Lavery HEALTH LAW

Number 15
August 2017

Legal newsletter for the health and social services network and health-care professionals

lavery Lawyers

Victory for the managerial personnel of the Health and Social Services Network in Superior Court of Québec – What is the immediate takeaway?

VÉRONIQUE MORIN

On July 27, 2017, the Superior Court of Québec rendered a decision in favour of the managerial personnel of the Health and Social Services Network, concluding that the changes made to some of their working conditions by the Minister of Health were null and void.[1]

Background

The *Association des gestionnaires des établissements de santé et de services sociaux* ("**AGESSS**") is a professional union which represents senior and mid-level managerial personnel employed by the network.

With its motion seeking a declaratory judgment and declaration of nullity, the AGESSS was not contesting the validity of the job eliminations carried out pursuant to the *Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies*, commonly referred to as Bill 10.[2]

However, the AGESSS was claiming that the amendments made pursuant to an order issued by Minister Gaétan Barrette which modified certain provisions of the regulations establishing the working conditions of managerial personnel of the network[3] were null and void.

Bill 10, which was assented to in February of 2015, stipulated that some of its provisions were to come into force on February 9, 2015, including section 189 which sought to eliminate certain managerial positions at a later date, specifically March 31, 2015.

Under section 189 of Bill 10, *[a]ny person referred to in this section whose position has been eliminated is not entitled to indemnities other than those provided under his or her conditions of employment.*[4]

The remaining provisions of Bill 10 came into force on April 1, 2015. This includes perhaps most notably sections 135 and 136 of Bill 10, the latter of which stipulates that *[i]f a position is eliminated because of a reorganization carried out pursuant to this Act, the maximum end-of-engagement indemnity provided for in sections 116 and 124 of the Regulation may not exceed 12 months' salary.*

Section 136 therefore had the effect of reducing the end-of-engagement indemnities payable to affected managerial personnel from 24 to 12 months of salary.

Following the ministerial ruling on March 23, 2015, the working conditions were retroactively amended such that not only were the end-of-employment indemnities reduced, but the total value of the amounts payable in the event an individual took pre-retirement leave could not exceed 12 months of salary (in both pre-retirement leave and end-of-engagement indemnity, if the manager elected to take it during his or her leave).

However, this amendment came into force on March 23, 2015, that is, before the elimination of the positions imposed by Bill 10, which were to occur on March 31, 2015. This change brought about by ministerial ruling had the effect of amending Bill 10, among other laws passed by the government.

---

1 *AGESSS* c. *Gaétan Barrette, es qualités de ministre de la santé et des services sociaux et P.G. du Québec*, C.S. 200-17-022087-159, July 20, 2017 (Honourable Suzanne Ouellet, S.C.J.)

2 *An Act to modify the organization and governance of the health and social services network, in particular by abolishing the regional agencies*, CQLR, c. O-7.2.

3 *Regulation respecting certain terms of employment applicable to officers of agencies and health and social services institutions*, CQLR, c. S-4.2, r. 5.1, hereinafter referred to as *"Regulation respecting certain conditions of employment"*.

4 Last subparagraph of section 189 of Bill 10.

The Protection of acquired rights principle

The Minister explained that the purpose of this amendment was to correct a clerical error. The Court dismissed this argument, ruling that the statute was clear and did not contain any such error.

That being said, the Superior Court accepted the arguments of the AGESSS and held that Bill 10 is consistent with the principle of the protection of acquired rights insofar as they do not retroactively affect the rights of affected individuals.

Indeed, the conditions applicable to managerial personnel whose positions were eliminated by Bill 10 are those set out in the *Regulation respecting certain conditions of employment* as they existed on March 31, 2015, given that section 136 of Bill 10 (which had the effect of reducing the end-of-employment indemnity to 12 months) only came into force on April 1, 2015.[5]

As a result, the retroactive amendments made to the *Regulation respecting certain conditions of employments* on March 23, 2015 had the effect of amending Bill 10 and yet were not authorized by any provision of Bill 10 or the *Act respecting health services and social services*.

Moreover, these amendments could not be valid as the Act did not give the Minister the power to amend a law passed by the government, and it certainly not provide the Minister the power to do so retroactively.

Duty to consult

Relying on a 1984 governmental decree which acknowledged the status of AGESSS as representative, the Superior Court confirmed that the Health Minister and its representatives had the duty to consult this association prior to changing the working conditions of the managers in the network.

Furthermore, the absence of any consultation was found by the Court to be another reason why the amendments to the *Regulation respecting certain conditions of employment* had to be nullified as they were contrary to the liberty of association recognized by the *Canadian Charter of Rights and Freedoms*. However, the Court noted that the AGESSS did not contest the validity of Bill 10 on any basis whatsoever. More specifically, it did not raise any argument regarding mandatory consultation.[6]

Conclusions and recommendations

Accordingly, the Court declared the ministerial order to be null and void and held that the end-of-employment and pre-retirement indemnities of the managers whose positions were eliminated by Bill 10 on March 31, 2013 must be determined in accordance with the *Regulation respecting certain conditions of employment* as it existed prior to the ministerial order.

Depending on the factual situation of each manager, adjustments could therefore be claimed.

However, the Minister and the government have 30 days from the judgment to apply for leave to appeal with the Québec Court of Appeal.

VÉRONIQUE MORIN, CIRC and Certified mediator
514 877-3082
vmorin@lavery.ca

[5] Paragraphs 22, 68, 69, 74-82, 107 and 109 of the judgment.

[6] Paragraphs 132-133 and 135 of the judgment.

HEALTH AND SOCIAL SERVICES TEAM UNDER THE DIRECTION OF SYLVAIN POIRIER

ANNE BÉLANGER	abelanger@lavery.ca	514 877-3091
JULES BRIÈRE, Ad. E.	jbriere@lavery.ca	418 266-3093
GENEVIÈVE CHAMBERLAND	gchamberland@lavery.ca	819 346-2562
RAYMOND DORAY, Ad. E.	rdoray@lavery.ca	514 877-2913
SIMON GAGNÉ	sgagne@lavery.ca	514 877-2916
DANIELLE GAUTHIER	dgauthier@lavery.ca	819 346-8073
VÉRONIQUE IEZZONI	viezzoni@lavery.ca	514 877-3003
PIERRE MARC JOHNSON, Ad. E., G.O.Q., MSRC	pjohnson@lavery.ca	514 877-3035
MAUDE LAFORTUNE-BÉLAIR	mlafortunebelair@lavery.ca	514 877-3077
PATRICK A. MOLINARI, Ad. E., MSRC	pmolinari@lavery.ca	514 877-3079
VÉRONIQUE MORIN, CIRC	vmorin@lavery.ca	514 877-3082
CATHERINE PARISEAULT	cpariseault@lavery.ca	514 878-5448
SYLVAIN POIRIER	spoirier@lavery.ca	514 877-2942
VIRGINIE SIMARD	vsimard@lavery.ca	514 877-2931
MAUDE ST-GEORGES	mstgeorges@lavery.ca	514 878-5642
CHARLES OLIVIER THIBEAULT	cothibeault@lavery.ca	514 877-3086

Pour recevoir notre bulletin en français, veuillez envoyer un courriel à info@lavery.ca.