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EMPLOYMENT PROTECTION MEASURES FOR TERMINATION ON ECONOMIC GROUNDS IN QUEBEC AND CANADIAN FEDERAL LAW

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In Canada, an employer has a right, without prior administrative authorisation, to abolish a position or reduce its workforce on economic grounds. An employee who loses his/her job on such grounds is entitled to a period of notice of termination or compensation in lieu of such notice under the applicable ordinary law¹ or, under employment standards legislation, to a statutory notice or compensation in lieu thereof in the case of individual or group termination.² In certain provinces or under federal law, this legislation also provides for severance pay whose purpose is not to compensate for the absence of or insufficient notice, but the loss of the job itself.³ Collective agreements may establish more generous notice periods or compensation. In short, the employer has the right to abolish positions or reduce its workforce on economic grounds, except when collective agreements provide otherwise.

However, employment standards statutes and collective agreements also provide, each in a different way, safeguards concerning the choice of employees whose employment is terminated as a result of position abolition or workforce reductions. As we will see in this article, these safeguards introduce a certain

1 Economic grounds are not serious grounds for termination without notice in Quebec civil law [*Civil Code of Québec*, CQLR c CCQ-1991, ss 2091, 2094 (hereinafter “CCQ”)]. The same applies under the common law regime in the other Canadian provinces, except if the contract of employment explicitly or implicitly allows the employer to terminate the contract without notice on economic grounds [G. ENGLAND, *Individual Employment Law*, 2nd ed (Toronto, Irwin Law, 2008) at 342].

2 See for example in Quebec: *Act respecting Labour Standards*, CQLR c N-1.1, ss 82, 83, 84.0.4, 84.0.13-84.0.14 (hereinafter “ALS-Q”); in federal labour law: *Canada Labour Code*, RSC 1985, c L-2, s 230 (hereinafter “CLC-F”). Certain statutes provide for the possible establishment of a reclassification assistance committee (ALS-Q, s 84.0.9) or a joint planning committee (CLC-F, s 214) following a group termination of employment.

3 CLC-F, s 235.

degree of employment protection of employees affected by termination for economic reasons. First, we will examine the rules that stem from collective agreements, which apply to employees represented by a trade union (I). Statutory employment protection rules applicable to unionised and non-unionised employees, which have been influenced by the content of collective agreements, will then be presented (II).

Given the fragmented nature of labour law in Canada, we will not deal with all applicable Canadian employment law. It will be recalled that the rules applicable to termination of employment contracts are part of an ordinary law system of private law that differs in Quebec, which follows a tradition of civil law, and in the other provinces, which apply common law.⁴ They also stem from employment standards legislation and collective labour relations that vary from one jurisdiction to another⁵ and which depart from ordinary law, in particular in matters concerning employment protection. We will focus on the case law of the Supreme Court of Canada, the highest court common to the whole of Canada, which has jurisdiction over all matters federal or provincial, both civil and criminal, as well as the Quebec and federal laws and the case law of the specialised or judicial tribunals that apply or interpret them.

I - THE CHOICE OF THE EMPLOYEE TERMINATED ON ECONOMIC GROUNDS: THE USUAL MODEL ESTABLISHED IN COLLECTIVE AGREEMENTS

The principles governing the negotiation of collective agreements in federal law and in the different Canadian provinces are modelled on the American *Wagner Act* of 1935.⁶ The collective agreement signed by the employer and the union, which has a monopoly on negotiating the working conditions of all employees included in the bargaining unit it represents (generally all the employees of one establishment),⁷ has a binding effect on both the parties that signed it and the employees that are subject to it.⁸ Generally it has the effect of limiting the management rights of the employer regarding the choice of the employees who will lose their jobs on economic grounds. In fact, seniority clauses (A) and clauses

4 D. CARTER, G. ENGLAND, B. ETHERINGTON and G. TRUDEAU, *Labour Law in Canada*, 5th ed (The Hague - London - New York, Kluwer Law International Butterworths, 2002) at para 152. Federal law gives rise to decisions based on common law or on civil law depending on which province the case originated.

5 Because of the constitutional division of powers, the ten Canadian provinces have exclusive power to set employment standards legislation conditions and collective labour relations, subject to exceptional federal powers over labour matters in companies whose activities are under federal jurisdiction: *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, ss 91-92; *Toronto Electric Commissioners v Snider*, [1925] AC 396.

6 G. HÉBERT, «La législation sur les relations du travail au Canada et le C.P. 1003», (1995) 50:1 *Relations industrielles / Industrial Relations* 85.

7 In Quebec, only an association of employees recognised after a public certification procedure has this power: *Labour Code*, CQLR c C-27, s 21 (hereinafter "LC-Q"). At federal level, certified trade unions or trade unions recognised voluntarily by the employer have this power: CLC-F, s 3 (1) ("bargaining agent").

8 LC-Q, s 67; CLC-F, s 56.

subjecting the dismissal of an employee to a just cause provision (B), which are among the first to be negotiated in North American collective agreements, limit the employer's power in this matter.⁹

A. Most collective agreements contain seniority clauses establishing priorities between employees represented by the union when it comes to allocating vacant posts or imposing layoffs.¹⁰ These clauses are applicable when the employer chooses to abolish positions or reduce its workforce for economic reasons by laying workers off. In the absence of another definition in the collective agreement, layoffs are a temporary suspension of work by the employer for reasons exogenous or extrinsic to the parties. Such a suspension differs from the termination of the employment relationship in that "[t]he hope or expectation of future work remains".¹¹

Most collective agreements recognise the employer's right to lay off workers as well as the right of the employees with the longest service to retain employment or, if their post is abolished, to occupy another position for which they are competent within the bargaining unit covered by the collective agreement. These employees have displacement rights enabling them to displace an employee with less seniority occupying a position at an equal level or sometimes even at a higher level than the one they occupied.¹² Depending on the collective agreement, these displacement rights may be subject to requirements on seniority and competence – equal or sufficient – and include a minimum training obligation on the part of the employer.¹³ They may be open to all the positions included in the scope of application of the collective agreement or be limited to a restricted range of posts.¹⁴

Employees who exercise a displacement right or who are "displaced" by a colleague who has exercised this right find the performance of their work altered under the effect of the collective agreement, which may stipulate their rights in their new post.¹⁵ As for the employees affected at the end of the chain by a reduction in the workforce, they are laid off temporarily rather than permanently so that they retain, at least for a certain period, a priority recall right if the employer is faced with a new need for labour.¹⁶ Recall arrangements are generally contained in clauses providing that workers be recalled in order of seniority and setting out the advantages maintained during the layoff.

9 C. GERNUSY, "Origins of Seniority Provisions in Collective Bargaining", (1982) 33 *Labour Law Journal* 518 at 520-521.

10 A. GILES, "Ancienneté" in P. JALETTE, M. LAROCHE and G. TRUDEAU, eds, *La convention collective au Québec*, 3rd ed (Montréal, Chenelière Éducation, 2018) at 179; A. GILES, "Gestion et protection de l'emploi" in *ibid* at 197; D. CARTER et al., *supra* note 4 at paras 859-863; D.J.M. BROWN, D.M. BEATTY and C.E. DEACON, *Canadian Labour Arbitration*, 4th ed (Aurora, Canada Law Book, 2006) (loose-leaf updated on August 20, 2011) vol 1, ch 6.

11 *Canada Safeway Ltd v RWDSU, Local 454*, [1998] 1 SCR 1079 at para 71.

12 A. GILES, «Gestion et protection de l'emploi», *supra* note 10 at 213.

13 G. VALLÉE and I. MARTIN, «Fourniture du travail convenu : détermination, modification et suspension de la prestation de travail pour des motifs exogènes, disciplinaires ou administratifs» in *JurisClasseur Québec*, coll «Droit du travail», *Rapports individuels et collectifs du travail* (Montréal, LexisNexis Canada, 2009) (loose-leaf revision 15, October 2017) fasc 22 at para 94.

14 A. GILES, «Gestion et protection de l'emploi», *supra* note 10 at 213.

15 G. VALLÉE and I. MARTIN, *supra* note 13 at para 94.

16 A. GILES, «Gestion et protection de l'emploi», *supra* note 10 at 214.

This layoff procedure based on the “Last In, First Out” principle, although it is largely dominant in unionised companies, is not the only option available to the employer facing economic difficulties. By virtue of its management prerogatives and insofar as other clauses in the collective agreement do not stand in its way, the employer can choose to reduce the working hours of all its employees for a given period rather than temporarily reducing its workforce by laying off employees.¹⁷ The Supreme Court of Canada, however, held that the reduction of the working hours of a part-time worker amounted to a “constructive layoff” contrary to the collective agreement given that the working hours of other employees with less seniority than her were not reduced. The Court writes that “[e]mployers must have the ability to reorganize their departments and staff. Yet, in the absence of a clearly expressed intention to the contrary, the provisions in a collective agreement should not generally be interpreted in a way that undermines acquired seniority rights of employees and fundamentally alters the nature of the employment”.¹⁸ This approach, which emerged from the common law provinces,¹⁹ is also applied in Quebec.²⁰

B. The layoff procedure described above, although it is common in collective agreements, is not accessible to all unionised employees. Certain collective agreements do not provide for it while others exclude certain categories of employees, for example atypical employees such as those with fixed term or intermittent working arrangements. In such cases, the clauses of the collective agreement subjecting the employer’s right to dismiss employees to the existence of a just cause may serve as the basis for a certain judicial control of the choice of the employees whose employment relationship is severed on economic grounds. This type of control is similar to that exercised under the laws presented in the following section.

II - JUDICIAL CONTROL AFTER THE FACT OF THE CHOICE OF THE EMPLOYEE TERMINATED ON ECONOMIC GROUNDS: THE MODEL ESTABLISHED IN SOME PROVINCIAL LAWS OR FEDERAL LAW

In Canada, federal employment standard legislation and the employment standard statutes of two provinces include an employment protection remedy enabling an employee with a certain length of service to challenge an “unjust” dismissal,²¹ made “without just cause”²² or without “good and sufficient cause”.²³ These remedies are inspired by the

17 *Air-Care Ltd v United Steel Workers of America*, [1976] 1 SCR 2.

18 *Battlefords and District Co-operatives Limited v RWDSU, Local 544*, [1998] 1 SCR 1118 at para 18.

19 P. E. MOREAU and C. MASSÉ-LACOSTE, «Décroissance et croissance : la gestion de la main-d'œuvre dans un contexte de crise économique : Précis des règles applicables lors d'une mise à pied dans le cadre des rapports collectifs du travail» in *Service de la formation continue, Barreau du Québec, Congrès annuel du Barreau du Québec* (Montréal, 2009) at 2-3.

20 *Syndicat des travailleurs et travailleuses de Granttech inc. (CSN) c Granttech inc.*, 2015 QCTA 40 at paras 87-103.

21 CLC-F, s 240.

22 *Labour Standards Code*, RSNS 1989, c 246, s 71 (1) (Nova Scotia) (hereinafter “LSC-NS”).

23 ALS-Q, s 124.

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collective agreement clauses requiring a just cause for dismissal.²⁴ The forced reinstatement of the employee and the payment of an indemnity in compensation of the salary lost between dismissal and reinstatement are the usual form of redress for unjust dismissal.

Even if these remedies do not concern termination for economic reasons, but only dismissal for grounds relating to the employee, they nevertheless offer a discharged employee the possibility of contesting his/her employment termination for economic reasons. The court will indeed ensure that the employment termination is not a dismissal that the employer has “disguised” as a termination for economic reasons to avoid having to justify the cause and get round the laws protecting the employee from unjust dismissal.²⁵ These remedies form the basis of an after the fact control of the reasons for discharging an employee. In Quebec law, the employer has the burden of showing that the economic grounds claimed are in fact real and that they are the true cause of the employee’s termination.²⁶ Similarly in federal law, the employer is required to provide economic justification and to establish reasonable explanation for the choice of the employee to be terminated.²⁷ If the employer is unable to provide such proof, or if the employee shows that his/her termination is based on unreasonable criteria (in Quebec law)²⁸ or is only a subterfuge (in federal law),²⁹ these are clues that the termination in fact constitutes a dismissal without just cause.

These remedies introduce a certain measure of employment protection for discharged employees. They have the effect of requiring that the employer justify the termination of any employment, whether or not it is dictated by economic reasons.³⁰ They also provide for a certain control of the choice of the employees terminated (A) which has led the courts to recognise that the employer has an obligation to consider alternative measures to termination for economic reasons (B).

24 *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 1. See also P. VERGE and G. VALLÉE, *Un droit du travail ? Essai sur la spécificité du droit du travail* (Cowansville, Éditions Yvon Blais, 1997) at 168; THE LABOUR LAW CASEBOOK GROUP, *Labour & Employment Law: Cases Materials, and Commentary*, 8th ed (Toronto, Irwin Law, 2011) at 783.

25 In Quebec: *Bousquet c Desjardins*, 1997 CanLII 10115 at 2, 4 (CA). In federal law: *Hewton v Dickson’s Transport and Coach Lines (Napanee) Ltd*, [2002] CLAD No 586 (LN/QL) (Arbitrator: B. ADELL).

26 *Drolet c ABB inc.*, 2009 QCCRT 0209 at para 30.

27 *Enoch Cree Nation Band v Thomas*, 2004 FCA 2 at para 5.

28 *Cloutier c Alsco, division de Western Linen Supply Co Ltd*, 2005 QCCA 1150 at para 18.

29 *Kassab v Bell Canada*, 2008 FC 1181 at para 30.

30 D. ROUX, *Le principe du droit au travail, juridicité, signification et normativité* (Montréal, Wilson & Lafleur, 2005) at 344-345.

A. Even if the employer proves the existence of economic grounds, the employee can challenge the validity of his/her termination if it is based on biased criteria³¹ or applied in a discriminatory or arbitrary way or in bad faith.³² In such cases, the court examines the criteria used to select the employee terminated in the light of the company's needs in order to determine whether they are objective and reasonable.³³ The court cannot, however, impose its own criteria:³⁴ the choice of criteria is a management prerogative of the employer.³⁵

The criterion of seniority does not enjoy any particular status and cannot be imposed by a court.³⁶ Case law has therefore accepted as reasonable the use of criteria such as competence,³⁷ versatility³⁸ or the maintaining of a team spirit.³⁹ Nonetheless, insofar as seniority is a criterion commonly used by employers,⁴⁰ the court may consider a deviation from this practice as an indication of dismissal. The reading of certain decisions, however, suggests that the seniority of an employee may be considered, even in the absence of any proof that this criterion is usually applied in the firm. Thus a judge of the Quebec Court of Appeal emphasised that the employee "enjoyed a certain amount of job security, and all things being equal, he should have been kept in the appellant's service rather than other employees who did not enjoy the same job security" [our translation].⁴¹

31 *Kopczynski c RSW inc.*, 2007 QCCA 992 at para 34.

32 *Donohue inc. c Simard*, [1988] RJQ 2118 (CA), application for leave to appeal to SCC dismissed, 21163 (16 February 1989). In federal law, decisions apply a "sham test" in order to assess the arbitrary nature of the choice of employee: *Bhushan v Bank of Montreal*, [2012] CLAD No. 19 (LN/QL) at para 96 (Arbitrator: S.L. NOVICK). *Contra: Royal Bank of Canada v Lapointe*, 2005 FC 633 at paras 27-28. For an analysis of Quebec case law on this issue, see R.-C. DROUIN, *La mobilité du salarié dans l'entreprise. Modification du contrat de travail, obligation de reclassement et de formation* (Montréal, Wilson & Lafleur, 2002) at 136-176; D. ROUX, *supra* note 30 at 337-354.

33 *Bousquet c Desjardins*, *supra* note 25 at 2, 12; *Enoch Cree Nation Band v Thomas*, *supra* note 27 at para 5.

34 *Bousquet c Desjardins*, *supra* note 25 at 17; *Mireault c Bell Canada*, [2005] DATC No. 162 (LN/QL) at para 66 (Arbitrator: M. ABRAMOWITZ).

35 N.-A. BÉLIVEAU with the collaboration of M. OUELLET, *Les normes du travail*, 2nd ed (Cowansville, Éditions Yvon Blais, 2011) at 582.

36 *Donohue inc. c Simard*, *supra* note 32.

37 *Ruel c Distribution Emblème inc.*, DTE 96T-1155 (CT); *Mireault c Bell Canada*, *supra* note 34 at para 62.

38 *Exilus c Société des services en signalisation*, 2009 QCCRT 0114 at para 43.

39 *Kassab v Bell Canada*, *supra* note 29 at para 29.

40 *Donohue inc. c Simard*, *supra* note 32.

41 *Publications Dumont (1988) inc. c Doré*, (1999), AZ-50068496 (SOQUIJ) at 7-8 (QCCA). See also *Moya c Wilderton*, 2010 QCCRT 0285 at para 13, determination of compensation, 2010 QCCRT 0597.

B. The examination of the reasonable and objective nature of the criteria used to determine the choice of the employee terminated has also led the courts to assess whether the employer had made “efforts” to save the employee’s job.⁴² This development is far less marked in federal law than in Quebec law.⁴³ When the company has a habitual practice of training or reclassification, the court may conclude that the abolition of the employee’s post should not have led to the termination of his/her employment when it would have been possible, in accordance with the company’s habitual practices, to modify the performance or conditions of his/her work. The courts have therefore considered that the employer’s failure to reclassify an employee in a vacant post,⁴⁴ providing him/her if necessary with training or elementary support,⁴⁵ to offer him/her part-time work⁴⁶ or revised (less advantageous) working conditions⁴⁷ indicated the presence of a disguised dismissal and not a termination for economic reasons. A few decisions have imposed such an obligation on an employer without having first established the past existence of such practices in the company.⁴⁸ Certain authors have therefore deduced that there is an obligation of training⁴⁹ or reclassification⁵⁰ and even an actual principle of the right to work.⁵¹ This line of case law imposing on employers measures other than the termination of employment in the absence of past practices is however contested in case law⁵² and in legal theory.⁵³

CONCLUSION

The rules of Quebec law and Canadian federal law allow for a certain degree of employment protection for discharged employees. This protection, however, is limited, whether we are talking about the protection arising out of collective agreements or those introduced by statutory provisions prohibiting dismissal without just cause. In collective agreements, this limitation is due to the decline in unionisation, which affects the number of employees covered by a collective agreement and protected by the seniority clauses

42 *Therrien c Coco Paving inc.*, 2014 QCCRT 0130 at para 31.

43 *Royal Bank of Canada v Lapointe*, *supra* note 32 at para 32. However, see *Connolly v Société de communication Atikamekw-Montagnais*, 2013 FC 909 at para 30, arbitral award dismissing a preliminary objection, 2014 QCTA 296, (2014), AZ-51064345 (SOQUIJ).

44 *Léveillé c Murs secs Jalap inc.*, DTE 93T-816 (QCCA); *Publications Dumont (1988) inc. c Doré*, *supra* note 41; *Deshais c Médias Transcontinental*, 2013 QCCRT 0505, determination of compensation, 2014 QCCRT 0431.

45 *Biochem Thérapeutique inc. c Dufault*, DTE 99T-288 (QCCS); *Durand c Ordre des comptables en management accrédités du Québec*, DTE 2003T-1108 (CRT).

46 *Laberge c Busque & Laflamme inc.*, 2007 QCCRT 0506, application for review dismissed, 2008 QCCRT 0128, application for judicial review dismissed, 2009 QCCS 1525, application for leave to appeal to QCCA dismissed, 2009 QCCA 763.

47 *Moya c Wilderton*, *supra* note 41.

48 *Ibid.* See also *Vachon c Maison de vêtements Piacente ltée*, 2015 QCCRT 0409; *Laberge c Busque & Laflamme inc.*, *supra* note 46.

49 P. VERGE, G. TRUDEAU and G. VALLÉE, *Le droit du travail par ses sources* (Montréal, Éditions Thémis, 2006) at 338; R.-C. DROUIN, *supra* note 32 at 156-162.

50 R.-C. DROUIN, *supra* note 32 at 121-122.

51 D. ROUX, *supra* note 30 at 316.

52 *Dubreuil c BCBG Max Azria*, 2013 QCCRT 0156 at para 78; *Fraser c Axor Construction Canada inc.*, 2002 QCCRT 0006 at para 55.

53 N.-A. BÉLIVEAU with the collaboration of M. OUELLET, *supra* note 35 at 579.

that they generally contain.⁵⁴ With regard to statutory provisions prohibiting dismissal without just cause, the protection is limited by the length of service needed to qualify for it, such delay can be one,⁵⁵ two⁵⁶ or even ten years.⁵⁷ This protection is also limited by its scope, these provisions applying only to employees governed by federal law, Quebec law or the law of Nova Scotia. Finally, whether it stems from collective agreements or statutory provisions on dismissal without just cause, this protection is, by definition, not very protective of the employment of atypical employees due to the importance of the criteria of length of service or seniority.

54 INSTITUT DE LA STATISTIQUE DU QUÉBEC, *Tendances historiques de la syndicalisation chez les femmes et les hommes au Québec*, September 2014; D. GARLARNEAU and T. SOHN, «Long-term Trends in Unionization», *Insights on Canadian Society*, November 2013 (Statistics Canada, Catalogue no. 75-006-X).

55 CLC-F, s 240.

56 ALS-Q, s 124.

57 LSC-NS, s 71 (1).