

## BE CAREFUL WHEN YOU COMPLETE THE ROE:

# You may incur costly, unintended consequences

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### Importance of accurate completion of a Record of Employment

One aspect of legal advice that I provide for my clients on a daily basis is to emphasize the importance of making sure that decision makers understand the potential repercussions for failing to accurately complete paperwork relating to employees.

Today, I want to focus on the employer's obligation to correctly fill out the information in an employee's Record of Employment (ROE).

The first question I am asked is when do I issue the ROE? For any reason, whenever there is an interruption of earnings, an employer is required to issue to the employee a Record of Employment ("ROE"). The ROE is issued by an employer regardless of whether the employee intends to file a claim for Employment Insurance ("EI") benefits. The obligation to issue the ROE stems from the interruption of earnings.

### The Importance of Block 16 in the ROE

The second question I am often asked, is how to complete Block 16. Block 16 requires a code to dictate the reason for issuing a ROE when an employee is dismissed. This question is important because the repercussions of the choice of Code by the employer can impact an employee's ability to collect EI benefits.

For example, recently, an employer advised an employee that their employment was being terminated due to lay off, and the employee was provided with 30 days of working notice. However, when asking

the employee what the actual end date of employment was going to be (it was anticipated that the employee might leave a few days earlier), the employer asked the employee to identify his "resignation" date. This led to confusion whether the employee was terminated, with working notice to work to the end of the month, or whether the employee, if leaving earlier than the end of the month, was resigning. Based upon the facts, I advised that the appropriate Code was Code A.

Code A, "Shortage of Work," includes lay off, end of a contract, the elimination of a position or company restructuring. However, Code M, "Dismissal," covers terminations during the probationary period if the employee is not working out, or any other reason not covered by Code A, and is the code used when an employee is terminated for cause.

### Choosing the incorrect code can have significant repercussions for an employer

When an employee is terminated for cause, he or she may not be eligible for EI benefits because the loss of employment is a result of their own misconduct. Consequently, the choice of Code M is a choice that should be considered very carefully. Depriving an employee of EI benefits means that there is likely to be conflict with that employee since the employee is motivated to obtain a different Code. There is a high likelihood the employee will make a complaint to the provincial or federal Labour Board. An

employer should be certain that the choice of Code M is appropriate, and that the employer has complied with all applicable laws and employment policies both theoretically and in practice prior to making that selection.

It is very important to know that an employer, who uses Code M in circumstances where it does not have grounds to assert cause, may be exposed to a claim for punitive damages or bad faith damages, in addition to wrongful dismissal damages. These damages, plus legal fees, mean that this is a potentially costly choice.

An employer may follow best practice when terminating an employee – only to find that the selection of Code M overturns the best practice entirely.

This was the result for the employer in the recent case of *Alexander v. Huron Commodities Inc.* 2019 CanLII 11915. The employee, Paul Alexander, had been employed for 6 years. The employer terminated his employment by letter – providing no reasons for the termination in the termination letter, and advising that Mr. Alexander would be paid 2 weeks' notice plus 10 days of severance.

Although the employer provided no reasons for the termination in the termination letter, the employer used Code M, "Dismissal," in the ROE. Consequently, Mr. Alexander would be deprived of EI benefits.

### The complaint resulted in the employee being awarded EI benefits

Mr. Alexander complained that he was entitled to EI benefits and that he was unjustly dismissed, and obtained

a preliminary ruling under the *Canada Labour Code* in his favour. In a preliminary ruling to answer the complaint, the EI officer awarded him EI benefits. This ruling had a significant effect on the later hearing.

As part of the investigation into Mr. Alexander's complaint, the EI officer contacted both the employer and Mr. Alexander to determine the reasons for dismissal. The employer alleged that there was an issue of missing fuel, but it appears that the employer did not investigate this allegation beyond simply identifying an issue. To properly establish this reason for dismissal, the employer should have taken steps to prove misconduct. However, it did not. The employer also alleged there were other reasons due to inadequate performance and that it concluded the employee was no longer suitable.

### Termination for misconduct sets a high standard to meet for an employer

After investigating the complaint, the EI officer concluded that the test for misconduct was not satisfied: that test requires proof that the employee's actions were wilful or of such negligence that he ought to have known that his actions would impair the performance of duty owed to the employer. This is what is signified by the use of Code M in the ROE. This is a high test to meet: here, the employer was unable to prove that the conduct regarding the missing fuel was willful or that Mr. Alexander knew that his actions would impair the performance of duty owed. Consequently, the EI officer concluded that there was no misconduct.

The employer accepted this conclusion and took no additional steps to provide additional information or to request a reconsideration.

The matter moved next to a hearing. However, prior to the commencement of the hearing, the employee argued that the issue of whether he was dismissed

for misconduct had already been determined. The legal argument was for a preliminary ruling that the adjudicator of the hearing should apply the 'doctrine of issue estoppel' regarding the question of misconduct based on the EI officer's decision. If that doctrine applied, then the employer would be prompted from arguing that Mr. Alexander was dismissed for misconduct. (The parties agreed that the employer's second argument, that the dismissal was based on the employee's incompetent performance of his duties, was not the subject matter of the EI officer's decision and so issue estoppel would only apply to prevent a finding of dismissal based on misconduct.)

Issue estoppel is a general legal concept based on fairness and is relied upon in circumstances where two parties have already litigated an issue. Generally, a judicial decision on an issue should finally resolve that issue between the parties, unless that decision is reversed on appeal. The case law sets out three requirements for the application of issue estoppel:

1. the same factual & legal question has been decided;
2. the judicial decision relied upon for the estoppel was final; and
3. the parties were the same in both proceedings.

Applying the test to the facts of this case, the adjudicator held that:

1. The question of the employee's misconduct before the adjudicator was the same question before the EI officer.
2. The EI officer's decision was a final judicial decision because the EI officer had authority to decide on EI benefits and to determine whether the dismissal was for misconduct; and
3. The parties were the same.

The adjudicator ruled that while issue estopped was met and could be applied, he retained discretion, whether he should apply it in this case. Issue estoppel is intended to promote justice and, if its application would promote an injustice, he could choose not to apply it.

The adjudicator considered two factors when exercising his discretion. First, did the employer challenge the EI officer's decision? It had not. Second, what was the expertise of the EI officer and did that experience merit judicial notice?

The adjudicator concluded that the EI officer has considerable experience and expertise in deciding whether a dismissal was for misconduct. Based on these two factors, and the facts that the termination letter did not mention any misconduct, and the employer did not investigate or pursue the only potential misconduct issue of the alleged missing fuel, the adjudicator found there was no basis to conclude that applying issue estoppel would result in an injustice.

As a result of the adjudicator's decision to apply issue estoppel, the employer could not defend the unjust dismissal complaint on the basis that Mr. Alexander was terminated for misconduct. The adjudicator retained jurisdiction to decide the employer's alternative defence that the employee was dismissed due to his inability to adequately perform his duties.

### Lessons Learned

Lessons learned: Be very careful when selecting the appropriate code for Block 16 of the ROE. If an employer is going to select Code M, the employer must be prepared to fully set out the grounds for the dismissal and to assist I recommend you seek legal advice. It is also important to know that an employer's response to an inquiry by an EI officer can affect the potential success of a hearing – the employer's responses during the investigation can create an unfavourable evidentiary record. Finally, if an employer is dissatisfied with an EI officer's conclusions, considering obtaining legal advice to determine the next course of action whether it is an appeal, the submission of additional evidence or taking no further steps at all.

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