Hiring in the New Year? What to do when a new recruit overpromises and underdelivers?

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A recent decision[1] by the Commission des relations du travail ("**CRT**") highlights the plight of an employer faced with an employee who oversold his abilities during the job interview and later proves incapable of delivering on his promises. In this case, Laurentian Bank Securities inc. ("**Laurentian**") successfully defended against a claim for dismissal without good and sufficient cause filed by a former employee.

The facts of the case are commonplace. The employee had been a highly successful Investment Adviser with Desjardins Wealth Management ("**Desjardins**") for a number of years. During a job interview with the vice-president of Laurentian, the employee estimated that he could transfer to Laurentian 75% of his portfolio, the total of which was worth $37 million of assets under managements. His performance potential led to an offer of employment from Laurentian and enabled him to negotiate a generous compensation and benefits package.

During the first days of his new employment, days which prove crucial from the perspective of client retention, the employee made minimal efforts to retain the client base he had built over the years and, ultimately, few clients transferred their assets to him at Laurentian. Several months into his employment, he was far from reaching his initial earnings objectives. The disparity between his performance and projected earnings became amplified with each annual performance review. Efforts made by Laurentian to support the employee's progress – encouraging him to utilize his business development budget, prepare a business plan, etc. – proved unproductive. After three years of service with Laurentian, the employee was dismissed for a failure to meet job requirements.

From the employee's perspective, his lack of success was the result of a number of external factors unrelated to his abilities (for example, he was placed in an open-plan office that did not permit the requisite confidentiality to call his clients; he was denied a transfer to another branch; Laurentian hired the very Investment Adviser whose book of business he had bought several years earlier, and this new employee unfairly solicited his clients; he was defamed by his former Desjardins partner, which explained why his clients broke off their relationship with him after his transfer to Laurentian). Moreover, the employee raised his health condition as a mitigating factor; the pressure at work caused him to develop depression, which left him unmotivated to solicit new clients.

The constellation of explanations given by the employee to rationalize his poor performance did not sway the CRT. Ultimately, the employee was regarded as an industry veteran, well aware of performance expectations. This factor appears to have been decisive in the CRT's weighing of the evidence, as can be seen from a summary of its analysis below.

In cases of administrative dismissal, it is the onus of the employer to demonstrate good and

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sufficient cause. In keeping with the principles developed under applicable case law, the CRT must verify that the employer's action was not arbitrary, discriminatory or unreasonable, and that the employer fulfilled its obligations imposed by applicable case law. The CRT's findings in respect of the applicable criteria are summarized below:

> **Whether the employee was informed of the company's policies and the expectations set by the employer**
> The employee was experienced in the financial services industry and familiar with the job requirements of an investment adviser. Moreover, the goals set for him by Laurentian were standard for such a position. Under the circumstances, the CRT concluded that Laurentian's expectations were reasonable and sufficiently transparent.
> **Whether the employee's shortcomings had previously been identified**
> The employee was repeatedly informed, both formally and informally, that his performance was inadequate. He had even been notified in writing that he was required to prepare a business plan to improve his job performance.
> **Whether the employee received the necessary support to address his shortcomings and achieve the performance objectives**
> The employee received appropriate support from Laurentian in order to meet his objectives (e.g. by utilizing a business development fund, launching an advertising campaign, working alongside other advisers, etc.).
> **Whether the employee received a reasonable time to adjust**
> The employee was employed by Laurentian for three years and was advised of his shortcomings at least as early as his first annual evaluation. He benefited from a reasonable time to adjust his performance.
> **Whether the employee had been advised that a failure to improve would lead to dismissal**
> The employee could not claim that he did not see the dismissal coming. He was clearly informed that his job was in jeopardy following his second annual evaluation.

The case serves to remind employers of the importance of setting firm and reasonable performance objectives early on in the employment relationship. Should a dismissal for lack of competence prove inevitable, what will serve the employer well in the event that litigation arises is evidence that the employee was advised of his performance deficiencies, that resources were offered to support the employee in realizing his objectives, and that the employee was notified that a failure to improve would jeopardize his employment. While the process may require time and patience, it must be followed to avoid possible liabilities stemming from an unfavourable ruling of unjust dismissal.

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[1] *Daniel Denis v. Valeurs mobilières Banque Laurentienne inc.*, 2014 QCCRT 0517.

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