Federal Court of Appeal | Cour d'appel fédérale

**Date: 20150122**

**Docket: A-312-13**

**Ottawa, Ontario, January 22, 2015**

**CORAM:** **STRATAS J.A.**
**WEBB J.A.**
**NEAR J.A.**

**BETWEEN:**

JOSEPH WILSON

**Appellant**

and

ATOMIC ENERGY OF CANADA LIMITED

**Respondent**

JUDGMENT

The appeal is dismissed without costs.

"David Stratas"

J.A.

Federal Court of Appeal | Cour d'appel fédérale

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**ATOMIC ENERGY OF CANADA LIMITED**

**Respondent**

Heard at Toronto, Ontario, on May 13, 2014.

Judgment delivered at Ottawa, Ontario, on January 22, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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## REASONS FOR JUDGMENT

**STRATAS J.A.**

[1] The appellant, Mr. Wilson, appeals from the judgment dated July 2, 2013 of the Federal Court (*per* Justice O'Reilly): 2013 FC 733.

[2] The respondent, Atomic Energy of Canada Limited, dismissed the appellant from his employment without cause. AECL paid him six months' severance pay.

[3] The appellant complained under section 240 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 that he was "unjustly dismissed."

[4] A labour adjudicator was appointed under the Code. Before the adjudicator, the appellant submitted that an employee who, like him, is dismissed without cause is, by that reason alone, unjustly dismissed within the meaning of the Code and is therefore entitled to a remedy under that subsection. In other words, says the appellant, the Code forbids an employer from dismissing an employee unless there is just cause for dismissal. AECL submitted that dismissals without cause are not automatically unjust dismissals under the Code. Some adjudicators under the Code have accepted the appellant's view of the matter; others, AECL's view of the matter. These two schools of thought concerning the proper interpretation of the Code have now persisted for decades.

[5] The adjudicator in this case accepted the appellant's submission. Accordingly, he concluded that the appellant, dismissed without cause, had made out his complaint of unjust dismissal under the Code.

[6] Having made that decision, the adjudicator adjourned, directing the parties to discuss the appropriate remedy in the hope that they might settle. Absent settlement, he intended to conduct a hearing to determine whether a remedy was warranted and, if so, what it should be.

[7] AECL applied to the Federal Court for judicial review of the adjudicator's decision that the appellant's dismissal was unjust. In the face of that, the adjudicator considered his position

carefully and decided to adjourn the remedies hearing until after the judicial review was finally decided.

[8] In the Federal Court, the appellant argued that the judicial review was premature. Further, he alleged that the adjudicator's decision on the merits – that as a matter of statutory interpretation the Code only permits dismissals for cause – was reasonable.

[9] The Federal Court dismissed the appellant's prematurity objection. On the merits of the judicial review, the Federal Court found that the adjudicator's statutory interpretation decision was unreasonable. The Federal Court quashed the adjudicator's decision and remitted the matter back to the adjudicator for decision.

[10] In this Court, the appellant appeals on both the prematurity issue and the reasonableness of the adjudicator's decision.

[11] For the reasons that follow, I would dismiss the appeal.

## A. The basic facts

[12] AECL employed the appellant for four and a half years. Starting as a Senior Buyer/Order Administrator, the appellant received many promotions. His last position was Procurement Supervisor, Tooling, a position that was not managerial within the meaning of subsection 167(3) of the Code. On November 16, 2009, his employment was terminated on a without cause basis.

[13] AECL offered the appellant a severance package equal to roughly six months' pay in exchange for a full and final release. Had his severance package been determined in accordance with the minimum statutory notice and severance requirements under sections 230 and 235 of the Code, he would have been entitled to only eighteen days' pay.

[14] The appellant did not sign the release. Instead, he filed a complaint under Part III of the Code. He alleged that he had been "unjustly dismissed" contrary to subsection 240(1) of the Code. In particular, he alleged that he was dismissed because he had complained about improper procurement practices on the part of AECL.

[15] At the request of the appellant's counsel, the appellant remained on AECL's payroll for roughly six months, continuing his access to AECL's employee benefit programs. In the end, he received the full amount of the severance package AECL had originally offered to him.

[16] An adjudicator was appointed to hear the appellant's complaint under the Code. Laudably, the parties filed an agreed statement of facts.

[17] In the agreed statement of facts, the parties identified two "preliminary questions": whether, as a matter of statutory interpretation, AECL could lawfully terminate the appellant's employment on a "without cause" basis and, if so, whether the severance package paid gave rise to a "just dismissal." The parties instructed the adjudicator to decide these questions only upon the facts contained in the agreed statement. By agreement, only after the adjudicator decided

those "preliminary questions" could he proceed to the appellant's allegation that he was the victim of reprisal.

[18] Before the adjudicator, the appellant argued that as a matter of statutory interpretation AECL could not terminate the appellant on a without cause basis, pay him severance, and have the complaint dismissed. In brief reasons that will be described in more detail below, the adjudicator agreed with the appellant.

[19] Having decided the first phase of the matter, the adjudicator considered that the only remaining issue was one of remedy and he decided to adjourn before holding a hearing into that issue:

> Although the parties did not ask me to determine the complaint if I answered as I have, it is clear that in the light of my answer the complaint should be allowed: Mr. Wilson complained of unjust dismissal and A.E.C.L. said that it does not rely on any cause to fire him. The parties might therefore discuss what remedies should now come to Mr. Wilson in the circumstances. If they cannot agree, they could contact me for a hearing and determination on remedies.

[20] Faced with a decision on the liability issue and a clear break before the remedies issue, AECL brought an application for judicial review to the Federal Court, alleging that the adjudicator's decision, one of statutory interpretation, was unreasonable. In response, the appellant submitted that AECL's judicial review should be dismissed on account of prematurity and that, in any event, the adjudicator correctly interpreted the Code as preventing AECL from terminating the appellant on a without cause basis.

[21] The adjudicator was not stayed pending the judicial review. He could have proceeded with the remedies issue pending judicial review. But, after consulting with the parties, he chose not to.

[22] The Federal Court rejected the appellant's prematurity objection. On the merits of the judicial review, it disagreed with the adjudicator on the statutory interpretation issue and quashed the adjudicator's decision as unreasonable. Mr. Wilson appeals on both issues.

[23] I begin with the appellant's prematurity objection.

## B. Prematurity

[24] The Federal Court applied the principles set out in this Court's decision in *Canada (Border Services Agency) v. C.B. Powell Ltd.*, 2010 FCA 61, [2011] 2 F.C. 322, applied them to the circumstances of the judicial review before it, and rejected the prematurity objection. The appellant appeals the rejection.

[25] On this point, we are reviewing a decision made by the Federal Court, not the adjudicator, on whether a preliminary legal objection – prematurity – applies to the application for judicial review in the Federal Court. Therefore, on this point, the standard of review is the appellate standard of review, not the standard of review that pertains to appeals from judicial reviews of administrative decision-making. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R.

235 applies, not *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47.

[26] Under the appellate standard of review described in *Housen*, *supra*, we review extricable legal issues on a correctness basis. On all other issues, we look for palpable and overriding error.

[27] Applying the appellate standard of review, I conclude that there are no grounds to set aside the Federal Court's exercise of discretion in favour of determining the judicial review.

[28] First, the Federal Court correctly identified *C.B. Powell*, *supra* as the controlling legal authority. Then the Federal Court accurately summarized its principles.

[29] In *C.B. Powell*, *supra* this Court confirmed the general rule that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. This general rule is called various things: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the rule against fragmentation of administrative proceedings, the prohibition against premature judicial reviews, among others. The rationales behind the general rule are as follows:

> [The general rule] prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience. Finally, this approach is consistent with and supports the concept of judicial respect for

> administrative decision-makers who, like judges, have decision-making responsibilities to discharge. [citations omitted]

(*C.B. Powell, supra* at paragraph 32).

[30] Those rationales are grounded in what one commentator has called "public law values," principles immanent in administrative law and repeatedly sounded in the case law especially when reviewing courts explain their exercises of discretions: Professor Paul Daly, "Administrative Law: A Values-Based Approach" in Mark Elliott and Jason Varuhas, eds., *Process and Substance in Public Law Adjudication* (forthcoming, Hart: Oxford, 2015), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460264, see also Peter Cane, "Theory and Values in Public Law," in Paul Craig and Richard Rawlings, eds., *Law and Administration in Europe: Essays for Carol Harlow* (Oxford: Oxford University Press, 2003). These values include the rule of law, the principles of good administration (including proper, fair, pragmatic, efficient and effective administrative regulation and decision-making), the democratic principle (including Parliamentary supremacy), and the separation of powers. For examples of discretions shaped by public law values such as these, see *D'Errico v. Canada (Attorney General)*, 2014 FCA 95 at paragraphs 16-21, *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37, 419 N.R. 385 at paragraphs 33-37, and *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710 at paragraph 52.

[31] The general rule against premature judicial reviews reflects at least two public law values. One is good administration – encouraging cost savings, efficiencies, promptness and allowing administrative expertise and specialization to be fully brought to bear on the problem

before reviewing courts are involved. Another is democracy – elected legislators have vested the primary responsibility of decision-making in adjudicators, not the judiciary.

[32] The weighty nature of these public law values explains the force and pervasiveness of the general rule against premature judicial reviews. Indeed, in appropriate cases, the general rule can form the basis of a preliminary motion to strike: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] D.T.C. 5001 at paragraphs 66 (motion to strike available), 51-53 (general rule against supporting affidavits) and 82-89 (discussion of prematurity in the context of motions to strike). Such motions serve to nip in the bud premature judicial reviews that corrode these values.

[33] The force and pervasiveness of the general rule against premature judicial reviews and the need to discourage premature forays to reviewing courts means that the exceptions to the general rule are most rare and preliminary motions to strike are regularly entertained. As *C.B. Powell*, *supra* explained, the recognized exceptions reflect particular constellations of fact found in the decided cases. They are rare cases where the public law values do not sound loudly in the particular circumstances, the public law values are offset by competing public law values, or both. For example, there are rare cases where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court's concern about the rule of law is aroused: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-30. In these cases – often cases where prohibition is available – the values underlying the general rule against premature judicial reviews take on less importance.

[34] The Federal Court instructed itself correctly as to the applicable principles and recognized the very high threshold that the applicant must meet. Then it applied that law to the particular circumstances before it. This was an exercise suffused in factual appreciation and fact-based discretion, and, thus, can only be set aside in this Court on the basis of palpable and overriding error: *Housen*, *supra* at paragraphs 26-37. In this case, there is no such error.

[35] Indeed, based on the above discussion of the principles that underlie *C.B. Powell*, *supra* there is much to commend in the Federal Court's decision.

[36] Administrative decision-makers, like courts, occasionally bifurcate the merits and the remedy. That sort of bifurcation – at a natural break between two separate phases of the proceedings – often does not cause the ills identified in *C.B. Powell*, *supra* unlike bifurcations in the middle of hearings on the merits, which often do. Certainly the adjudicator considered the bifurcation to be natural and practical, as is evident from his emails in the record before us. Also of significance is the absence of any objection or submissions to the contrary to the adjudicator by the appellant.

[37] As the Federal Court correctly noted, this case is very different from *C.B. Powell*, *supra*, where the administrative decision-maker stopped his hearing in the middle of the merits phase of the proceeding to hive off a so-called jurisdictional issue for judicial review when it was, in reality, an issue of statutory interpretation that he should have decided himself. His decision ran counter to the rationales underlying the bar against prematurity and sent the parties on a harmful detour to the Courts. It was a procedural choice that could not be respected.

[38] In the unusual circumstances of this case, the adjudicator's decisions to adjourn and to remain adjourned while judicial review was ongoing were discretionary procedural choices suffused by factual and policy appreciation that deserve respect. They are not choices constrained by well-established, fundamental legal principles. See generally *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 147 D.L.R. (4th) 193 at paragraph 27; *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 245 at paragraphs 70-73. This is not a case like *C.B. Powell*, *supra* where the procedural choice was inherently faulty or constrained by legal principle. The adjudicator had many defensible reasons based on policy and fact for acting as he did.

[39] As is apparent from his reasons, the adjudicator was well-aware of the legal point before us, one that has festered for many years and has divided adjudicators into two schools of thought. Perhaps in adjourning and remaining adjourned, this adjudicator, a knowledgeable and experienced participant in this regulated sector, took the view that while the judicial review might delay this particular case, it would settle once and for all this nagging legal point. In these unusual circumstances, this judicial review is not unlike a referral of a legal question to the Federal Court under section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[40] As is apparent from the foregoing discussion, the rationales underlying the general rule against premature judicial reviews do not sound loudly here. In fact, they support it.

[41] Therefore, in my view, there are no grounds to set aside the Federal Court's rejection of the prematurity objection. The Federal Court was entitled to consider the merits of the judicial

review and the central issue in it: whether Part III of the *Canada Labour Code* permits dismissals on a without cause basis.

### C. The standard of review of the adjudicator's decision

[42] On this part of the appeal, we are examining the Federal Court's review of the adjudicator's decision, not the Federal Court's own, original decision. Accordingly, the standard of review is that set out in *Agraira*, *supra* at paragraph 47. We are to assess whether the Federal Court selected the appropriate standard of review and then to ensure that that standard of review was properly applied.

[43] The parties agree that the Federal Court correctly adopted the standard of review of reasonableness, *i.e.*, the adjudicator's decision must fall within a range of acceptability and defensibility on the facts and the law. However, the choice of standard of review is a question of law and so we are not bound by the parties' agreement: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152.

[44] The central legal issue before the adjudicator, the Federal Court and this Court concerns a statutory interpretation question. That question is whether Part III of the *Canada Labour Code* permits dismissals on a without cause basis.

[45] The adjudicator answered that in the negative. The adjudicator ruled that, as a matter of statutory interpretation, the Code only permits dismissals for cause. He considered himself bound

by the Federal Court's decision in *Redlon Agencies Ltd. v. Norgen*, 2005 FC 804, 139 A.C.W.S. (3d) 1018.

[46] Normally, a labour adjudicator's interpretation of a provision in a labour statute would be subject to reasonableness review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. This, however, is an unusual case. For a long time, adjudicators acting under the Code have disagreed on whether Part III of the *Canada Labour Code* permits dismissals on a without cause basis.

[47] Some agree with the adjudicator and the appellant in the case at bar and have concluded that the Code does not permit dismissals on a without cause basis: see, *e.g.*, *Re Roberts and the Bank of Nova Scotia* (1979), 1 L.A.C. (3d) 259; *Champagne v. Atomic Energy of Canada Ltd.*, [2012] C.L.A.D. No. 57; *Iron v. Kanaweyimik Child and Family Services Inc.*, [2002] C.L.A.D. No. 517; *Lockwood v. B&D Walter Trucking Ltd.*, [2010] C.L.A.D. No. 172; *Stack Valley Freight Ltd. v. Moore*, [2007] C.L.A.D. No. 191; *Morriston v. Gitanmaax Band*, [2011] C.L.A. No. 23; Innis Christie, *et al.*, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) at page 669; David Harris, *Wrongful Dismissal*, loose-leaf (Toronto: Carswell, 1990) at pages 6.7-6.9.

[48] Others disagree and have concluded that the Code does permit dismissals on a without cause basis: see, *e.g.*, *Knopp v. Western Bulk Transport Ltd.*, [1994] C.L.A.D. No. 172; *Chalifoux v. Driftpile First Nation – Driftpile River Band No. 450*, [2000] C.L.A.D. No. 368 aff'd on other grounds, 2001 FCT 785, aff'd 2002 FCA 521; *Jalbert v. Westcan Bulk Transport*

*Ltd.*, [1996] C.L.A.D. No. 631; *Prosper v. PADC Management Co.*, [2010] C.L.A.D. No. 430; *Halkowich v. Fairford First Nation*, [1998] C.L.A.D. No. 486; *Daniels v. Whitecap Dakota First Nation*, [2008] C.L.A.D. No. 135; *Klein v. Royal Canadian Mint*, [2012] C.L.A.D. No. 358; *Paul v. National Centre For First Nations Governance*, [2012] C.L.A.D. No. 99; Gordon Simmons, "Unjust Dismissal of the Unorganized Workers in Canada," 20 Stan J. Int'l Law 473 (1984) at pages 496-97.

[49] In circumstances such as these, what is the standard of review?

[50] *Dunsmuir*, *supra* provides the answer in two ways: one by way of concept, another by way of presumptive rule.

[51] At the conceptual level, the Supreme Court in *Dunsmuir* identified two principles that underlie our law of judicial review, principles that are in tension with each other (at paragraphs 27-31). First, there is the constitutional principle of Parliamentary supremacy. Absent constitutional objection, courts are bound by the laws of Parliament, including those that vest exclusive power in an administrative decision-maker over a certain type of decision. Second, there is the constitutional principle of the rule of law. In some circumstances, courts must intervene even in the face of Parliamentary language forbidding intervention: *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

[52] In this case, it is true that Parliament has vested jurisdiction in adjudicators under the Code to decide questions of statutory interpretation, such as the question before us. However, on

the statutory interpretation issue before us, the current state of adjudicators' jurisprudence is one of persistent discord. Adjudicators on one side do not consider themselves bound by the holdings on the other side. As a result, for some time now, the answer to the question whether the Code permits dismissals on a without cause basis has depended on the identity of the adjudicator. Draw one adjudicator and one interpretation will be applied; draw another and the opposite interpretation will be applied. Under the rule of law, the meaning of a law should not differ according to the identity of the decision-maker: *Taub v. Investment Dealers Association of Canada*, 2009 ONCA 628, 98 O.R. (3d) 169 at paragraph 67.

[53] In the case of some tribunals that sit in panels, one panel may legitimately disagree with another on an issue of statutory interpretation. Over time, it may be expected that differing panels will sort out the disagreement through the development of tribunal jurisprudence or through the type of institutional discussions approved in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524. It may be that at least in the initial stages of discord, without other considerations bearing upon the matter, the rule of law concerns do not predominate and so reviewing courts should lay off and give the tribunal the opportunity to work out its jurisprudence, as Parliament has authorized it to do.

[54] However, here, we are not dealing with initial discord on a point of statutory interpretation at the administrative level. Instead, we are dealing with persistent discord that has existed for many years. Further, because no one adjudicator binds another and because adjudicators operate independently and not within an institutional umbrella such as a tribunal,

there is no prospect that the discord will be eliminated. There is every expectation that adjudicators, acting individually, will continue to disagree on this point, perhaps forever.

[55] As a result, at a conceptual level, the rule of law concern predominates in this case and warrants this Court intervening to end the discord and determine the legal point once and for all. We have to act as a tie-breaker.

[56] *Dunsmuir* envisaged just such a situation and formulated a presumptive rule to be applied in circumstances such as these. Where a question of law is of "central importance to the legal system...and outside the...specialized area of expertise" of the administrative decision-maker, correctness is presumed to be the standard of review (at paragraph 55). Questions of central importance to the legal system are those whose "impact on the administration of justice as a whole" is such that they "require uniform and consistent answers" (at paragraph 60). In other words, for certain questions and for some questions in unusual circumstances, rule of law concerns predominate. In these, the court must decide the matter by giving its view of the correct answer.

[57] In this case, the specialized expertise of adjudicators has not led to one accepted answer on the statutory interpretation issue before us. Further, the persistent discord – quite irresolvable among adjudicators – means that here, the rule of law concerns predominate. Therefore, in my view, the standard of review on this statutory interpretation point is correctness.

[58] Even if the standard of review were reasonableness, as we shall see, the statutory interpretation point before us involves relatively little specialized labour insight beyond the regular means the courts have at hand when interpreting a statutory provision. Accordingly, if we were to conduct reasonableness review in this case, we would afford the adjudicator only a narrow margin of appreciation: see, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228, 245 A.C.W.S. (3d) 846, and *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201. In the end, whether we conduct reasonableness review or correctness review, the outcome of this appeal would be the same.

## D. The merits of the statutory interpretation question

[59] Conducting reasonableness review and apparently affording the adjudicator only a very limited margin of appreciation, the Federal Court found that the adjudicator misinterpreted the Federal Court authority of *Redlon*, *supra*. Examining *Redlon* and other authorities, and examining the regime for dismissals under the Code, referring specifically to sections 230, 235, 240 and 242 of the Code, the Federal Court found that the Code does permit dismissals without cause.

[60] In the circumstances, the Federal Court found it unnecessary to order a new hearing before a different adjudicator. Rather, it remitted the matter to the adjudicator to decide whether the terms of the appellant's dismissal were just. See paragraphs 28-41 of the Federal Court's reasons.

[61] I agree with the result the Federal Court reached and, with one qualification discussed below, its reasoning. However, owing to the persistent disagreement in the adjudicators' jurisprudence, I wish to offer some additional analysis.

[62] Like the Federal Court and the adjudicators' decisions in paragraph 48 above, I conclude that a dismissal without cause is not automatically "unjust" under Part III of the Code. An adjudicator must examine the circumstances of the particular case to see whether the dismissal is "unjust."

[63] Key to reaching this conclusion is the relationship between:

- *The common law of employment.* At common law, an employer can dismiss a non-unionized employee without cause, but is liable to provide reasonable notice or compensation for same. Put another way, an employee dismissed without cause but given reasonable notice is not wrongfully dismissed. Later development of the case law shows that depending on the nature of the dismissal, an employee can be entitled to further damages: *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1.

- *Part III of the Code.* In this Part, Parliament has set out a complaints mechanism and remedies for "unjust" dismissals. Subsection 242(3) of the Code empowers an

adjudicator to "consider whether the dismissal of the person who made the complaint was unjust." The Code does not define "unjust."

[64] Does Part III of the Code oust the common law of employment as described above? Or does it accept this aspect of the common law as given, supplementing and building upon it?

[65] The legislator is presumed not to depart from prevailing common law: *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161. Only by way of explicit language or necessary implication can it be ousted. An example of necessary implication is where the legislator has provided for something that conflicts with the common law such that the two can no longer live together. The common law is not ousted unless Parliament has "[expressed] its intentions to do so with irresistible clearness": *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 at page 614, 4 D.L.R. (2d) 1.

[66] The Supreme Court applied both *Rawluk* and *Goodyear Tire* in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, 109 N.R. 321, a case concerning the duty of fair representation under the Code. It found that while the Code does not expressly oust the common law duty of fair representation, it does so by necessary implication or, in the words of *Goodyear Tire* (cited above by Cory J. in *Rawluk*), with "irresistible clearness."

[67] The case before us is quite different from *Gendron*. Here, there is no statutory text or necessary implication – no "irresistible clearness" – that can be taken to oust the aspects of the

common law of employment as described above. For example, the Code does not contain explicit words forbidding an employer from dismissing employees absent misconduct. The Code was enacted against the backdrop of the common law and does not explicitly oust it in this respect.

[68] Indeed, in some respects the Code seems to leave alone aspects of the common law of employment. In section 246, the Code recognizes the existence of common law remedies for wrongful dismissal, encouraging adjudicators to draw upon general employment case law in resolving issues before them, unless specifically ousted by the Code. In addition, section 168 preserves more beneficial contract provisions which an employee enjoys independently of the Code.

[69] The appellant submits, citing Innis Christie *et al.*, *supra* at pages 668 and 712, that "[n]on-unionized employees in the federal jurisdiction cannot be dismissed except for just cause" – just as unionized employees cannot be so dismissed – and that the Code "bestows a right to the job, not simply to reasonable notice as does the common law."

[70] But there is nothing in the Code or in its purpose that suggests that Parliament was granting non-unionized employees a "right to the job" or was trying to place unionized and non-unionized employees in the same position: protected from being dismissed without cause. To the contrary, subsections 230(1) and 235(1) expressly allow an employer to terminate an employment relationship even without cause and require that notice or compensation be given.

[71] If Parliament intended to limit the right of an employer to terminate an employment relationship to cases where just cause existed, it could have said so quite explicitly. After all, before Parliament passed the provisions in issue before us, the Nova Scotia Legislature did just that. It amended its labour legislation to provide that an "employer shall not discharge ... [an] employee without just cause": *Labour Standards Act*, S.N.S. 1975, c. 50, section 4. Further, we have evidence that Parliament knew of Nova Scotia's legislative initiative when considering whether to pass the relevant provisions before us: *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration respecting Bill C-8, An Act to Amend the Canada Labour Code* (House of Commons, February 9, 1978 at page 18). Yet, Parliament refrained from adopting the "irresistible clearness" of the language used by the Nova Scotia Legislature.

[72] In support of its position, the appellant also points to the powers of adjudicators under paragraphs 242(4)(*b*) and 242(4)(*c*) of the Code to reinstate dismissed employees and to require the employer "to 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." Neither of these remedies is available under the common law. These remedies, however, are best seen as new statutory remedies – over and above the old remedies available under the common law – that Parliament has seen fit to grant, not as evidence of a sea-change in the meaning of what constitutes an unjust dismissal.

[73] As explained above, where there is no language specifically ousting the common law, the question is whether the language in paragraph 242(4)(*b*) can live together with the common law. Here, it can.

[74] It follows from the foregoing that I largely agree with Adjudicator Wakeling in *Knopp*, *supra* at paragraph 77:

> 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.

[75] Quite aside from the foregoing analysis of the text and context of Part III of the Code, I must have regard to the purpose of these provisions of the Code: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559. Appropriately, the appellant urges this Court to do just that.

[76] From the foregoing discussion, it is evident that Parliament largely intended that Part III of the Code offer employees more remedies than exist at common law.

[77] In his text, Professor Christie disagrees. He asserts that "[t]he policy of the section is to provide the non-unionized employee with substantially similar protections against unjust discharge as the unionized employee enjoys under a collective agreement": Innis Christie *et al.*, *supra* at page 669.

[78] He suggests two reasons for this. First, he observes that the section "seeks to establish standards of "cause" more in line with modern industrial relations practice than with outdated common law precedents" (at pages 669-670). Second, he notes the broad remedies in paragraphs 242(4)(*b*) and 242(4)(*c*) (at page 670). These two things may perhaps be so. But as a matter of logic they do not take us to the specific conclusion that Parliament intended non-unionized employees to be placed in the same position as unionized employees.

[79] Many of the academic and arbitral treatments of the issue before us rightly say that this part of the Code has a reforming purpose. And it is orthodox law that in interpreting legislative provisions, we must have regard to Parliament's purpose. But finding a reforming purpose does not end our inquiry. Instead, it starts it. What exactly was Parliament's reform? When inquiring into that question, it is not open to us to import our personal views of the desirable or to take a reformist purpose as justification for finding the broadest possible interpretation. Instead, as always, our job is to investigate, discern and apply the actual meaning of the text adopted by Parliament, nothing else.

[80] The appellant invokes the adjudicators' jurisprudence in paragraph 47, above, in support of his position. This jurisprudence deserves careful study, as it represents the considered opinion of adjudicators in this specialized field interpreting their home statute, jurisprudence normally reviewable only on a deferential basis. However, as I shall demonstrate, much of the jurisprudence in support of the appellant's position suffers from flaws. It is well-answered by the reasoning in the adjudicators' jurisprudence (referenced in paragraph 48, above) that supports AECL's position.

[81] Much of the jurisprudence in support of the appellant's position relies directly or indirectly upon the passage from Professor Christie's text set in out paragraph 77 above, a passage that, as I have explained in paragraph 78, above, is unsupported by authority and logic.

[82] Much of the adjudicators' jurisprudence cited by the appellant also asserts a view favourable to the appellant's position but without providing any explanation, a trend also noted by the adjudicator in *Chalifoux*, *supra* at paragraph 16. The views of administrative decision-makers, even ones in specialized areas such as this, are not likely to be respected by reviewing courts unless the views are accompanied by reasoned explanations.

[83] Much of the adjudicators' jurisprudence cited by the appellant stems from an early case that, on close scrutiny, does not advance the appellant's position very far: *Bank of Nova Scotia*, *supra*. The adjudicator in *Bank of Nova Scotia* observed that in using the word "unjust" to modify "dismissal" in what is now subsection 240(1), Parliament intended something broader than the common law standard of "cause" (at page 264). But then the adjudicator leapt to the conclusion that "unjust" dismissal under the Code invoked the concept of dismissal for "just cause" under collective agreements. "Unjust" is a generic word used in a host of statutes. It is quite a leap to assume that by using the word "unjust," Parliament intended to place non-organized and organized employees on the same footing for dismissals. On close examination, even the adjudicator in *Bank of Nova Scotia* hedged his bets on this, conceding that "unjust" may also take its meaning from "a whole host of important considerations" on which "the statute is silent" (at page 265).

[84] Much of the adjudicators' jurisprudence cited by the appellant adopts an academic opinion that the relevant provisions in the Code adopt the International Labour Organization's *Termination of Employment Recommendation, 1963*, a recommendation said to support the appellant's position: see ILO, Record of Proceedings (47th Session). However, this opinion also suffers from flaws. The ILO recommendation did not require Canada to enact conforming legislation and it is open to serious question whether the ILO recommendation truly supports the appellant's position: see *Chalifoux*, *supra* at paragraphs 21-56.

[85] Finally, much of the adjudicators' jurisprudence cited by the appellant invokes the interpretive principle that benefits-conferring legislation should be construed liberally in favour of the benefits seeker. I do accept that Part III of the Code is benefits-conferring legislation. I also accept the existence of this interpretive principle, set out in cases binding upon us such as *Re Rizzo*, *supra* at paragraph 36 and *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2 at page 10. But this pro-benefits principle can take the analysis only so far.

[86] The pro-benefits principle begs the question before us. It sheds no light on just what benefits Parliament has actually given employees under Part III of the Code. We cannot use the pro-benefits principle to drive Parliament's language in the Code higher than what genuine interpretation of Part III of the Code – an examination of its text, context and purpose – can bear. Put another way, while the pro-benefits principle exists, it cannot be used as a licence to amend the law that Parliament has made.

[87] Turning to a different point, the parties suggest that two of this Court's decisions have some bearing upon the issue before us. I agree with AECL that, if anything, these decisions support the above analysis.

[88] First, in *Atomic Energy of Canada Ltd. v. Sheikholeslami*, [1998] 3 F.C. 349, 157 D.L.R. (4th) 689, this Court was not faced with the question before us, namely whether Part III of the Code permits dismissals on a without cause basis. Rather, it concerned the novel remedy of reinstatement under paragraph 242(4)(*b*) of the Code.

[89] However, in the course of his majority reasons, Marceau J.A. offered comments suggesting, as I have, that these provisions do not represent a sea-change in the law of dismissal but rather enhance the remedies that may be available in appropriate cases of dismissal (at paragraph 12):

> The unfair dismissal provisions for non-unionized employees in the Canada Labour Code no doubt represent a statutory modification of the traditional rule that an employment contract will never be specifically enforced. But they certainly do not and even could not, go so far as to create a right in the person of the wrongfully dismissed employee. It would be contrary to the common sense that precisely supports the traditional rule. They simply provide for reinstatement as a possible remedy that may be resorted to in proper situations.

[90] Next, in *Canadian Imperial Bank of Commerce v. Boisvert*, [1986] 2 F.C. 431, 68 N.R. 355, this Court also did not deal with the question before us now. Nevertheless it examined the meaning of "unjust dismissal" to some extent. That examination sheds some light on the question before us and, again, confirms my analysis.

[91] In *Boisvert*, the majority of this Court went about understanding the meaning of "unjust dismissal" by considering common law cases (see, *e.g.*, at pages 458-459). In concurring reasons, Marceau J.A. attempted to define "unjust dismissal" by considering its opposite, just dismissal. He defined a just dismissal as a "dismissal based on an objective, real and substantial cause...entailing action taken exclusively to ensure the effective operation of the business." Viewed in its proper context, this Court was not saying that the "real and substantial cause" had to relate to the affected employee. Rather the cause had to entail "action taken exclusively to ensure the effective operation of the business" and had to be something other than "caprice, convenience or purely personal disputes."

[92] I see nothing in *Boisvert* inconsistent with the import of my analysis above. *Boisvert* does not stand for the proposition that an employee has a right to a job in the sense that any dismissal without cause relating to the employee is automatically unjust.

[93] Finally, I wish to address one final submission made by the appellant. The appellant warns of severe implications associated with AECL's position. He raises the spectre of employers being able to dismiss employees without cause, paying them an amount of money the employers think is adequate, leaving employees with no meaningful right of recourse under section 240 of the Code.

[94] That is simply not so. It will always be for the adjudicator to assess the circumstances and determine whether the dismissal, whether or not for cause, was unjust.

[95] *Klein*, *supra*, illustrates this well. In *Klein*, the employer dismissed the employee in accordance with provisions in the employment contract, including provisions for notice or compensation for same. The employer maintained that there was no unjust dismissal because it was done in accordance with the employment contract. According to the employer, the adjudicator had no jurisdiction to consider a complaint under section 240 of the Code.

[96] Based on the many adjudicators' decisions in paragraph 48 above, the adjudicator in *Klein* rejected the submission that the dismissal of an employee without cause was automatically "unjust," giving rise to section 240 remedies.

[97] At the same time, however, the adjudicator did not assume that the dismissal of an employee without cause who had been paid a compensatory sum of money was automatically just. He still considered that he had jurisdiction to consider the complaint under section 240 of the Code. However, in *Klein*, the adjudicator was able to dismiss the complaint on a summary basis.

[98] The adjudicator in *Klein* considered common law principles concerning the dismissal, namely whether the employment contract was the product of free will and was not vitiated by duress (at paragraph 44). The adjudicator found no circumstances suggesting duress. The adjudicator also considered the compensation the employer offered, terming it "requisite [and] … enhanced to facilitate a quick resolution" (at paragraph 45). In the circumstances in *Klein*, there was nothing necessary for the employer "to do in order to remedy or counteract any consequence of the dismissal" under paragraph 242(4)(*c*) of the Code. In light of these

considerations, the adjudicator found that there was no basis to proceed to a full hearing on the merits of the dismissal of the employee – the dismissal was simply not unjust.

[99] I note that the Federal Court adopted substantially the same position as the adjudicator in *Klein*. It held that "[t]he fact that an employer has paid an employee severance pay does not preclude an adjudicator from granting further relief where the adjudicator concludes that the dismissal was unjust" (at paragraph 37). As is apparent from the foregoing, I agree with this statement.

[100] The Federal Court also said that the broad remedial powers under subsection 242(2) kick in when "the adjudicator … concludes on any basis that the dismissal was unjust" (my emphasis, at paragraph 36). On this, it bears noting that an adjudicator under the Code does not have free rein to find a dismissal "unjust" on "any basis." As I have suggested above, "unjust" is a term that sits alongside and gathers much, if not all, of its meaning from well-established common law and arbitral cases concerning dismissal. It is also a term whose meaning must be discerned using accepted principles of statutory interpretation: see paragraph 75, above. I shall not comment further on the meaning of "unjust." It is for Parliament's chosen decision-makers in this specialized field – the adjudicators – to develop the jurisprudence concerning the meaning of "unjust" on an acceptable and defensible basis, not "any basis." It is for us to review the adjudicators' interpretations for acceptability and defensibility when they are brought before us.

## E. Conclusion

[101] For the reasons offered by the Federal Court and for the foregoing additional reasons, I reject the appellant's submission that the Code does not permit dismissals on a without cause basis.

## F. Proposed disposition

[102] I would dismiss the appeal. In the Court below, the Federal Court declined to order costs because the matter involved the resolution of an important legal issue applicable beyond this particular dispute. I agree and so I would not award costs.

"David Stratas"
J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D.G. Near J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-312-13 |
| **APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE O'REILLY DATED JULY 2, 2013, NO. T-1531-12** | |
| **STYLE OF CAUSE:** | JOSEPH WILSON v. ATOMIC ENERGY OF CANADA LIMITED |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 13, 2014 |
| **REASONS FOR JUDGMENT BY:** | STRATAS J.A. |
| **CONCURRED IN BY:** | WEBB J.A.<br>NEAR J.A. |
| **DATED:** | JANUARY 22, 2014 |

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