Federal Court of Appeal Affirms Federally Regulated Employees Can Make Unjust Dismissal Complaints After Signing Releases

Recently, in *Bank of Montreal v. Li*, 2020 FCA 22, the Federal Court of Appeal (FCA) dismissed the Bank of Montreal's (BMO's) appeal of the decision of the Federal Court (FC) in *Bank of Montreal v. Li*, 2018 FC 1298. Our Insight discussing the decision of the FC is here.

The issue in this matter is whether a federally regulated employee can make a complaint for unjust dismissal under s. 240 of the *Canada Labour Code* (CLC) after signing a release and settlement agreement.

The following provisions of the CLC are relevant to the discussion:

- Section 240(1) of the CLC, which allows federal employees who have completed 12 consecutive months of employment and who are not subject to a collective agreement to make a written complaint regarding a perceived unjust dismissal within 90 days of the date of dismissal.
- Section 168(1), which states that all provisions under Part III of the CLC (Standard Hours, Wages, Vacations and Holidays), which contains the unjust dismissal provisions, apply notwithstanding any law, custom, contract or arrangement, unless the law, custom, contract or arrangement grants rights or benefits to the employee that are more favourable than those granted under Part III of the CLC.

The Appeal

In its appeal, BMO argued that the FCA should depart from its earlier decision in *National Bank* of *Canada v. Canada (Minister of Labour)*, [1997] 3 FCR 727 (FC), aff'd, 1998 CanLII 8077 (FCA) ("*National Bank*"), which provided that due to s. 168 of the CLC, it is possible for employees to utilize the unjust dismissal complaint process even when they have signed releases or accepted severance payments.

Set out below are BMO's arguments in support of its position together with the FCA's response to each argument:

Distinction between Prospective and Retrospective Waiver

BMO argued *National Bank* was wrongly decided because it conflates prospective and retrospective waivers of statutory rights, ignoring the common law principle permitting retrospective waiver. The FCA held that this argument was without merit for the following reasons:

- Subsection 168(1) does not distinguish between prospective and retrospective waivers, therefore the distinction should not be drawn;
- Since *National Bank* was decided, the CLC has been amended more than once. If Parliament believed *National Bank* was wrongly decided it could have amended s. 168(1) to allow explicitly for BMO's interpretation;
- The jurisprudence relied upon by BMO in support of its distinction between prospective and retrospective waiver is distinguishable; and
- An employee may not be aware of all of the relevant circumstances of their termination when they sign a release but might learn of them afterward. As was the case here, it may be uncertain whether the employee knowingly decided to renounce their rights under the CLC or knew exactly what they were.

Policy Reasons

BMO argued that there were compelling policy reasons for upholding retrospective releases of unjust dismissal complaints. The FCA conceded that such policy reasons might exist:

> In holding that retrospective waivers of unjust dismissal complaints are not binding, *National Bank* dissuades employers from offering more than the statutory minimum entitlements to employees until 90 days following dismissal. This creates a chilling effect on voluntary settlements and risks clogging the administrative system. This also harms the employees at a time when they are most vulnerable. Furthermore, it deprives employees of settlement leverage outside the 90-day period.
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> There is no doubt that settlement agreements are to be encouraged, and that employers may be tempted to provide no more than the minimum entitlements in the first 90 days following termination. (paras. 55 and 56)

The FCA concluded, however, that "it is not for courts to change the law for policy reasons." It is up to Parliament to address these policy concerns in legislation.

Enhancement of Certainty in Law

BMO argued that overturning *National Bank* would enhance the certainty and predictability of the law because courts and adjudicators have followed the decision infrequently, distinguished it, referred to it ambivalently, or ignored it altogether. The FCA did not agree with BMO's position, noting that *National Bank* has been unanimously endorsed by the FCA.

Bottom Line for Employers

As a result of amendments to the CLC that came into force on July 29, 2019, responsibility for unjust dismissal complaints made to federally regulated employers was transferred from adjudicators to the Canada Industrial Relations Board (CIRB). When an unjust dismissal claim is brought before the CIRB, it will be bound by the decision of the FC, affirmed by the FCA in *Bank of Montreal v. Li.*

With the FCA's dismissal of BMO's appeal, the following continues to be true, as stated in our prior Insight:

- Employees of federally regulated employers may make claims for unjust dismissal during the permissible 90-day period, even after signing releases and settlement agreements.
- Federally regulated employers may attempt to avoid unjust dismissal claims by providing dismissed employees only the minimum amount of severance mandated by the CLC in the 90-day limitation period following a dismissal, and offering to provide additional compensation if no unjust dismissal complaint is made within the 90-day period.
- If the CIRB requires an employer to compensate an employee for unjust dismissal pursuant to the CLC, and the CIRB would have awarded the employee more than the employee already received under a settlement agreement, the CIRB can order the employer to pay the employee the difference. In accordance with section 168, however, if the CIRB concludes that the amount received by an employee under a settlement agreement was equal to or exceeded the amount the CIRB would have awarded, the agreement will govern.

We will be watching to see if the decision of the FCA in *Bank of Montreal v. Li* is appealed to the Supreme Court of Canada, and will report on any significant developments as they arise.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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