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Employment Law Primer for Mariners - Severance and Damages for Wrongful Dismissal

In last month's *Legal Desk* we outlined the law regarding a *maritime lien* for a seaman's wages and discussed why the powerful remedy of such a lien, which allows for the arrest and sale of a vessel to satisfy such a claim, ought to be understood by seaman and vessel owners alike.

In this month's *Legal Desk* we summarize the law that gives rise to a claim for a seaman's wages in the first place, and discuss how the principles of severance pay and damages for wrongful dismissal of a seaman differ from the law that applies to land-locked employees.

Principles of Employment Law

"Severance" and damages for "wrongful dismissal" are terms best defined by outlining the following general principles of employment law:

- The law will not generally force an employer to keep an employee if the employer no longer wants to employ that person. Consequently, an employee may be terminated at any time with or without "just cause". This principle preserves an employer's right to hire, and fire, whom and when they choose, subject to the legal rights of employees to claim monetary damages for being terminated under the applicable law;
- "Just cause" is essentially a fair reason for firing someone. What is a fair reason will generally depend on the duties of the employee, and what the employer alleges is the reason for the termination. There is no broad rule of what is just cause – it must be determined on the facts of each case.
- There are some cases where just cause is presumed and the allegation that there was just cause must be rebutted by the employee, such as where drugs or alcohol are involved in a workplace accident.
- If an employee is terminated with just cause they are not entitled to a "notice period" or "severance". "Notice period" is a period of time, after notice of termination has been given to the employee, where the employee may be permitted to keep working, and is paid, pending their last day of work. Often employers chose not to allow the employee to remain on the job waiting for their last day, but rather chose to pay the employee an amount equal to the wages for

that period of time and ask the person to leave immediately. The amount of money paid in lieu of the notice period is part of “severance”.

- What is the appropriate notice period, or severance pay in lieu of the notice period, will depend on such factors as minimum requirements under legislation such as the B.C. *Employment Standards Act* or Canada *Labour Code*, the type of work, the level of seniority and age of the employee, and likelihood of re-employment.
- If an employee is terminated without just cause, they are entitled to either a notice period or severance pay in lieu of the notice period.
- Where an employee is terminated without just cause, they may also be entitled to damages for *wrongful dismissal*.
- Damages for wrongful dismissal may exceed the amount of severance the employee is entitled to depending on the conduct of the employer and the circumstances of the employee.
- If the employer terminates the employee in a manner that is callous, high-handed, or objectively insensitive, damages for wrongful dismissal can be as much as equal to 24 months of the employee’s regular salary.

Important Distinctions:

There are three important distinctions that must be considered in this discussion of a seaman’s claim for severance or wrongful dismissal damages: the first is the difference between a *contractor* and an *employee*; the second is the difference between union and non-union workers; and the third is the difference between federal employment law and provincial employment law. It is only with these three distinctions in mind that we come to the clear, and worthwhile, understanding of a seaman’s right to severance pay and damages for wrongful dismissal.

The difference between an *employee* and a *contractor* is important to this discussion because it is only an employee that has a right to severance pay or damages for wrongful dismissal. A contractor’s rights are limited to the benefits of the particular contract between themselves and the hirer - the contractor cannot rely on provincial or federal employment law to imply such privileges as minimum pay or working conditions, severance pay or damages for wrongful dismissal. A contractor takes certain benefits, such as greater tax advantages for expenses, but loses privileges that a true employee has. Whether a worker is a contractor or an employee will depend on the facts in each case, such as who supplies the tools, who dictates how the work is done, whether the pay is contingent on success, and whether deductions for taxes are made by the hirer. Importantly, while this discussion of severance and wrongful dismissal relates only to true employees, as it is only true employees that have the benefit of severance or damages

for wrongful dismissal, a contractor that earns their pay working aboard a vessel likely has a maritime lien for wages regardless of their status as a non-employee.

The difference between union and non-union employees is also important because the right of an employee to claim for severance and damages for wrongful dismissal will, in the case of a union employee, be dictated in part by a collective bargaining agreement (“CBA”) between the union and employer, whereas for a non-union employee such claims will not. Because I cannot appreciate how the terms of any particular CBA dictate a claim for severance without viewing that agreement, this discussion relates only to non-unionized employees. Regardless, claims for unpaid wages of union employee working aboard a vessel is a claim that generally gives rise to a maritime lien for wages in the same way that claim by a non-union employee does. A significant difference however is that the union will generally work with the employer to ensure the employer’s vessel is not arrested and sold to satisfy the claim.

The third distinction is that between provincial and federal statute law and common law. The rights of many of the non-marine employees in British Columbia are governed by the B.C. *Employment Standards Act* (“ESA”), being a provincial statute, and provincial common law, being law developed through consecutive decisions of the courts of law of British Columbia. The provincial *ESA* and the provincial common law govern issues such as notice periods and severance pay, with the general rule that the common law provides more generous awards of severance than does the statute. Under the *Constitution Act* of Canada however, provincial law does not apply to matters that are in substance matters of “navigation and shipping” – this is reserved for Federal law. Seaman’s wages has traditionally been regarded as being within the jurisdiction of navigation and shipping. The Federal law that applies is the *Canada Labour Code* and federal common law. There are however some possible exceptions to this rule, particularly that some provincial employment law may apply to ferries that trade entirely within the province.

Severance for Mariners

Where a claim is brought against an employer in British Columbia for work completed on a typical vessel trading within and outside of B.C. waters, the claim will be governed by Canadian Maritime Law, including the federal *Labour Code* and the common law. While the *Labour Code* specifically sets out the amount of severance an employee is entitled to, the common law is generally more generous. While no specific rule of law can be stated, employees of higher seniority, older employees with less chance of re-employment, and employees who were lured from other employers to commence work at the employer which is letting them go, are generally entitled to significantly more severance than provided for in the *Labour Code*.

For example, while the *ESA* provides that the employee is entitled to: 2 weeks of notice (or severance pay in lieu of) after one year of service, three weeks severance after three consecutive years of service, and one additional week for each year of service thereafter

to a maximum of 8 weeks, The *Labour Code* on the other hand provides that the employee is entitled to the greater of 5 days of notice, or two days per year for every year of continuous service, but only after the employee has served 12 months of initial service. In both cases, the common law is typically significantly more generous. However, in order to take advantage of the common law's more generous approach to severance a seaman must either sue the employer, or educate the employer of what the common law is and therefore what the likely result of suing would be. In either case, if the seaman intends on taking advantage of the right to arrest the vessel pursuant to their maritime lien for wages, the greatest of care must be taken in not unnecessarily handicapping the business of the vessel.

Damages for Wrongful Dismissal:

Like a claim for severance, a claim for wrongful dismissal of an employee gives rise to a *maritime lien* for seaman's wages. As discussed in last month's Legal Desk, this claim ranks in priority to most other claims against a vessel, including common claims such as a prior registered mortgage, and a claim by a repairer (not in possession of the vessel) for monies owing.

Damages for *wrongful dismissal* are not as readily quantified as *severance* because the degree of damages depends on the particular circumstances of what preceded the termination, and how the termination was carried out. Again, there is no firm rule of what the appropriate amount of damages is, however, damages will generally be greater where the conduct of the employer is without reason, is insensitive, or is vindictive.

It is important for an employer or vessel owner to appreciate that, because an employer is liable for the acts of its employees who are tasked with terminating other employees, the employer will be liable for damages where the employee doing the firing acts wrongfully. In other words, where an employee takes a personal issue with the other employee in fulfilling their role in firing that other employee, damages for any inappropriate conduct will be visited on the employer and not on the employee who acted poorly in the firing process. These greater damages result in an increased claim against the vessel as the seaman's claim for wrongful dismissal forms a lien against the vessel. To this end, the firing process of a seaman becomes relevant to ensuring the security of a vessel from claims.

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