

# Dismissing an Employee in the Federal Sector? You Will Need More Than a Severance Package

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# Speakers

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- Kate McNeill-Keller - Moderator
  - Summary of SCC Decision
- Christopher McHardy
  - Twelve-month eligibility requirement – extended probationary period?
- Cristina Toteda
  - Managerial exemption – how broad?
- Shana Wolch
  - What do Lack of Work/Discontinuance of a Function exemptions mean?
- Tim Lawson
  - How Unjust?: Can a termination be Just even if Just Cause is not met?
  - Can contract out of Unjust Dismissal and relinquish right to reinstatement? What about arbitration clauses?



## SCC Decision – Summary

- Plaintiff employed in non-management role for 4.5 years when dismissed without cause and without reasons – provided with severance package equivalent to six months
- CLC Adjudicator: AECL could not avoid an Unjust Dismissal determination by providing (even a sizable) severance package
- Federal Court/Federal Court of Appeal: Common law construct of without cause termination on reasonable notice applies under *CLC*
- SCC: Sections 240 – 246 of the *CLC* displace an employer's ability at common law to terminate an employee without reasons but with reasonable notice

# Twelve-month eligibility requirement – risk management options

- Making the most of the 12-month eligibility requirement (aka “the grace period”)
- Digging deeper – Performing more thorough reference checks
- Extended probationary periods
- Formalized probation review plans
- Critical decision making - erring on the side of caution
- Formalized performance improvement plans for post-probationary employees



# Managerial exemption – how broad?

- Relatively narrow interpretation
- Job title or position description does not automatically make a person a manager
- The Fundamental Test: The power to act independently and autonomously on the basis of his or her own discretion
  - Ability to make decisions in matters of consequence to the employer
  - Power to formulate company policy
  - Power to hire, fire and discipline subordinate employees – beyond supervision
  - Power to contract



# What do Lack of Work/Discontinuance of a Function exemptions mean?

## → **Lack of work**

- not enough work to keep the entire existing workforce employed

## → **Discontinuance of a function**

- bundle of responsibilities no longer exists; or
- the bundle of responsibilities is divided among multiple employees.

## → **Using the exemptions**

- acting in good faith
- providing sufficient evidence



# Final Thoughts:

Are there opportunities to:

- Terminate using a lesser standard than Just Cause?
- Relinquish reinstatement right?
- Arbitrate in place of a s.240 complaint?



# Questions?

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