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TABLE OF CONTENTS

UPDATE ON COLLECTIVE DISMISSAL	3
MORE SALT IN THE WOUND WITH NEW FINES	9
A DISTINCTION BASED UPON « PARENTAL SITUATION » IS NOT DISCRIMINATORY	11
WAL-MART: A CLOSED DOOR OPENS ANOTHER ONE	15
LORANGER MARCOUX REPEATS ON CANADIAN LAWYER TOP TEN LIST	19

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UPDATE ON COLLECTIVE DISMISSAL

When the legislator enacted substantial amendments to the *Labour Standards Act* (hereinafter the “Act”) in 2002, provisions were also included which dealt with collective dismissal. Prior to these changes, the *Act respecting Manpower, Vocational Training and Qualification* imposed similar obligations upon employers, but with less important consequences in cases of non-compliance.

Since the coming into force of these provisions (May 1, 2003), Quebec has experienced a major recession, which unfortunately led to numerous collective dismissals touching every sector of the Quebec economy. Some of the collective dismissals which have occurred over recent years have given rise to litigation, which allows us to more accurately gauge the impact of these provisions.

What is a collective dismissal?

Article 84.0.1 the Act defines a collective dismissal as a termination of employment by the employer, including a layoff for a period of six months or more, involving not fewer than 10 employees of the same establishment in the course of two consecutive months.

It is worth pointing out that the section dealing with collective dismissal does not apply: 1) to the layoff of employees for an indeterminate period, but in fact less than six months; 2) in respect of an establishment whose activities are seasonal or intermittent; 3) in respect of an establishment affected by a strike or lock-out within the meaning of the Labour Code.

Two terms in the definition of collective dismissal deserve a particular attention, i.e. “employee” and “establishment”.

Employee

The legislator specifically provides at Article 84.0.2 that the following employees are excluded from application of the Act: 1) an employee who has less than three months of uninterrupted service; 2) an employee whose contract for a fixed term or for a specific undertaking expires; 3) an employee to whom section 83 of the Public Service Act applies; 4) an employee who has committed a serious fault; 5) an employee expressly excluded from application of the Act pursuant to Article 3, including senior managerial personnel.

Thus, any dismissed employee not specifically excluded has to be part of the calculation which determines whether an employer is in the presence of a collective dismissal.

Establishment

Contrary to a number of other labour law provisions, the legislator doesn't refer here to the notion of enterprise, but rather to that of establishment. It follows that by using different terms, the legislator is necessarily contemplating a different reality. The definition of the word establishment may trigger important consequences where the employer conducts business in several locations.

Under the case law and the doctrine, an establishment is more than just a mere building or a civic address. The *Commission des normes du travail* echoes this line of the case law on its Web site, which underlines that the notion of establishment may “be determined with respect to a management or activity unit governing physical facilities”.¹ Thus, separate buildings or physical facilities may constitute a single establishment, provided that there is a management or activity unit. Conversely, it is possible to have more than one establishments in the same building or physical facility where there is sufficient functional autonomy between the management or activity units found there.

EMPLOYER'S OBLIGATIONS

Notice

The principal obligation of an employer dealing with a collective dismissal is set forth at Article 84.0.4. which states that, prior to proceeding with a collective

dismissal for technological or economic reasons, the employer shall give notice to the Minister of Employment and Social Solidarity (hereinafter, the “**Minister**”) within the following minimum periods:

- 8 weeks where the number of employees affected by the dismissal is at least equal to 10 and less than 100;
- 12 weeks where the number of employees affected by the dismissal is at least equal to 100 and less than 300;
- 16 weeks where the number of employees affected by the dismissal is at least equal to 300.

The Regulation respecting Labour Standards sets forth the content of the notice.

The Act also stipulates that throughout the collective dismissal notice period, the employer may not change the wages of an employee affected by the collective dismissal or, where applicable, the group insurance and pension plans recognized in the employee's place of employment without the written consent of that affected employee or the certified association representing the employee.

A recent arbitration award² furthermore confirms that the purpose of the notice is not to inform employees of termination of their employment, but rather to implement measures which are designed to reduce the consequences of a collective dismissal, including the creation of reclassification assistance committees where the dismissal concerns 50 or more employees.

Arbitrator Faucher also confirmed in this matter that the employer is not required to determine the exact date of dismissal. The arbitrator in fact added that the employer may amend an initial notice by either advancing or postponing the date of collective dismissal, provided any such notice complies with the obligations set forth in the Regulation. Arbitrator Faucher wrote as follows:

“[52] Furthermore, the legislator has imposed no duty on the employer to indicate the effective date of dismissal, but rather asks for an anticipated date. This is a significant nuance, which is actually logical given the purpose of the law. In fact, collective dismissal doesn't necessarily occur on any given date, but may take place at various points in time. The very notion of collective dismissal refers to the dismissal of employees over a period of two consecutive months. Since the employer is not required to provide the names of targeted employees, it is not required to inform the ministry of each and every date of individual dismissal.”

[53] “Moreover, as the legislator did not choose to impose upon the employer the obligation to specify the precise date of dismissal, this implies the granting of a certain operational flexibility. Thus, the employer may adjust according to circumstances, and thus advance or defer a collective dismissal without having to reinitiate the entire process, provided obviously, that the effective date of dismissal occurs within a reasonable period following the initially scheduled date announced. It serves no good purpose to stipulate a date arbitrarily which has no connection with reality, other than to avoid the sanction of the law. It goes without saying that any such action would be contrary to the spirit and intent of the law. Nor does the law prohibit an employer from amending an initial notice, by either advancing or postponing collective dismissal, provided this measure or amendment complies with relevant legal and regulatory requirements.” (Our translation)

We note therefore that the obligation of the employer does not extend to having to notify each employee affected by the collective dismissal. This is why the legislator deemed it appropriate to specify that an employer who gives a notice of collective dismissal to the Minister is not exempted from giving the individual notice of termination or compensatory indemnity in lieu thereof, as provided at Article 82 of the Act.

Payment of an indemnity

The principal novelty introduced by the legislator with these collective dismissal provisions resides in the fact that the employer who gives no notice to the Minister in accordance with Article 84.0.4, or who gives insufficient notice, must pay to each dismissed employee an indemnity equal to the employee's regular wages, excluding overtime, for a period equal to the time period or remainder of the time period within which the employer was required to give notice. This indemnity must be paid at the time of dismissal or at the end of a period of six months after a layoff of indeterminate length or a layoff expected to last less than six months but which exceeds that period.

Exceptions

To avoid these obligations, the employer must demonstrate that it is in a situation of “superior force” or an “unforeseeable event” which prevents it from respecting these time limitation periods. Under this scenario, the employer must forward notice of the collective dismissal to the Ministry as soon as the employer is in a position to do so.

Certain recent decisions have ruled on the notions of “superior force” and “unforeseeable event”. In one matter³, the Court of Quebec found that a substantial and sudden loss of contracts which caused the weekly production of pairs of jeans to decrease from 11,500 to 6,500 within one month, constituted an unforeseeable event. In essence, although the judge acknowledged that it was possible for the employer to lose contracts, he nevertheless concluded that it was unforeseeable that such a large volume of contracts would be lost over such a short time period. The judge wrote as follows: « Since the legislator provides for a defence based upon an unforeseeable event, this expression should not be interpreted as meaning an unpredictable event. Thus, given the nature of this business, it was possible that Troie Inc. loses contracts from time to time, but it was unforeseeable that such a volume would be lost over such a short period of time.” (Our translation)

More recently, arbitrator Faucher distinguished the unforeseen event from superior force or an act of God as follows: « It is therefore necessary to conclude that the unforeseen event can be distinguished from an act of God (*cas fortuit*) in that it is not necessary to examine the criterion of irresistibility. » The arbitrator added that « there has to be a relationship of cause and effect demonstrated between the impossibility of forwarding notice and the alleged event”.⁴ (Our translation)

Penal provisions

In closing, we underline that the Act provides that the failure of an employer to comply with the provisions of the Act dealing with collective dismissal may give rise to a fine of \$1,500 per week or portion of week corresponding to the default or delay.

Carl Panet-Raymond

¹ Quotation retrieved from the Commission des normes du travail Web site.

² Syndicat canadien des Communications, de l'Énergie et du Papier, Section locale 4848 (unité de l'encartage) et Journal de Montréal, D.T.E. 2010T-222, a decision rendered on March 1, 2010.

³ Commission des normes du travail et Industrie Troie Inc., D.T.E. 2009T-60 (C.Q.)

⁴ Syndicat canadien des Communications, de l'Énergie et du Papier, Section locale 4848 (Unité de l'encartage) et Journal de Montréal, supra, note 2.



MORE SALT IN THE WOUND WITH NEW FINES

REMINDER TO EMPLOYERS: ENTRY INTO FORCE OF NEW OCCUPATIONAL HEALTH AND SAFETY PROVISIONS

In the last issue of our newsletter, we reported on the June 2009 adoption of Bill 35 which has introduced significant amendments to certain aspects of the *Act respecting Occupational Health and Safety (AOHS)*.

One of these amendments deals with the substantial increase in fines arising out of non-compliance with the *AOHS* or its regulations, or in cases where an employer seriously compromises the health or safety of a worker. Indeed, as of July 1, 2010, current fines will be doubled. By January 1, 2011, current fines will have tripled. For example, where an employer acts in a manner which compromises the health or safety of a worker, the current minimum fine is 5 000\$. However, by July 1, 2010, the minimum fine will be 10 000\$ and will be further increased to 15 000\$ on January 1, 2011.

In our view, these heavier fines create a corresponding risk of an increase in litigation, as under the current regime, many employers were opting to resolve disputes by paying the minimum fine rather than incurring the more substantial costs involved in going to court.

Christine Fortin



A DISTINCTION BASED UPON « PARENTAL SITUATION » IS NOT DISCRIMINATORY

In the matter *Syndicat des intervenantes et intervenants de la santé Nord-Est québécois (SIISNEQ) (CSQ) v. Centre de santé et de services sociaux de la Basse-Côte-Nord*, a recent judgment handed down on March 18, 2010, the Quebec Court of Appeal ruled that the decision of an employer to no longer subsidize the residence of an employee during parental leave is not discrimination based on the civil status of the employee. Article 10 of the *Charter of Human Rights and Freedoms* (hereinafter the « **Charter** ») prohibits discrimination upon several grounds, including the civil status of a person.

Furthermore, the Court of Appeal has indicated that any distinction based on parental situation, parental status or parental leave cannot be deemed discriminatory, as these grounds are not contemplated by Article 10 of the Charter.

The facts

The complainant was a nurse who worked in a hospital located in a isolated region. Under the collective agreement, she was entitled to subsidized housing. This benefit was deemed to be part of her remuneration and was taxable.

In 2004, she went on maternity leave, followed by unpaid parental leave. During the latter leave, the employer allowed her to keep her residence, but

without granting the reduced rate. She therefore filed a grievance, alleging a violation of the collective agreement and the Charter. In fact, the complainant alleged that she had been a victim of discrimination due to her « civil status », a prohibited ground of discrimination under the Charter.

The arbitrator dismissed the grievance. As a result, the union filed an application for judicial review, which was also dismissed. This judgment was then appealed before the Quebec Court of Appeal.

The judgment of the Court of Appeal

The Quebec Court of Appeal upheld the decision rendered by the arbitrator. The Court ruled that although the right to parental leave arises out of the parental situation, it is not a component of the “civil status” of the person. In fact, the Court of Appeal decided that any inconvenience arising out of parental leave, from the standpoint of remuneration, cannot be deemed discrimination based upon civil status, nor does it qualify under any of the other grounds prohibited under Article 10 of the Charter.

The Court of Appeal expressed this in the following terms:

*[23] « The condition or the parental situation, which is not formally defined in the collective agreement or the Charter, can nevertheless be simply defined in the following terms, i.e. the fact of being a parent. In itself, it is nothing more than this fact. It is neither a right, nor a condition identified in relation to any civil act whatsoever. Although children are identified in relation to their parents in a formal birth certificate, this is not the case for paternity.
(...)»*

[27] « In law, it is important to emphasize that neither Parliament, in the Canadian Charter of Rights and Freedoms, nor the provincial legislator at Article 10, deemed it necessary to promote parental situation, parental status and even less so parental leave to the rank of fundamental rights enjoying the protection of the charters.»

(Our translation and emphasis) (Reference omitted)

The narrow reading of the notion of « civil status » favoured by the Court of Appeal

It was fairly well-established under the case law prior to this judgment of the Court of Appeal that the notion of « civil status » also included the condition of being a parent, i.e. a mother or father.

This judgment appears to mark a major change: the Court of Appeal mentions that the provincial legislator, at Article 10 of the *Charter of Human Rights and Freedoms*, did not deem it appropriate to promote the condition of being parent or parental status to the rank of fundamental rights enjoying the protection of the Charters.

However, this development in the case law changes nothing with respect to the application of *An Act respecting Labour Standards*, which provides certain minimum standards governing leave and absences for family or parental reasons, at Articles 79.7 et seq, which continue to bind employers.

For the time being, it would appear that the decision of the Court of Appeal, which was not appealed before the Supreme Court of Canada, brings an important qualifier to the notion of « civil status » under existing case law. We are therefore adopting a “wait and see” position, and look forward to seeing how the Quebec courts will apply the notion.

Ann Sophie Del Vecchio



WAL-MART: A CLOSED DOOR OPENS ANOTHER ONE

WHILE CONFIRMING THAT EMPLOYERS ARE ENTITLED TO SHUT DOWN THEIR BUSINESS OPERATIONS, THE SUPREME COURT OF CANADA OPENS THE DOOR TO ANOTHER RECOURSE FOR UNIONIZED EMPLOYEES

In two complementary and highly anticipated judgments, the Supreme Court of Canada upheld, on November 27, 2009, the right of Wal-Mart to shut down its business operations, even on anti-union grounds (*Plourde v. Wal-Mart Canada Corp* and *Desbiens v. Wal-Mart Canada Corp*).

Here's a reminder of the facts. In August, 2004, the Jonquière store becomes unionized. The employer and the newly certified union attempt, unsuccessfully, to reach agreement on the terms of an initial collective agreement. In February 2005, on the same day a dispute arbitrator is named, Wal-Mart announces closure of the Jonquière store, thereby terminating the employment of nearly 200 employees.

Employees and union file several claims, including a complaint pursuant to Sections 15 to 17 of the *Labour Code*, alleging that the loss of their employment is directly related to unionization of the store.

These provisions offer recourse to employees who are penalized because of the exercise of a right provided for under the *Code*. Section 17 establishes a presumption in favor of the employees: they only have to demonstrate the

exercise of a right provided for under the *Code*, and thereafter the employer has to prove that the penalty was imposed for good and sufficient reason.

In its judgment, the Supreme Court of Canada first circumscribed the issue raised before the court. In its view, the issue was not to examine the practices of Wal-Mart in the field of labour relations, but solely to determine whether it was possible to rely on the procedural mechanism set forth in Sections 15 to 17 of the *Code* in a case where a store no longer exists.

According to the majority of the Supreme Court, such recourse is not open to employees where a company ceases to carry on business.

The Court adopts a literal and formalist approach. It reasons that the fact that Section 15 deals with the reinstatement of the employee in his or her employment reveals that the legislator considered the existence of an operational workplace as a necessary condition to success for such complaint. Consequently, given that the Jonquière store was no longer carrying on business, Section 15 could not be applicable, as reinstatement into the workplace was no longer possible.

The Court also points out that, for more than 45 years, Quebec case law has recognized that where the closure of a business by an employer is real and definitive, the dismissals which are carried out are caused by the closure of business activities and not by the union activities of employees. In fact, the reason which motivated the closure does not have to be examined within the framework of a recourse based upon Sections 15 *et seq.* of the *Code*. The Court therefore reaffirms the right of an employer to close down its business, even upon grounds which may be reprehensible from a social standpoint.

Furthermore, the Court points out, on several occasions, that the closure of a business does not immunize the employer against the financial consequences which may arise out of the closure for anti-union reasons. The Court nevertheless specifies that the appropriate recourse can be found elsewhere in the *Code*, i.e. in Sections 12 to 14. These provisions notably prohibit the employer from hindering the activities of any employees' association.

Any such recourse would deal directly with the reason underlying the closure of the store and not the reason for termination of employment of employees of a store which no longer exists.

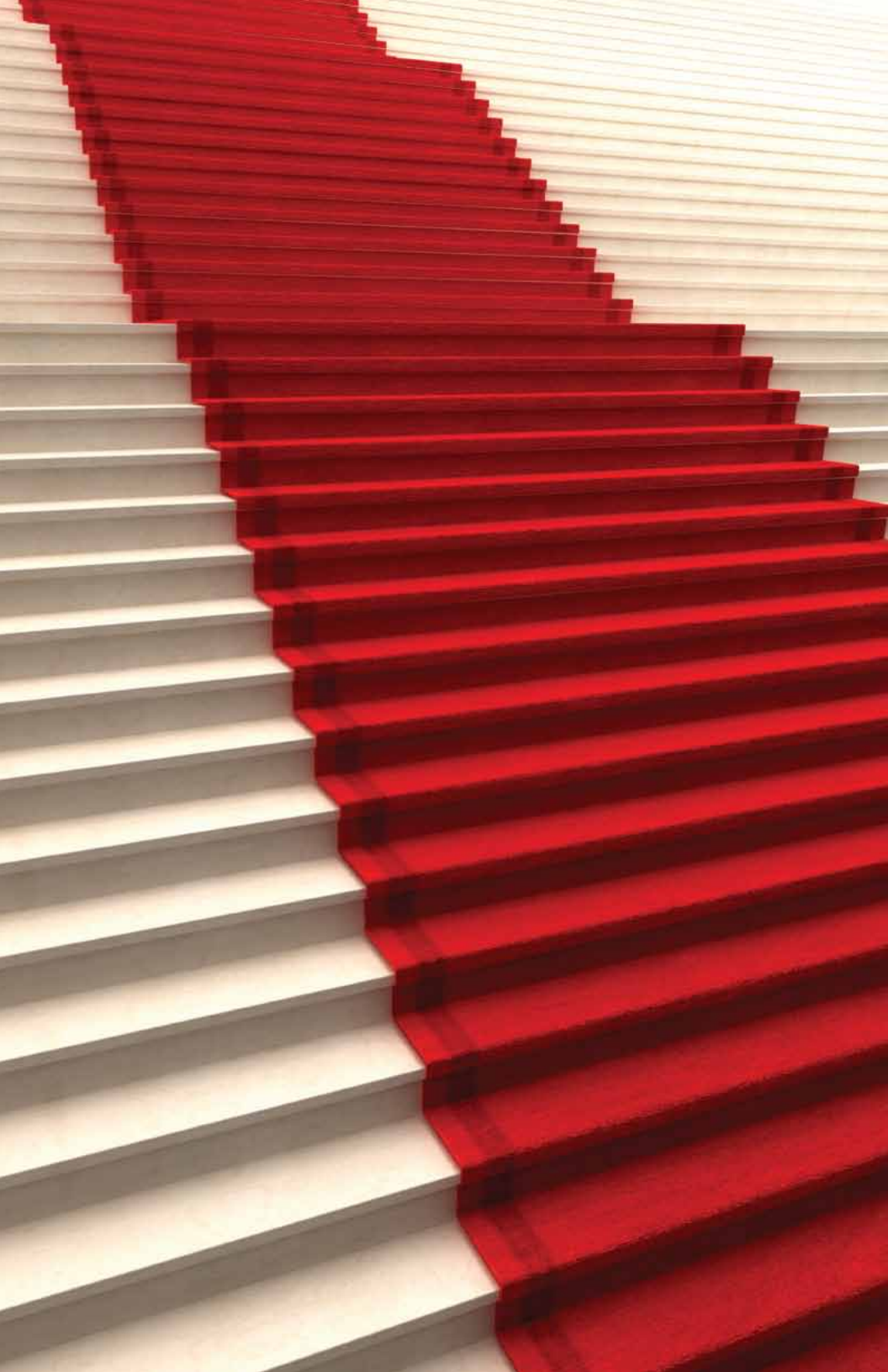
However, Sections 12 to 14 of the *Code*, contrary to claims based on Sections 15 *et seq.*, impose a heavy evidentiary burden upon the employees, who must prove anti-union animus of the employer, which is far from a straightforward matter. In Wal-Mart, certain employees relied upon Section 12 *et seq.* of the *Code*, but they withdrew their complaint in 2007.

Wal-Mart prevailed in this case, but the Supreme Court of Canada nevertheless rules that employees whose employment terminates following the closure of a business may successfully seek redress pursuant to Sections 12 *et seq.* of the *Code* and thus be awarded compensation if they succeed in proving that the closure is tainted by anti-union animus.

At the time of this writing, we are solely aware of one decision where a court adopts the Supreme Court of Canada's conclusion that the appropriate recourse, where anti-union animus taints the purported closure of a business, is set forth in Sections 12 to 14 of the *Code* (*Association des pompiers professionnels de Québec inc. c. Ville de Québec*). However, this matter related to a reorganisation which was structured so as to eliminate union positions and making them non-union positions. On April 30, 2010, the *Commission des relations du travail* granted an application for an interim order suspending the elimination of these positions.

It will be interesting to follow the evolution of the case law on this issue, in order to see whether or not the recourse based on Sections 12 to 14 of the *Code* actually presents an interesting alternative, despite the higher burden of proof which has to be met by the complainants.

Caroline Desjardins-Saey



LORANGER MARCOUX REPEATS ON CANADIAN LAWYER TOP TEN LIST

In its May 2010 issue, **Canadian Lawyer** magazine once again placed Loranger Marcoux on its select list of ten « boutique » law offices identified as leading labour and employment specialists in Canada - the sole law office in Quebec representing management to receive this honour.

Loranger Marcoux is indeed proud to be distinguished once again by Canadian Lawyer.



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