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Rights and responsibilities upon termination of employment: Resignation vs. Dismissal

When an employment relationship comes to an end, the rights and responsibilities of both employees and employers differ significantly depending on whether the employee resigns or is dismissed. Each scenario carries distinct legal implications, particularly concerning severance pay, entitlement to various benefits and the available remedies following termination.

Resignation occurs when an employee voluntarily chooses to leave their position, while dismissal results from the employer's decision to terminate the employment, either due to disciplinary issues or the employee's inability to perform their duties. Despite their apparent contrast, in practice, the boundary between these two concepts can be blurred, especially in situations involving conflicts or organizational changes.

Over time, courts have refined the criteria for determining a resignation. Audet, Bonhomme and Gascon, in *Le congédiement en droit québécois,* summarize these criteria as follows:

a. Resignation comprises both objective and subjective elements.

b. It is an employee's right, not the employer's, and therefore must be voluntary.

c. How to assess whether an employee resigned varies depending on whether the intention to resign is expressed.

d. The intention to resign is not presumed if the employee's conduct allows for another interpretation.

e. An expression of intent to resign doesn't necessarily confirm the employee's true intention.

f. In cases of ambiguity, courts generally refrain from recognizing a resignation.

g. The parties' past and subsequent conducts are relevant in assessing resignation[1].

According to case law, resignation must be clear and unequivocal. In other words, the employee must explicitly state their intention to resign, whether in writing, verbally, or through conduct incompatible with any other interpretation. In all cases, renouncing such a fundamental right as employment cannot be assumed from circumstances where it's not clearly expressed.

Moreover, resignation must be freely chosen, implying that the employee leaves their job without any form of coercion or pressure from the employer. Employers cannot indirectly force an employee to resign by imposing substantial changes in working conditions or creating a hostile environment, even if there is no malicious intent. If an employee resigns due to such circumstances, it might be deemed "constructive dismissal".

Determining whether a resignation has occurred is not always straightforward and may require a thorough examination of the case's facts.

In a recent case[2], the Administrative Labour Tribunal (the "**Tribunal**") had to decide on the qualification of the employment termination when the employee explicitly stated she was not resigning. In this case, the employee demanded that changes be made to her working conditions, particularly with regard to the ambient temperature and the music played in the store. Faced with her employer's refusal to comply with her demands, the employee planned a staged event and left her job precipitately, stating that she would not return to work until her demands were met, while making it clear that this was not a resignation. After analyzing the facts, the Tribunal concluded that, despite her contradictory statements, the employee's behaviour indicated an intention to abandon her job. The Tribunal concluded that her hasty departure, without authorization, and her refusal to work unless the employer complied with her demands constituted a resignation.

Conversely, in another case, the Tribunal ruled that leaving with personal belongings was not enough to infer resignation[3]. Indeed, according to the Tribunal, the circumstances surrounding the employee's departure indicated rather that he had acted in reaction to a conflict, tensions with his employer and disciplinary measures imposed on him, and that he had no real intention of resigning. In this context, the employer's refusal to let him return to work on the grounds that he had abandoned his job the previous day constituted dismissal.

It's essential to note that resignation is a unilateral act effective upon communication to the employer, whether or not the employer acknowledges it. Consequently, an employee cannot unilaterally revoke a resignation during or after the notice period.

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1 Georges Audet, Robert Bonhomme and Clément Gascon, Le congédiement en droit québécois, en matière de contrat individuel de travail, 3e ed. Cowansville, Éditions Yvon Blais, p. 18-90.

2 *Boily v. Centre Massicotte inc*, 2024 QCTAT 37

3 *Bangia v. FNC Avocats inc*, 2024 QCTAT 131

Besides, apart from not being entitled to severance pay or employment insurance benefits in the case of a dismissal, the classification of termination is crucial in determining whether the employer can enforce postcontractual restrictive covenants adhered to during employment. Article 2095 of the *Civil Code of Québec* prohibits invoking non-competition clauses in cases of dismissal without cause or constructive dismissal, a principle extended to non-solicitation clauses by most jurisprudence.

In conclusion, as mentioned above, the assessment of resignation's validity in employment law is rigorous and case-specific. Since a resignation cannot be presumed in the absence of a clear and unambiguous statement or behaviour, we recommend that you proceed with caution and consult the members of our employment law team before concluding a resignation has occurred.

Decision briefs

Gestion Juste pour rire inc. v. Gloutnay, 2024 QCCA 156

Mr. Gloutnay ("**Mr. Gloutnay**") was employed by Groupe Juste pour Rire inc. ("**GJPR**") from 1993 until 2019, when he was terminated due to GJPR's financial difficulties. A unique and unusual fact characterizing this case, in 2004, Mr. Gloutnay and Gilbert Rozon ("**Mr. Rozon**") entered into an agreement wherein Mr. Rozon committed to providing Mr. Gloutnay with "permanent employment for life" through the GJPR companies. Relying on this agreement, Mr. Gloutnay, following his termination, initiated legal proceedings against GJPR (as well as related entities and Mr. Rozon), seeking reinstatement and compensation for lost wages, among other claims.

In a decision issued in the summer of 2022, the Superior Court of Québec determined that Mr. Gloutnay was indeed entitled to lifetime employment with GJPR. It ordered GJPR to reinstate him to his former employment, reimburse him for lost wages since the expiration of the payments of the indemnity in lieu of notice, and awarded him $20,000 in moral damages.

GJPR appealed the Superior Court's decision to the Court of Appeal, contending that the judge had made three legal errors in: (i) finding that Mr. Gloutnay had a lifetime employment guarantee; (ii) ordering for reinstatement and lost wage reimbursement in the context of a remedy under the *Civil Code of Québec*; and (iii) awarding of $20,000 in damages.

Regarding the first issue, the Court of Appeal found no reversible error in the Superior Court's determination that GJPR was bound by its commitment to offer Mr. Gloutnay lifetime employment. The Court also confirmed that while a contract committing an employee to work for an employer for life would be against public order (since this would involve the individual and his or her personal freedom), there is nothing to prevent an employer from waiving its right to terminate the employment contract in advance, as GJPR had done in this case.

However, the Court of Appeal sided with GJPR on the reinstatement issue. It noted that "contrary to the first instance judge's conclusion, the intuitu personae nature of [Mr. Gloutnay's] employment contract was an obstacle to such reinstatement" [our translation]. In this regard, Québec's highest court noted that Mr. Gloutnay had been hired because of his unique knowledge and to perform specific functions no longer required, and that in this context, his reinstatement "offers only an illusory remedy and presents inconveniences that are likely to outweigh the benefits of such an order" [our translation]. In saying this, the Court seems to open the door to the possibility that civil courts may, in other circumstances, order the reinstatement of an ex-employee who has brought a civil action against his former employer, which may be surprising given the state of the law.

Having overturned the judge's ruling on reinstatement, the Court granted Mr. Gloutnay's subsidiary claim for appropriate remedies, and ordered GJPR to compensate him with an indemnity in lieu of notice until his expected retirement age of 65, representing 11 years' salary minus the already paid year following dismissal. The Court acknowledged that the existence of an employment

guarantee does not eliminate the ex-employee's obligation to mitigate his damages, but concluded that, in this case, it is reasonable to believe that Mr. Gloutnay would not be able to find a job by 2030, given his very specialized skills. It therefore concluded that there is no reason to reduce the compensation to which he is entitled.

Lastly, the Court determined that the Superior Court erred in awarding moral damages to Mr. Gloutnay. It found no evidence to suggest GJPR had acted cavalierly, and the award constituted double compensation alongside the indemnity in lieu of notice.

Canadian Union of Public Employees, Local 301 v. Parc Six Flags Montréal (La Ronde), 2023 QCCA 1485

The Canadian Union of Public Employees, Local 301 (the "**Union**") was certified in 2017 to represent first aid employees at La Ronde theme park. For the first collective agreement, faced with demands it considered unreasonable and jeopardizing its financial stability, Parc Six Flags Montréal (La Ronde) (the "**Employer**") terminated all employees included in the bargaining unit and outsourced their duties to a subcontractor.

The Union contested the dismissals, which occurred during the period of negotiations of a collective agreement covered by section 59 of the *Labour Code* (the "**Code**"). The Employer defended its actions based on anticipated financial strain due to union wage demands. The Court of Appeal uphold the appeal, thereby reversing the arbitration award and Superior Court's decision.

In his award, the arbitrator, employing the analytical framework from the *Wal-Mart* decision[4], concluded that the Employer could alter working conditions if deemed reasonable by a prudent employer in similar circumstances, notwithstanding past practices. He considers that the disagreements between the parties are mainly due to differences over the qualification of employee status and the Union's monetary demands. Consequently, he found it reasonable for the Employer to refuse compensation based on qualifications rather than duties and, absent a satisfactory agreement, to justify dismissal. He deemed the dismissal a legitimate exercise of the Employer's management rights for sound economic reasons, which would have occurred irrespective of union certification. In the judicial review decision, the Superior Court also concluded that the terminations and the recourse to subcontracting were consistent with the management standards of a reasonable employer in the circumstances. It ruled that there was no reason to intervene, since the arbitrator's decision that the working conditions had been modified without violating the associational process or the right to negotiate was not unreasonable. This prompted the Union's appeal.

The Court of Appeal upheld the Union's first ground of appeal, deeming it unreasonable for the arbitrator to rely on the notion of a reasonable employer to determine that the dismissals did not contravene section 59 of the Code, when the evidence showed that the decision was not consistent with the Employer's past practices. In this regard, the Court pointed out that the framework for analyzing section 59 of the Code, established by the Supreme Court in *Wal-Mart*, which requires a determination of whether the employer would have acted in the same way in the absence of a petition for certification, does not provide for two alternative criteria, but rather successive ones. Thus, the first question is always whether the employer's alleged action is consistent with its past practices, and only if this question cannot be answered because the situation is new can the court ask what a reasonable employer in the same circumstances would have done. The Union's second contention was that the arbitrator had erred in considering the Union's wage demands and in analyzing their monetary impact himself. The Court agreed, stating that the arbitrator could not rule on the Union's demands in the context of negotiations, nor evaluate the parties' conduct in this regard. It viewed the Employer's reaction as a response to monetary demands made in the course of negotiations, and not as a solution to a precarious financial situation. Such a preventive measure contravenes article 59 of the Code, which is designed to facilitate certification and promote good faith bargaining.

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4 *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada (S.C. Can., 2014-06-27)*, 2014 SCC 45

Canadian Union of Public Employees, Local 3333 v. Réseau de transport de Longueuil, 2024 QCCA 204

The Court of Appeal has dismissed the appeal by the Canadian Union of Public Employees, Local 3333 (the "**Union**") and uphold the decision of the Superior Court which dismissed the application for judicial review of the arbitration award. In this ruling, the Court of Appeal emphasized that parenthood, parental status and family or parental situation do not constitute prohibited grounds for discrimination.

The collective agreement between the Réseau de transport de Longueuil (the "**RTL**") and the Union provides for an "attendance leaves" provision, allowing employees with a good attendance record to use their sick leave and overtime balance to obtain an additional one or two weeks of leave per year. To qualify for this leave, employees must not have been absent more than three (3) instances and/or for more than ten (10) days during the reference year. However, the agreement stipulates that certain types of leave, such as social, personal, union, and employment injury leaves, are excluded from this calculation. Maternity, paternity, and parental leave, however, are not exempted, prompting the Union to file a grievance.

The Union contends that maternity leave, paternity leave and parental leave (the "**Leaves**") should be excluded from the calculation of absences to determine eligibility for the attendance leave provided for in the collective agreement. According to the Union, such not excluding those leaves would constitute a discriminatory measure under section 10 of the Quebec*Charter of human rights and freedoms*5 (the "**Charter**"), particularly on the basis of civil status and, in the case of maternity leave, pregnancy. The RTL argues that the exclusion aligns with the agreement's purpose of recognizing consistent work performance throughout the year.

The arbitrator rejected this grievance and the Superior Court dismissed the Union's appeal for judicial review of this decision. The Union therefore appealed.

Before the Court of Appeal, the Union argued that the ground of discrimination based on civil status in section 10 of the Charter should include the notion of parenthood, pointing out that case law is contradictory on the subject. The Court, as it had already established in SIISNEQ6, on which the arbitrator relied, confirms its decision in this regard, namely that this is not a prohibited ground of discrimination. The Court also pointed out that when a tribunal such as the Human Rights Tribunal of Québec disregards the teachings of one of its uncontradicted decisions, we are not dealing with contradictory jurisprudence, but with an infringement of the Québec judicial system. In addition, it points out that the list of prohibited grounds of discrimination contained in section 10 of the Charter is exhaustive, and that the courts cannot add grounds similar to those already set out. On this first point, it also pointed out that the parties had not agreed to include the notion of parenthood as a basis for discrimination in the agreement. As a second argument, the Union criticizes the judge for failing to find that the arbitrator's decision to use an inappropriate group of employees to make a comparison is unreasonable, since it fails to compare the situation of employees taking maternity leave with that of employees absent on unpaid leave. The Court considers that the interpretation of the agreement falls within the exclusive jurisdiction of the arbitrator, who reasonably concluded that the situation of the employee on maternity leave should not be equated with that of the employee on unpaid leave. Finally, the Court considers that the non-inclusion of maternity leave among those not taken into account for the purposes of granting attendance leave does not cause any real prejudice when analyzing the provisions of the collective agreement that provide for other benefits. The exclusion of this leave is therefore not a discriminatory measure based on pregnancy.

5 RLRQ c C-12

6 *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*, 2010 QCCA 497

Union des employés et des employées de service, section locale 800 and Toure Cleaning Services Ltd. (group grievance), 2023 QCTA 498, SOQUIJ AZ-51988080

The Arbitration Tribunal is seized with a union grievance concerning the sudden layoff without notice of 60 employees assigned to the contract entered into by Toure Cleaning Services Ltd. (the "**Employer**"), a cleaning company, with the Valcartier military base. The union sought compensation in lieu of notice for each employee, citing the collective agreement and the *Act respecting labour standards*. In response, the Employer contends that it had to terminate the contract one month before its expiry date due to the unforeseen departure of the foreman overviewing this contract, and that this constitutes superior force (force majeure) under article 1470 of the *Civil Code of Québec*.

The arbitrator clarified that an Employer is not obligated to give notice to an employee whose employment contract is terminated due to force majeure. In order to successfully invoke the argument of force majeure, the Employer must prove that the event was unforeseeable and irresistible. The arbitrator also pointed out that the absence of such an exception in the collective agreement does not prevent the application of the general rules governing force majeure situations.

In this case, it was established that the termination of the contract resulted directly from the foreman leaving for a competitor. At the hearing, the Employer argued that it was impossible for it to perform the obligations of its maintenance contract in the absence of its foreman. The arbitrator noted that the foreman had a duty of loyalty to his employer, and there was nothing to suggest that he was likely to abandon his job in the manner he did. Since the foreman had worked for the employer for several years, the unforeseeability criterion was met. The irresistibility criterion was also met, given the bond of trust that must have existed between the Employer and the foreman. Thus, even if the event results from a person who was initially an employee of the employer, the criterion of exteriority required in certain cases by jurisprudence is satisfied. Finally, it was impossible for the Employer to find a replacement for the foreman within a period of less than two weeks, so as to validly assume his obligations for the remaining term of the contract. In such a context, the Employer was under no obligation to give the notice or pay the indemnities provided for in the collective agreement.

Syndicat des technologues d'Hydro-Québec, SCFP section locale 957 v Hydro-Québec, 2024 CanLII 1154 (QC SAT)

The Arbitration Tribunal is seized of two individual grievances in which the grievor contests, respectively, his suspension without pay pending investigation and his dismissal. The union claims that the suspension for investigation imposed on an employee (the "**Employee**") was unreasonable and abusive, or at the very least, that it should have been imposed with pay. It also contests the dismissal of said Employee on the grounds that it was a clearly unreasonable sanction.

Hydro-Québec (the "**Employer**"), for its part, is seeking the reimbursement of 140 hours for which the Employee would have been paid without entitlement. More specifically, the Employer alleges that the Employee claimed and obtained paid leave, even though he did not meet the conditions required to be entitled to it. In fact, both he and his spouse, also employed by Hydro-Québec, claimed the same leave, even though the rule was that only one parent was entitled to it. These leaves were put in place by the Employer to help parents during the period when schools and day-care centres were closed during the COVID-19 pandemic. The Employer alleges that this misconduct occurred on a daily basis for over two months. In response to this behaviour, the Employer suspended the Employee for investigation purposes for eight days before finally dismissing him.

With regard to the suspension without pay, the Tribunal concluded that the eight-day period was reasonable, in view of the evidence demonstrating that, within the Employer's business, several people had to examine the facts, testimony and information gathered during the investigation before validating the measure to be imposed. On the question of remuneration during the suspension, the arbitrator noted that the suspension could be without pay, given the terms of the collective agreement. Indeed, the clause in the collective agreement is clear that the parties agreed that suspensions for investigation purposes not exceeding two months would be without pay. The arbitrator cannot modify the collective agreement and must apply it as written.

On the question of whether dismissal is an unreasonable disciplinary measure in the circumstances, the Tribunal held that claiming paid leave to which the Employee knows he is not entitled constitutes serious misconduct. Indeed, this type of misconduct can be likened to a form of theft of time due to the fact that he received remuneration to which he was not entitled. However, the arbitrator reiterated the principle that dismissal is not an automatic remedy for employee dishonesty. In reaching his decision, the arbitrator weighed the Employee's 15 years of seniority, his clean disciplinary record, the social and health situation prevailing at the time of the events, but also the Employee's repeated misconduct, the premeditation of his behaviour and the considerable autonomy he enjoyed in the course of his employment. In the end, the Tribunal stated that it was not convinced that the bond of trust had been irretrievably broken, and annulled the dismissal, replacing it with a lengthy 18-month suspension without pay.

Finally, the employer's grievance was upheld on the grounds that the Employee had enriched himself at the Employer's expense. The Tribunal therefore orders the Employee to reimburse the salary received in excess during the vacations to which he was not entitled.

Varia

Act to prevent and fight psychological harassment and sexual violence in the workplace

On March 27, the Act to prevent and fight psychological harassment and sexual violence in the workplace received Royal sanction, bringing several of its provisions into effect. This Act stipulates that, as of September 2024, the policy that all employers are required to adopt under the Act respecting labour standards must include a minimum content, including the identification of a person designated by the employer to handle a complaint of harassment, mention of specific information and training programs on the prevention of psychological harassment, and a description of the process applicable when an investigation is conducted by the employer. Our team is available to assist you in revising your policy to take account of these new rules. To find out more about the new law, join us for a webinar on May 29, 2024 (in French) or on June 5, 2024 (in English).

Bill Nº 51, Act to modernize the construction Industry

On February 1, 2024, the Minister of Labour Jean Boulet tabled Bill 51 in the National Assembly of Québec. The bill proposes the modernization of the construction industry intended to reduce labour shortages in this sector. This bill is currently at the study committee stage, we will keep you informed of its progress.

Stay tuned!

Labour Spotlight

Past practice and the theory of estoppel in labour relations

Blog post : "Recent social media trend: recording termination meetings"

Webinar on the Act to prevent and fight psychological harassment and sexual violence in the workplace. Join us for this webinar offered on June 5, 2024.

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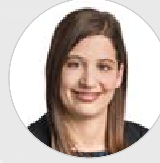

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