IN FACT AND IN LAW

Litigation and Employment

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Is it permissible to communicate with the employees of the opposite party?

Do the employees then have a duty of loyalty?

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These questions arise periodically and always pose problems of conscience for the lawyers and employers concerned.
A recent decision of the Court of Appeal in *Caisse Populaire Desjardins de La Malbaie* v. *Tremblay*, J.E. 2006-1218, 2006 QCCA 697, sets out the latest state of the law on the subject.

The facts

Tremblay sued the Caisse Populaire for unlawful dismissal and his lawyer communicated with employees of his former employer for the purpose of meeting with them. The Caisse's lawyer refused to allow these meetings to be held without her being present. The plaintiff's lawyer, faced with the refusal of the defendant's employees to cooperate, filed a motion for authorization to meet these witnesses.

The Superior Court defined the issues as follows:

> **"1. Despite the duties of confidentiality and loyalty imposed by article 2088 C.C.Q., can the employee testify in favour of a third party in judicial proceedings by that party against his employer's business?**
>
> **2. Can an employee placed in such a situation be considered as the party itself (within the meaning of sections 397 and 398 C.C.P.)?" [Translation]**

The Superior Court's judgment

• The duty of loyalty

The trial judge was of the view that an employee's **duty of loyalty** mainly applies to conflict of interest situations involving the obligations not to compete or solicit which flow from such duty, whereas the **duty of confidentiality** applies to confidential information such as that relating to trade secrets or a specific project of the business or its processes, as well as information concerning customer lists, exclusive products, the business's reputation and the private lives of its employees. He added:

> **"[10]. However, the duties of loyalty and confidentiality to which the employees of a business are subject are not absolute and may have limits legitimized by considerations of a higher order. Indeed, situations may arise where these duties must give way to the right to life, the integrity of the person, justice and a full and complete defence." [Translation]**

In this instance, the trial judge considered that the public interest in the sound administration of justice and the right of the dismissed employee to have a just and fair trial must prevail over a business's rights to its employees' faithfulness and discretion.

Starting from the principle that witnesses must tell the whole truth at trial, the employees called to testify in a case involving their employer and a former manager are not thereby engaging, unduly or without good reason, in any dishonest conduct towards their employer, nor are they breaching their duty of confidentiality or loyalty.

In contesting the grounds of his dismissal, Tremblay therefore had the right to produce evidence countering his employer's evidence through the persons with whom he worked for all those years and, these persons, called to testify about the facts, were required to do so like any good citizen and tell the truth.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

• The presence of the lawyer

The Caisse argued that its employees had to be considered as its representatives within the meaning of articles 397 and 398 C.C.P. and that the plaintiff's lawyer could not meet them without violating the *Code of ethics of advocates* (s. 3.02.01 h), which prohibits an advocate from meeting directly with a party represented by a lawyer. The trial judge wrote:

> **"[24] The mere fact that employees are employed or have been employed by a business that is party to a dispute and that they have personal knowledge of the facts is, in itself, insufficient to consider them as parties to the dispute. To be disqualified under section 3.02.01 h) of the CEA, the employees must also have played a decision-making role in the business and have participated actively in the fact giving rise to the dispute. Otherwise, like any other person outside the corporate structure, these persons are limited to being able to act as mere witnesses to the facts and, therefore, cannot be considered as being the party itself." [Translation]**

Since the evidence showed that the persons that the plaintiff's lawyer was seeking to meet had not participated in the dismissal decision, the judge allowed him to meet these employees and former employees of the Caisse without the presence of the Caisse's lawyer.

The Court of Appeal's judgment

• The duty of loyalty

Regarding the first question, namely the extent of the duty of loyalty and confidentiality imposed by article 2088 C.C.Q. on the defendant's employees, Judge Morissette, for the Court, saw no error by the trial judge. He made it clear that this duty cannot be likened to the notion of professional secrecy and that it cannot stand as an obstacle to a witness's obligation to say what he knows *"even if this benefits a third party to the detriment of his employer"* (para [14]). [Translation]

• The presence of the lawyer

Judge Morissette noted that the plaintiff's lawyer was simply seeking a meeting with the plaintiff's former colleagues in order to decide which of them, as the case may be, should be summoned to testify at the trial and, on the assumption that some of them should be, for the purpose of preparing their evidence. He added that *"witnesses do not belong to anyone"* , and that there is no principle that would require that the employer's lawyer be present at these meetings (para [18]).

He pointed out that each of the persons with whom the respondent communicated had and retained the right to meet the plaintiff's lawyer, alone or in the presence of his own lawyer, or to refuse to meet him.

If the potential witnesses refused, the plaintiff's lawyer could resort to the usual procedural means to compel them to testify at an examination on discovery and notice thereof would be given to the other parties' lawyers, who could be present if they so desired.

As for the argument based on the interpretation of section 3.02.01 h) of the *Code of ethics of advocates*, the Court of Appeal found that the persons the plaintiff's lawyer was seeking to meet were not currently represented by a lawyer and that, consequently, the section could not apply except if they were considered to be representatives of the legal person represented by a lawyer. Repeating the trial judge's reasoning to the effect that the persons the lawyer wished to meet were mere witnesses, the Court was of the opinion that they may have observed the circumstances of the dismissal but not played any part as managers or executive officers in the decision to terminate the respondent's contract, with the result that they were not the employer's representatives.

Comments

This decision thus establishes, as a general principle, that it is permissible for a lawyer to communicate with any witness to the facts, regardless of whether he is an employee of the opposite party, but provided that he is not considered a representative of the opposite party. The term "representative" is interpreted restrictively and applies only to persons who played a decision-making role and participated in the facts in dispute.

In this case, a representative recognized as such by a court would have acted as both a decision-maker and a participant. However, we are of the view that if a witness, even though he may only hold a junior position, has participated in the facts in dispute and his statements put the liability of his employer in issue, then he should not be allowed to be met, except in the presence of the lawyer for the employer that is required to answer for the alleged fault of its employee.

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