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HEAVY BURDEN FOR EMPLOYERS RESPECTING MITIGATION OF DAMAGES FOR LOST SALARY: FOLLOWING DISMISSAL, AN EMPLOYEE WHO MAKES NO EFFORT TO MITIGATE HIS DAMAGES MAY STILL BE ENTITLED TO AN INDEMNITY

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THE COURT OF APPEAL RECENTLY REVIEWED THE SCOPE OF THE DUTY OF EMPLOYEES TO MITIGATE THEIR DAMAGES FOR LOST SALARY PURSUANT TO SECTION 128(2) OF THE *ACT RESPECTING LABOUR STANDARDS* (ARLS). [1]

In this case, the Court of Appeal allowed in part the appeal of an employee following a decision of the Superior Court which had dismissed his motion for judicial review of two decisions of the Commission des relations du travail (CRT). In one of these decisions, the CRT had refused to grant an indemnity to the employee under section 128(2) ARLS because it was of the view that by failing to search for a job, the employee had breached his obligation to mitigate his damages.

Although acknowledging as being reasonable the interpretation generally given by the CRT to section 128(2) ARLS, namely, that it implicitly includes an obligation to mitigate one's damages, the Court of Appeal was of the view that in the case under review, the application of that rule by the CRT was unreasonable.

[1] *Carrier* v. *Mittal Canada Inc.*, 2014 QCCA 679, April 4, 2014.

The Court of Appeal noted that the mitigation of damages is an obligation of means which is subject to an objective test, that is, the review of how a reasonable person placed in the same circumstances would behave. Contrary to popular belief, a dismissed employee has no obligation to take all means one could imagine to reduce his damages to a minimum, he is rather required to make "reasonable efforts" toward that purpose.

The Court of Appeal also stated that for taking the absence of mitigation into account, such absence of mitigation must, pursuant to article 1479 of the *Civil Code of Québec*, have had the effect of increasing the damages. To illustrate this principle, the Court noted that in some situations, mitigation efforts would probably be fruitless. Lastly, the Court indicated that the employer has the burden of establishing that the employee failed to discharge his obligation to mitigate and to prove the resulting increase in damages.

Applying these principles, the Court of Appeal decided that for the period during which the Commission de la santé et de la sécurité du travail had determined that the complainant was able to work while his employer was refusing to reinstate him (period of one year during which the employee received benefits pursuant to section 48 of the *Act Respecting Industrial Accidents and Occupational Diseases*), any effort of the employee for mitigating his damages would have been pointless. He would probably not have been able to find a comparable job on account of his recourses against the employer and his 3-year disability leave due to depression. In the absence of preponderance of evidence demonstrating an increase in damages, the employee could not be blamed in this respect.

As to the following period, during which the CRT allowed his complaint and set aside his dismissal without however order his reinstatement, the Court of Appeal considered that the employee could not be blamed for not having undertaken a job search while waiting for the issuance of the second judgment of the CRT ordering his reinstatement. The Court stated that [TRANSLATION] "it remains that to force the appellant to search for a job in the meantime while he will likely be reinstated shortly places him in a very uncomfortable situation in respect of potential employers and confers a rather artificial character to the obligation to mitigate". par. [131]

This decision, which proposes a contextual approach, repositions the obligation to mitigate damages in the area of indemnity for loss of salary pursuant to section 128(2) ARLS by taking into account the specific facts of each case. However, the decision would not apply to the recourses instituted under ordinary law, which does not recognize the right to reinstatement.

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