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Do transactions or releases signed upon termination of employment protect the employer against further action

By Lyne Perron and Élaine Léger

Before the coming into force on January 1, 1994 of the *Civil Code of Québec* (the "CCQ") it was permissible for the parties to include a clause in an employment contract stipulating that either party could terminate the contract upon giving a predetermined notice of termination. Accordingly, the courts recognized the intentions of parties who provided the conditions governing termination of employment in their employment contracts and intervened only in cases of vitiated consent. The same approach was adopted where the parties determined that the rules of transaction were to govern the terms and conditions in the event of the employee's departure for the purpose of avoiding court action.

With the coming into force of the new CCQ, in article 2091 the legislator codified the principle established in earlier case law, namely that either party could terminate a contract of employment by giving the other party reasonable notice of termination.

However, the purpose of article 2092 was two-fold: to change the state of the law regarding the rule of freedom of contract that had previously applied. That article provides as follows:

> *"The employee may not renounce his right to obtain compensation for any injury he suffers where insufficient notice of termination is given or where the manner of resiliation is abusive." (emphasis added)*

That article therefore introduces the principle that no employee may now renounce in advance to his entitlement to reasonable notice of termination upon termination of his or her employment. Thus, any notice of termination stipulated in the **employment contract**, even before the coming into force of the CCQ, may now be cancelled by the courts, after termination of employment, if deemed unreasonable.

Until very recently, the doctrinal position was that the rule in article 2092 would only apply to the termination notice stipulated in the employment contract. In that respect, the commentary of the Minister of Justice when the article was enacted would appear to confirm that approach. The Minister stated as follows:

> *[unofficial translation:] "The purpose of this article is to grant a right to the employee. Like wages, compensation is a vital element, therefore, is regarded as a taking the place of a fundamental contractual feature.*
>
> *It seemed reasonable to prohibit renunciation to compensation; the article is therefore of public order." (emphasis added)*

Two Québec Superior Court decisions have broadened the protection granted to the employee under article 2092 CCQ not only as regards employment contracts, but also as regards the agreement entered into between employer and employee upon termination of employment.

In *O'Connor v. Omega Engineering inc*.[1] the Superior Court agreed that article 2092 CCQ does not affect freedom of contract and that a transaction can evidence the agreement between the parties if the employer conducts itself properly and respects the employee's rights. However, any such agreement may be voided if, as in the aforementioned case, the employer acted abusively in requiring that the employee sign the transaction immediately under pain of no compensation, without giving the employee time to make a considered and informed decision.

In *Karasseferian v. Bell Canada inc*.[2] the Superior Court went so far as to rule that the Court has the power to examine whether the compensation paid to an employee in the transaction is reasonable. The Judge stated as follows:

> *[unofficial translation:] "The transaction, which expresses a renunciation in the form of a release, is relative and is no longer unqualifiedly enforceable by the employer against a former employee. As set forth in article 1609 CCQ, an acquittance and transaction may be without effect if damaging to the employee, who is owed reasonable notice of termination, which most frequently takes the form of reasonable compensation."*[3]

This being said, the Court adopted an approach that gave both parties some latitude. He went on to state:

> *[unofficial translation:] "Given that notice of termination is not calculated mathematically, according to some table – each case must be dealt with individually, according to its particular circumstances – the adequacy of notice is assessed according to relative significance. To be regarded as unreasonable, the insufficiency of the notice must be considerable.* [4]

In other words, even if the termination notice granted to the employee under the transaction is not exactly that provided for in the Code, the Court may held that it is reasonable if the difference is insignificant. It suffices if it is within the "range of the reasonable" in order to escape judicial review.

It is clear that if these decisions are followed, especially the *Karasseferian* case, it means that it must never be presumed that the signing of a transaction or a release will preclude legal proceedings. Until the actual scope of article 2092 CCQ has been determined, it would be prudent to take these decisions into consideration when negotiating a transaction with an employee and ensure that the offer is reasonable in the circumstances.

Lyne Perron of the Montréal office can be reached at 514 397 7663 or at lperron@mtl.fasken.com and Élaine Léger, also of the Montréal office, can be reached at 514 397 4389 or eleger@mtl.fasken.com

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[1] 2000 - R.J.D.T. 139 (C.S.)
[2] 2000 - R.J.Q. 1452 (C.S.)
[3] Id. page 1457
[4] Id. page 1458