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Borden Ladner Gervais

The Impact of Dismissal on Cost Sharing and Transfer Procedures Available to Employers: Tightening Up the Criteria

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The *Act respecting industrial accidents and occupational diseases* (the "AIAOD") provides that the costs of benefits payable to an employee as a result of his or her employment injury are imputed to the injured worker's employer at the date of the industrial accident in question. The AIAOD also provides a number of procedural mechanisms enabling the employer to apply to the *Commission des normes, de l'équité, de la santé et de la sécurité du travail*, Occupational Health and Safety Division, (the "CNESST"), to transfer or apportion those costs, which have been imputed to its record.

The dismissal of a worker can have a major impact on the management of an employment injury, and particularly on the costs resulting from the dismissal of the injured employee. First, since the terminated employee can no longer be re-assigned to another job temporarily, he or she will be entitled to the resumption of payment of his or her income replacement indemnity, until such time as a decision is rendered on his or her capacity. Thereafter, if the employee has a functional disability precluding him or her from resuming his or her pre-injury job, the employer will obviously be unable to re-assign the worker to any other job in the company. If the employee is suffering no functional disability, he or she might be entitled to claim one entire year of compensation while seeking another position.

Since the costs associated with an employment injury, following the dismissal of the injured worker, can therefore increase substantially, and, depending on the employer's assessment classification, entail an increase in the assessment collected from the employer by the CNESST, it is important for employers to take advantage, if they can, of the cost transfer and cost sharing procedural mechanisms for which the AIAOD provides.

Nevertheless, recent case law appears to be tightening the screws and making the transfer or apportionment of costs connected with terminating such employees more difficult. Employers therefore need to be aware of these latest developments, so as to be able to make enlightened decisions when dismissing injured workers, in full knowledge of the financial impact that such terminations could entail and of the difficulties that could be encountered in obtaining a transfer or sharing of those dismissal-related costs.

i. Transfer of costs

The first procedural mechanism of which employers may avail themselves after dismissing an injured employee is a transfer of costs under section 326 of the AIAOD. This provision allows an employer to transfer the costs of the dismissal-related benefits imputed to its record, since it would be unjust for an employer to have to bear those costs.[1]

Generally speaking, in order for a dismissal to open the door to the procedural mechanism afforded by section 326 AIAOD, the termination must not have resulted from the mere will of the employer or a simple exercise of its managerial discretion. The firing must have been motivated by some just and sufficient cause, and it must have been carried out in compliance with company policy in such cases, as well as with labour and employment law.

A review of the jurisprudence, however, shows that it is not systematically recognized that a dismissal for a good and sufficient cause entails an injustice for the employer within the meaning of section 326 AIAOD. Transfers of costs are therefore not automatically granted whenever an employee has been fired for a just and sufficient cause.

On this point, in *WEC Tours Québec inc.* and *CNESST*,[2] the Administrative Labour Tribunal (the "Tribunal") refused to award any transfer of costs to an employer who had terminated a worker for repeatedly reporting late for work and for absenteeism. According to the Tribunal, the dismissal, whether or not it was justified, was a decision made by the employer, and by firing the employee, the employer had itself decided to terminate the employee's temporary re-assignment. In the circumstances of the case, the Tribunal found that the employer could not argue that having been deprived of the right to re-assign the worker temporarily was unjust, since it was the employer itself that had deprived itself of that opportunity by firing him. On the other hand, although he dismissed the employer's application under section 326 of the AIAOD, the administrative judge observed that the employer could have applied to the CNESST to suspend payment of the indemnities payable to the worker under section 142 of the AIAOD. That provision permits reducing or suspending indemnities payable to a worker who, among other things, neglects or refuses to perform the work that his or her employer assigns temporarily or who makes false statements about his or her state of health.

That being said, depending upon the circumstances surrounding the dismissal, the employer should seek a suspension of the indemnities under section 142 of the AIAOD, in addition to a transfer of costs under section 326 of the AIAOD, in order to cover all bases and make sure that all its termination-related rights are safeguarded. We also wish to take this opportunity to remind you that, as stated in a recent article, applications for cost transfers under section 326 of the AIAOD must be filed with the CNESST within one year of the dismissal concerned.[3]

ii. Cost-sharing applications

On another subject, an employer may also file an application for the sharing of costs under section 329 of the AIAOD, if the injured worker was already afflicted with a handicap at the time that the employment injury happened. The cost of the benefits may then be apportioned, in whole or in part, among the employers of all of the units.

We would remind you that a number of factors must be taken into consideration in order to obtain a cost sharing, including the impact of the handicap on the occurrence of the employment injury, the length of the consolidation period, the permanent impairment and functional disability suffered by the worker and, finally, the rehabilitation process from which the worker has benefited. What interests us in this article is the rehabilitation procedure from which the employee may benefit, following his or her termination.

As for the percentage apportionment that may be granted, it is well established by the jurisprudence that where the worker's handicap entails an extension of the consolidation period, a cost sharing of the order of 90 per cent may be awarded to all of the employers, whereas when other consequences are added to further extend the consolidation period, the cost apportionment among all the employers may then be in the vicinity of 95 per cent.

Nevertheless, it has recently been held that the employer may not benefit from any cost sharing that would take into account consequences added to extend the consolidation period and which are also connected with the employee's dismissal (regardless of whether or not such firing was ordered for a serious reason).

The Tribunal recently ruled on this issue in *Moules & plastiques Vif ltée*.[4] More specifically, the employer in that case was seeking a cost apportionment with all the employers involved, of the order of 99 per cent, particularly because of the rehabilitation procedure from which

the worker had benefited. The worker in question had been fired during the consolidation period, thus precluding his reinstatement with the employer and enabling him to take advantage of a period of rehabilitation and therefore to obtain income replacement indemnities for one year after his degree of capacity was determined. Had it not been for his termination, the worker could have been reinstated in his pre-injury job instead of collecting the income replacement indemnities.

So, considering that the extension of the period when the employee was entitled to income replacement indemnities during his rehabilitation was attributable to the act of the employer alone, the Tribunal held that it was improper to take that factor into account in assessing the handicap-related consequences afflicting the worker. The Tribunal therefore awarded a cost sharing of the order of 90 per cent to all the employers concerned.

The monetary differential resulting from obtaining a cost apportionment in the vicinity of 90 per cent or of 95 per cent for all employers involved can be very significant, depending upon the assessment classification of each employer concerned.

Hence, any employer wishing to terminate the employment of an injured worker who suffers from a pre-existing handicap that could give rise to cost sharing must henceforth consider that the consequences added to extend the consolidation period and which are connected with the dismissal might not be taken into account in apportioning the relevant costs.

In conclusion, before dismissing an injured employee who is receiving benefits under the AIAOD, employers must think about the pecuniary consequences resulting from such a termination and about the procedural mechanisms that might be applied to reduce the maximum costs to be awarded in their CNESST record.

[1] See, in particular, *Branchaud Signature Inc. et CNESST-Outaouais* (2016 QCTAT 3829), in which an employee working on a temporary assignment was dismissed for having stolen an object belonging to his employer. The Administrative Labour Tribunal applied section 326, holding that it would be unjust for the employer to have to assume the costs related to the income replacement indemnity as of and after the date when the employee was fired.

[2] 2016 QCTAT 2686.

[3] The Supervac Decision: The Court of Appeal Speaks! (in French).

[4] 2017 QCTAT 5521.

AUTHORS

Maude Longtin
T 514.954.2645
MLongtin@blg.com

Don J. Alberga
T 514.954.2566
DAlberga@blg.com

Borden Ladner Gervais

BLG OFFICES

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T +1.403.232.9500
F +1.403.266.1395

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T +1.514.954.2555
F +1.514.879.9015

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T +1.613.237.5160
F +1.613.230.8842

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415