

Canada Labour Code ("CLC")

The CLC gives to the employees covered by its jurisdiction a unique right to reinstatement. To many people this may be a godsend.

Other may ask why they would possibly want to go back to this company again ?

The ironic response to that question may well be that the employer will have an even stronger preference that the employee not return. This can add to the negotiating strength of the employee's position.

Here are the requirements:

Federal Jurisdiction

The industry in which you work must be subject to federal law. A long time ago when the British government was determining what powers would be given to the provinces and what would be given to the federal government, a division of powers was made in the British North America Act. (the "BNA") This remains today the reasons why your driver's licence comes from the province and your TV station is regulated by the CRTC.

OK - so who is on first

The major (note - this is not exhaustive) industries subject to federal jurisdiction are the following:

Inter-provincial transportation

Banking

Television, radio,

Telecommunications, phone companies

Airlines

Port Authorities

Indian Bands

Federally established agencies and commissions

Approximately 11% of Ontario's labour force is subject to federal law. There are enormous differences, so care should be taken in determining jurisdiction. This is particularly the case, given absolute time limits for filing complaints. The time period for Canada Labour Code unjust dismissal complaints, discussed below, is 90 days.

You may call the local federal Department of Labour to determine its view of whether you fall under federal law.

A little History

The Canada Labour Code was amended in 1979 to allow for a unique remedy of "unjust dismissal". Strangely enough, this legislation, so the story goes, originated because the banks were then being subjected to a unionizing campaign. As one of the powers unions bring to the employees was the right of reinstatement on termination, the feds were pushed to creating this legislation to give reinstatement, and hence reduce the attractiveness of the unions to the bank employees.

This vocabulary of "unjust dismissal" is used to describe the remedial powers following termination.

Just tell me how to get there

The conditions to be met for its application, apart from the obvious federal jurisdiction issue, are as follows:

1. minimum of 12 months of consecutive employment;
2. not a unionized work force
3. not a manager
4. termination is not due to discontinuance of a job function or redundancy.

If these conditions are met, then a complaint for unjust dismissal must be made within 90 days of termination.

The complaint leads to a hearing before an adjudicator appointed by the federal government.

So what's so good about all this paperwork ?

Where the adjudicator finds the dismissal unjust, he/she may make any order considered fair in the circumstances. In practice this could mean any or part of the following:

1. lost wages and benefits since termination;
2. reinstatement;
3. legal costs;
4. interest on (1) above;
5. mandatory letter of reference.

The time passing to the date of the hearing then becomes an important factor in that this may become the basis of the award for lost compensation, as opposed to common law which will award only reasonable notice.

Typically it may take as long as 12 to 18 months to complete a hearing from the date of termination.

In addition where reinstatement is not ordered, an award still may be made for future losses beyond the hearing date.

More about these sticky conditions:

The manager definition has applied fairly liberally in favour of the applying the definition tightly. There have been many cases decided where an employee with "manager" in his or her title has been determined not to be a manager for this purpose of the Canada Labour Code.

Generally an adjudicator will look to the real decision making power in the employee's daily work functions to assess whether there is a significant degree of independent decision making authority in the real job functions.

Discontinuance of a function - tell me more

The theory of this exception is to allow the company to make normal job cuts and not be hassled by these applications. An employer should be allowed to make good faith alterations to fluctuate with its business demands - fair enough.

What an employer is not allowed to do, however, is to pretend that the reason was a job discontinuance when really it was terminating a problem employee and avoid the CLC remedy.

For this reason, the elimination of the position has to be in good faith. That onus (legal word for obligation) is in the employer to prove. If the employee can show that the real reason was its intent to cut him from the work force because he was a pain in the neck, then the hearing will be allowed.

Also, there must be a real discontinuance. If an employee has a job function of "project manager" and the company decides to do away with this and create a position of "senior project manager", then there will be an examination of the real life job functions of the two positions to see if there is a real difference - if not, the remedy of the CLC will be open.

So has this ever really happened to a live person ?

There are two cases on this web site where such applications succeeded - one where the employer was found to have acted in bad faith in creating a merged job function and hence not in law discontinuing the job function - Nihal Mathur vs Bank of Nova Scotia.

The second case was the one dealing with project manager to senior project manager - Mahavir Mathur vs. Bank of Nova Scotia. (no, they are not related)

In the latter case, Mahavir was reinstated in 1997 and seems now likely (touch wood) to be working to normal retirement age.

In the case of Nihal Mathur, he was not awarded reinstatement, but did receive from the Bank 3 years pay to the date of the final decision from termination and is eligible for one more year after the hearing, should he remain unemployed despite reasonable efforts of a continuing job search.

So tell me - what can an employer do that is OK ?

Also, an employer is allowed to contract out the job functions to an external at arm's length (another fancy legal word for real live external company) company. This may seem odd, but its legal. In such cases, there is no CLC remedy. In that case, there is still a common law wrongful dismissal case.

If one position which consists, for example, of 10 different functions, is divided up and given to 5 other employees, that is acceptable and no CLC remedy will exist.

But they want me to sign a release - Yikes - I need the cash !!

There has been one very well known case where the employee signed a release for a substantial sum of cash - I forget the numbers, but around 6 months pay and still filed a complaint.

The complaint was allowed as the court found that she was under financial duress, her complaint was meritorious, and that she should not be allowed to contract out of her statutory remedy.

Please, as the saying goes, don't try this at home. Speak to a lawyer before you consider such action.

OK we're done

For the reasons, the CLC remedy should be examined closely. Keep in mind that you cannot sue civilly and use this remedy - you just gotta choose.