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A worker who has suffered an employment injury: Is there a time limit on returning to work?

By Carole Desjardins and Jean-François Cloutier

Under section 236 of the *Act respecting industrial accidents and occupational diseases* (hereinafter the "Act"), a worker who has suffered an employment injury can be reinstated in his employment when he becomes able to work again. However, section 240 of the Act stipulates that this right must be exercised within a certain time period, based on the number of workers in the establishment, namely one year in an establishment employing 20 or less workers and two years in an establishment employing more than 20 workers.

These sections have given rise to many debates among grievance arbitrators, the *Commission des lésions professionnelles* (hereinafter "CLP") and the Quebec Labour Relations Board as to whether expiry of the time limit set out in section 240 of the Act is sufficient grounds to terminate the employment of a worker who has suffered an employment injury.

The facts

This is the question Commissioner Michel Marchand had to answer in *Caroline Sayegh and Boutique Jacob inc.*[1] Ms. Sayegh had started working as manager in August 1998 for the Jacob group. In September 2000, she suffered an employment injury and had to stop working.

On March 15, 2002, when Ms. Sayegh was still on leave due to her employment injury, a doctor mandated by the *Commission de la santé et de la sécurité du travail* (hereinafter the "CSST") expresses the opinion that the worker's employment injury had consolidated.[2]

On April 2, 2002, the CSST informed Ms. Sayegh, who was still on leave, that the time period within which she was entitled to be reinstated in her employment had expired in September 2001, given that the establishment where she worked employed less than 20 workers. Following this letter, the employer terminated the worker's employment and issued a record of employment which indicated as grounds for termination the following: "[TRANSLATION] Right to reinstatement in employment is expired under section 240 of the *Act respecting industrial accidents and occupational diseases*." The worker then filed a complaint for dismissal without good and sufficient cause under section 124 of the *Act respecting labour standards*.[3]

The decision

Commissioner Marchand cites two decisions, one from the *Commission d'appel en matière de lésions professionnelles* (hereinafter the "CALP") (former name of the CLP), *Régie intermunicipale de traitement de l'eau potable de Saint-Romuald et de Saint-Jean-Chrysostôme v. Yves Tremblay and The Commission de la santé et de la sécurité du travail*[4], and another from the arbitrator Jean-Pierre Lussier, *Ville de Dollard-des-Ormeaux vs. Syndicat canadien de la fonction publique, section locale 4398*.[5]

In the first decision, the CALP concluded that just because a worker can no longer return to work at the expiry of the time limit set out in section 240 of the Act doesn't mean he cannot otherwise challenge an employer's decision to refuse to reinstate him. Commissioner René Ouellet mentions, in fact, that employers cannot use expiry of the time limit as a defence against a worker's complaint for dismissal under section 32 of the Act

By contrast, in *Ville de Dollard-des-Ormeaux vs. Syndicat canadien de la fonction publique, section locale 4398*, arbitrator Lussier examined the scope of section 240 of the Act and found that the employment relationship is subject to a time limit. In his reasoning, the legislator specifically provided that once the time line set out in section 240 of the Act expires, a worker who suffered an employment injury may no longer require his employer to reinstate him. He adds that the right of reinstatement goes hand in hand with the employer's right to terminate its employment relationship with a worker once the right to return to work has been extinguished. In this case, the union argued that the employer had terminated the worker's employment without making any effort to accommodate him. On this point, arbitrator Lussier specified that the employer's duty to accommodate applied only for that period in which the employee was entitled to reinstatement, in this case two years.

Furthermore, the arbitrator specified that the employer had respected all his obligations since, prior to dismissing the worker, he had evaluated all jobs in light of the functional limits placed on him by his doctor, and had concluded that no appropriate job was available. Arbitrator Lussier upheld the dismissal and specified that, upon expiry of the protection period provided for in section 240 of the Act, the worker was still unable to carry on his employment.

Commissioner Marchand distinguishes arbitrator Lussier's decision. In fact, he maintains that arbitrator Lussier upheld the dismissal not simply because the time frame prescribed in section 240 of the Act had expired, but because the worker's employment injury had not yet consolidated after the expiry. The employer was then justified in terminating his employment because the worker was still considered disabled.

In other words, according to Commissioner Marchand, it is the worker's inability to return to work, and not solely the expiry of the time limit under section 240 of the Act, which constitutes good and sufficient cause for dismissal.

Applying this reasoning to the case at bar, Commissioner Marchand deems that Boutique Jacob's reason dismissing Ms. Sayegh – expiry of the time period set out in section 240 of the Act – is no more justifiable than would be a claim that she was disabled, seeing as her injury had consolidated. The only grounds invoked by the employer to terminate the worker's employment was the lack of an available position, hence her dismissal. Commissioner Marchand argues the employer failed to prove there was no available position and did not meet any other criteria that would objectively justify its choice of the employee to be dismissed. As a result, Commissioner Marchand ordered Ms. Sayegh reinstated.

Conclusion

This decision is inconsistent with a previous trend in jurisprudence that allows an employer to terminate a worker's employment upon expiry of the time limit set out in section 240 of the Act. In the future, employers will have to take into account the principles developed in this case before terminating a worker's employment at the expiry of the relevant time period. According to Commissioner Marchand, an employer's decision to terminate a worker's employment under section 240 of the Act may have to be supported by another good and sufficient cause if, at that time, the worker's employment injury is consolidated and he is able to return to work.

Carole Desjardins *specializes in labour and employment law and human rights. She has developed a particular expertise in the field of industrial accidents and occupational diseases as well as the field of occupational health and safety.*

Jean-François Cloutier *specializes in labour and employment law. He assists employers in various industries, namely the manufacturing and retailing sectors.*

***Carole Desjardins may be reached at 514 397 5169 or cdesjardins@mtl.fasken.com*; and**
Jean-François Cloutier at 514 397 5201 or jcloutier@mtl.fasken.com.

1. 2003 QCCRT 0412, July 4, 2003.
2. "Consolidation" means the healing or stabilization of an employment injury following which no improvement of the state of health of the injured worker is foreseeable.
3. R.S.Q., c. N-1.1.
4. [1997] C.A.L.P. 1088.
5. 2003T-372.