PUBLICATION

The Employment Standards Code: Not the final word on employee rights

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The Employment Standards Code (the "Code") and the Employment Standards Regulation (the "Regulation") set out the rules that employers are required to comply within their dealings with employees. For the most part the language used is clear so that employers and employees understand their rights and obligations.

Unfortunately, that clarity can also be misleading. Section 3 of the Code provides that the Code does not affect any greater right an employee has (or greater obligation an employer has) whether by an agreement, custom, or at common law.

That language effectively makes the rights and obligations set out in the Code, the minimum of what the law requires. An employer's legal obligations can actually, be much greater than what is set out in the Code.

For example, section 56 of the Code states the amount of notice which an employer must give an employee prior to terminating the employment relationship. In the case of an employee with 10 years of tenure section 56 provides:

56 To terminate employment an employer must give an employee written termination notice of at least...

(f) 8 weeks, if the employee has been employed by the employer for 10 years or more.

However, 8 weeks' notice (or pay in lieu of notice) is not the full extent of the notice entitlement an employee with 10+ years' tenure could receive.

At common law the amount of notice an employee is entitled to is decided on a case-by-case basis after considering a number of factors such as the age of the employee, the length of time they were employed, the job responsibilities of the employee, the employee's ability to obtain comparable employment, and whether the employee had been lured away from other secure employment. Once the Court weighs those factors the common law notice period is virtually certain to be more than the minimums required by section 56 of the Code.

To give just one example, the Court in Hyland v. Advertising Directory Solutions Inc., 2014 ABQB 336 awarded a 47 year old manager who had been employed for 11 years, damages equivalent to 11 months' notice; more

than five times the amount identified in section 56 of the Code.

Another provision that is deceptively clear on its face is section 5 of the Regulation, which is titled “No notice of termination”. The section provides that:

5(1) No termination notice is required to be given by an employee, and no termination notice, termination pay or combination of termination notice and termination pay is required to be given or paid by an employer to terminate the employment of an employee if

(a) the employee is employed at the site of and in the construction, erection, repair, remodelling, alteration, painting, interior decoration or demolition of any [building, structure, road, highway, railway, airfield, sidewalk, pipeline, sewage system, etc.]

The effect of section 5 of the Regulation seems obvious: on-site construction workers are not entitled to notice of termination (or pay in lieu of notice). Instead, the Alberta Court of Queen’s Bench has recently indicated that section 5 of the Regulation removes an employee’s right to the minimum notice in the Code but would not affect an employee’s right to common law notice.

In Cunningham v. Hillview Homes Ltd., 2015 ABQB 304 the employer terminated the employment of Mr. Cunningham, a 57 year old service manager who had been with the company for approximately 11 years. The employer took the position that no notice or pay in lieu of notice was required because of section 5 of the Regulation.

The Court rejected that argument. First, the Court held that section 5 of the Regulation would not apply to managers or office workers because the Regulation refers to employees “employed at the site of” and engaged “in the construction of” buildings or other structures.

Of greater significance, the Court noted that even if Mr. Cunningham had been within the scope of section 5 of the Regulation, “he was nevertheless entitled to a common-law remedy for wrongful dismissal…” Mr. Cunningham was awarded damages equal to a notice period of more than 11.5 months, and the Court has signalled that would have been the result whether or not section 5 of the Regulation applied.

Conclusion

Two hidden ‘traps’ in the Code and the Regulation are discussed above. There is no shortage of other examples.

For both employers and employees the lesson is clear: the Code and Regulation set out minimum standards that have to be met and a plain reading of the legislation can often be misleading.

Obtaining legal advice before assuming that the Code and Regulation tell the full story can help employers avoid litigation and empower employees to enforce rights they didn’t realize they have.

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