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The Employer's Obligation to Make Reasonable Efforts to Reassign an Employee Prior to Dismissal for Incompetence

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For several years, Québec employers have been subjected to a number of requirements before dismissing an incompetent employee:

1. The employee must be aware of the company`s policies and the employer's expectations in this regard;
2. The employee's performance deficiencies must have been pointed out to him/her;
3. The employee must have had the necessary support to correct those deficiencies and achieve the goals set;
4. The employee must have had the benefit of a reasonable period of time to adjust; and
5. The employee must have been advised of the risk of dismissal without improvement on his/her part.

Those criteria were established by the Québec Court of Appeal in 2005 in the case *Costco Wholesale Canada Ltd.* c. *Laplante*[1] and, until October 4, 2017, were seen as the standard requirements in this matter. However, the *Commission scolaire Kativik* c. *Ménard*[2] decision from the Superior Court has disrupted more than twelve years of consistent case law by imposing an additional requirement on employers: an employer may now be required to make reasonable efforts to reassign the employee to another position within the employee's competence before terminating him or her on grounds of incompetence.

The Development of the Case Law Test

The criteria applying to the administrative dismissal for incompetence were first set forth in 1982 in the arbitral award in *Edith Cavell Private Hospital v. Hospital Employees' Union, Local 180*[3] rendered in British Columbia. In that case, a Vancouver hospital wanted to dismiss its chief cook, blaming her for the generally disorganized condition of her kitchen, which was impacting the quality of the food served to the patients. Establishing the six-point test that we now know, the arbitration board held that it was representative of a case of "poor," but "non-culpable," job performance. The requirements it set down, better known as the "Edith Cavell test," were subsequently adopted across Canada and were even confirmed by the Supreme Court in 2004.[4]

However, when the Québec Court of Appeal adopted the test in the *Costco* case in 2005, it omitted the section dealing with the employer's obligation to make reasonable efforts to find alternate employment within the employee's competence. No reason was provided to justify the omission. The result was that the obligation to try to reassign an incompetent employee to another job was never applied by Québec courts until that criterion was brought back for consideration in the *Kativik* case. Let us review that decision in greater detail.

The *Kativik* Decision

A unionized employee who had held an administrative technician position in a school for over ten years was dismissed for incompetence. Before being dismissed, the employee signed a three-month performance improvement plan, the purpose of which was to assist him in fulfilling his job requirements. During that period, despite many meetings with his supervisor, no improvement was observed in the employee's performance. The employer then offered to transfer him to a receptionist position, which he had held previously. He refused and was terminated a few weeks later. A grievance for unjust dismissal was then filed.

The arbitrator allowed the grievance, since, in his view, the Commission scolaire had breached [translation] "its obligation to find a reasonable alternative solution to terminating the employee." The arbitrator ruled that it was unreasonable to require the employee to give the employer an answer within three days regarding the receptionist position, when the offer of the position was valid for a longer period than that imposed on the employee. The employer then appealed, filing an application for judicial review to contest the arbitrator's decision.

The Superior Court dismissed the application for judicial review, confirming that the arbitrator's decision was reasonable, falling within [translation] "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." While reiterating the tests laid down in *Costco*, the Court noted that no reason had been advanced by the parties to justify not applying all of the criteria laid down in the "Edith Cavell test" in Québec. The Court held it to be illogical for the rules governing employers and employees to be different in Québec from elsewhere in Canada. Therefore, the test of reasonable efforts to reassign the employee to another suitable position now prevails in Québec.

Takeaways for Employers

Henceforth, in light of the Superior Court's conclusions in *Kativik*, a Québec employer who wishes to administratively terminate an incompetent employee is obligated not only to comply with the *Costco* criteria, but also to make reasonable efforts to reassign the employee to another position within his or her competences. Although the decision was rendered in a unionized context, there is no reason to assume that the revisited test could not also apply in individual employment relationships.

On the other hand, certain subtle distinctions need to be made.

It must be kept in mind that the application for leave to appeal of the *Kativik* decision was allowed by the Québec Court of Appeal on February 15, 2018. It will be interesting to see whether the highest court in the province will maintain the arbitral award.

Furthermore, this new "reasonable efforts" test is to apply only "in cases that justify it." The obligation is therefore one of means, not one of result. The Superior Court further held that it will not always be possible to reassign an incompetent employee to work somewhere else in the same company. The employer is not being forced to create a new job for the incompetent employee or to replace him or her. We would nevertheless strongly suggest to employers that this exercise be undertaken objectively before administratively terminating an incompetent employee and that a position be offered to him or her, subject to the foregoing comments.

[1] 2005 QCCA 788.

[2] 2017 QCCS 4686.

[3] [1982] 6 L.A.C. (3d) 229.

[4] *A.U.P.E.* v. *Lethbridge Community College*, 2004 SCC 28.

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