A dismissed employee's obligation to mitigate damages in the context of the COVID-19 pandemic

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Over the years, the Quebec courts have repeatedly stated that dismissed employees have a duty to mitigate the damages they suffer as a result of a dismissal. This obligation, which is now codified in the *Civil Code of Québec,*[1] has been adapted to the circumstances of the cases over which the courts have presided. The question, then, is whether the COVID-19 pandemic is likely to have an impact on a dismissed employee's obligation to mitigate damages.

The Administrative Labour Tribunal (hereinafter the "**ALT**") addressed this issue in its recent decision *Tourigny* c*. Fonds de solidarité des travailleurs du Québec (FTQ)*[2] (hereinafter the "**Tourigny decision**").

Background

On August 30, 2021, the ALT upheld Ms. Tourigny's complaint against a dismissal made without a good and sufficient cause under section 124 of the *Act respecting labour standards.*[3]

The complainant, who held a position as director of the *Direction Marketing Investissement* department before being dismissed on January 28, 2019, claimed, in particular, the wages she lost as a result of her dismissal up to the date of the ALT decision upholding her complaint.

The employer argued that the complainant had failed in her duty to mitigate her losses. For her part, the complainant felt that she had done everything in her power to find a job quickly.

It should be noted that the COVID-19 pandemic began while the complaint was being heard in

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court.

Decision on the obligation to mitigate losses

The ALT reiterated, quoting the decision in *Durocher* c. *Lisam America Inc.,*[4] that dismissed employees have a duty to mitigate damages resulting from their dismissal, even when they are dismissed without good and sufficient cause. This obligation is one of means and is assessed based on the circumstances of each case using the reasonable person test. The ALT further noted, quoting the decision in *Agropur, Division Natrel* c. *Teamsters Québec local 1999 (Montpetit),*[5] that the duty to mitigate damages consists of two components, namely (1) to make reasonable efforts to find new employment, and (2) not to refuse an offer of employment that is reasonable in the circumstances.

In the Tourigny decision, the ALT confirmed that the complainant had failed to mitigate her losses. As such, it reduced the indemnity for lost wages by $34,000, finding that, given the pandemic and the scarcity of job offers, the complainant should have conducted a more thorough job search and been more open to positions that did not perfectly match the job she held prior to her dismissal. Thus, the ALT stated the following:

[69] For the Tribunal, during a recession or even a pandemic, when job offers are less important and less financially attractive than in normal times, one must, on one hand, expect to conduct a more rigorous search.

[70] On the other hand, one must be more open to offers which, even if they do not correspond exactly to those held in the previous job, are related to the expertise or jobs already held. [our translation]In short, with the pandemic in mind, the ALT deducted two (2) months of gross salary from the indemnity for lost wages, which amounted to $34,000, because:

> The complainant had taken two (2) trips abroad of about ten days each in the first few months following her dismissal, and the employer did not have to assume the financial consequences of the complainant's choice to do so;
> The complainant had been in a management position for a short time and limited her job search to positions similar to the one she held prior to her dismissal. However, limiting herself to management positions with working conditions similar to those she had with the employer—which were exceptional—did not demonstrate a willingness to mitigate her damages. Thus, according to the ALT, the complainant had set aside several positions that could have provided her with a substantial income; and
> The complainant had applied for only one job during the first eight (8) months following her dismissal and thirty-eight (38) jobs over the next twenty (20) months, that is, fewer than two (2) jobs per month. Her job search efforts were therefore not considered sufficient.

Conclusion

In short, the Tourigny decision confirms that the context in which employees find themselves is relevant in determining the extent of their obligation to mitigate the damages they suffer as a result of their dismissal. In theory, employers should not be penalized when a dismissed employee fails to put in the necessary effort to find a job during challenging economic times. In circumstances such as these, arising from, say, a pandemic, a dismissed employee must make greater efforts to find a job, failing which the indemnity paid by their former employer may be reduced considerably.

The members of our Labour and Employment Law group are available to counsel you and answer your questions.

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1. CQLR, c. CCQ 1991, art. 1479.
2. 2021 QCTAT 5548.
3. CQLR, c. N-1.1.
4. 2020 QCTAT 4648.
5. 2018 QCTA 445.

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