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Right to refuse to work and preventive withdrawal: the Dionne v. Commission scolaire des Patriotes case

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In Québec, the objective of the *Act Respecting Occupational Health and Safety*[1] (the "Act") is the elimination, at the source, of dangers to the health, safety and physical well-being of workers. Recently, the Supreme Court of Canada rendered a decision in the *Dionne* v. *Commission scolaire des Patriotes*[2] case concerning the right that the Act confers on a worker to refuse to work if he[3] has reasonable grounds to believe that it could expose him to a threat to his health, safety, or physical well-being or would expose another person to a similar danger[4]. This unanimous decision of the judges of the Supreme Court of Canada clarifies the scope of the right of a pregnant woman to refuse to work where she faces job insecurity, in this case, given her status as a part-time supply teacher.

A PREGNANT WOMAN TO REFUSE TO WORK WHERE SHE FACES JOB INSECURITY, IN THIS CASE, GIVEN HER STATUS AS A PART-TIME SUPPLY TEACHER. A PREGNANT WORKER'S RIGHT TO REFUSE TO WORK AND PREVENTIVE WITHDRAWAL: LEGAL CONCEPTS

In the more specific example of a pregnant worker, the Act provides for the option of a preventive withdrawal where said worker provides her employer with a certificate attesting to the fact that her working conditions may be physically dangerous to her unborn child or to herself due to her pregnancy.[5] In this particular case, the pregnant worker may request to be reassigned to other duties involving no such danger and that she is reasonably capable of performing. If the employer does not or cannot comply with the request, the pregnant worker may exercise her right of refusal to work until she is reassigned to duties that are compatible with her condition or until the date of delivery.[6] A worker on preventive withdrawal is deemed to be at work and retains all the benefits attached to her regular position prior to her reassignment to other duties or her work stoppage.[7] She is also entitled to full compensation for the first five working days of her work stoppage and, subsequently, receives 90% of her net salary for days where she would normally have worked, had

she not been in preventive withdrawal.[8] In these situations, income replacement benefits are provided to workers by the Commission de la santé et de la sécurité du travail (the "CSST").

THE FACTS

In 2006, Ms. Maryline Dionne was a supply teacher who was added to the Commission scolaire des Patriotes' (the "School Board") list of supply teachers. A collective agreement requires the School Board to use the teachers on this list when replacement teachers are needed, leaving the selection of said replacements to the School Board's discretion. Once on the list, Ms. Dionne worked frequently such that in 2006, she worked nearly full-time. In September 2006, she learned she was pregnant. Shortly thereafter, her doctor informed her that she was vulnerable to catching a contagious virus which could harm her fetus. As this virus can be spread by groups of children, her doctor completed two certificates prescribing preventive withdrawal and reassignment, confirming that her workplace also posed a risk to her health. Ms. Dionne forwarded the certificates to the CSST, which informed her that she would be eligible for preventive withdrawal on the day when she would be "called to work by [her] employer to carry out a contract".[9] Ms. Dionne received several offers from the School Board to substitute teach in November 2006, all of which she accepted. She was never reassigned to any other tasks.

The CSST rendered a decision declaring that Ms. Dionne was entitled to receive income benefits related to her preventive withdrawal. This decision was appealed by the School Board to the Commission des lésions professionnelles ("CLP"), with the CLP setting aside the decision rendered by the CSST.[10] In its decision, the CLP held that since Ms. Dionne was unable to enter the school due to the risks it posed to her health, she was incapable of performing the supply teaching work and no contract of employment could be formed. More specifically, the CLP held that Ms. Dionne's condition prevented her from performing the tasks necessary to form a contract of employment within the meaning of the *Civil Code of Québec* ("CCQ").[11] Consequently, she could not be considered to be "a worker" within the scope of the Act nor was she entitled to preventive withdrawal and the resulting benefits. The Superior Court confirmed the decision of the CLP.[12] The Court of Appeal upheld this decision, although there was a dissent.[13]

THE DECISION OF THE SUPREME COURT OF CANADA

Basing itself on the objectives and the context of the Act, the Supreme Court of Canada allowed Ms. Dionne's appeal. In its decision, the Court reiterated that the objective of the Act is the elimination, at the source, of dangers to the health, safety and physical well-being of workers.[14] After reviewing the principles applicable to the right of refusal set out in the Act, the Court indicated that the right to refuse to perform dangerous work must not be considered to be a refusal to fulfil an employment contract but, rather, as "the exercise of legislative protection".[15] The Act being of a law of public order, this right to refuse to perform work is automatically incorporated into any contract of employment.[16] The Act therefore protects pregnant women in two significant ways: it protects their health by substituting safe tasks for dangerous ones, and it protects their employment by providing financial and job security.[17]

The Court recognizes that in order to qualify as a ''worker" within the meaning of the Act, there must be a "contract of employment". Since this concept is not defined in the Act, the Court refers to the definition of a contract of employment provided for at article 2085 of the CCQ. In the case of Ms. Dionne, does the presence of a health risk in the workplace constitute an obstacle to the formation of an employment contract? The CLP was of the view that since Ms. Dionne could not enter the workplace to teach, the essential element of the performance of the contract was missing and, as a result, no contract of employment could be formed. According to the Supreme Court, this decision is unreasonable.

The concept of “worker” set out in the Act must be distinguished from the concept of a “contract of employment” as set out in the CCQ. There are several indications of the legislative intention to reach a much broader group of workers than that contemplated by the “employee” of the CCQ. The requirement of the performance of work must be interpreted in order to give meaning to the right of refusal provided for by the Act. According to the Court, this requirement shall be respected even if, following the formation of the contract, the worker withdraws from the workplace for health and safety reasons; at that point, the Act deems the employee to be “working”.[18] Consequently, when Ms. Dionne accepted the School Board’s offer to work as a supply teacher, an employment contract was formed and she became a worker in accordance with the definition of that term in the Act. It was not her pregnancy but rather the dangerous workplace that prevented her from carrying out her work, and that in turn triggered her statutory right to substitute that work with a safe task or to withdraw.[19] The refusal to perform a dangerous task is not a refusal to fulfil the employment contract; it is the exercise of a statutory right under the Act. Protective reassignment is not an obstacle to the formation of an employment contract. The CLP’s decision had the “anomalous” effect of putting certain women in the untenable position of having to choose between entering into an employment contract and protecting their health and safety or the health and safety of their fetus.

OUR OBSERVATIONS

This decision will likely have major repercussions on workers who have casual status and employers in Quebec’s education sector. The expansive and liberal interpretation given by the Supreme Court of Canada to the rights and protections set out in the Act has the effect, notably, of extending the grounds for workers’ right of refusal compensation to which such workers are entitled when they are offered a job, regardless of whether or not these workers can in fact perform the work. Therefore, when an employer makes a job offer, the worker may accept it and then refuse to perform the work, citing a risk to her health, safety and well-being.

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1 CQLR c. S-2.1 (the “Act”).

2 2014 SCC 33 (‘‘*Dionne*’’).

3 For the purposes of convenience, in this text, the masculine is used to refer to both men and women.

4 The Act, section 12.

5 *Id*., section 40. See also *Regulation respecting the certificate issued for the preventive withdrawal and re-assignment of a pregnant or breast-feeding worker*, CQLR c. S-2.1, r. 3.

6 The Act, section 41.

7 *Id*., section 14 and 43.

8 *Id*., section 36.

9 *Id*., par. 10.

10 *Commission scolaire des Patriotes* v. *Dionne*, 2008 QCCLP 3215.

11 LRQ, c C-1991, article 2085 (‘‘CCQ’’).

12 *Dionne* v. *Commission des lésions professionnelles*, 2010 QCCS 1550.

13 *Dionne* v. *Commission scolaire des Patriotes*, 2012 QCCA 609.

14 The Act, section 2.

15 *Dionne, supra*, note 2, par. 22, citing *Bell Canada* v. *Québec (CSST)*, [1988] 1 S.C.R. 749, p. 801.

16 The Act, section 4.

17 *Dionne, supra*, note 2, par. 30.

18 *Id*., par. 38.

19 *Id*., par. 43.