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THE LAW OF DISMISSAL IN CANADA, THIRD EDITION

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What's New in this Update:

This release includes updates to case law and commentary in Chapters 1 (Applicability of the Law), 2 (Federal Jurisdiction Employers) and 3 (The Employment Relationship).

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Highlights

- **Federal Jurisdiction Employers — Lay-Off — Adjudicator’s Jurisdiction under the Code — Definition of “Discontinuance of a Function” — Case Law — Judicial Review — *Giffen v. TM Mobile Inc.*, 2023 FC 1666 (F.C.), additional reasons 2024 FC 216 (F.C.)** — affirmed re: discontinuance of function and application dismissed — “*Waywayseecappo* is distinguishable in facts in that the employer failed to provide evidence for why it eliminated the complainant’s employment” — *Sedpex* also distinguished — “Unlike *Sedpex*, the Respondent in this case presented evidence before the Adjudicator of an economic justification for the dismissal, namely the Restructuring Plan, which resulted in the dismissal of eighty-one Telus employees across Canada” — three months after returning from maternity leave, the applicant/business systems analyst I with 11 years, 9 months of service was terminated — “In sum, I conclude the Adjudicator was reasonable in finding that the Applicant’s allegation of discrimination is unsupported, in view of the factual and legal constraints that bear on the Decision: *Vavilov* at para. 99 ... [among other factors], there is nothing inappropriate for an employer to consider experience in the role, as time actually spent on the role, as a measure of skills, when considering who to retain or dismiss, as the case may be: *Rogers Cablesystems* at para. 40 ... In my view, the Decision meets the hallmarks of transparency, intelligibility and justification, and is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85.”
- **Federal Jurisdiction Employers — Grounds for Dismissal — Customer Service — Breach of Standard of Performance and Competence — Remedies — Introduction — General Damages — Costs — Judicial Review — *Amer v. Shaw Communications Canada Inc.*, 2023 FCA 237 (F.C.A.)** — reversed on appeal and reinstatement of the adjudicator’s award of severance pay and substantial indemnity costs — “I therefore conclude that the Federal Court made a palpable and overriding error in holding that the Adjudicator shifted the focus of the case and that the nature of the appellant’s core duties or the adequacy of the employer’s statistical evidence of cause was not in issue before the Adjudicator ... I thus conclude that the Federal Court’s determination as to the unreasonableness of the Adjudicator’s findings on the scope of the appellant’s duties cannot stand ... it is true that the Adjudicator provided no reasons for her award of a relatively modest amount of severance pay, but, given the nature of the parties’ submissions, and the commonplace nature of such awards, there was no need for her to have said more on the issue of severance pay ... *Vavilov* at paragraph 91” — “I cannot conclude that substantial indemnity costs may only be reasonably awarded where there is unduly objectionable conduct ... While it would have been preferable for the Adjudicator to have provided reasons for her costs award, I cannot conclude that her failure to do so means that the award must be set aside. This is especially so since the respondent chose to make no submissions on the quantum of costs when faced with the appellant’s request for a make-whole costs award” — “While stating that it was applying the reasonableness standard, the Federal Court did not do so and instead

conducted its own analysis of the evidence to reach an opposite conclusion from that reached by the Adjudicator. This is correctness as opposed to reasonableness review” — paras. 83 and also 91 (re: no reasons for severance pay award — severance pay award affirmed) of *Vavilov* cited.

- **Federal Jurisdiction Employers — Remedies — Costs — *Giffen v. TM Mobile Inc.*, 2024 FC 216 (F.C.)** — decision had dismissed the applicant’s application for judicial review of an adjudicator’s decision dismissing her unjust dismissal complaint and awarded the respondent, on a lump sum basis, costs in the amount of \$6,500, inclusive of taxes and interest — four Federal Court cases cited re: among other factors, “the granting of a lump sum award has become increasingly common, and is frequently preferred to the Tariff ‘because of its simplicity, the time and effort it saves in not having to prepare and debate the minutiae of items under the Tariff’ ” — six factors noted, such as the amount of work involved, the result of the proceeding, and other factors raised by the applicant — among other factors, “I find it equally unpersuasive for the Respondent to now attribute their own decision to bring an unsuccessful motion to the ‘conduct of the Applicant’ ” — “I agree with the Respondent that they are wholly successful on the merits of the judicial review, but the same cannot be said about the Motion” — among other factors, “I agree with the Applicant that the type of litigation the Applicant has initiated, and the costs consequences with it, are dissimilar from the large scale, patent and commercial litigation that the Respondent references.”

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