

Determination of the “real employer” under the *Act respecting Industrial Accidents and Occupational Diseases* when a business entrusts the management of its human resources to a “personnel agency”

By Jean Beauregard and Nicolas Joubert

The phenomenon of personnel agencies

Generally, Labour Relations laws assume the interaction of two parties, an employer and an employee. The employee offers his services, for pay, to an employer, who determines the working conditions and ensures discipline. This is a bipartite relationship. However, when a business entrusts the management of its human resources to a personnel agency, there is a tripartite relationship. As the Supreme Court noted in the *City of Pointe-Claire*¹ decision, these agencies occupy a growing place in the labour market. In a way, they play an intermediary role by supplying businesses with the services of the workers they recruit.

The issue

The use of a personnel agency (an “agency”) obviously can pose problems in determining who the real employer is. The Commission des lésions professionnelles (the “CLP”) has recently rendered several decisions^{2,3} in cases all raising this same fundamental question as to whether the agency or the business is a worker’s real employer for the purposes of establishing which of the two must report his wages



or salary on the payroll it provides to the *Commission de la santé et de la sécurité du travail* (the “CSST”) and which of them is charged the costs related to employment injuries.

The cases recently studied by the CLP involved specialized businesses which agencies offered to relieve of everything pertaining to personnel management. Contracts were entered into between the agencies and the businesses for this purpose. The workers were laid off by the businesses and rehired, if they so desired, on the same conditions, by the agencies. Representatives of the agencies were then dispatched to the businesses to handle all or part of the tasks related to recruiting, hiring, schedules, compilation of time worked, payroll, vacations, discipline and relations with third parties (CSST, Employment Insurance, seizures of salaries, labour standards, alimentary support payments, and attestations of income). Occasionally, the

agencies’ representatives even determined the staffing needs and the conditions of employment when hiring, and negotiating salary increases.

The CLP thus had to clarify the relevant criteria to be applied for the purposes of determining who is the real employer in the specific context of the application of the *Act respecting Industrial Accidents and Occupational Diseases* (the “AIAOD”).

¹ *City of Pointe-Claire v. Labour Court*, [1997] 1 S.C.R. 1015.

² Cases in which it was decided that the agency was the real employer: *Les Viandes Guy Chevalier inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-204; *Fondrémy inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-208; *Rebuts solides canadiens*, (CLP 2005-12-12); *Immeubles Jacques Robitaille inc.*, (CLP 2005-12-12); *Centre de valorisation de verre du Québec (Unical)*, (CLP 2005-12-12).

³ Cases in which it was decided that the agency was not the real employer: *Aliments Danac inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-209; *Nostrano inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-207; *Abattoir Ste-Julienne ltée.*, (CLP 2005-12-12); *Récubec inc.*, (CLP 2005-12-12); *Uni-Viande inc.*, (CLP 2005-12-12).



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Factors favoured by the CLP when determining the real employer

1) The CSST recognizes agencies

First, the CLP recognizes that agencies are a reality in the working world, a reality that the CSST itself recognizes because it sets out classification units covering their sphere of activity in the *Regulation respecting the classification of employers*⁴.

Secondly, the CLP also recognizes that these agencies are generally retained in good faith. Supplying labour is a legitimate and legal business activity. So, it is legitimate for clients to resort to it. Moreover, the CLP affirms that the contracts entered into between the businesses and the agencies are presumed to be valid and opposable to third parties.

The CLP also states that Section 5 of the AIAOD⁵ does not have as its purpose to establish that an agency is always the employer of the worker whose services it hires out to a client. Rather, this Section does provide that, when employer status is confirmed by the evidence, the hiring out of the worker's services by the agency to a client does not result in the agency losing such status.

2) Hiring out may be for short or long term

Wishing to respond to an argument often invoked regarding the determination of the real employer, the CLP states that hiring out may be for short term or long term, given that the *Regulation respecting the classification of employers* in no way specifies that hiring out must be temporary to meet the regulatory requirements.

3) Since the AIAOD differs from the Labour Code, it is appropriate to apply certain nuances to the case law arising from the application of the Labour Code

The CLP observes that the AIAOD contains definitions of the terms “worker” and “employer” that differ from those found in the *Labour Code*. Therefore, the CLP is of the opinion that appropriate nuances must be applied to the case law developed under the *Labour Code*.

4) Review of the hiring out agreement

It is necessary to verify who are the parties to the hiring out agreement and what are the purposes of such agreements, especially if it is in writing. It is also appropriate to examine whether it reflects reality or whether it is a smokescreen intended to mask a different contractual relationship.

5) Identification of the party who exercises the greatest control over all aspects of the work

With regard to the principal issue of determining the real employer, the CLP reiterates the Supreme Court's remarks set out in the *City of Pointe-Claire* decision. It argues that, because it would be illogical for a client who retains the services of an agency for the provision of temporary personnel to end up as the employer of the agency's employees simply due to the fact that such client controls the day-to-day tasks to be performed by them, it is appropriate to apply nuances to the concept of “legal subordination” traditionally used by the Labour Court to determine the real employer within the meaning of the *Labour Code*, and to prefer the criterion of “broadened legal subordination”. In reality, the criteria of control of the day-to-day work and integration into the business are certainly important but far too simplistic, and should not be used as the exclusive criteria for the purposes of determining the real employer.

The factors that must be assessed when considering “broadened legal subordination” include not only recruiting, selection, training, remuneration and discipline, but also integration into the business, continuity of employment and the workers' sense of belonging. The purpose of this more comprehensive and more flexible approach is to identify “the party that exercises the greatest control over all aspects of the work”, depending on the particular factual situation in each case.

6) Remuneration

Remuneration is also one of the factors to be analyzed. The CLP must find out who ensures that the worker is paid and verify whether the situation in this respect conforms to the real relationships between the different stakeholders.

7) The notion of establishment

The CLP observes that the notion of establishment has some importance but that it is essential to refrain from concluding that this concept alone always confers the status of employer on the client on the grounds that the work is performed in the client's establishment. The CLP notes that, in all cases of hiring out (short or long term), the reality is that the workers whose services are hired out perform their work at the client's establishment. Putting too much importance on this criterion would amount to putting the agencies out of business as employers.

⁴ *Regulation respecting the re-determination of employer classifications, of employer assessments and of imputations of the cost of benefits* R.Q. c. A-3.001, r.2.01.1.

⁵ “An employer who lends or hires out the services of a worker in his employ continues to be the worker's employer for the purposes of this Act.”

Moreover, Section 2 of the AIAOD indicates that an employer uses a worker's services "for the purposes" of its establishment and not "in" its establishment. Such a formulation is based on an assumption that a worker can work elsewhere than in his employer's establishment, provided that his work serves "for the purposes" of his employer's establishment. The criterion of establishment thus must be weighed like the other criteria mentioned above. This criterion alone cannot orient the debate and seal a business's fate.

8) A comprehensive analysis

Finally, the CLP affirms that none of the factors alone is absolute or determinant but that, taken together, the factors may allow a court to distinguish between the roles of each player involved in a tripartite relationship and rule on the merits of the dispute brought before it.

Application of the criteria

After analyzing these criteria, the CLP concluded that an agency is the real employer when it:

- handles, without interference by the business, the recruiting, selection and hiring of the workers necessary for the client's production, through the work of its representatives located in the business, whether they are from its own bank of candidates or from the bank constituted by the job applications submitted directly to the business;
- takes charge of preparation of work schedules, compilation of time worked, preparation and distribution of pay, authorization of vacations, determination of working conditions, establishment of disciplinary measures, and relationships with third parties (in particular, management of industrial accidents);
- ensures that the workers are paid and deals directly with all aspects related to their occupational lives;
- establishes a structure in the business of its client, creating a barrier between the agency's workers and the client's business.⁶

The CLP also notes that the payment of insurance premiums on the equipment and with respect to the workers is not a determining factor. In fact, it may be normal and more advantageous for the client to pay these costs directly, without thereby becoming the real employer.

In some cases, the CLP considers the fact that the CSST has earlier recognized the agency as the real employer to arrive at the same conclusion.

Applying the same reasoning, the CLP will, however, conclude that the agency is not the real employer when:

- the agency, upon the arrival of its representatives at its client's business, does not initiate any personnel selection process and merely settles for transferring the existing personnel to its control;
- subsequent hiring is handled by the agency through its representatives in the client's business, but the managers of the client's business also deal with recruiting by meeting the candidates, being present during the collection of information and soliciting individuals directly;
- a manager of the business interferes directly in the working conditions of the workers, particularly by giving his opinion on the individual salary increases requested by them and by having to approve these increases for them to be recognized;
- a manager of the business gives the workers instructions regarding the work to be performed and the manner in which it must be performed and informs them of his displeasure when the work is not performed to his satisfaction;
- training is the responsibility of the business, since this aspect is not covered by the contract with the agency;
- there is confusion regarding the hierarchy within the business;
- the business itself handles payment of the expense accounts of workers reported by the agency on its payroll, and it disburses the vacation pay owed to the workers hired out to it by the agency upon termination of their activities.⁷

Conclusion

What emerges from the CLP's recent decisions is that when the businesses do not interfere or intervene in labour relations, or limit themselves to paying for the services offered by the agencies, they are not the real employers of the workers whose services are provided to them.

However, the opposite conclusion applies if the client, despite the contracts existing between the workers and the agency on the one hand, and despite the contract for services entered into between the client and the agency on the other hand, retains authority over the workers and continues to exercise "the greatest control over all aspects of their work".

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⁶ See, in particular: *Les Viandes Guy Chevalier inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-204 and *Fondrémy inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-208.

⁷ See, in particular: *Aliments Danac inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-209; *Nostrano inc. and Service de personnel Antoine inc.*, CLPE. 2005LP-207.

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