



EMPLOYER NEWS

Regional Newsletter - Labour, Employment, Human Rights and Public Law

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COLLECTIVE DISMISSAL AND MAJOR CONTRACT LOSSES: WHEN AN EVENT IS "UNFORESEEN" WITHOUT NECESSARILY BEING "UNFORESEEABLE"

In the week of February 9, 2009, we learned that Canada's trade balance had fallen into the red for the first time in more than 30 years, and then that the next budget to be tabled in the National Assembly of Quebec would show a deficit. One thing is certain: our economy will not avoid the global recession. Actually, for many Canadian and Québec companies, 2009 is already synonymous with "*administrative reorganization*" and "*downsizing*". To paraphrase the words of the new president of the United States in his inaugural speech: "The state of the economy calls for action."

FASKEN NEWS

DATE:

April 1, 2009

FLASH TRAINING:

The Labour Standards Act (Quebec):
5 years since the changes

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In this difficult economic context, a decision rendered on December 15, 2008 by the Court of Québec appears to be of interest to managers, in particular those whose organizations will have to implement collective dismissals in the near or not too distant future.

In *Les Industries Troie Inc.*,¹ Justice Lina Bond of the Court of Québec determined that the sudden and drastic loss of contracts could constitute, in some circumstances, an "*unforeseen event*" justifying an employer's failure to comply with the notice periods that apply to collective dismissals.

BACKGROUND

Les Industries Troie Inc. ["Troie"] is a family-owned company in the province of Québec that has been operating in the clothing-manufacturing industry since 1954.

DID YOU KNOW THAT...?

For its fiscal year ending March 31, 2008:

The Labour Standards Commission received 15% less complaints for psychological harassment than the previous year;

In comparison to the previous year, complaints for dismissal without just and sufficient cause were reduced by 2.3%.

According to the evidence adduced at the hearing, Troie began to experience a significant decrease in its production in 2002, which forced the company to strategically reposition itself as of 2003. In early 2004, in order to improve its production, Troie Inc. completed two major projects in the context of its business plan, thanks in particular to a government grant. In mid-July of 2004, the company actually seemed to regain its ground, production having increased since the spring. However, in mid-August of 2004, its situation deteriorated radically. Various clients of the company successively cancelled or reduced their orders. Eventually, Troie's weekly revenue forecast plummeted from \$110,875.00 to \$46,000.00.

¹ *Commission des normes du travail v. Les Industries Troie inc.*, 2008 QCCQ 12002, (C.Q.); see also 2008 QCCQ 12003, (C.Q.).

In light of all this, Troie decided to shut down the company for good, and consequently to dismiss its 186 non-unionized employees. Troie's employees were informed of the shut down on September 1, 2004. A notice of collective dismissal was sent to the Minister of Employment and Social Solidarity the following day.

Following an investigation conducted at the request of some former employees, the *Commission des normes du travail* claimed a little over \$30,000 from Troie in indemnities that were allegedly owing to 17 of the laid-off employees.

DISPUTE

As of May 1, 2003, the statutory provisions governing collective dismissals in Québec are incorporated in the *Act respecting Labour Standards*² [the "Act"].

Essentially, the applicable provisions state that any employer must, before proceeding to a collective dismissal³ for technological or economic reasons, give notice thereof to the Minister within the minimum time periods provided in the Act. Further, an employer who does not give the notice or who gives insufficient notice must pay to each dismissed employee an indemnity equal to the employee's regular wages, for a period equal to the remainder of the notice period which the employer was required to give.

Incidentally, and this is the heart of the matter, the Act provides that in the case of a "irresistible force" or where an "unforeseeable event" prevents an

employer from respecting the notice periods set out, the employer must give notice to the Minister as soon as the employer is in a position to do so.

On the strength of this exception, Troie argued that it was justified in not giving the notice to the Minister earlier due to the sudden and drastic loss of contracts. The *Commission des normes du travail* argued in turn that, given the context, the collective dismissal was normally foreseeable.

DECISION

After reviewing the rules that apply to collective dismissals in Québec, Justice Bond proceeded to define the notions of "irresistible force" and "unforeseeable event" in order to grasp the respective scopes of these causes of exoneration.

The court first concluded that these two terms necessarily apply to different situations. But while "irresistible force" is a relatively well-defined concept in Québec civil law, the same does not hold for the notion of "unforeseeable event".

The court then examined the case law rendered in the context of layoffs of indeterminate length that subsequently turn, after a six-month period, into dismissals and concluded that it is incumbent upon an employer to foresee the length of layoffs "[TRANSLATION] *when the circumstances demonstrate that they possessed all of the data needed to conclude that exceeding the time period was imminently probable, if not unavoidable.*"

Applying a similar reasoning to the dispute submitted to her for adjudication, Justice Bond weighed the evidence in order to determine whether "[TRANSLATION] *the sudden and major loss of contracts constitutes a probable event that Troie was normally in a position to foresee in light of the elements at hand.*"

In the end, the Court concluded that, despite the difficult economic conditions that had prevailed in the clothing-manufacturing industry since 2003, nothing could have pointed to such a drastic and rapid drop. Therefore, the major loss of contracts constituted, under the circumstances, an "unforeseen event" in that "[TRANSLATION] *it could probably not have been foreseen by a reasonably diligent person operating the same type of business in the same circumstances.*"

As for this notion of "unforeseen event", the court added that this cause of exoneration should be interpreted narrowly, but not to the point of vesting "unforeseeable event" with a more restrictive meaning as was suggested by the *Commission des normes du travail*. The action against Troie was therefore dismissed.

CONCLUSION AND REFLEXIONS

This decision sheds an interesting new light on the scope of the cause of exoneration provided in the *Act respecting labour standards* when an "unforeseeable event" prevents employers from giving notice of collective dismissal within the minimum time periods provided by the Act.

Therefore, in certain circumstances, a significant and drastic loss of contracts can constitute an "unforeseeable event" that entitles employers to avoid paying a compensatory indemnity equal to the remaining period of notice, even when their businesses are operated in a fragile and delicate economic context.

In the current economic context, it will seldom be easy to argue this cause of exoneration, as losses of contracts and order reductions will quite often have been foreseen.

Basically, companies will have to determine if "[TRANSLATION] *a reasonably diligent*

² *An Act respecting Labour Standards*, RSQ, c. N-1.1; Section VI.0.1.

³ Pursuant to Section 84.0.1 of the Act, collective dismissal means the termination of employment by the employer, including a layoff for a period of six months or more, involving not fewer than 10 employees of the same establishment in the course of two consecutive months.

person operating the same type of business in the same circumstances would normally be in a position to foresee this major loss of contracts, in light of the information and the data available.”

If not, the event could be qualified as unforeseen, even if it is not completely unforeseeable. In the latter case, employers

could be exempted from paying compensatory indemnities equal to the remaining period of notice.

For more information, please do not hesitate to contact the author of this newsletter or one of the members of our [Labour, Employment, Human Rights and Public Law](#) practice group.

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LEGISLATIVE NEWS

On March 12, 2009, the Minister of Labour, Mr. David Whissel, introduced in the National Assembly a Bill to amend the *Pay Equity Act*.

The salient points of the proposed modifications are:

- the expansion of the definition of a red circle salary
- the incorporation of rules concerning maintenance of pay equity
- transitional provisions for employers who have not yet completed their pay equity process
- the creation of an advisory committee of partners
- the expansion of the powers and responsibilities of the Pay Equity Commission.

Various employer organisations have already expressed their interest to be heard in Parliamentary Commission, namely with regard to the role of the Pay Equity Commission.

We will update you on any developments in our following newsletters. More detailed comments will be provided as the Parliamentary discussions progress. In the meanwhile, if you want to find out more about this Bill, please contact one of the members of our group or:

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