Employee Seeks Provisional Order Ahead of Harassment Hearing

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As an employer, how would you react if a tribunal issued an order requiring you to reinstate an employee into his/her previous job and take reasonable measures to ensure that the workplace would be free from harassment, when the employee's position had previously been abolished and the employee's harassment claim had yet to be decided by the court?

These are precisely the questions one is left with after reading the recent Québec decision of *Bergeron*v. *Caisse Desjardins de Brossard*, 2016 QCTAT 1607.

In January 2014, Ms. Sonia Bergeron, an Asset Management Director at the Caisse Desjardins de Brossard, filed a complaint with the Caisse's Board of Directors having been assaulted by another Caisse employee and following several disturbing incidents relating to the General Manager of her branch.

An external investigation in early 2014 determined that Ms. Bergeron's harassment complaint was founded and the employment of both the employee and General Manager was terminated. However, a subsequent investigation in May 2015 concluded that Ms. Bergeron had not been the victim of harassment. As a result of this second investigation report, the General Manager was reinstated into his employment with the Caisse.

Ms. Bergeron has been on sick leave since April 13, 2014.

In March 2015, Ms. Bergeron's position was abolished by the Caisse. This is disputed by Ms. Bergeron as she alleges the title was simply changed and that the position continues to exist within the organization.

In May 2015, Ms. Bergeron filed a claim with the CSST (the Québec Workplace Health and Safety Commission) alleging that she had contracted an occupational disease as a result of the harassment she had sustained at the hands of the General Manager. The CSST accepted Ms. Bergeron's claim and in August 2015, the CSST's review branch upheld the initial decision and declared that Ms. Bergeron was entitled to workers compensation indemnities as a result of the workplace harassment. The

Employer contested the review branch's decision and a hearing date is set for October 2016.

In June and July 2015, Ms. Bergeron also filed both an unjust dismissal complaint and a harassment complaint with the CNESST (the Commission responsible for labour standards and health and safety complaints) which will be heard at a future date by Québec's *Tribunal Administratif du Travail*'s (the Administrative Labour Tribunal, "TAT") labour relations division.

In January 2016, Ms. Bergeron's physician determined that she was capable of a progressive return to work. Ms. Bergeron communicated with the Caisse shortly thereafter requesting certain terms, including her reinstatement at the Caisse's head office, instead of her usual branch, and placing an intermediary between Ms. Bergeron and the alleged harasser (the General Manager). The Employer responded that Ms. Bergeron's proposal was under review.

In the absence of a response from her employer, Ms. Bergeron asked the TAT to issue a provisional order, ahead of the hearing on the merits of her harassment complaint. Ms. Bergeron was asking the TAT to order the Caisse to take reasonable measures to ensure that the workplace would be free from any psychological or sexual harassment by reinstating her at the Caisse's head office and placing an intermediary between Ms. Bergeron and the General Manager.

The Employer argued that TAT's labour relations division did not have jurisdiction to issue such a provisional order because Ms. Bergeron's return to work was under the exclusive jurisdiction of the CNESST and the TAT's health and safety division. Alternatively, the Employer argued that the conditions to pronounce such an order had not been met in this specific case.

The administrative judge before whom the request for the order was heard listed the conditions that were required for such an order to be pronounced: 1) the petitioner must appear to have a right to obtain the order and 2) the order is deemed necessary to prevent serious or irreparable harm.

On the first condition, the appearance of right, the judge noted that Ms. Bergeron's harassment allegations were both serious and uncontested by the Employer. The judge therefore determined that Ms. Bergeron had met the first condition in that her harassment complaint was not frivolous and was not manifestly ill-founded.

However, Ms. Bergeron failed to meet the second condition since, despite her doctor's recommendation for a progressive return to work, Ms. Bergeron's occupational disease had not yet been deemed consolidated by her physician, and therefore, she was not capable of returning to work at the time she was seeking the provisional order. Consequently, the judge found that the order was not necessary to prevent serious or irreparable harm.

While the facts of this case did not allow for both conditions for a provisional order to be met, employers should be aware that it is possible for the TAT to pronounce such an order ahead of a hearing on the merits of a harassment complaint — i.e. before the TAT determines that the harassment complaint is actually founded. And while this decision did not address the issue directly, it appears even more surprising that the TAT could,

by provisional order, require the reinstatement of an employee into a position that is presumed to have been abolished — i.e. before the TAT determines that the unjust dismissal claim is actually founded.

It remains to be seen whether this will be an avenue used by other employees in the future.

By

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