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Adjudicator rejects non-union employees' "right to the job" under Canada Labour Code

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A recent adjudication decision under the *Canada Labour Code* (the "*Code*") refutes the notion that non-unionized employees in the federal jurisdiction cannot be dismissed except for just cause. In *Tony Klein and Royal Canadian Mint* (November, 2012), the employee challenged his non-cause dismissal under section 240 of Part III of the Code, notwithstanding the fact that his employment was terminated in accordance with his employment agreement. The adjudicator dismissed the complaint and held that Part III of the *Code* did not jettison the common law principles that govern employment relationships. The decision in *Klein* is positive for employers under federal jurisdiction. It indicates that where an employment contract provides for non-cause termination on terms that meet or exceed the statutory minimum requirements for notice and severance, and absent an improper purpose, the termination will likely not be "unjust" under section 240 of the *Code*.

Mr. Klein (the "Complainant") was dismissed in May of 2010 after three years of employment at the management level. He was initially hired by the Royal Canadian Mint (the "employer") as a unionized employee in 1998. He was laid off in 2002 and then rehired into the union in 2004. In 2007 he was offered a promotion to a management position outside of the scope of the bargaining unit. By taking this promotion, the Complainant received an additional $15,000 in salary per year, but he gave up his collective agreement benefits and protections, including the grievance procedure in the collective agreement.

THE EMPLOYMENT AGREEMENT

The employment agreement between the Complainant and the employer contemplated both termination for cause, and without cause. It stated:

> In the event that your employment is terminated by the Mint for cause, at any time during or after the successful completion of your probationary period, it is understood and agreed that you will not be entitled to any advance notice or any compensation in respect of that termination. In addition, following your probationary period, should your employment be terminated for reasons other than cause, it is understood that you will be entitled to two (2) weeks notice and not more than three (3) weeks of salary for each completed year of service at the Mint less applicable statutory deductions and less any monies you may owe to the Mint; at its sole discretion, the Mint may wish to increase the number of weeks for each completed year of service.

THE DISMISSAL

At the time of the dismissal, the employer offered the Complainant a severance package conditional upon signing a settlement agreement which would release the employer from any liability. The settlement agreement included a lump sum payment of $33,571.11 for pay in lieu of notice and benefits (including statutory termination and severance pay). There was also an amount for vacation pay up to the date of termination, and $3,000 for career placement services from a professional consultant. The employer testified that the lump sum was calculated based on 6.5 years of service notwithstanding that the employment contract stipulated *completed* years of service. The employer also grossed up the salary figure by 26% to reflect the value of benefits. The Complainant declined the employer's offer and filed a complaint of unjust dismissal under section 240 of the *Code*. Section 240 provides in relevant part:

> 240. (1) Subject to subsections (2) and 242(3.1), any person
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> > (a) who has completed twelve consecutive months of continuous employment by an employer, and
> > (b) who is not a member of a group of employees subject to a collective agreement,
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> may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Subsection 242(4) sets out the remedies available where a dismissal is found to be unjust. It states:

> 242. (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to
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> > (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
> > (b) reinstate the person in his employ; and
> > (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

The Complainant sought reinstatement to his former position which paid $70,000 per annum. He argued that section 240 of the *Code* entitles an employee to dispute his dismissal if he believes it was unjust, regardless of whether the employer satisfies its obligations for notice and severance. The Complainant submitted that the right to contest an unjust dismissal under the *Code* is unqualified.

The employer argued that there was no unjust dismissal due to the fact that the Complainant was terminated in accordance with the provisions of his employment contract. The employment contract specifically permitted termination without cause provided the employer provided notice and severance pay. The employer also pointed out that the severance package offered to the complainant was substantially more generous than what was required by the employment contract.

TWO COMPETING LINES OF AUTHORITY – *KNOPP* v. *CHAMPAGNE*

Adjudicator Peltz commenced his analysis and noted that there are two diverging schools of thought in relation to the protections conferred on employees pursuant to Part III of the *Code.* The first school of thought begins with *Knopp v. Western Bulk Transport Ltd.,* (1994) ("*Knopp*"). In *Knopp*, the adjudicator held that a dismissal would not be unjust under section 240 if the employer terminated without alleging just cause and met the more generous of:

> (i) the *Code* standard for notice and severance (i.e. two weeks notice or pay in lieu under subsection 230(1) and the greater of two days pay per completed year of service or five days pay under subsection 235(1));
> or
> (ii) the common law requirement for reasonable notice or pay in lieu thereof.

The adjudicator quoted the following analysis from the *Knopp* decision:

> If the employer is not alleging "just cause", the dismissal will be adjudged "unjust" if the employer has not given the employee the more generous of the dismissal packages required by sections 230(1) and 2345(1) of the Code and the common law. […]
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> Those who hold the view that the Code "bestows a right to the job" must believe that the degree of job security in the unionized sector and in the nonunion sector subject to the Canada Labour Code is comparable. I do not see it this way. How can this be when the *Canada Labour Code* expressly bestows on an employer the right to terminate an employment relationship by giving notice or compensation under sections 230(1) and 235(1)? […] Collective agreements rarely, if ever, contain such provisions. […]
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> In conclusion, Divisions X, XI, and XIV of Part III of the *Canada Labour Code* do not jettison the common law principles which govern the termination of an employment relationship.

> Had Parliament intended to implement a drastically different legal order in which common law principles played no role, it would have said so in plain language. In enacting Division XIV of Part III of the Code, Parliament created another forum besides the courts to hear complaints of unjust dismissal and granted Code adjudicators remedial powers common law judges are without. […] This is not an insignificant reform.

The adjudicator went on to draw out the principles from the cases that followed the reasoning in *Knopp*. In *Daniels v. Whitecap Dakota First Nation,* (2008), the notice clause in the employment contract was upheld on the basis that it was a straightforward provision and the contract was neither complex nor ambiguous. In *Halkowich v. Fairford First Nation*, (1998), the adjudicator held that if an employment contract expires or one party enforces an agreed term as to notice, there is no dismissal under section 240 of the *Code*, or in the alternative, if there is a dismissal, it is not unjust. Similarly, in *Prosper v. PPADC Management Co.*, (2010) the adjudicator held that there was no unjust dismissal provided that the employer paid the greater of the *Code* standard and the employer's Personnel Policy Manual. Finally, in the more recent decision in *Paul v. National Centre for First Nations Governance* (2012), the adjudicator held that if the contract is not found to be unconscionable, there is no section 240 jurisdiction to consider a termination carried out pursuant to a defined method in the employment contract.

This line of jurisprudence was contrasted to the 2012 decision in *Champagne v. Atomic Energy of Canada Ltd.,* (2012) ("*Champagne*"). The adjudicator in *Champagne* noted that Part III of the *Code* is benefit-conferring legislation and therefore should be interpreted in a broad and generous way. In terms of section 240 of the *Code*, the adjudicator in *Champagne* stated:

> The very right of dismissal has been completely altered to preclude arbitrary action by the employer and to ensure continuity of employment. Only a right of "just" dismissal now exists, and this certainly means dismissal based on an objective, real and substantial cause, independent of caprice, convenience or purely personal disputes, entailing action taken exclusively to ensure the effective operation of the business.

The adjudicator in *Champagne* went on to hold that payment in lieu of reasonable notice cannot circumvent section 240, as this would render section 240 inoperative.

ADJUDICATOR ADOPTS *KNOPP* – DISMISSES COMPLAINT

Although *Champagne* was followed in a number of decisions, Adjudicator Peltz stated that the *Knopp* line of authority represented a better interpretation of the *Code*. In his view, the Complainant had entered into the employment contract for the purpose of career advancement. By doing so, he gave

up the protection of the collective agreement and substituted the terms of an individual contract, along with Part III *Code* protections as applicable. The adjudicator noted that the employment contract was neither unclear nor ambiguous and there was nothing to suggest that Klein did not understand its basic elements. When the employer opted to terminate the employment relationship without cause, it fulfilled the bargain by offering the required severance. The original severance package was in fact still open for acceptance by Klein. Based on these factors, the adjudicator held that the dismissal was not unjust and dismissed the complaint.

In our view

The *Klein* decision is positive for employers and represents a more reasonable interpretation of the Part III protections than that put forth in the *Champagne* decision. *Champagne* and the line of cases that follow it, stand for the principle that a non-unionized employee under federal jurisdiction has "a right to a job" as a result of section 240 of the *Code*. This in turn means that dismissal is only available in cases of misconduct. As pointed out in *Knopp*, this concept is inconsistent with other provisions of the *Code*, such as section 230 and 235, which apply to the same group of employees as section 240, and specifically contemplate non-cause termination. In our view, the decision in *Klein* is a positive step in clarifying the protections afforded under Part III of the *Code*.

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