No indemnity for federal employees on preventive withdrawal

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In December 2015, the Court of Appeal of Quebec in *Éthier* v. *Compagnie de chemins de fer nationaux du Canada*[1] confirmed that section 36 of the *Act Respecting Occupational Health and Safety* ("AROHS")[2] does not apply to federal undertakings and that, accordingly, a worker who is pregnant or breastfeeding and who is on preventive withdrawal in accordance with the *Canada Labour Code* ("CLC")[3] is not entitled to receive an income replacement indemnity.

The Court of Appeal also clarifies the scope of the evolution of the case law since the Supreme Court of Canada's decision in *Bell Canada* v. *Quebec (Commission de la Santé et de la Sécurité du Travail)*[4] ("*Bell Canada*") regarding the application of some provisions of the AROHS to federal undertakings.

This decision is of interest not only with respect to the specific issue of the compensation of federal employees who are pregnant or breastfeeding, but also due to its analysis of the recent case law regarding the interaction between the federal and provincial occupational health and safety legislation.

Factual background

In August 2011, Ms. Éthier ("the employee"), a pregnant employee of the Canadian National Railway Company ("CN"), a federal undertaking, filed an application with the Commission de la santé et de la sécurité du travail ("CSST")[5] under the program "For a Safe Maternity Experience". During that same period, in a report intended for CN, the employee's physician recommended that her tasks be changed, failing which she should be put on preventive withdrawal.

In September 2011, a CN representative informed the employee that he was unable to reassign her to another position, as recommended by her physician. The employee therefore chose to leave on preventive withdrawal, as provided under the CLC.[6]

The employee simultaneously applied to the CSST in hopes of receiving the income replacement indemnity to which pregnant workers are entitled under the AROHS and more specifically sections 36, 40 and 42 of this statute which deal with preventive withdrawal. Section 36, which is at the heart of the argument raised by the employee, essentially provides that the income replacement indemnity in question is the same as the one which is to be paid to an employee unable to perform his professional duties due to an employment injury, as set out under the *Act respecting industrial accidents and occupational diseases*[7] ("ARIAOD").

It must be noted that the sections of the CLC applicable to the preventive withdrawal of a federal employee who is pregnant or breastfeeding do not provide for the payment of an income replacement indemnity.

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1 2015 QCCA 1996 (the "*Éthier case*").

2 CQLR, c. S-2.1.

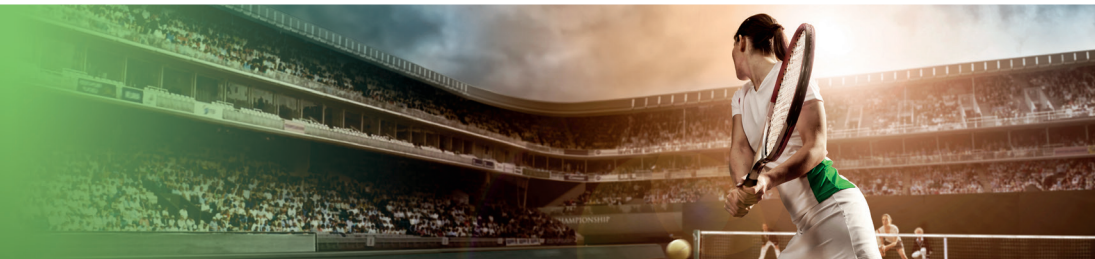
3 R.S.C. 1985, c. L-2.

4 [1988] 1 SCR 749.

5 Since 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 came into force on January 1, 2016, the CSST has been replaced with the Commission des normes, de l'équité, de la santé et de la sécurité du travail and the CLP is henceforth replaced with the Tribunal administratif du travail. For more details regarding this reorganization of Quebec's labour and employment institutions, please consult the following bulletin: *Need to know*, July 2015, "Bill 42 and the reorganization of the Quebec labour-related institutions".

6 Sections 132, 205 (6) and 205.1.

7 CQLR, c. A-3.001.



The proceedings

The CSST declared that the employee was not eligible to participate in the provincial compensation regime regarding preventive withdrawal since the AROHS does not apply to pregnant workers employed by federal undertakings. Accordingly, the employee is not entitled to the income replacement indemnities provided for under section 36 AROHS.

The Commission des lésions professionnelles [8] and the Superior Court [9] both denied the employee's request, essentially for the same reasons.

The conclusions of the Court of Appeal

The employee raised the following arguments before the Court of Appeal:

(1) Section 131 CLC constitutes an interjurisdictional reference in accordance with which the Canadian Parliament intended to make section 36 AROH applicable to federal undertakings;

(2) In the absence of such a reference, section 36 nonetheless applies to federal undertakings as a result of the legislative amendments made to the CLC and the evolution of the case law since the decision in *Bell Canada*.

As did the lower jurisdictions, the Court of Appeal dismissed these arguments for the reasons summarized below.

a) Section 131 CLC is not an interjurisdictional reference

Section 131 CLC essentially provides that a proceeding brought under a provision of Part II of the CLC does not affect the right of an employee to compensation under any statute relating to compensation for industrial accidents or occupational diseases.

According to the Court of Appeal, this section does not constitute an interjurisdictional reference which would allow section 36 AROHS to apply to federal undertakings but rather it constitutes [TRANSLATION] "a reservation of rights the purpose of which is to protect the right of an employee to be compensated under a statute which addresses the compensation of industrial accidents and occupational diseases where the employee or his employer failed to comply with their occupational health and safety obligations." [10] This provision does not have the scope that the employee alleges.

b) Despite the evolution of the case law since the *Bell Canada* decision, section 36 AROHS is inapplicable to federal undertakings.

The employee further alleged that section 36 AROHS also applies to federal undertakings as a result of the legislative amendments made to the CLC since the *Bell Canada* decision and the subsequent evolution of the relevant case law. More specifically, she maintained that the *Bell Canada* decision is no longer authoritative.

The Court of Appeal conceded that the state of the law has evolved quite a bit since the *Bell Canada* decision.[11] This being said, the principles set out in that case remain relevant.

It must be noted that in *Bell Canada*, the Supreme Court concluded that the sections of the AROHS which deal particularly with both the right of a pregnant employee to refuse to work and with preventive withdrawal were inapplicable to federal undertakings given that they pertain directly to labour relations, working conditions and the management and operations of federal undertakings.[12] However, even in light of the recent evolution of the case law on this issue, a provincial law which "impairs" a federal undertaking on such subjects which are considered to be "vital" or "essential" to its operations or which cause it specific harm is inapplicable to it.[13]

In the present case, although the prevention scheme of the AROHS can be distinguished from the compensation scheme under the ARIAOD which is applicable to industrial accidents and which applies to federal undertakings, the income replacement indemnity for pregnant workers who are on preventive withdrawal pursuant to the AROHS cannot be likened to the one which is payable to an employee who is unable to work due to an occupational injury under the ARIAOD.

Indeed, the Court of Appeal is of the view that the income replacement indemnity for pregnant workers must be classified as a "working condition" and therefore constitutes a vital and essential element of any undertaking. Accordingly, section 36 AROHS, which provides for the payment of such an indemnity is inapplicable to federal undertakings given that to decide to the contrary would have the impact of "impairing" one of its essential components.[14]

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[8] *Éthier* and *Compagnie de chemins de fer nationaux du Canada*, 2013 QCCLP 4672.

[9] *Éthier v. Commission des lésions professionnelles*, 2014 QCCS 1092.

[10] It is to be noted that the Court of Appeal makes a clear distinction between the wording of section 131 CLC and that of section 4 of the *Government Employees Compensation Act*, RSC 1985, ch. G-5, which is the subject of a decision rendered by the Supreme Court in *Martin v. Alberta (Worker's Compensation Board)*, 2014 SCC 25, and which was relied upon by the worker in support of her claim.

[11] More specifically, sections 204 to 205.2 of the CLC, which deal with the preventive withdrawal of workers who are pregnant or breastfeeding, did not exist when this judgment was rendered. Moreover, recent Supreme Court cases have changed the analytical framework applicable to situations where the issue is the application of a provincial statute to a federal undertaking. The Court refers to the decision in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, amongst others.

[12] *Éthier case*, paragraph 26.

[13] *Id.*, paragraph 29. Also see *Canadian Western Bank v. Alberta*, cited above.

[14] *Éthier case*, paragraphs 36 and 37.

Conclusion

This decision marks an interesting development in the case law dealing with the issue of the application of provincial occupational health and safety statutes to federal undertakings.

In particular, we are of the view that there is a parallel to be made with the case of *Purolator Courrier Itée* v. *Hamelin*,[15] in which the Court of Appeal concluded that section 32 ARIAOD does not apply to federal undertakings. In that case, the Court of Appeal held that the general jurisdiction of the provincial legislator over the subject-matter of a specific statute does not necessarily mean that each and every provision of such a statute will be directly and fully applicable to federal undertakings. It is important to analyze each provision of the provincial statute in order to determine what its effects are on the relationship of the employer with its employees. To the extent that such a review allows one to conclude that the provision in question affects the labour relations of the federal undertaking, it will be inapplicable to said undertaking.

Given that the employee has filed an application for leave to appeal before the Supreme Court of Canada, we will monitor the evolution of the *Éthier* case with great interest.

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[15] D.T.E. 2002T-197 (C.A.). On the same subject : *Commission de la santé et de la sécurité du travail* c. *Compagnie de chemin de fer Canadien Pacifique*, D.T.E. 2002T-189 (C.A.).

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