Saddled With An Incompetent Employee? Are You Really Obliged To Reassign Him To Another Job Before Terminating His Employment?

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The legal requirements for terminating an employee for incompetence have always been well-known in Québec. It was established long ago that before terminating the employment of an employee on grounds of incompetence, the employer was obliged to:

1. Inform the employee of the company's policy and the employer's expectations;
2. Point out the employee's shortcomings;
3. Offer the employee the necessary support to enable him/her to correct his/her performance and reach the objectives concerned;
4. Give the employee a reasonable time to make adjustments; and
5. Warn the employee of the risk of dismissal should there be no improvement.

These five criteria were set forth by the Court of Appeal in the *Costco*[1] decision, and have been unanimously followed since 2005.

Additional Criterion Added by the Superior Court in the *Kativik* Case

That being said, as we wrote in a previous article, the Superior Court has sown doubt, since October 2017, about the criteria applicable in dismissal for incompetence cases. In *Commission scolaire Kativik* c. *Ménard*[2] (*Kativik*), the Superior Court added an additional criterion to the five mentioned above. The Superior Court held that before the employment of any employee could validly be terminated for administrative reasons, the employer was also obliged to attempt to reassign the incompetent employee to some *other* job for which he or she would be better qualified.

According to the Superior Court, this obligation of reassignment would constitute an "obligation of means", which means that an employer should take reasonable means to try to reassign an incompetent employee, without having any obligation to the results. In the *Kativik* case, the Superior Court added that this requirement of reassignment would not apply in all cases, and it ruled that certain characteristics of the position and the

business in question should be taken into account by employers. However, the Court did not explain to what extent those factors might have an impact.

As mentioned in our previous article, the motion for leave to appeal the *Kativik* decision was allowed by the Québec Court of Appeal on February 15, 2018, particularly on the ground that the decision seemed contrary to the established line of Québec jurisprudence in dismissal for incompetence cases, but no decision has yet been rendered on the appeal.

The *Moutis* Case

It is noteworthy that despite the Superior Court's decision in *Kativik*, a number of subsequent decisions rendered by the Administrative Labour Tribunal (the ALT) and by some grievance arbitrators have not followed the new test announced in *Kativik* and have articulated their firm disagreement with it[3].

The recent ALT decision in *Moutis et Bombardier*[4] is a case in point.

In this matter, the employer, Bombardier, had dismissed Mrs. Demetra Moutis, on the ground that she was incapable of performing work equivalent to what was expected of a Grade 3 engineer, which was the position for which she had been hired. Mrs. Moutis then filed a complaint under section 124 of the *Act respecting labour standards*, alleging dismissal without good and sufficient cause.

Responding to that complaint, Bombardier alleged that Mrs. Moutis was involved in a performance improvement plan at the time when her employment came to an end: Her failures had been pointed out to her on numerous occasions; she had obtained the necessary support to correct her performance and reach the objectives required; she had enjoyed a reasonable time to make adjustments; and, she had been warned of the risk of dismissal should she show no improvement. In other words, Bombardier pleaded that it had followed and applied all the criteria of the *Costco* judgment.

For her part, Mrs. Moutis pleaded that Bombardier also had an obligation to offer her *another* position before terminating her employment.

The ALT, however, expressly refused to apply that new requirement and contented itself with applying the *Costco* tests. The ALT nevertheless found that, even supposing that the obligation to reassign an incompetent employee existed, it was satisfied that Bombardier had no job to offer Mrs. Moutis. The evidence had, in fact, shown that Mrs. Moutis was incapable of meeting the objectives of any other Grade 1 or 2 engineering jobs. It would therefore have been pointless for Bombardier to offer her any such position. Under those circumstances, Mrs. Moutis' complaint was dismissed.

Some Unanswered Questions

In reaching its conclusion in *Moutis*, the ALT relied on another decision (the *Diabo*[5] case), where the Tribunal had also refused to apply the new reassignment criterion to an incompetent employee, on the grounds that that requirement was variable in its scope. The following passage is particularly telling on the subject:

[TRANSLATION]

" *Either the obligation applies to all employers or it applies to none. In fact, depending upon the size of the company, the obligation would be greater. On what criteria should the decision-maker determine that such and such an enterprise would be obliged to offer a position? On the basis of its net sales, of the number of employees in the department concerned or in any business, of its specialty or its reputation? At first glance, the list of criteria appears inexhaustible. That can only lead to inequities. Let us stop asking questions right there*."

To those questions, we would add the following ones: would the employer's duty to reassign an employee goes as far as reassigning him or her to *another* establishment of the same employer, or even to another subsidiary of the same company? And what would happen in the case of a company having places of business around the world — would the employer's obligation then extend to having to assess all of the jobs available in all of its places of business? And again, would the duty to reassign an incompetent employee within the business go as far as imposing a demotion on the employee, including a salary cut? If so, would the employer not then risk exposure to a claim for constructive dismissal of the employee?

All these unresolved questions clearly illustrate that the application of the criterion of reassignment of employees poses a number of practical and legal problems. That is why we are not surprised to learn that certain decision-makers prefer to continue applying the five familiar criteria governing dismissal for incompetence, rather than imposing any additional burden on employers.[6]

We should, however, mention the fact that certain decision-makers have opted, in some decisions, to apply the new test developed in *Kativik*[7].

Conclusions and Recommendations

In the light of the foregoing, and taking into account the pending appeal in *Kativik*, there is certainly a jurisprudential controversy about the existence of an obligation on the part of an employer to make reasonable efforts to reassign an incompetent employee to another job.

Accordingly, as long the Court of Appeal has not yet decided the issue, we recommend that employers try, as far as possible, to reassign incompetent employees before terminating their employment for administrative reasons.

We also note that in virtually all the decisions rendered in incompetence cases since the *Kativik* judgment, employers have pleaded that, in the event that they had a duty to reassign incompetent employees, such reassignment would have been ineffective, or would have been impossible, in the circumstances.

One thing is certain: while awaiting the Court of Appeal's decision, *Moutis* stands as an encouraging example for employers, where the new reassignment requirement for incompetent employees was not applied by the ALT. In any event, we would hope that the Court of Appeal's decision will provide some needed clarification as to the application of this requirement, the scope of the operation which employers will then

have to undertake, as well as the factors that must be taken into account by employers in assessing other available jobs, if any.

[1] *Costco Wholesale Canada Ltd.* c. *Laplante*, 2005 QCCA 788.

[2] *Commission scolaire Kativik* c. *Ménard*, 2017 QCCS 4686 (Motion for leave to appeal allowed, 2018 QCCA 239).

[3] See, for example, *Moutis* et *Bombardier inc.*, 2018 QCTAT 3478; *Diabo* et *Kahnawake Sharotiia'Takenhas Community Services*, 2018 QCTAT 1508; *Syndicat Des Employé_E-S De Métiers D'Hydro-Québec, Section Locale 1500, SCFP-FTQ* et *Hydro-Québec (Jean-Philippe Charbonneau)*, 2018 QCTAT 268 ; *Aéroports de Montréal* et *Syndicat des gestionnaires de premier niveau (CSN) (Benoît Bastien), 2017 QCTAT 368.*

[4] *Moutis* et *Bombardier inc.*., 2018 QCTAT 3478.

[5] *Diabo* et *Kahnawake Sharotiia'Takenhas Community Services,* 2018 QCTAT 1508.

[6] See the decision mentioned in note 3.

[7] See, for example, *Roon* et *Centre de la petite enfance Les Maisons enjouées*, 2018 QCTAT 3610, where the ALT found that the employer had not shown that it had made any serious and substantial effort to reassign an educator to another position before dismissing her.

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