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Supreme Court ponders whether, for some, job security is a legal right

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It is another potentially groundbreaking case: whether a federal non-unionized employee can be fired without cause, allowing a company to retain the power to dismiss someone it simply doesn't like.

Like similar cases before the Supreme Court of Canada last year — about the constitutional right to strike or the rights of RCMP employees to collective bargaining — the case of Joseph Wilson versus Atomic Energy of Canada has the potential to dramatically overturn almost 40 years of labour relations in Canada.

At heart is whether the Canada Labour Code gives non-unionized employees the same rights as union members over dismissal without cause. That's what the Code seemed to mandate in 1978 when it was amended by the then Liberal government to dictate that non-unionized employees with at least one year of service could not be dismissed without a reason.

The only exception is in the case of an economic layoff, where there is no work for the employee.

Two provinces — Quebec and Nova Scotia — have the same legislation in their labour codes, protecting employees from being fired without just or sufficient cause, although Nova Scotia's is limited to workers with at least 10 years on the job.

Opponents to Wilson's case insist the meaning of the Labour Code is that a non-unionized employee can be fired without cause as long as sufficient notice or severance is given. Otherwise, they say, the law "would impose unique and onerous restrictions on federal employees."

At stake are the rights of half a million federal non-unionized employees working for the banks, telecommunications and transportation companies and some Crown agencies.

Labour groups intervening in the top court case argue if the reasons for dismissal aren't apparent, labour tribunals should decide if the employee is to be either reinstated with back pay or compensated in some other way.

Joseph Wilson started working for AECL, a nuclear energy Crown corporation, in 2005, and was eventually promoted to the position of procurement supervisor for tooling. In 2009 he was dismissed, and given a severance package of about six month's pay.

Wilson was 38, had a clean disciplinary record, and may have given up a good job to come to AECL or looked forward to a long career at the nuclear agency. Not only did he face what his lawyers say is the severe financial and psychological trauma of being fired — labour adjudicators liken job dismissal to capital punishment — he claimed he was let go for a reason AECL didn't want to admit: he'd reported corrupt procurement practices he'd witnessed to his bosses.

When Wilson demanded a reason in writing for his dismissal, as the Labour Code says he had a right to do, AECL's lawyer provided a letter, saying, "Joseph Wilson was terminated on a non-cause basis and was provided a generous severance package that well exceeded the statutory requirements." This, say Wilson's lawyers, "tells him nothing. It is not a denial his dismissal was related to his whistleblowing…. It only allows an odious inference."

Before the top court Tuesday, AECL's lawyer, Ronald Snyder, admitted, "In hindsight, reasons should have been included in that letter."

He didn't elaborate on the reasons for Wilson's dismissal, but presented a hypothetical case in which a legal secretary or an administrative clerk might gradually not be a good fit for a company any more.

"You find that there's a bit of personality change in the administrative clerk, not a reason to dismiss for just cause, but the relationship is not as comfortable as it once was, the rapport is not the same…. Now, (in Wilson's lawyers' view) you are saddled with these employees until they decide to leave. That is, they are to be treated as if they are unionized employees with permanent job security," Snyder told the court.

After a labour adjudicator found in Wilson's favour, AECL asked for a judicial review of the decision, a step that hasn't been taken since the Labour Code was changed in 1978.

The Wilson case reached the highest court after Justice David Stratas, writing for the Federal Court of Appeal, found a non-unionized employee can be dismissed without cause as long as "sufficient" notice, or pay in lieu of notice, is given. Stratus's decision led to him being named as one of 25 "most influential" in the 2015 legal field by *Canadian Lawyer Magazine*. "Many federally regulated organizations including banks, telecommunications and transportation companies view the decision a victory," the magazine said.

The justices at the top court struggled with what Justice Michael Moldaver called notions of "just cause, a cause, or no cause." What if, Justice Russell Brown asked Wilson's chief lawyer, James LeNoury, an employer considers an employee "not a good fit, or didn't like the cut of his jib?" Would there be a basis, he wondered, within the scheme to consider (those kind of) reasons that were given for termination?

“Well, that’s exactly what the scheme is, Justice,” LeNoury replied, explaining that during the last 35 years, under the Labour Code, thousands of unjust dismissals and the reasons for them have been judged by labour adjudicators, not courts. Until now.

The court reserved its decision.