The Impact of a Dismissal On the Costs of a Workplace Injury in Québec

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Jules had been working for an employer for five months as a labourer when, on January 3, 2017, he was injured on the job. He filed a claim to the *Commission des normes, de* l'équité, de la santé et de la sécurité du travail (the "CNESST") which was accepted. The employer decided to assign Jules temporarily to clerical duties necessitating no physical effort. Jules, wishing to make a "quick buck", decided to steal an item of some value belonging to the company. Learning of this, the employer then asked himself three important questions:

1. May the employer dismiss Jules under these circumstances?
2. What will the impact be of such dismissal on the cost of the employment injury?
3. How can the employer be protected against an increase in its workers' compensation assessment?

As regards the first question, it is important to note that an employer still retains its management rights, even where an employee is benefiting from the compensation regime pursuant to the *Act respecting industrial accidents and occupational diseases* (the "AIAOD") and may impose disciplinary measures where appropriate. The only restrictions applicable are those resulting from sections 32 of the AIAOD and 122 and/or 124 of the *Act respecting labour standards*.

For example, an employer may not fire an employee because he or she has been the victim of a workplace accident or because he or she has exercised a right conferred by the AIAOD. Furthermore, where a disciplinary measure is imposed within six months from the date when the employee has been the victim of an employment injury or the date when the right conferred by the AIAOD was exercised, the employer, under that statute, is deemed to have imposed the disciplinary measure because the worker was the victim of an employment injury or by reason of the exercise of such right. Accordingly, where any recourse is taken under the AIAOD, the employer will have the burden of showing that the dismissal was for another just and sufficient cause.

That being, the employer decides to fire Jules. A number of consequences flow immediately from that decision as regards the management of the employment injury. Since Jules can no longer be assigned to light duties, he will be entitled to the resumption of payment of his income replacement indemnity. In addition, should Jules

suffer from functional disability preventing him from resuming his job, the employer obviously cannot offer him any suitable employment in the company. If he suffers no such disability, Jules could be entitled to one year with full compensation to look for another job, if his right to return to work has expired. In short, the costs of the employment injury on the employer's records can skyrocket and, depending on the assessment regime to which the employer is subject, trigger an increase in the amount of the assessment that will be collected by the CNESST.

To attempt to mitigate this problem, it is therefore important for the employer to immediately file an application for transfer of the costs, under section 326 of the AIAOD, since the resumption of the indemnities is unrelated to the employment injury, but rather results from circumstances extrinsic to it.

In *Branchaud Signature Inc. et CNESST-Outaouais* (2016 QCTAT 3829), Administrative Judge Danis, in circumstances similar to Jules' case, held that it would be unjust for an employer to assume the costs resulting from a dismissal where the dismissal:

- was based on a just and sufficient cause;
- did not result from simple discretion and/or the mere whim of the employer;
- was in accordance with the general rules of labour law; and
- was in conformity with the employer's policies, where applicable.

The Administrative Judge further recognized that it may not be [translation] "…imposed on an employer to retain a person in its employ who commits unacceptable acts, simply in order to be able to assign him to, or keep him temporarily on, light duty." The employer is therefore entitled to have the costs connected with the indemnity transferred, effective from the date of dismissal.

However, in WEC Tours Québec inc. et CNESST (2016 QCTAT 2686, under judicial review in case No. 100-17-001754-169), Administrative Judge Lemire refused an employer's application for transfer of costs where the employee had been terminated for lateness and absenteeism. The employee, in that case, had not contested his dismissal. In its decision, the Tribunal held that the employer could have sought a suspension of the indemnities, under section 142 of the AIAOD, instead of dismissing the employee. Furthermore, the Administrative Judge was of the opinion that the dismissal, whether or not it was justified, did not result from circumstances unconnected with the employer's intentions, since the employer had decided to dismiss the employee with full knowledge of the facts. The transfer was therefore denied. That decision is now the subject of a judicial review, but it is important to understand that a transfer of costs can be refused and that the employer, in such cases, will then have to assume all costs associated with the payment of the indemnity. Similar reasoning was also applied by the Tribunal in the case of a retiring employee, in *Entreprises Michaudville Inc. et CNESST* (2016 QCTAT 5128).

Finally, it is noteworthy that depending upon the circumstances of the dismissal, it will be important to request the CNESST to suspend the income replacement indemnities, under section 142 of the AIAOD, where, for example, the worker has misrepresented his or her health condition and there is medical evidence confirming that he or she is fit to work. Such action will enable the employer to cover all possible angles in seeking to reduce the costs imputed to it.

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