



Still Not Worth the Paper It's Written On: Release Won't Oust Canada Labour Code Unjust Dismissal Complaints

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***Bank of Montreal v. Li* affirms that a release will not preclude an employee from making an unjust dismissal complaint pursuant to the *Canada Labour Code*.**

The Federal Court of Canada in [Bank of Montreal v. Li](#) ("Bank of Montreal") recently upheld a decision of an adjudicator that a settlement agreement and release signed by an employee did not preclude the employee from filing an unjust dismissal complaint under section 240 of the [Canada Labour Code](#) (the "Code"). Even though the settlement agreement and release contemplated that the employee would receive \$27,154 in exchange for the employee releasing their employer from any actions, claims, damages and proceedings, the Court reaffirmed its decision in [National Bank of Canada v. Canada \(Minister of Labour\)](#) ("National Bank") that such agreements will not protect an employer from unjust dismissal complaints, but may affect the remedy awarded to the employee if the adjudicator concludes that the employee was unjustly dismissed.

Pursuant to Division XIV of the Code, certain non-managerial federal employees are afforded protections similar to those in a unionized workplace. More specifically, the Code was interpreted in [Wilson v. Atomic Energy of Canada Ltd.](#) to provide such employees with protections limiting an employer's ability to terminate their employment without cause. In an effort to address this restriction, employers often enter into settlement agreements with, and obtain releases from, employees that it terminates without cause.

In *National Bank*, the Court held that a settlement agreement and release did not preclude an employee from pursuing relief under the Code for an unjust dismissal. While some adjudicators have neglected or refused to follow this decision, in *Bank of Montreal*, the Federal Court affirmed *National Bank* and chastised those that have not been following it.

In *National Bank*, the employer sought judicial review of a decision made by the Minister to appoint an adjudicator, pursuant to section 242(1) of the Code, to hear an unjust dismissal complaint even though the employee had signed a settlement agreement and release. Under the settlement, the employee was to receive \$33,048 plus relocation counselling in consideration for her signing a release discharging the employer from any demands, claims, actions or rights of action including any recourse under the Code.

The Court dismissed the application for judicial review based on section 168(1) of the Code which provides that Part III of the Code (which contains the unjust dismissal provisions) applies notwithstanding any other law, custom, contract or arrangement unless the rights or benefits granted to the employee

under the law, custom, contract or arrangement are more favourable than the rights granted under Part III of the Code

The Court was not persuaded by the policy argument made by the employer that there would be a chilling effect on voluntary settlements between employees and employers if agreements and releases are not binding. The Court "appreciate[d] the concern at a policy level" but stated it was bound by the legislative scheme adopted by Parliament (i.e., section 168(1)).

However, the Court did note that an adjudicator must consider a settlement agreement when determining the amount of compensation an employee is entitled to for an unjust dismissal. Accordingly, if an adjudicator determines that an employee is entitled to monetary compensation equal to or less than the amount the employee already received under the settlement agreement, it is likely that no monetary compensation should be awarded. However, if the amount received under the settlement agreement is less than the amount the adjudicator would have awarded, the employer will be ordered to pay the difference.

The Court also noted that the power of the Minister to appoint an adjudicator under section 242(1) was discretionary. Therefore, the Minister could decide not to appoint an adjudicator if a prior settlement had been reached by the employer and employee. The Court suggested that the Minister may decide not to appoint an adjudicator for any of the same considerations as a complaint might be dismissed by the Canadian Human Rights Commission (the "Commission") under section 44 of the [Canadian Human Rights Act](#) (the complaint is not warranted or is trivial, vexatious, or made in bad faith) as well as for other reasons since the Minister's discretion is even broader than that of the Commission.

Bank of Montreal v. Li

In *Bank of Montreal*, the employer sought judicial review of a decision made by an adjudicator regarding jurisdiction to hear an unjust dismissal complaint pursuant to section 240 of the Code. The objection was made as the employee had previously signed a settlement agreement and release. Under the settlement, the employee was to receive a lump sum payment of \$24,546 and \$2,608 by way of salary continuation in exchange for a release of claims as follows:

In exchange for the consideration set out in paragraphs 2-3, the Employee hereby releases and forever discharges BMO, its subsidiaries, affiliates, and successors and each of their respective officers, directors, employees, and agents from any and all actions, causes of action, claims, demands and proceedings for whatever kind of damages, indemnity, costs, compensation, and any other remedy which Employee or Employee's heirs, administrators or assigns had, may now have, or may have in the future arising out of Employee's employment or the termination of employment.

The Court dismissed the application for judicial review and affirmed its previous decision in *National Bank*. In doing so, the Court reiterated that an employee is not precluded from relief under the Code by reason of an agreement to release their claims.

The Court also noted that policy considerations did not provide a basis from departing from the *National Bank* decision. Despite the argument that federally-regulated employers might be motivated to provide only the minimum amount of severance mandated by the Code, at least for the 90-day period within which the employee may pursue a complaint of unjust dismissal, the Court rejected the employer's policy arguments and simply reiterated the *National Bank* reasoning regarding such considerations.

Key Takeaways

The *Bank of Montreal* decision clarifies that a settlement agreement and release will not preclude an employee from filing an unjust dismissal complaint. Employers must consider alternative strategies to mitigate such risk. As discussed in *Bank of Montreal*, one strategy that may allow employers to avoid an

unjust dismissal complaint is to only provide the minimum amount of severance mandated by the Code and offer to provide additional compensation following the end of the 90-day limitation period, provided that no complaint of unjust dismissal is filed. The terminated employee could be given the details of the offered severance package and told that it may not be accepted or entered into until the 90-day period has lapsed.

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