Pitfalls to Avoid: How Saying Termination Wasn't for Misconduct in EI Process Increases Your Wrongful Dismissal Risks

Navigating the Employment Insurance (EI) system is part of the termination process. That's because employers must provide an explanation for employees who no longer work. The problem is that in completing the EI paperwork and going through the claims processing system, you may say things about the reasons for termination that come back to bite you in the behind later. The risk stems from a legal principal called "issue estoppel" that many employers don't learn about until after they get socked with a wrongful dismissal damages award. Here's a look at the trap and how to avoid it.

ROE Filing Requirements

To explain issue estoppel, we need to discuss the Service Canada EI reporting rules which require employers to file a Record of Employment (ROE) within 5 days of termination (or within 5 days of the following pay period end if the ROE is filed electronically. In either case, employers must also provide a reason for the employee's leaving in Block 16 of the ROE—either M for dismissal or K for other.

The EI Claims Determination Process

Stage 1: Regardless of whether you list code M or K in ROE Block 16, the employer can expect a call from a Service Canada agent asking whether the termination was due to the employee's misconduct or reasons having nothing to do with his/her behaviour. The Service Canada agent will also contact the employee and give him/her the chance to explain why the employment was terminated. The separate versions of each party are among the information the agent relies on to determine if the employee is eligible for EI benefits. If the agent determines there was employee misconduct, the claim will be denied. If the agent finds no misconduct (or that misconduct occurred but wasn't the reason for dismissal), EI benefits will be granted.

Stage 2 and beyond: After this decision is reached, the EI process becomes more formal and judicial, i.e., court-like in the sense it unfolds as a series of appeals to different tribunals each of which applies legal principles to decide the issue. The process begins when and if a party to the Service Canada decision makes an appeal to the Social Services Tribunal. An SST member then reviews the Service Canada decision and renders a ruling that either party may contest it to another member in

the Tribunal's appeal division. Thereafter, decisions can be appealed to the Federal Court of Appeal and from there to the Supreme Court of Canada.

The *Alexander* Case

Keep in mind that if the terminated employee files a claim for EI benefits—and not every terminated employee does—the EI claim is settled well before any employment standards complaint or civil action stemming from the termination that the employee might bring. A recent arbitration ruling in a *Canada Labour Code* wrongful dismissal lawsuit illustrates the unforeseen and potentially damaging consequences employers face as a result of this timing.

The case involved an employer that didn't provide an employee it fired any reason for termination at the time of termination. When questioned by the Service Canada agent, the employer simply stated the employee wasn't meeting expectations. But it provided no real evidence or details to support that statement. Service Canada found no evidence of misconduct and granted the employee EI benefits. It also sent the employer a notice from Service Canada explaining how it could appeal the decision and finding of no misconduct. But the employer took no steps to appeal.

That decision came home to roost when the employee later filed a wrongful dismissal claim against the employer under the *Canada Labour Code*. The employer denied the charge and argued that the employee had been terminated for misconduct—at least it tried to. But the adjudicator ruled that the that in the course of deciding the EI claim Service Canada had already decided that the termination wasn't due to misconduct. As a result, the employer wasn't allowed to re-argue that point in this case.

The Dreaded Issue Estoppel Pitfall

In technical terms, the adjudicator cited "issue estoppel," the legal principal that once one tribunal makes a decision on a particular fact, the issue can't be reargued in another tribunal. In this case, Service Canada's finding that the employee wasn't terminated misconduct, "estopped" the employer from arguing that he was terminated for misconduct in the wrongful dismissal proceeding. And once stripped of the "misconduct" defence, there was nothing the employer could do to avoid having to pay the employee wages in lieu of notice and severance pay for wrongful dismissal under the *Canada Labour Code* [*Huron Commodities Inc. v Alexander*, 2019 CanLII 11915 (CA LA), Feb. 14, 2019].

Takeaway

The moral of this story: Recognize that the way you characterize an employee's termination during the EI process can be held against you in a later case arising from the termination. More precisely, if you say on the ROE or to the Service Canada agent during the EI process that an employee *wasn't* dismissed for misconduct, you may be unable to reverse course and claim there *was* misconduct if the employee later sues you for wrongful dismissal.

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