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In this issue

Are unionized employees entitled to two days of paid sick leave or family leave in addition to those provided for in their collective agreement?

On January 1, 2019, a number of important amendments were made to the *Act respecting labour standards* (the ARLS), including to sections 79.1, 79.7 and 79.16. These legislative amendments require employers to pay an employee counting three months of uninterrupted service who is absent from work for family reasons or for illness for the first two days of absence taken in a year.

In recent years, the courts have been asked to rule on the question of whether a collective agreement that provides for paid personal days includes the two days of paid absence due to illness or family reasons provided for in the ARLS. It should be noted that the labour standards set out in the ARLS are of public order, so no collective agreement can offer benefits that are less than those set out. However, since these new legislative provisions came into force, several employers have tried to argue that when a collective agreement offered paid personal days, such as flexible leave, it met the requirements of the ARLS and they were not required to offer the two statutory days in addition to personal days.

Most recently, in the *Maax Bath Inc. v. Syndicat des salariés d'acrylique de Beauce (CSD)* decision rendered on January 24, 2023, the Québec Court of Appeal (the QCA) had to determine whether the provisions of the collective agreement granting paid flexible leave constituted conditions of employment as advantageous as those set out in the ARLS. The QCA concluded that the paid flexible leave provided for in the collective agreement is **not** of the same nature and does **not** have the same purpose as the two paid days for family reasons or illness set out in the ARLS. In this regard, the judges reiterated that the two days of leave provided for in the ARLS are for specific societal objectives, namely family-work balance. Thus, a clause that allows employees to take flexible leave for unspecified reasons, or for reasons other than family reasons or illness, cannot be considered equivalent to the requirements of the ARLS. In the QCA's view, flexible leave is much more general and more akin to an additional day of leave, which is not consistent with the objectives of the ARLS. According to the QCA, a contrary interpretation would mean that an employee who has taken all their flexible leave for recreational purposes could be unable to benefit from the minimum standard set out in the ARLS for illness, as an example. The QCA therefore upheld the arbitral award ordering the employer to pay at least two absences per year for family reasons or illness in addition to the paid flexible leave to which the employees were entitled under their collective agreement.

It is interesting to note that in the *Cascades Emballage Carton-Caisse Drummondville v. Côté* decision rendered on January 11, 2023 by the Québec Superior Court, the judge reached the same conclusion as the QCA, even before the *Maax Bath Inc.* decision was rendered.

Practical advice

The two decisions mentioned above shed some light on a very specific issue that has often been the subject of debate before arbitration tribunals. These cases should remind employers of the importance of paying particular attention to the language used in their collective agreement clauses providing for paid days off, such as flexible leave, personal days, etc. In particular, when drafting a collective agreement, employers would be well advised to precisely define the reasons why such paid flexible leaves are granted and to expect that at least two of these days must be used for personal illness or for family reasons.

Decision briefs

Bartowiak v. Produits forestiers D&G ltée, 2023 QCCS 5

A director of operations, who was dismissed while still on probation about two and a half months after taking up his duties, is claiming six months' pay in lieu of notice from his former employer. The employer argues that the employee is not entitled to any compensation, first because he was dismissed for a serious reason (poor performance during his probationary period) and second because he failed to minimize his damages.

On the serious reason issue, the Court noted that the fact that the employment contract includes a probationary period does not relieve the employer of its obligation to prove the existence of such a reason if it wishes to dismiss an employee without giving them notice or pay in lieu thereof. However, the existence of such a period is one of the factors that the court may consider in assessing such a reason, or in assessing the amounts to which the person is entitled. For example, an employer who terminates the employment of a probationary employee, simply because the employee does not meet expectations, is liable to pay the employee compensation in lieu of notice. In this case, the judge found that the fact that the employee had a difficult relationship with co-workers and that he did not adhere to the organizational culture was not a serious reason for dismissal, even during the probationary period.

However, the Court accepted that the employee had failed to minimize his damages and consequently refused to grant him pay in lieu of notice. In that case, the evidence showed that, the day after his dismissal, the applicant had found work with a third-party company, but that he had asked the company to postpone his start for a few months because he wanted to renovate his home. Noting that the notice of termination has an indemnity purpose, the Court concluded that no indemnity in lieu of notice was owed to the employee.

Bédard and *Office des producteurs de bois de la Gatineau*, 2022 QCTAT 1549

In April 2022, the Administrative Labour Tribunal declared as admissible in evidence the recording of a conversation between the employer and its representative, that was captured without their knowledge during the break of a virtual hearing when the employer's microphone had accidentally been left open.

The employer objected to the production of this recording on the basis that it was a confidential conversation and that its use would violate his fundamental rights. However, the administrative judge first decided that the conversation captured was not protected by professional secrecy because the representative was not a lawyer, but a forest engineer, and that the conversation did not occur in the performance of his duties under the Professional Code. Moreover, he also found that the litigation privilege did not apply in the circumstances of that case, as it could not be invoked to obstruct the judicial process. However, the worker, who alleged that the employer and his representative were conspiring to commit perjury, had made a prima facie case that this conversation constituted evidence of an abuse of process. Finally, the Tribunal noted that the expectation of privacy in a virtual courtroom cannot be the same as in the employer's private premises because of the "public" nature of the courtroom.

In our view, while this decision reminds employers to exercise great caution in virtual hearings, it was the unique facts of this case that militated in favour of the admissibility of the recording and, in their absence, the conclusions might have been different.

Trivium Avocats inc. v. Rochon, 2022 QCCS 4628

An employer within the meaning of the *Act respecting occupational health and safety* (OHSA) obtained a permanent injunction to protect one of its employees who is subject to domestic violence of a psychological nature. In that decision, the Superior Court recognized that the employer's obligation under section 51 of the OHSA, specifically the new subsection 16 which requires the employer to *"take measures to ensure the protection of a worker exposed in the workplace to physical or psychological violence, including spousal, family or sexual violence"*, allowed for the issuance of such a protection order.

Gnagbo v. Énergie CWP inc., 2023 QCTAT 208

On January 19, 2023, the Labour Administrative Tribunal had to rule on a complaint from an employee who alleged that he had been dismissed because he had told his employer he might be absent due to illness. It was held that such an announcement may be sufficient to demonstrate that the employee intended to exercise a right under the ARLS. Thus, although the employee was not ultimately absent for medical reasons, the Tribunal concluded that he still benefited from the presumption that he was dismissed for a reason prohibited by the ARLS. Ultimately, however, the Tribunal dismissed the complaint, the employer having rebutted the presumption by showing that the termination of employment was the result of another non-pretextual cause.

Varia

On January 4, 2023, the *Regulation respecting financing*, CQLR c A-3.001, r 7, was amended to enact the Unit Groups concerning the imputation of noise-induced hearing loss that does not result from an industrial accident. This amendment follows the reform of the occupational health and safety regime that came into force in October 2021, which amended the general principle of the imputation of occupational diseases by adding a fourth paragraph to section 328 of the *Act respecting industrial accidents and occupational diseases*, CQLR c A-3.001.

On January 10, the Commission des normes, de l'équité, de la santé et de la sécurité du travail published in the *Gazette officielle du Québec* the *Draft Regulation amending the Regulation respecting occupational health and safety*. The proposed amendments include updating the permissible exposure values for certain airborne contaminants and adding the notation "OTO: Ototoxic" for substances that may cause a decrease in hearing.

To read or to see

British Columbia announces new statutory holiday on September 30th for the National Day for Truth and Reconciliation
article by **Sylvia Nicholles** and **Rachel Au**, associates in Dentons' Vancouver office, published on February 9, 2023


Time theft and employer privacy considerations
article by **Eleni Kassaris** and **Victoria Merritt**, respectively partner and associate in Dentons' Vancouver office, published on February 8, 2023


Labour Spotlight Series: A series of webinars hosted by Dentons' Employment Law Group

Acknowledgements and other announcements

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