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# Contentious Labour Relations a Factor in Evaluating Employer Decisions During a Strike

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## Delastek Case

In early March 2018, the Administrative Labour Tribunal (the "Tribunal") rendered two decisions on the same day in the context of a protracted labour conflict (the "Delastek Case"). These decisions are quite interesting for Québec employers, as they illustrate how a context of tumultuous labour relations between the employer and the union can colour the Tribunal's perception when it is called upon to assess the legality of changes made by the employer during a strike.

Delastek is a business specialized in the design and manufacture of parts for the aerospace and transportation industries, located in Shawinigan, Québec. Unifor, Local 1209 (F.T.Q.) (the "Union"), is the union representing Delastek's production employees. The Union and Delastek share a history of litigious labour relations. Here are some examples:

- Multiple dismissal complaints for Union activities;
- Application to revoke the Union's certification by the employer;
- Strike starting the day after the expiry of the collective agreement;
- Problems of repeated strike-breakers;
- Provisional interlocutory injunction against intimidating strikers; and
- Accusations of bad faith bargaining on both sides.

It is in this context of conflict and confrontation that the present decisions were rendered.

## First Decision: The Abolition of 23 Unionized Positions

While the strike had been underway for over two years, Delastek decided to abolish the positions of 23 employees included in the bargaining unit, three of which were held by Union representatives. The company justified this decision by the transfer of activities to the United States and third parties, as well as by the loss of contracts and changes in production methods. The Union filed complaints under sections 12, 13, 14, 15 and 53 of the *Labour Code*, alleging that the employer had violated its obligations and engaged in anti-union practices.

Administrative Judge Myriam Bédard rendered a decidedly stern judgment against Delastek. First, she considered that, by abolishing the 23 positions, which practically amounted to half of the unionized employees, Delastek "clearly and objectively sought to weaken the Union while the strike had been persisting for years and the employees' motivation was likely to wane" (our translation).

Then, Administrative Judge Bédard considered that Delastek knowingly took advantage of a "*legal vacuum,*" namely, the period following the beginning of the strike where the obligation to safeguard working conditions provided for in the *Labour Code* is no longer in effect, to push the Union aside. According to Administrative Judge Bédard, this intention, which she

imputed to Delastek, would in itself be sufficient to conclude that there existed an anti-union strategy in violation of the *Labour Code*.

The Administrative Judge also reiterated the important distinction between the burden of proof applicable to sections 12, 13 and 14 of the *Labour Code*, and that applicable to section 15. In the first case, the Union must demonstrate the prohibited actions of the employer, while in the second case, the Union benefits from a legal presumption alleviating its burden of proof. Thus, when a measure is imposed concomitantly with the exercise of a right, this legal presumption requires the employer to prove the existence of another just and sufficient cause in support of its decision.

In the case at hand, the Administrative Judge considered that the Union benefited from the application of this presumption, and that Delastek failed to establish convincingly that the work reduction by which it sought to justify the position abolitions was real, and that, instead, the decision was "clearly tainted by anti-union animus" (our translation).

The Tribunal, presided by Administrative Judge Bédard, ordered that the abolition of the 23 positions in question be overturned, and it reserved jurisdiction with respect to damages and remedies.

## Second Decision: Strike-Breakers

On the same day, Administrative Judge Sylvain Allard also ruled in favour of the Union, stating that Delastek had contravened the *anti-scab* provisions of the *Labour Code*.

The Tribunal was called upon to determine whether the work performed by Delastek employees during the strike could be categorized as production or as research and development (“R&D”). Since the bargaining unit covered the production employees, if the tasks performed by the employees in question qualified as R&D, as Delastek claimed, the Tribunal would have to conclude that they were working legally.

However, the Administrative Judge stated that it could not be left to Delastek alone to determine when the R&D process ends and when production begins. The Tribunal analyzed the different stages involved in the commercialization of the products in order to settle the issue, and it concluded that the employees in question were indeed engaged in production tasks, thus violating section 109.1 of the *Labour Code*.

In light of Delastek's repeated strike-breaking activities, the Tribunal issued an order allowing Union representatives to visit the factory during working hours once per day for the duration of the strike. This order was rendered under the authority of section 9 of the *Act to Establish the Administrative Labour Tribunal*. This provision enables the Tribunal to decide any issue of fact or law necessary for the exercise of its jurisdiction, including rendering any order it considers appropriate to safeguard the parties’ rights.

## Takeaways for Employers

The importance of the context and history of events is definitely highlighted by the Delastek Case. However, we wish to point out that Québec employers should not take this decision to mean that they are precluded from imposing changes to working conditions during a strike, such as abolishing positions, although such right is not unfettered under the law.

Indeed, abolishing positions was not in itself illegal, but the following elements added up to convince Administrative Judge Bédard that the employer exercised an otherwise legitimate right in an anti-union manner, contrary to the provisions of the *Labour Code*:

- The decision was made more than two years after the start of the strike;
- The abolition could only come into effect when the employees returned to work;

- The significant proportion represented by the abolished positions, which included three Union representatives; and
- The deficiency of the evidence in support of the grounds alleged by the employer.

An employer in a similar situation would be well-advised to wait until the end of the strike and to raise the abolition of positions at the time of the return to work, either in the negotiation of a return to work protocol with the Union or by exercising its management rights.

The second decision signals to Québec employers that their definition of the duties performed by employees during a strike may very well be scrutinized and reviewed by the Tribunal. Moreover, the order issued by Administrative Judge Allard is novel, and demonstrates that the Tribunal may impose creative measures upon the parties if deemed appropriate in the circumstances. We would highlight the fact that Delastek's recidivism justified such an order, and that, in principle, this type of order will not necessarily become commonplace.

That said, Québec employers should understand that exceptional circumstances may give rise to exceptional measures.

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