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A pandemic of job losses? Workforce rationalizations in the age of COVID-19

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The health crisis caused by the COVID-19 pandemic has forced governments of different provinces and territories to order the closure of all businesses deemed non-essential for several weeks or months. Many businesses reacted to the abrupt halt of the economy by suspending their activities and temporarily laying off some of their employees, or by making use of the various government support programs.

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As of April 2020, over 3 million jobs had been lost throughout the country and today, almost 8.8 million workers have so far benefited from the Canada Emergency Response Benefit (known as the CERB).¹ While stabilization in the decline of employment has been observed in May and a substantial gain of new jobs occurred in June and July,² there is still some uncertainty as to the long-term consequences of COVID-19 on the labour market, particularly in the travel and hospitality sectors.

Today, while a gradual reopening of the economy is underway across the country, businesses must deal with the possibility of an upcoming second wave and serious and unprecedented economic difficulties caused by the public health crisis while positioning themselves for the economic upturn.

From a historical perspective, in the three previous economic recessions, about 45% of temporary layoffs became permanent layoffs,³ and 15% of temporarily

laid off employees who were recalled ended up losing their job in the following year.⁴

In this context, many businesses will need to consider different options and make difficult decisions to ensure their survival, including restructurings and permanent workforce reductions over the next few months. We provide below an overview of some key issues that companies must be aware of in planning workforce rationalizations.

Termination of employment: legislative and jurisprudential overview

Before addressing specific issues in relation to COVID-19, we provide a brief review of applicable legal principles relevant to non-union termination of employment without cause in Canada's two largest provinces, Quebec and Ontario:

- 1) In Canada, an employer who terminates an employment contract of indefinite term without cause must provide the employee with: (i) statutory notice of termination of employment pursuant to applicable employment standards legislation ("statutory notice"), and (ii) reasonable notice of termination of employment under common law (unless the parties have explicitly contracted out of common law notice with an enforceable termination clause) and in Quebec, by virtue of the *Civil Code of Quebec* ("reasonable notice").
- 2) Note that Quebec courts held that financial difficulties experienced by a business do not constitute "serious grounds" to terminate employment.

¹ Canada, Statistics Canada, *COVID-19 and the labour market in May 2020*, (Ottawa: Statistics Canada, 5 June 2020), online: <<https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2020038-eng.htm>>; Canada, Service Canada, *Canada Emergency Response Benefit statistics*, (Ottawa: Service Canada, as of September 13, 2020), online: <<https://www.canada.ca/en/services/benefits/ei/claims-report.htm>>.

² Canada, Statistics Canada, *Labour Force Survey, July 2020*, (Ottawa: Statistics Canada, 7 August 2020), online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/200807/dq200807a-eng.htm>>.

³ Canada, Statistics Canada, *COVID-19 and job displacement: Thinking about the longer term*, (Ottawa: Statistics Canada, 10 June 2020), online: <<https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00030-eng.htm>>.

⁴ *Ibid.*

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- 3) Statutory notice pursuant to the applicable employment standards legislation in all Canadian provinces and territories is formulaic, increasing based on the number of years of service. This notice is capped in the applicable statute (e.g. in Quebec, notice is capped at eight weeks for employees with ten years of service or more, and in Ontario, notice is capped at eight weeks for employees with eight years of service or more). In some provinces, additional statutory entitlements are owed upon termination.⁵ In addition, minimum standards legislation in many provinces and territories also provides for additional compensation (as well as other procedural requirements) in cases of mass terminations (i.e. where a certain number of employees are terminated during a certain timeframe).
- 4) In contrast to statutory notice, reasonable notice is non-formulaic and is determined according to all relevant circumstances including an employee's age, years of service, total remuneration (including incentive compensation and certain benefits) and position upon termination of employment. Canadian courts have observed a cap on reasonable notice case law at 24 months. Reasonable notice at common law and under the *Civil Code of Quebec* includes, but usually exceeds, statutory notice.
- 5) Both reasonable notice and statutory notice can be provided (i) in time worked (working notice), (ii) as a payment in lieu of notice, or (iii) as a combination of both. Ontario's severance pay obligations cannot be discharged by way of working notice and must be paid to the employee as a lump sum unless otherwise agreed.
- 6) Upon termination of employment, employees are bound by an obligation to mitigate their damages for the reasonable notice period. This obligation arises from the common law (outside of Quebec), and also pursuant to article 1479 of the *Civil Code of Quebec*. The obligation for employees to mitigate damages is generally two-fold and consists of a dual obligation of: (i) making a reasonable effort to find a suitable job in the same or related field of activities based on their qualifications, and (ii) not refusing a job offer that proves to be reasonable under the circumstances. Failure by employees to mitigate damages can lead to a reduction of the payment in lieu of notice to which they would otherwise be entitled. The duty to mitigate one's damages also implies that the payment in lieu of reasonable notice to which employees are entitled will be reduced by the income earned from new employment during the reasonable notice period.

As a general rule, regardless of the principle of mitigation, employees may not receive less than their minimum statutory entitlements (i.e. statutory notice and, where applicable, severance pay).

⁵ In Ontario, employees are entitled to severance payments (on top of statutory notice or pay in lieu of notice) if they have worked for the employer for at least five (5) years and either: the employer has a \$2.5 million payroll in Ontario, or, the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment, and the severed employee is one of 50 or more employees whose employment was terminated within a six month period as a result. Severance pay is calculated as one week of regular wages for every completed year of service with the employer, with a pro-rated week for a part-year. In some provinces, such as Ontario, an employer is also legally obligated to continue an employee's group insured benefits, if any, for the statutory notice period.

- 7) In Quebec, an employer's right to terminate an employment contract for an indefinite term remains subject to the reinstatement recourse provided under section 124 of the *Act respecting labour standards*. In fact, an employee who is not a senior manager and who has two years of service or more has a right to be reinstated in his/her position when dismissed without just and sufficient cause. However, the reinstatement recourse is not available to an employee whose dismissal results from economic or organizational reasons (provided that the selection of employees to be dismissed rests on objective and impartial criteria).

Reasonable notice in the context of COVID-19

Given countrywide court closures, Canadian courts have not yet addressed the immediate impacts of COVID-19 on employees' rights regarding termination of employment. Nevertheless, subject to jurisprudential developments and legislative actions, we note the following:

Duty to mitigate

- 1) It remains to be seen whether the current economic situation would lead to an extension of reasonable notice.

Some case law has taken into consideration a higher unemployment rate or difficult economic circumstances to extend the reasonable notice given to employees, on the grounds that this would make it more difficult to transition to alternate employment.⁶ More broadly, a number of precedents stress the importance, in assessing reasonable notice, of taking into account the difficult economic conditions that prevail at the time of termination of employment.⁷

However, a number of cases also held that extending reasonable notice in challenging economic times would impose an undue burden on the employer who is also a victim of the same economic situation.⁸ Having the employer bear alone the entire burden of the actual time needed for an employee to find new employment during difficult economic times "[our translation] would render illusory its right to unilaterally terminate the employment contract of one of its employees".⁹

⁶ *Labelle c. Experts-conseils Shawinigan Inc.* (C.S., 1984-06-01), D.T.E. 84T-547; see also *Loiselle c. Brunelle, Lasalle Corporation* (C.S., 1987-09-01), [1987] R.J.Q. 2536, at p 8 (confirmed in appeal: C.A. Mtl, n° 500-09-001165-877, November 13, 1988, unreported); *Laterreur c. Hôpital juif de réadaptation* (C.S., 1993-05-13), J.E. 93-1253; *Gignac c. Sandoz Canada inc.*, 2011 QCCS 6216; *Saladini v. Affinia Canada Corp.*, 2011 ONSC 79; *Monti v. Hamilton-Wentworth (Regional Municipality)*, [1999] O.J. No. 2527.

⁷ *Sauvé c. Banque Laurentienne du Canada* (C.A., 1998-12-03), D.T.E. 99T-51; *Ciamparelli c. Syndicat du vêtement, du textile et autres industries* (C.S., 2004-08-05), D.T.E. 2004T-891; *Castelino v. Richard Ellis (Canada) Inc.*, [1997] O.J. No. 6268.

⁸ *Lanctôt c. Romifal inc. (Nova PB inc.)*, 2010 QCCS 4755; *Bernatchez c. Commonwealth Plywood ltée*, 2012 QCCS 2119; *Michaud c. Fédération des Caisses populaires Desjardins du Bas St-Laurent* (C.S., 2002-01-30), J.E. 2002-477; *Surveyer, Nenniger & Chênevert Inc. c. Short* (C.A., 1987-11-12), D.T.E. 88T-60; *Breeze c. Federal Business Development Bank* (C.S., 1984-10-12), J.E. 84-963; *Boisvert c. Fabspec inc.*, 2007 QCCQ 6239; *Slater v. Sandwell Inc.*, [1994] O.J. No. 1317, at para 52; *Bohemier v. Storwal International Inc.*, (1982), 40 O.R. (2d) 264; *Bohemier v. Storwal International Inc.*, (1983), 44 O.R. (2d) 361.

⁹ *Lauzon c. Gazaille*, 2009 QCCS 5385, at para 86; see also *Musitechnic Services éducatifs inc. c. Ben-Hamadi* (C.A., 2004-07-13), D.T.E. 2004T-789 and *Standard Broadcasting Corp. c. Stewart* (C.A., 1994-06-30), D.T.E. 94T-815.

- 2) That being said, an employer would unlikely be able to rely on the challenging economic context to seek a reduction of reasonable notice owed to dismissed employees.¹⁰

In fact, to the extent that economic difficulties affect both employers who are forced to carry out dismissals, and dismissed employees who will struggle to find alternate employment, it will be a difficult task for employers to invoke the economic context as a basis for providing reduced reasonable notice.

- 3) In several cases, it may be difficult for employers to invoke the duty to mitigate damages in order to reduce the amounts owed to an employee as payment in lieu of notice.

Actually, case law widely recognizes that (i) mitigation efforts should be assessed in a contextual analysis, and (ii) in order to justify the reduction of reasonable notice, there must be a causal link between the failure to find a job and the lack of mitigation efforts. In other words, an employee cannot be faulted for his/her lack of efforts to find employment in “[our translation] situations where, in all likelihood, mitigation efforts would have accomplished nothing, or else so little as to make no difference”.¹¹

While it is a generally accepted principle of mitigation that terminated employees cannot be expected to accept a position with a substantial decrease in salary or level of responsibility or a material change in the character of employment, it is relevant to note that the contextual assessment of the duty to mitigate damages also implies that employees must show flexibility in considering jobs that may not in all respects correspond to their previous position but that are nonetheless interesting opportunities in the current economic context.¹²

However, despite the increased flexibility that a difficult economic situation requires of employees mitigating their damages, the greater impact of the current economic situation will probably be to diminish the effect that mitigation of damages will have in terms of reduction of payments in lieu of notice.

Other factors in assessing notice periods at common law

The COVID-19 pandemic may also impact the relative importance of certain factors such as the “character of employment” in assessing reasonable notice at common law. Historically, managerial and more highly skilled employees were entitled to longer notice periods. However, prior to the pandemic, this factor was becoming less important.¹³ To the extent that job losses in this pandemic would disproportionately affect certain sectors and job classes, this may have an impact on this trend. Moreover, COVID-19 related job losses may also

¹⁰ While there is a precedent in *Michel c. Welding Institute of Canada Institut de soudage du Canada* (C.S., 1998-04-27), D.T.E. 98T-653, the Court stressed that all the exceptional circumstances combined in this case were allowing to reduce the plaintiff's reasonable notice.

¹¹ *Carrier c. Mittal Canada inc.*, 2014 QCCA 679 at paras 110-111; see similar view in *Clark v. Township of Otonabee-South Monaghan*, 2019 ONSC 6978 at para 20.

¹² *Standard Radio inc. c. Doudeau* (C.A., 1994-06-30), D.T.E. 94T-843, at p 4; also applied in *2108805 Ontario inc. v. Boulad*, 2016 QCCA 75; see also *Haakonson v. V.O.T. Transport Co.*, [1988] B.C.J. No. 1970.

¹³ *DiTomaso v. Crown Metal Packaging LP*, 2011 ONCA 469.

disproportionately affect older workers, which may factor as well into this assessment.

Force majeure, supervening illegality and reasonable notice

In the present context, a number of employers are considering whether they may be exempt from having to provide reasonable notice to dismissed employees on the basis that the dismissal results from a *force majeure*, or frustration of contract at common law.

Force majeure is an exemption that allows a party to be liberated from its contractual obligations when an external and unforeseeable event makes it impossible to perform said obligations.¹⁴

In Quebec, courts have had the opportunity to rule on *force majeure* invoked by employers regarding reasonable notice in the context of economic difficulties induced by a recession.

In *Labelle c. Experts-conseils Shawinigan Inc.*,¹⁵ the Superior Court had to determine whether economic difficulties resulting from a recession could amount to *force majeure* enabling the employer to be exonerated from providing payment in lieu of notice on top of a limited amount that it had already paid.

In its ruling, the Court did not accept that the economic downturn experienced by the employer as a result of the recession was in itself an unforeseeable event, as *force majeure* requires. More importantly, the Court held that while the precarious financial situation caused by the recession made it *more difficult* for the employer to meet its obligation to provide reasonable notice, it did not make it *impossible* for the employer to do so.

Similarly, in *Surveyer, Nenniger & Chênevert Inc. c. Thomas*,¹⁶ the Court of Appeal noted that the employer failed to demonstrate how the economic recession prevented the company from providing reasonable notice. The Court recognized that the employer's financial situation affected by the economic recession made it more difficult to fulfill its obligations towards employees, but found that fact alone to be insufficient for an argument of *force majeure*.

We note that the above-mentioned decisions were rendered in the context of recessions, which generally entail a gradual decrease of the economy over the course of several months. The current situation may be distinguished in that the economic consequences caused by the COVID-19 pandemic were brutal and immediate. However, a number of exceptional support programs, both governmental and private, were introduced to assist employers in weathering the storm.

In light of all of the above, even though case law did not completely close the door on the possibility of invoking *force majeure* to exempt employers from their obligation to provide reasonable notice, the burden of proof on employers remains extremely high and would unlikely be met in the vast majority of

¹⁴ Article 1470 of the *Civil Code of Quebec* (« C.C.Q. »); see also article 1693 C.C.Q.

¹⁵ *Labelle c. Experts-conseils Shawinigan Inc.* (C.S., 1984-06-01), D.T.E. 84T-547.

¹⁶ *Surveyer, Nenniger & Chênevert Inc. c. Thomas*, (C.A., 1989-05-18), D.T.E. 89T-640.

cases, even in the context of COVID-19. The door might not be completely closed, but it is only very slightly open.

Similarly, in common law jurisdictions, courts have examined frustration of contract, which is when an event occurs that either renders the employment contract impossible to perform or transforms the contract into something radically different from what the parties had initially bargained for. The event must be outside the control of the parties and beyond what the parties contemplated at the time the contract was entered into. Frustration is a high threshold to meet since a successful defence will release both parties from their contractual obligations.

One example of frustration is the concept of supervening illegality, where a change in law suddenly renders a contract illegal, or incapable of performance, thus frustrating the contract and relieving the parties of their respective obligations.¹⁷ In the COVID-19 era, these circumstances have arisen where emergency government orders necessitate an immediate shutdown of certain businesses, sometimes unintentionally causing a permanent shutdown of business. It remains to be seen how the courts will interpret the doctrine of frustration and supervening illegality to assess claims by terminated employees in light of the COVID-19 mandated shutdown.

Applicable employment standards legislation may provide for exemptions, which require employers to make statutory termination and/or severance payments despite frustration of contract under certain circumstances.¹⁸ While economic struggles and recessions alone typically do not meet the high threshold required to establish frustration of contract at common law and relieve employers from their obligations, the sudden, acute and extreme economic effects of the COVID-19 pandemic may elicit reconsideration by the courts. It is also possible that employment contracts entered into for various purposes (e.g. fixed term or fixed task, versus an indefinite term contract) and at different times (e.g. pre-pandemic, versus the early months of 2020 when the mere existence of the virus became known, versus March 2020 and onward) will receive different legal treatment.

Directors' liability

Employers across Canada should keep in mind that corporate laws, such as the applicable Business Corporations Act (or equivalent) of each province or territory and the *Canada Business Corporations Act*, hold directors jointly and severally liable with the corporation for wages or outstanding debts due to employees.

Subject to some nuances, case law has generally held that directors' liability does not cover any compensation resulting from termination of employment, such as reasonable notice. The liability for unpaid wages generally attaches to services performed for the corporation and is for the protection of employees.

¹⁷ See *Cowie v. Great Heron Charity Casino*, 2011 ONSC 6357.

¹⁸ In Ontario, an employment contract that becomes impossible to perform or frustrated due to illness or injury of the employee does not relieve the employer from its obligation to pay statutory termination pay and severance pay, if applicable. Additionally, an employment contract that becomes impossible to perform or frustrated due to a permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event does not relieve an employer from its obligation to pay statutory notice and statutory severance pay, if applicable.

However, under the current circumstances, several businesses have unilaterally reduced wages and other benefits of their employees, without necessarily having obtained their consent. Although several provinces and territories have enacted time-specific, statutory exemptions for layoff deadlines or wages, time and/or salary reductions, such a unilateral change without employee consent likely still gives rise to liability for unpaid wages at common law. Therefore, in a context of termination of employment, those employees might be inclined to institute claims, not only for reasonable notice, but also for unpaid salaries and benefits. The latter claims could engage directors' liability.

Class actions

By balancing risks regarding unpaid salaries and benefits as well as claims related to termination of employment, we believe that businesses must also consider the inherent risk of class actions.

Indeed, even if class actions in respect of reasonable notice and constructive dismissal claims have been generally unsuccessful in Quebec and Canada,¹⁹ employee class actions have proven to be a viable recourse in the past with respect to statutory termination entitlements, overtime and fringe benefits claims.²⁰

In the current circumstances, class actions will prove an attractive recourse for employees and their attorneys. Resurgence in the use of class actions with regard to terminations of employment may indeed be part of the legacy left by COVID-19 in employment law, particularly for distressed industries where claimants are motivated to aggregate their claims.

Conclusion

In summary, the impact of the COVID-19 pandemic on employment claims and employment-related litigation is yet to be determined in some respects.

While employees will argue that the current economic situation should lead to an increase in reasonable notice awards, the law is not settled in this regard and there may be some room for employers to argue the opposite in some jurisdictions.

However, employers will unlikely be able to invoke COVID-19 in order to reduce reasonable notice awards, and may also find themselves unable in most circumstances to raise an employee's failure to mitigate damages as grounds to reduce notice payments.

As such, employers should act proactively and properly assess statutory requirements related to workforce rationalizations (such as mass terminations) as well as reasonable notice awards, where applicable, and they should do so prior to the expiry of wage subsidies such as the Canada Emergency Wage Subsidy (known as the CEWS) when the full impact of revenue reductions will be most keenly felt. This will allow employers to manage risks accurately while

¹⁹ See *Agostino c. Allstate du Canada, compagnie d'assurances*, 2013 QCCS 3049.

²⁰ See *Samoisette v. IBM Canada ltée*, 2016 QCCS 2675; *Wood v. CTS of Canada Co.*, 2017 ONSC 5695; *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75.

using other tools at their disposal, such as working notice, to reduce their financial liabilities.

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