that the dismissal was in fact a "dismissal" rather than a simple resignation, but that it was also

"unjust" In addition, there may be some instances where the actions of employers may not appear to be "dismissals," but because of their nature, will effectively amount to dismissal for the purpose of the Code. These are tricky cases that require further explanation. Accordingly, we will turn now to a brief discussion about the differences between dismissals and resignations, just and unjust dismissals, and actual and constructive dismissals.

® **The distinction between a "resignation" and a "dismissal"**

It is obvious that before an employee can claim that they are entitled to the unjust dismissal protections of the *Code*, they must have been dismissed and cannot in fact have resigned. The difference between the two is not always clear. The following factors are relevant in making this distinction.

1. the employee must have intended to resign and must have acted in a way that caused the resignation;
2. because the right to resign is a right held by the employee, the employee must have voluntarily indicated to the employer that they wished to end their employment - the employer has no right to demand the employee to resign or to simply deem the individual to have quit because they behaved in a certain way;
3. both prior to the "resignation," and following the "resignation," the employee and employer must have acted in a way that supports the conclusion that it was the intention of the employee to resign. If their conduct suggests otherwise, the true nature of the "resignation" will be open to question.

There are a number of other cases where a "resignation" will not be recognized as such and may instead be seen as a dismissal. For example, a "resignation" may be made for technical and administrative purposes including to allow the employee to continue employment in a different company that is part of the same corporate group. This resignation will not, however, be recognized as a true resignation under the *Code*. Similarly, an employer cannot deem an employee to have resigned when they failed to act in a certain way. An employer cannot say that an employee "resigned" when they refused to sign a contract of employment that would fundamentally change the contractual

relationship between the parties. This will instead be considered a dismissal under the *Code*.

® Employees on Fixed-Term Contracts

Where an individual is employed under a fixed term contract, and the contract was not renewed at the end of the fixed term, he or she cannot use the *Code* to claim unjust dismissal. If, however, an employee works beyond the expiration of a fixed term contract, and the employer does not object to the employee's continued employment, the employment contract will then become one for indefinite employment. Adjudicators under the *Code* do have authority over these latter contracts even though no new terms and conditions of employment have been negotiated between the parties. The *Code* is silent on the remedies that are available to employees who are employed under contracts that are invariably renewed each and every year when these contracts are not renewed.

(vi) **The person cannot have been laid-off**

Returning now to the general conditions that must be met in order for a person to enjoy protection under the *Code*, section 243(3.1)(a) provides that no complaint shall be considered if the employee "has been laid off because of lack of work or because of the discontinuance of a function." This provision is an attempt to strike a balance between allowing the employer to exercise their right to decide what must be done in the interest of the company, and limiting the circumstances under which a "layoff" will be improperly used to dismiss employees.

It is often questioned whether the alleged layoff is genuine. In order to be considered such, a layoff must have been "because of a lack of work or discontinuance of a function." To meet the "lack of work" requirement, a lack of work must have been "the real, essential, operative and dominant reason for the termination of [an employee's] employment." Several situations have been held to indicate that the lack of work was not in fact the real, essential, operative and dominant reason for the "layoff" including:

1. where, shortly after the claimant's termination, a replacement worker is hired to fill the claimant's position and the duties performed by that replacement worker are substantially the same as those performed by the claimant;

2. where a decision to dismiss the claimant comes right after a decision to re-organize the work place, thus indicating that the reorganization was specially engineered so as to justify the claimant's dismissal;

3. where the employer first tells the claimant that they have been dismissed for cause, and then later alleges it was because of a "layoff";

4. where the employee is replaced temporarily while he or she takes a leave of absence (or is otherwise re-assigned), and the employer later refuses to reinstate the employee claiming that there are no vacant positions; and

5. where the claimant's old position becomes vacant and open for application within a reasonable time following the "layoff" but the claimant's is not offered the position.

In order to make a finding that the layoff resulted from a "discontinuance of a function," the duties performed by the claimant must no longer be performed in the workplace where he or she was employed. Where a set of activities is merely handed over in its entirety to another person, or the duty is simply given a new and different title so as to fit another job description, the "discontinuance of a function" test will not be met. The same is true where these responsibilities are subsequently contracted-out to individuals who engage in exactly the same work, on the same premises, with the same equipment, and pursuant to the same instructions.

It is also important to recognize that even if a layoff is genuine, the termination of an individual's employment may not be just if the employer acted arbitrarily, in bad faith, or with discrimination when he or she selected the claimant for termination. The burden of proving that none of these conditions existed is on the employer. The rationale behind this is that it is the employer who can best explain his or her reasons for terminating the employee. The ultimate determination of whether or not these conditions did in fact exist for the purposes of the *Code* is the responsibility of an adjudicator. Accordingly, even if the federal government's inspector has identified a particular termination of employment as a "layoff," it is not determinative of this issue.

(vii) The person must not have sought redress under any other statutory procedures and cannot be covered by a collective agreement

Adjudicators have held that if an employee has already lodged a complaint regarding his or her dismissal under another statute, for example a *Human Rights Act*, proceedings under s. 240 will be postponed pending the disposition of that complaint. However, in order for postponement to take place, the factual and legal issues at stake in both cases must be very similar in nature. The reason for insisting on deferring to other proceedings is partly to minimize the risk of duplication and to avoid the possibility of inconsistent conclusions. However, it is also intended to show respect for other tribunals that might have particular expertise in dealing with particular issues such as racial or sex discrimination.

In much the same way, if an employee is otherwise covered by a collective agreement, he or she will not be able to make a claim for unjust dismissal under the *Code*. This is because it is presumed that the collective agreement will provide this employee with an effective remedy pursuant to its own provisions. There is therefore no need for the employee to seek recourse to section 240. Importantly, the claimant need only be covered by the collective agreement as a bargaining unit member. He or she need not be a member of the union. At the same time the "collective agreement bar" will only be at issue when the employee was allegedly "unjustly" dismissed while the collective agreement was in effect. Accordingly, if an employee alleges that their claim arose during a strike or lockout, he or she may still be able to seek protection under the *Code*.

(viii) The person must have engaged in mandatory conciliation with his or her employer

Before the adjudicator can hear a case, section 241(2) requires that an inspector from HRDC previously investigated the complaint, and attempted to reach a voluntary settlement between the employee and employer. The roles and powers of HRDC inspectors will be discussed at length in the next section.

(ix) The person must have received approval from the Minister

As discussed earlier in the guide, a claimant seeking adjudication must have received approval from the Minister of Labour in order to engage in this process.

Once all of these preconditions have been met, an adjudicator will have the “jurisdiction” or the power to hear a complaint lodged under section 240 of the *Code*. If any of these are missing the complainant may not have recourse to the protections of the *Code*.