NEED TO KNOW

JANUARY 2016

lavery Lawyers

Labour and Employment

RIGHT TO RETURN TO WORK: THE JURISDICTION OF THE ARBITRATOR OR OF THE CNESST AND TAT?

ÉLODIE BRUNET, ZEÏNEB MELLOULI and MARIE-HÉLÈNE RIVERIN

ON NOVEMBER 24, 2015, THE QUÉBEC COURT OF APPEAL RENDERED A MUCH ANTICIPATED JUDGMENT IN THE CASE OF *UNIVERSITÉ McGILL* V. *McGILL UNIVERSITY NON ACADEMIC CERTIFIED ASSOCIATION (MUNACA)*[1] ("*McGILL*"). IN THIS JUDGMENT, THE COURT DISPELLED THE AMBIGUITY THAT HAS EXISTED FOR SEVERAL YEARS IN THE CASE LAW REGARDING THE GRIEVANCE ARBITRATOR'S JURISDICTION IN DISPUTES REGARDING THE INTERPRETATION AND APPLICATION OF THE PROVISIONS OF COLLECTIVE AGREEMENTS AS THEY PERTAIN TO AN EMPLOYEE'S RETURN TO WORK FOLLOWING AN INDUSTRIAL ACCIDENT OR OCCUPATIONAL DISEASE, WITHIN THE MEANING OF THE *ACT RESPECTING INDUSTRIAL ACCIDENTS AND OCCUPATIONAL DISEASES* ("AIAOD").[2]

In this case, the Court had to consider the following issues: can the parties to a collective agreement provide employees with more beneficial conditions than those contained in the AIAOD? And if so, who has jurisdiction to hear and render decisions regarding disagreements arising from such contractual provisions? Finally, the Court had to determine whether the collective agreement between the parties in this case contained a provision which offers greater protection than the statute.

CONTEXT OF THE *McGILL* CASE

An employee suffered from a permanent functional disability following an employment injury. The Commission de la santé et de la sécurité du travail[3] ("CSST") found that that disability prevented him from continuing to work in the same position he held prior to the injury, and therefore identified suitable alternative employment elsewhere in the labour market, since such employment was not available with his employer. After temporarily assigning the employee to light work, the employer terminated his employment nearly five years after the CSST had identified suitable alternative employment on the grounds that such employment still did not exist within the employer's organization.

---

1 2015 QCCA 1943. As of January 4, 2016, no application for leave to appeal to the Supreme Court of Canada had been filed. We would also like to draw your attention to the following decisions rendered by the Court of Appeal on the same subject: *Syndicat des cols bleus regroupés de Montréal, section locale 301* v. *Beaconsfield (Ville de)*, 2015 QCCA 1958, and *Montréal-Est (Ville de)* v. *Syndicat des cols bleus regroupés de Montréal, section locale 301*, 2015 QCCA 1957.

2 CQLR c A-3.001.

3 Since the coming into force of the *Act to group the Commission de l'équité salariale, the Commission des normes du travail and the Commission de la santé et de la sécurité du travail and to establish the Administrative Labour Tribunal*, S.Q. 2015, c. 15, on January 1, 2016, the CSST has been replaced by the "Commission des normes, de l'équité, de la santé et de la sécurité du travail" ("CNESST") and the CLP has been replaced by the "Tribunal administratif du travail" ("TAT").

The collective agreement between the parties also provided that [TRANSLATION] "where an employee becomes able to carry on his employment again, but has a permanent functional disability that prevents him from continuing to hold his previous employment, he shall be reassigned, without a posting, to another position suitable for his health condition, based on the available positions needing to be filled."

The employee filed grievances contesting the employer's decision to terminate his employment claiming that, notwithstanding the CSST's finding that suitable employment did not exist within the employer's organization, he should be offered another position. The employer raised an objection to the arbitrator's jurisdiction, arguing that [TRANSLATION] "where the worker was the victim of an industrial accident leading to a permanent functional disability, the arbitrator does not have jurisdiction over the worker's ability to carry on employment with his employer."[4] The parties agreed to deal with this issue as a preliminary matter and the arbitrator held that the jurisdiction conferred on him by section 244 of the AIAOD to resolve the terms of the return to work [TRANSLATION] "does not include the jurisdiction to decide on the employee's ability to carry on employment following an employment injury — an issue that is reserved for the CSST and the Commission des lésions professionnelles ("CLP") on appeal."[5] Therefore, he allowed the employer's objection and declined jurisdiction, without ruling on the merits of the grievances which, among other things, contested the employee's termination.

The union sought judicial review of this decision to the Superior Court, which quashed the arbitrator's award and referred the grievances back to him for a ruling on the merits.[6] The employer appealed this judgment to the Québec Court of Appeal, which affirmed the decision of the Superior Court and dismissed the employer's appeal.

DECISION OF THE COURT OF APPEAL

Like the Superior Court, the Court of Appeal found that section 4 of the AIAOD permits the parties to a collective agreement to provide more beneficial provisions for employees than those set out in statute. Section 244 of the AIAOD does not limit the possibility of doing so. Therefore, the grievance arbitrator has exclusive jurisdiction to determine whether an agreement contains a clause which confers greater benefits than those set out in the AIAOD and, if so, to interpret and apply such a clause.[7]

For instance, the Court noted that a collective agreement could provide for more beneficial provisions which would:

- Extend the time period for exercising the right to return to work set out at section 240 of the AIAOD, thereby requiring the employer to reinstate the employee to his pre-injury employment or suitable employment, beyond the period prescribed by statute;[8]
- Require the employer to offer or create suitable employment within its organization, if no such employment exists or is available;
- Require the employer to offer an employee who is incapable of resuming his pre-injury employment another position which is consistent with his residual abilities, even if such a position does not constitute "suitable employment" within the meaning of the AIAOD.[9]

The Court noted however that in exercising his jurisdiction the arbitrator remains bound by the findings made by the CSST or the CLP, where applicable, particularly as they pertain to the existence of an employment injury, the employee's ability to resume his pre-injury employment, his functional disability, and what constitutes suitable employment.[10] These findings are the background against which the arbitration award must be made.

On the other hand, if the arbitrator concludes that the collective agreement does not provide for any additional benefits to the regime created by the AIAOD, he cannot claim jurisdiction to impose additional obligations on the employer, nor can an employee who is exercising the rights conferred on him by statute demand any greater rights. In such a case, the parties are and remain bound by the findings of the CSST and the CLP, where applicable.[11]

---

4 Comments at para 56 of the arbitration award (D.T.E. 2011T-582), reproduced by the Court of Appeal in the *McGill* decision, at para 10.

5 Para 103 of the arbitration award, reproduced by the Court of Appeal at para 15.

6 2013 QCCS 1175.

7 *McGill* decision, para 95.

8 The time period provided for at section 240 of the AIAOD is either one or two years, depending on the circumstances.

9 See, in particular, para 51.

10 *McGill* decision, paras 73 and 74.

11 *Ibid.*, para 78.

COMMENTS

To summarize, according to the *McGill* decision, the grievance arbitrator has exclusive jurisdiction, first to determine whether a collective agreement confers more benefits on an employee than those provided for in the AIAOD and, if that is the case, to interpret and apply those provisions. In exercising this jurisdiction, the grievance arbitrator cannot reject, refute or dispute the findings made by the CSST or the CLP, and his intervention must be within the boundaries of the framework created by these organizations in accordance with the AIAOD.

This decision therefore dispels the ambiguity [12] which could have previously arisen, particularly from such decisions as *Société des établissements de plein air du Québec* v. *Syndicat de la fonction publique du Québec* [13] and *Syndicat canadien des communications, de l'énergie et du papier, section locale 427* v. *Tembec, usine de Matane* [14], in which the courts upheld the decisions of grievance arbitrators granting the employer's preliminary objections on the grounds that the arbitrators lacked the jurisdiction to call into question the decisions rendered by the CSST and the CLP in accordance with their exclusive jurisdiction. We note that the collective agreements in these two cases did not contain more beneficial provisions than the AIAOD on the right to return to work.[15]

Time will tell whether the Court of Appeal's judgment in the *McGill* case has an impact on the negotiation of clauses in collective agreements providing for more beneficial terms and conditions than those contained in the AIAOD. However, in our view, disputes over the return to work of employees following an industrial accident or occupational disease must also be assessed from the perspective of the Court of Appeal's judgment in the case of *Commission de la santé et de la sécurité du travail* v. *Caron*,[16] which held that where an employee exercises his right to return to work and seeks suitable employment, the employer must engage in a process of reasonable accommodation in accordance with the *Charter of Human Rights and Freedoms*,[17] up to the point of undue hardship.

ÉLODIE BRUNET
514 878-5422
ebrunet@lavery.ca

ZEÏNEB MELLOULI
514 877-3056
zmellouli@lavery.ca

MARIE-HÉLÈNE RIVERIN
418 266-3082
mhriverin@lavery.ca

[12] *Ibid.*, para. 20.

[13] 2009 QCCA 329.

[14] 2012 QCCA 179.

[15] As noted by the Court of Appeal in the *McGill* decision, para 60.

[16] 2015 QCCA 1048. In this regard, we refer you to our previous publication on this decision, which you can consult by clicking here.

[17] CQLR c C-12.

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE LABOUR AND EMPLOYMENT GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

PIERRE-L. BARIBEAU pbaribeau@lavery.ca 514 877-2965
PIERRE BEAUDOIN pbeaudoin@lavery.ca 418 266-3068
AMÉLIE BÉLISLE abelisle@lavery.ca 514 877-2929
VALÉRIE BELLE-ISLE vbelleisle@lavery.ca 418 266-3059
DAVE BOUCHARD dabouchard@lavery.ca 819 346-3411
JEAN BOULET jboulet@lavery.ca 819 373-4370
ÉLODIE BRUNET ebrunet@lavery.ca 514 878-5422
BRITTANY CARSON bcarson@lavery.ca 514 877-3027
GENEVIÈVE CHAMBERLAND gchamberland@lavery.ca 819 346-2562
NICOLAS COURCY ncourcy@lavery.ca 819 373-8225
MAGALI COURNOYER-PROULX mproulx@lavery.ca 514 877-2930
MICHEL DESROSIERS mdesrosiers@lavery.ca 514 877-2939
NORMAN A. DIONNE ndionne@lavery.ca 514 877-3070
JOSÉE DUMOULIN jdumoulin@lavery.ca 514 877-3088
CHARLOTTE FORTIN cfortin@lavery.ca 418 688-5000
SIMON GAGNÉ sgagne@lavery.ca 514 877-2916
DANIELLE GAUTHIER dgauthier@lavery.ca 819 346-8073
MICHEL GÉLINAS mgelinas@lavery.ca 514 877-2984
RHONDA GRINTUCH rgrintuch@lavery.ca 514 877-3068
MARIE-JOSÉE HÉTU mjhetu@lavery.ca 819 373-4274
MARIE-HÉLÈNE JOLICOEUR mhjolicoeur@lavery.ca 514 877-2955
NICOLAS JOUBERT njoubert@lavery.ca 514 877-2918
NADINE LANDRY nlandry@lavery.ca 514 878-5668
CLAUDE LAROSE clarose@lavery.ca 418 266-3062
ARIANE LAUZIÈRE alauziere@lavery.ca 819 373-1881
MYRIAM LAVALLÉE mlavallee@lavery.ca 819 373-0339
GUY LAVOIE, CIRC guy.lavoie@lavery.ca 514 877-3030
GUY LEMAY, CIRC glemay@lavery.ca 514 877-2966
CARL LESSARD clessard@lavery.ca 514 877-2963
JOSIANE L'HEUREUX jlheureux@lavery.ca 514 877-2954
CATHERINE MAHEU cmaheu@lavery.ca 514 877-2912
ZEÏNEB MELLOULI zmellouli@lavery.ca 514 877-3056
VÉRONIQUE MORIN, CIRC vmorin@lavery.ca 514 877-3082
JEAN-FRANÇOIS PAGÉ jfpage@lavery.ca 819 346-7999
FRANÇOIS PARENT fparent@lavery.ca 514 877-3089
CATHERINE PARISEAULT cpariseault@lavery.ca 514 878-5448
SYLVAIN POIRIER spoirier@lavery.ca 514 877-2942
MARIE-HÉLÈNE RIVERIN mhriverin@lavery.ca 418 266-3082
CHANEL STERIE csterie@lavery.ca 514 878-5450

DS TE la