The Employer's Duty To Make Reasonable Efforts To Reassign Employees Before Dismissing Them For Incompetence… Continued

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On May 31, 2019, the Court of Appeal handed down its decision in *Commission Scolaire Kativik* c. *Association des employés du Nord québécois*[1](*Kativik*), regarding the criteria applicable to administrative dismissals for incompetence. The decision follows an arbitral award that cast doubt on the state of the law with respect to the criteria applying to employers seeking to rid themselves of incompetent workers. Those criteria, clearly established in the jurisprudence since the 2005 judgment in *Costco Wholesale Canada Ltd.* c. *Laplante*[2] (*Costco*), are the following:

1. The employee must be aware of the company`s policies and the employer's expectations in his or her regard;
2. The employee's performance deficiencies must have been pointed out to him or her;
3. The employee must have had the necessary support to correct those deficiencies and achieve the performance goals set;
4. The employee must have had the benefit of a reasonable period of time to adjust; and
5. The employee must have been advised of the risk of dismissal, should there be no improvement on his or her part.

The Arbitral Award and the Judicial Review

On March 23, 2015, arbitrator Jean Ménard rendered an award[3] allowing a grievance and quashing the administrative termination of an employee on grounds of incompetence, because the employer had failed to fulfill its obligation to reassign the employee to less demanding duties. A receptionist position, which the employee had previously occupied, was available. The arbitrator castigated the employer for having imposed too short a deadline (three days) on the employee to decide whether or not to accept the job.

The employer filed a motion for judicial review, arguing that the making of reasonable efforts by employers to reassign employees before terminating them for incompetence formed no part of the five-part test applying to Québec employers under *Costco*. On October 4, 2017, the Superior Court upheld arbitrator Ménard's ruling, holding that it fell within the range of reasonable outcomes.

Mr. Justice Pierre C. Gagnon noted that the criteria applied in the *Costco* judgment were derived from the "Edith Cavell" test, announced in the British Columbia case of *Edith Cavell Private Hospital* v. *Hospital Employees' Union, Local 810*[4], an arbitral award later confirmed by the Supreme Court in 2004[5]. The "Edith Cavell" test includes the duty to reassign an incompetent employee, to the extent possible. The judge found that there was no justification for refusing to apply that criterion as part of Québec's *Costco* test and that the duty was an obligation of means, with each case to be treated as a *cause d'espèce*.

You can find here one of our previous newsletters, in which we analyzed in greater detail the development of the criteria governing administrative terminations for incompetence in Québec case law, as well as the Superior Court judgment that was the subject of this appeal.

The Court of Appeal's Decision in *Kativik*

On August 15, 2018, the employer's motion for leave to appeal was allowed. The employer's basic contention was that by imposing on it the obligation to assign the employee concerned to another position, the arbitrator had added to the criteria that the Court of Appeal had approved in *Costco* and had thereby flouted Québec law.

The appeal was dismissed. The question of whether any firing for unsatisfactory performance was justified was held to be dependent on the context, to be assessed in light of the particular facts of each case. Nevertheless, it was not necessarily improper for a grievance arbitrator to decide that an administrative termination was unjustified where the employer had failed to identify any other available post in his company that was compatible with the employee's skills. The arbitral award in this case was deemed to possess all the attributes of reasonableness, although another decision-maker might indeed have reached a different conclusion.

The Court of Appeal, however, clarified that the arbitrator had not sought to impose any systematic obligation to relocate an incompetent employee to another job before terminating him or her for administrative reasons. The court further added that the judge in first instance should not have based his ruling on his own view of the law governing administrative dismissals, but only on the reasonableness of the arbitral award, and the court did not share his approach.

Recommendations

In consequence, although the highest court in the province has now confirmed both the arbitrator's and the Superior Court's decisions in *Kativik*, **it has clarified that an employer's duty to make reasonable efforts to reassign employees before dismissing them for incompetence, is not a rigid criterion to be added to the five (5) other *Costco* criteria that employers must apply systematically.**

In addition, since the Superior Court's judgment, decision-makers have been hesitant to apply the reassignment duty as a sixth criterion of the *Costco* test. We even published a newsletter article, which you can find here, citing a decision handed down by the Administrative Labour Tribunal, where adding a sixth criterion to the *Costco* test was rejected.

It remains to be seen how administrative tribunals and arbitral panels will interpret this sixth criterion as a result of the Court of Appeal's decision. Nor do we know for the moment whether the employer will seek leave to appeal the judgment to the Supreme Court of Canada.

We cannot, however, ignore the fact that reassigning an employee must henceforth form part and parcel of the employer's thought process before firing an employee whose performance is unsatisfactory, especially where the circumstances indicate that the employee could perform satisfactorily in another vacant position, as was the case in *Kativik*. Although not a decisive factor in itself, this criterion may cause decision-makers to be more inclined to set aside terminations on grounds of incompetence.

[1] 2019 QCCA 961.

[2] 2005 QCCA 788.

[3] 2015 QCTA 247.

[4] [1982] 6 LAC (3d) 229.

[5] *A.U.P.E. c. Lethbridge Community College*, 2004 CSC 28.

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