A pregnant worker’s right to benefits in the event of preventive withdrawal pursuant to section 36 of the AROHS does not apply to a business under federal jurisdiction: Éthier v. Commission des lésions professionnelles

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This decision of the Superior Court of Québec addresses a pregnant worker’s right to preventive withdrawal where said worker is employed by a business under federal jurisdiction.[1] In this case, questions of constitutional jurisdiction were raised and the Superior Court confirmed that article 36 of the Québec*Act Respecting Occupational Health and Safety*[2] (the “Act”) is not applicable to businesses under federal jurisdiction. As a result, a worker who exercises her right to cease to perform a job pursuant to the *Canada Labour Code* (the “Code”)[3] is not eligible to receive income replacement benefits, regardless of the fact that the federal scheme does not provide for the payment of such benefits.

THE FACTS

Ms. Éthier works for the Canadian National Railway Company (“**CN**”), a business under federal jurisdiction. In August 2011, while she was pregnant, she filed an application with the Commission de la santé et de la sécurité du travail (“**CSST**”) under the “[TRANSLATION] For a Safe Maternity Experience Program”. Subsequently, due to her condition, a doctor recommended that she be assigned tasks posing no physical risk to her or, failing that, that she be preventively withdrawn as of the 20th week of her pregnancy. Her employer informed her that it could not modify her job and could not reassign her to other tasks. Consequently, Ms. Éthier availed herself of the preventive withdrawal option available to pregnant women under sections 132, 205 (a) and 205.1 of the Code. Subsequently, the CSST informed Ms. Éthier that she was not eligible for the preventive withdrawal program under the Act, since the program does not apply to businesses under federal jurisdiction.

Therefore, the CSST notified her that she was not entitled to income replacement benefits under section 36 of the Act. Ms. Éthier sought review of this decision and, subsequently, appealed the decision rendered by the CSST's Administrative Review Division before the Commission des lésions professionnelles ("CLP"). The two bodies having dismissed her requests, Ms. Éthier requested that the Superior Court review the decision rendered by the CLP.[4]

THE SUPERIOR COURT DECISION

The Superior Court must determine whether the compensation system provided for under the *Act respecting industrial accidents and occupational diseases*[5] ("**ARIAOD**") is, pursuant to section 131 of the *Code*, constitutionally applicable to a pregnant worker employed by a business under federal jurisdiction and who exercises a right of preventive withdrawal. Section 131 of the *Code* reads as follows:

"131. [Compensation under other laws precluded] The fact that an employer or employee has complied with or failed to comply with any of the provisions of this Part may not be construed as affecting any right of an employee to compensation under any statute relating to compensation for employment injury or illness, or as affecting any liability or obligation of any employer or employee under any such statute."

Before the Superior Court, Ms. Éthier claimed that a pregnant employee working for a business under federal jurisdiction must be entitled to the same benefits as a pregnant employee working for a business under provincial jurisdiction and, therefore, must be able to receive an income replacement benefit allowing her to exercise her right of preventive withdrawal. She claimed that section 131 of the *Code* is an interjurisdictional reference to the provisions of the ARIAOD which entitle the employee of a business under federal jurisdiction to an income replacement benefit. The Superior Court confirmed the CLP's decision and rejected Ms. Éthier's appeal. Citing the Supreme Court of Canada's decision in *Bell Canada* v. *Québec (CSST)*,[6] the Superior Court refused to depart from well-established jurisprudence according to which the Act does not apply to businesses under federal jurisdiction. Section 131 of the *Code* makes no reference to the ARIAOD or the Act. In order to be applicable, an interjurisdictional reference must be clearly defined. As well, the wording of section 132 of the *Code*, which provides for the right of a pregnant worker to cease performing her tasks if she believes that, due to her pregnancy or the fact that she is nursing, continuing any of her current tasks may pose a risk to her health or to that of the fetus or child, gives the worker a unilateral right to cease carrying out her tasks. At face value, this provision is inconsistent with any form of income replacement benefit under a provincial plan. Even on an expansive interpretation of section 131 of the*Code*, there is no clear interjurisdictional reference to the provisions of the ARIAOD which provide for the compensation of the pregnant employees of a federal business.

OUR OBSERVATIONS

Developments in this matter are still ongoing since the Court of Appeal of Québec granted Ms. Éthier leave to appeal the Superior Court's decision on April 16, 2014. The Court of Appeal was seized of the following questions, which would be new and which had not previously been the subject of debate before either the Court of Appeal or the Supreme Court of Canada:

a) Do the legislative amendments made to the Code since 1993 and the decisions of the Supreme Court of Canada in Canadian Western Bank v. Alberta,[7] Tessier Ltée v. Québec (CSST),[8] Québec (Attorney General) v. Canadian Owners and Pilots Association,[9] Marine Services International v. Ryan[10] and Martin v. Alberta (Worker's Compensation Board)[11] justify a review of the principle according to which sections 36, 40, 41 and 42 of the Act are not applicable to a federal business?

b) Does section 131 of the Code constitute an interjurisdictional reference providing for the

compensation of a pregnant or nursing worker pursuant to section 36 of the Act and the ARIAOD even if she is employed by a business under federal jurisdiction?

These questions would be of "[TRANSLATION] general interest to all employees of businesses under federal jurisdiction."[12]

For their part, CN, the CSST and the Attorney General of Québec consider that the jurisprudence established by the Supreme Court in *Bell Canada*[13] is still the authority and that sections 33, 36, 37 and 40 to 45 of the Act are not applicable to businesses under federal jurisdiction.

Lavery will keep you informed of the result of this appeal.

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1 2014 QCCS 1092 ("*Éthier*") (application for leave to appeal granted) (C.A., 2014-04-16), 2014 QCCA 793). Note that as of July 16, 2014, no decision had been rendered in this case by the Court of Appeal.

2 CQLR c. S-2.1 (the "Act").

3 RSC 1985, c. L-2 (the "*Code*").

4 *Éthier* v. *Canadian National Railway*, 2013 QCCLP 4672.

5 CQLR c. A-3.001 ("ARIAOD"). This plan applies to preventive withdrawal by virtue of sections 36 and 42 of the Act.

6 [1988] 1 S.C.R. 749, p. 801 ("*Bell Canada*").

7 2007 SCC 22.

8 2012 SCC 23.

9 2010 SCC 39.

10 2003 SCC 44.

11 2014 SCC 25.

12 *Éthier* v. *Compagnie de chemins de fer nationaux du Canada*, 2014 QCCA 793, par. 2.

13 *Supra*, note 6.