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An employer can file a counter claim against an employee in the context of proceedings instituted by the Commission des normes du travail in order to enforce the right of set-off

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In *Commission des normes du travail v. Compagnie d'assurances Standard Life du Canada*,[1] (the "Standard Life of Canada case"), the Court of Québec allowed an employer to file a counterclaim against an employee in the context of proceedings instituted by the Commission des normes du travail ("CNT") on behalf of that same employee. In so doing, the Court authorized Standard Life of Canada (the "Employer") to request, by way of a counterclaim, the enforcement of the right of set-off between the amounts owed to the employee and the amounts owed by the employee to the Employer. However, the Standard Life of Canada case runs contrary to the majority of the case law coming out of the Court of Québec[2] according to which the employer cannot file a counterclaim against his employee or ex-employee in the context of proceedings instituted by the CNT on the grounds that such an employee or ex-employee does not constitute a "plaintiff" within the meaning of the *Code of Civil Procedure*.[3]

In the Standard Life of Canada case, the CNT claimed the amount of $2,301 on behalf of an employee for unpaid vacation. For its part, the Employer argued that he had set off this amount against salary advances that had been made to the employee under a reimbursement agreement. The Employer was therefore claiming from the employee the remaining balance of the advances due after set-off by way of a counterclaim. The CNT argued that the Employer was not authorized to set off these amounts and that its counterclaim should have been filed as a separate case. Accordingly, the CNT was seeking to have Standard Life's counterclaim dismissed and struck out.

In its judgment, the Court of Québec relied on a decision of the Court of Appeal[4] to conclude that the employee was a "party" to the action instituted by the CNT and that, accordingly, the Employer could enforce any right against the CNT which could be validly asserted against the employee herself.[5] In the specific case where an employer seeks to set off amounts owed to an employee and the amounts the employee owes the employer, the Court will have to satisfy itself that the employer had a debt that is certain, liquid and exigible prior to proceedings being instituted by the CNT, in which case there may be extinction of the debt up to the lesser of the two amounts owed.[6]

The Court of Québec also bases its conclusion on the proportionality rule as set out in the *Code of Civil Procedure*.[7] In fact, allowing the CNT's motion to dismiss would require the Employer to institute separate proceedings against the employee. The Court was of the view that the interests of

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justice would not be as well served in such circumstances as opposed to if the crossclaim was dealt with at the same time as the action filed by the CNT given that both claims originated from the same source.

Lavery will monitor the Standard Life of Canada case and keep you informed of any significant developments.

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[1] 2014 QCCQ 4523.

[2] Particularly see *Commission des normes du travail v. 9175-0489 Québec inc. (Steak frites Saint-Paul)*, 2013 QCCQ 3884 (C.Q.); *Comité paritaire de l'industrie des services automobiles de la région de Montréal v. Hewitt Équipements ltée*, 2012 QCCQ 1485 (C.Q.) and *Commission des normes du travail v. Groupe Dubé Entrepreneur Général inc.*, 2012 QCCQ 6896 (C.Q.).

[3] RLRQ c. C-25.

[4] *Commission des normes du travail v. Motos Daytona inc.*, 2009 QCCA 1833 (C.A.) ("*Motos Daytona inc.*"), quoting *Maltais v. Corp. du parc régional du Mont Grand-Fonds inc.*, D.T.E. 2002T-715 (C.A.).

[5] Prec., note 1, par. 11 and 12.

[6] *Motos Daytona inc.*, prec., note 4.

[7] Prec., note 3, article 4.2.

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