Is an Employer Legally Bound to Accept an Employee's Notice of Resignation, No Matter How Early it is Given?

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On August 11, 2017, the *Tribunal Administratif du Travail* (the Québec Administrative Labour Tribunal or the "TAT") rendered a most interesting, if somewhat disconcerting, decision for employers. The TAT's decision in *Sylvestre* and *Distribution Zone Électronique Inc* 1 was in fact the first decision in Québec law to apply the reasoning of the Supreme Court of Canada's judgment in *Asphalte Desjardins* 2. It also applied the Court's ruling to an extreme situation where an employee provided his employer with nearly 11 months of notice that he would be resigning from his employment.

The TAT concluded that, on the one hand, the employer was bound to accept the notice of termination given by the employee. In addition, and as more fully set forth below, the TAT pushed its reasoning even further by holding that an employer may not shorten the notice of termination period of an employee having more than two years of uninterrupted service, unless there is a good and sufficient cause to dismiss the employee, and that absent any such cause, the employee could file a complaint under section 124 of the *Act respecting Labour Standards* (the "LSA").

Curiously, this decision appears to not have attracted much attention. As explained below, we believe that this decision deserves to be fully explained and clarified, in view of the important implications it may have for the day-to-day management of human resources for businesses in Québec.

1. A review of the *Asphalte Desjardins* decision

In the first place, and for greater certainty, we think it advisable to briefly discuss the facts and principles of the *Asphalte Desjardins* decision. In that case, the employee, who had been working intermittently for a Québec company for 14 years, gave his employer a letter of resignation, dated February 15, 2008. The letter stated that the employee would be resigning from his job on March 7, 2008. Although the employee gave the employer a 3-week notice of resignation, the employer asked the employee to resign as of February 19, 2008, just 4 days after his letter of resignation was delivered, without paying him any compensatory indemnity whatsoever. The *Commission des normes du travail* (the Québec Labour Standards Commission) then seized the Court of

Québec of the matter, claiming that the employee was entitled to receive an indemnity in lieu of notice of termination, pursuant to sections 82 and 83 of the LSA.

The issue in dispute essentially required the Court to determine how the employment relationship had been terminated: was it a resignation or a dismissal engineered by the employer?

When the case reached the Supreme Court of Canada, it was held that a contract of employment for an indeterminate term does not automatically terminate when an employee gives a notice of resignation. Rather, the contractual relationship between the parties continues up until the final day of work that has been announced by the employee. The Court thus held that if the employer, in turn, wished to terminate the contract *before* the expiry of the notice period, it was then obliged to give the employee a notice of termination under article 2091 of the *Civil Code of Québec* (the "CCQ")

In this regard, the Supreme Court of Canada clearly established that an employer who advances the termination date of a resigning employee does not "renounce" to the notice of resignation that has been given; rather, the employer is unilaterally resiliating (terminating) the contract of employment, which must be done in accordance with the law.

From that judgment, it must then be clearly understood that in the situation where an employee announces his/her intention of resigning, the employer has three choices:

1. Require the employee to continue working and performing his/her duties during the period of notice given by the employee;
2. Deny the employee access to the workplace for the entire period of notice given by the employee, while ensuring that the employee remains paid during this period; or
3. Terminate the employment relationship by paying the employee a reasonable indemnity in lieu of notice, in accordance with article 2091 CCQ.

That being said, what happens when the resigning employee has more than two years of uninterrupted service with the same company? And what happens in the event that the employee gives a very long notice period prior to his/her resignation? No decision as yet appears to have been rendered on such situations since the *Asphalte Desjardins* judgment was handed down…at least not until the *Sylvestre* case arose.

2. Legal principles applying to any termination of employment without serious reason

In Québec, the right to unilaterally terminate a contract of employment with an indeterminate term is governed by both the LSA and the CCQ. On the one hand, article 2091 CCQ provides that the employer or the employee may unilaterally terminate the employment relationship without serious reason, provided that the terminating party gives the other a reasonable period of notice.

However, section 124 LSA limits the employer's ability to unilaterally terminate the employment relationship by providing employees (who have two or more years of uninterrupted service) with the ability to contest the termination, on the basis that the employer did not have good and sufficient cause to terminate the employment

relationship. An employee who exercises their right under section 124 LSA may claim, in particular, reinstatement into their employment with the employer as well as the payment of lost wages.

Therefore, an employer's right to terminate the employment relationship by providing reasonable notice of termination under article 2091 CCQ is limited insofar as employees with two or more years of uninterrupted service may require that the employer prove the existence of good and sufficient cause. In such a case, the reasonable notice that has been provided pursuant to article 2091 CCQ will not satisfy the employer's obligation to also prove that good and sufficient cause existed.

How then, can these principles be reconciled with those laid down in *Asphalte Desjardins*? That is what the TAT tried to do in the *Sylvestre* case, outlined below, a ruling that illustrates the difficulty of reconciling section 124 LSA with the general provisions set forth in the CCQ.

3. The facts of the *Sylvestre* case and the conclusions of the TAT

The facts underlying this decision are quite simple. Mr. Sylvestre was a marketing manager who had worked for his employer for 26 years, without interruption. On July 2, 2015, Mr. Sylvestre announced that he was resigning from his position and that his departure date would be 11 months later, on June 3, 2016. The employer accepted his resignation but, finding the notice of termination unreasonable, unilaterally decided that Mr. Sylvestre's last day of work would be September 23, 2015, some 11 weeks later. Refusing that change of date and maintaining that he had been dismissed without good and sufficient cause, Mr. Sylvestre filed a complaint under section 124 of the LSA.

In its decision, the TAT first studied the Supreme Court's decision in *Asphalte Desjardins* and concluded that this had in fact been a dismissal, rather than a resignation. It came to this conclusion on the basis that the employer had shortened the period of working notice provided by the employee, and in doing so, had unilaterally breached the contract of employment.

That being said, even without focusing on the reasonableness of the 11-week notice period that had been provided by the employer, the TAT recalled that Mr. Sylvestre had more than two years of uninterrupted service and concluded, on that basis, that the employer was required to have good and sufficient cause for terminating the employment relationship. The TAT thus decided that Mr. Sylvestre's dismissal was contrary to the LSA and ruled that he should have remained at work, with all of his rights and privileges, until his scheduled departure date of June 3, 2016. Consequently, the TAT ordered the employer to pay Mr. Sylvestre an indemnity equivalent to the salary and other benefits that he had not received as a result of his dismissal.

4. Reflections on the *Sylvestre* decision

With all due respect, we are of the opinion that the TAT erred by forcing the employer to keep the employee at work, after he had given a notice of resignation that the employer deemed to be too lengthy. We are of the view that TAT should have analyzed what reasonable period of notice would have been appropriate in the circumstances, without basing itself exclusively on the general principle that the employer was required to prove

good and sufficient cause when dismissing an employee with more than two years of continuous service.

We believe that the TAT's reasoning goes well beyond the Supreme Court of Canada's ruling in *Asphalte Desjardins.* We are of the view that the employer should be able to determine whether the notice of termination that has been given is or is not reasonable, keeping in mind the circumstances of each individual case. Should the notice of termination be deemed unreasonable by the employer, the employer should have the discretion to alter the employee's last day of work in accordance with the requirements of article 2091 CCQ, without being required to prove that good and sufficient cause existed.

We believe that that is what the Supreme Court of Canada actually meant in *Asphalte Desjardins*, where it held that:

Of course, *the notice period chosen unilaterally by the employee cannot be "imposed" on the employer*. An employer can deny an employee access to the workplace during the notice period, but must nonetheless pay his or her wages for that period,*provided that the employee's notice of termination was given in reasonable time*.3 [Emphasis added]

Moreover, we think it important to stress that in *Asphalte Desjardins*, the employee had occupied his employment with the employer from 1994 to 2008. The lower court decision indicates that [translation] "*that period was interspersed with times when he worked for other employers*4". We cannot state with certainty whether the employee had more than two years of uninterrupted service with Asphalte Desjardins at the time that he announced his resignation. One thing is certain, however: in its decision, the Supreme Court of Canada did not refer to section 124 LSA or any other requirement for the employer to have good and sufficient cause when shortening an employee's notice of resignation period.

We are of the view that the TAT's reasoning in *Sylvestre* will give rise to unusual and problematic situations where employees with more than two years of continuous service will attempt to give their employers unreasonably lengthy notices of resignation in order to benefit from their wages for the entire duration of the notice period. This may apply, for example, where an employee is on the verge of retiring.

Finally, please note that since the TAT's decision last August, the employer has filed an application for judicial review before the Superior Court of Québec. We will be following these proceedings as they develop and report on whether the TAT's decision is maintained by the Superior Court.

12017 QCTAT 3655 (application for judicial review filed August 28, 2017 (docket no.: 400-17-004688-178).

2*Québec (Commission des normes du travail)* v. *Asphalte Desjardins inc.*, 2014 SCC 51.

3*Québec (Commission des normes du travail)* v. *Asphalte Desjardins inc.*, 2014 SCC 51 at para. 44.

4*Commission des normes du travail* c. *Asphalte Desjardins inc.*, 2010 QCCQ 7473 at para. 5.

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