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Employees and the Cost of Justice: The Court of Appeal of Québec concludes that a complaint pursuant to section 124 of the Act Respecting Labour Standards (the Act) is admissible despite the existence of an internal arbitration procedure

May 1, 2014

THE FACTS

The complainant, a non-unionized employee, was hired by McGill University (hereinafter the "**University**") in 1987 to be a member of the administrative staff. After working as an administrative assistant since 1994, she was dismissed by the University on June 30, 2009 for fraud. The University's administrative staff is subject to a Dispute Resolution Policy (the "**Policy**"), which also covers their employment conditions. That Policy, which was unilaterally adopted by the University, provides, among other things, that it forms part of the employment contract of all employees falling within its purview. It also provides for a dispute resolution mechanism, the last step of which is the referral of the complaint to arbitration. With respect to arbitration, the Policy states that the costs are to be shared equally by the employee and the University.

Following her dismissal, the complainant initiated the dispute resolution procedure. She followed every step, going so far as to request that her complaint be referred to arbitration. It is unclear what exactly happened with her request for arbitration but, given what followed, every indication is that it had become irrelevant.

At the same time, the complainant also filed a complaint with the *Commission des normes du travail* under section 124 of the Act contesting the same dismissal.

During the hearing before the *Commission des relations de travail* (the "**Commission**"), the University contested the jurisdiction of the administrative tribunal, arguing that the Policy provided the complainant with another remedial procedure in accordance with section 124 of the Act. The Commission dismissed the preliminary objection and held, firstly, that the Policy formed part of the complainant's employment contract and, secondly, that the recourse provided for in the Policy was not the equivalent to the one provided for at section 124 of the Act since, in contrast to the "free" recourse prescribed by section 124 of the Act, the complainant had to pay half the costs. The complainant was therefore able to avail herself of the recourse provided by the Act.

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On judicial review, the Superior Court of Québec said that it agreed with the Commission's conclusions and dismissed the University's action. Dissatisfied with the decision, the University appealed.

THE COURT OF APPEAL'S DECISION

The Court of Appeal began by stating that the complainant's mere knowledge of the Policy did not mean that it was automatically incorporated into her employment contract. However, the Court of Appeal was of the opinion that the Commission had rendered a reasonable decision in ruling that, by taking advantage of the arbitration mechanism under the Policy, the complainant had implicitly admitted that it formed part of her employment contract.

Regarding the equivalence of the recourses, the Court of Appeal confirmed that the Commission had correctly determined that, based on the legislator's intention and given the resulting costs for the complainant, the mechanism provided for by the Policy was not an equivalent remedial procedure to that provided for by section 124 of the Act. In fact, the parliamentary debates surrounding the 1990 amendments to sections 124 and 126.1 of the Act – which, at the time, granted a right of action before an arbitrator – demonstrated the need to provide a free recourse, given that the cost could represent a serious impediment for a person wishing to assert his or her rights, especially someone working for minimum wage. These legislative changes (and the others that followed) consequently transferred jurisdiction over the recourse set out at section 124 of the Act to the labour commissioner (now the Commission), leading to, among other things, the following consequences:

> The employee does not have to bear the decision-maker's costs
> The employee has the option of being represented by the *Commission des normes du travail* free of charge

According to the Court of Appeal, in ruling as it did, the Commission ensured that section 124 of the Act was effective and in doing so, took into account the vulnerability of the employee who, once dismissed, no longer has a union (or other association) to represent him or her or to assume the cost associated with arbitration; a recourse that is inaccessible is not an effective recourse. This approach is in keeping with current access to justice concerns.

An arbitration policy will therefore be valid, but the issue regarding the concurrent jurisdiction of the Commission under section 124 of the Act may be raised again in the event that the arbitration procedure does not require the employee to assume any cost.

This Court of Appeal decision is available at the following address:
http://www.canlii.org/fr/qc/qcca/doc/2014/2014qcca458/2014qcca458.html

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[1] *Université McGill v. Ong*, 2014 QCCA 458.

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