The Court of Appeal hands down its decision in the Kativik case: A second chance for poor performance employees?

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Does an employer have to make reasonable efforts to reassign an employee to another suitable position before proceeding to dismissal due to poor performance?

This issue has been the cause of a great jurisprudential controversy, especially since the Superior Court rendered its decision in *Kativik*[1].

This judgment handed down in October 2017, implied that such an obligation could apply to Québec employers in addition to the five criteria established in *Costco*[2] to determine whether a dismissal for poor performance is abusive, arbitrary or unreasonable.

Labour market stakeholders have since been waiting for the Court of Appeal's judgment in this case, which was finally rendered on May 31, 2019[3].

Background on the *Kativik* case

Here are the highlights of this saga[4]:

> An administrative technician had agreed on a three-month performance improvement plan with an employer in order to solve performance issues;
> During this period and faced with the employee's inability (or difficulty) to meet the plan's requirements, the employer offered him a receptionist position and gave him three days to accept the offer, even though the position was posted with a deadline for accepting applications that was longer than the amount of time given to the employee;
> The employee refused the offer, preferring to continue working according to the terms of his improvement plan;
> Given the employee's lack of progress, the employer dismissed the employee for administrative reasons, being poor performance.

Arbitrator Jean Ménard was seized of the grievance challenging the dismissal. He held that the employer had failed to fulfill its obligation to reassign the employee to less demanding duties, relying in particular on three arbitral awards filed by the labour union attorney applying this principle. He thus allowed the grievance[5]. The arbitrator pointed out that it was unreasonable for the employer to require a response from the employee within three days when the evidence showed that the employee would have been able to perform the replacement position duties. The employer challenged this decision by way of an application for judicial review.

The Superior Court dismissed the application on the grounds that arbitrator Ménard had rendered a reasonable ruling by concluding that the employer had not fulfilled its obligation to find an acceptable alternative to the complainant's dismissal. To do so, the Court indicated that although the five criteria used in *Costco* did not clearly state this sixth criterion, it remained applicable in Québec according to the principles enunciated in *Edith Cavell*[6], a decision from British Columbia that inspired the five criteria developed and established by the Québec courts for dismissals due to poor performance.

Decision of the Court of Appeal

The judges of the Court of Appeal dismissed the appeal and upheld the arbitral award on the grounds that it possessed all the attributes of reasonableness. However, the judges indicate that :

> The arbitrator departed from the majority of jurisprudence on dismissal for unsatisfactory performance;[7]
> Another decision-maker could have come to another conclusion;[8]
> This approach is certainly uncommon, but it is not unreasonable.[9]

That means that although an employer may terminate an employee's employment for performance reasons without having to reassign him or her to another suitable position, a Tribunal may find that such dismissal is unjustified, depending on the circumstances of the case, in the absence of evidence of the employer's effort to reassign the employee[10]. In this regard, establishing the legality of dismissal for unsatisfactory performance essentially comes down to context and will be decided on a case by case basis.

The Court also points out that in the presence of a plurality of applicable criteria and jurisprudential controversies, the same factual situation may give rise to different reasonable outcomes, as is the case here. The Court thus concluded that the trial judge was right to dismiss the application for judicial review given that the arbitral award, in which the arbitrator applied this sixth criterion, was a possible and acceptable outcome.

Conclusion: A new criterion, yes or no?

On the basis of the Court of Appeal's reasons in this case, an employer may not be required to make reasonable efforts to reassign an employee to another suitable position before proceeding to dismissal for poor performance but depending on the circumstances, may be obliged to do so.

A prudent manager should therefore analyze each individual situation in order to determine whether or not the circumstances require a reassignment.

It should be noted that in the Kativik case, the employee's new supervisor had significantly changed his duties, which resulted in performance difficulties and the personal improvement plan. Yet, the employee had not encountered any difficulties in his previous duties. Such special circumstances could thus confer reasonableness upon a conclusion of the arbitrator requiring the employer to attempt a reassignment before dismissal.

At the time of publication, the delays to file an application for leave to appeal to the Supreme Court have not expired. We shall follow this matter and keep you informed of any future developments.

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1. *Commission scolaire Kativik* c. *Ménard*, 2017 QCCS 4686; on the subject of the jurisprudential controversy, see our article published on the Ordre des CRHA website [French only].
2. *Costco Wholesale Canada Ltd.* c. *Laplante*, 2005 QCCA 788: this landmark decision in Québec outlines the five criteria used by Québec courts to uphold a 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 his 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.
3. *Commission scolaire Kativik* c. *Association des employés du Nord québécois*, 2019 QCCA 961.
4. The facts are more fully described in our publication further to the Superior Court decision.
5. *Association des employés du Nord québécois* et *Commission scolaire Kativik*, 2015 QCTA 247, para. 126.
6. *Re Edith Cavell Private Hospital and Hospital Employees' Union, Local 180*, (1982), 6 L.A.C. (3d) 229 (BC).
7. *Kativik*, supra note 3, para. 19.
8. *Id.,* para. 18.
9. *Id.*
10. *Id.* para. 17.