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Has there been a change in the standard for the administrative dismissal of an employee due to poor performance?

December 13, 2017

On October 4, 2017, the Honourable Justice Pierre-C. Gagnon of the Superior Court of Québec, sitting in judicial review of an arbitral award, rendered a key decision[1] on the criteria to be considered in order to uphold an administrative dismissal.

The facts

An employee working as an administrative technician was dismissed for poor performance. The employer and the employee had agreed on a three-month performance improvement plan prior to the dismissal. The employee's performance did not improve during this period, despite the numerous meetings between the employee and his superior. The employee continued to make mistakes in carrying out his duties and systematically declined the employer's offers to help.

Faced with the employee's inability to meet the plan's requirements, the employer offered him a job as a receptionist, with less demanding tasks than those required of an administrative technician. The employer gave him three days to accept the offer.

After the three days, the complainant refused the proposed assignment, preferring instead to continue with the performance improvement plan. There was still no progress several weeks later, and the employer dismissed the employee for administrative reasons.

Arbitrator Jean Ménard was seized of the grievance challenging the dismissal.[2] He held that the dismissal was abusive as it was unreasonable to expect the employee to provide an answer regarding the position within the three-day period. The job had indeed been posted and the deadline for accepting applications was later than the amount of time given to the employee. The arbitrator added that the employer breached its duty to reassign the employee to less demanding tasks and therefore to find an alternative to the administrative dismissal.

The employer applied for judicial review of the decision on the grounds that the arbitrator imposed an obligation on the employer that does not exist in Québec labour law, namely to reassign the employee to less demanding tasks as opposed to proceeding to a dismissal.

The decision

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The Honourable Justice Pierre-C. Gagnon of the Superior Court held that the arbitrator's conclusions were reasonable and dismissed the application for judicial review.

Justice Gagnon held that the employer had an obligation under Québec law to make a reasonable effort to reassign the employee to another more suitable position. Therefore, despite the fact that this obligation is not expressly stated in *Costco*,[3] which is considered the leading case, the "Edith Cavell"[4] test still applies in Québec.[5]

In this decision from a British Columbia arbitration tribunal, the arbitrator outlined five criteria for evaluating administrative dismissals, similar to those developed in *Costco* in Québec.

While Justice Delisle acknowledged in *Costco* that the criteria developed by the Québec courts are based on those coming out of *Edith Cavell*, he did not apply the criterion requiring the employer to make a reasonable effort to reassign the underperforming employee to another position more suited to the employee's abilities, nor was such a criterion specifically adopted by the Québec courts.

Justice Gagnon held that this obligation of means does not apply to every case in Québec, but that, in this matter, arbitrator Ménard's decision that the employer breached its obligation to reassign the employee was reasonable.

Conclusion

It will be interesting to see how both this case and the case law regarding administrative dismissals due to poor performance more generally evolves, should the decision be upheld on appeal.[6].

This obligation, which has been newly incorporated into Québec law, may end up altering the usual process followed by employers in cases of administrative dismissals. The employer may then have to assess the possibility of reassigning an underperforming employee to another more suitable position before dismissing the employee on administrative grounds, and perhaps provide sufficient time within which the employee can decide to accept the new position.

Could the courts find that there has been a "constructive dismissal" were the new position to substantially change the basic conditions of the employment contract (for eg., wages and level of responsibility)? Stay tuned...

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1. *Commission scolaire Kativik* c. *Ménard*, 2017 QCCS 4686.
2. *Association des employés du Nord québécois et Commission scolaire Kativik* (Harry Adams), 2015 QCTA 247.
3. *Costco Wholesale Canada Ltd. c. Laplante*, 2005 QCCA 788: this landmark decision in Québec outlines the five criteria used by Québec courts to uphold an administrative dismissal for poor performance. They are a) the employee is aware of the company's policies and what the employer expects of the employee, b) the employee has been notified of any deficiencies, c) the employee had the support needed to remedy the deficiencies and meet the employee's objectives, d) the employee was given a reasonable time period within which to adapt and e) the employee was informed of the risk of dismissal should there be no improvement.
4. *Re Edith Cavell Private Hospital and Hospital Employees' Union, Local 180*, (1982), 6 L.A.C. (3d) 229 (B.C.).
5. Especially, as the judge states, since the Supreme Court's decision in *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28 endorsing the approach adopted in *Edith Cavell*.
6. An application for leave to appeal the Superior Court decision has been filed.

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