

## DESPITE A RECENT JUDGMENT OF THE SUPERIOR COURT PERTAINING TO EMPLOYEES HIRED THROUGH AN EMPLOYMENT AGENCY, THE AGENCY MAY BE THE TRUE EMPLOYER, DEPENDING ON THE CIRCUMSTANCES

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In light of recent case law on who properly qualifies as the employer of employees hired through an employment agency, it is essential for every organization to review its operating procedures to be sure of their legal and financial implications. This review, which we perform on behalf of managers of facilities in the health-care industry, is effective in ensuring the sound management of the organization and preventing litigation.

On December 2, 2009, the Superior Court upheld a decision of the Commission des relations du travail (the "CRT") which concluded that nurses hired through an employment agency were employees of the health-care facility and, therefore, covered by the bargaining certificate of the union in question. Therefore, these nurses were entitled to benefit from the employment conditions provided for in the applicable collective agreement.<sup>1</sup>

The Superior Court upheld the holding of the CRT on the basis that it was not unreasonable, since it was properly based on the evidence and on the principles recognized in 1997 by the Supreme Court of Canada in the case of *Pointe Claire (City) v. Quebec (Labour Court)*:<sup>2</sup>

- The regular staff of the CSSS was not sufficient to provide the Info Santé services, and the CSSS had been forced to rely on employment agencies after attempting, unsuccessfully, to fill these positions through internal and external postings, and ads in the papers and at job fairs.<sup>3</sup>
- The CRT applied the analysis laid down in the *Pointe Claire* case in assessing the evidence.
- The CRT made various findings which showed that the relationship between the CSSS and the nurses from the employment agencies was no different from the relationship between the CSSS and the members of the relevant bargaining unit: structure of schedules, premises, work tools, evaluation procedures, procedure for recording calls, internal mail, breaks and meals, supervision by immediate superiors in the workplace, evaluation by listening to recordings, continuing education, requisite experience, and opinion of superiors where problems arise.<sup>4</sup>

Relying on the *Pointe Claire* case, the Superior Court noted that it was necessary to assess the specific circumstances of each case to determine who exercises actual control over all aspects of the work of the employees in question.<sup>5</sup>

The judgment of the Superior Court described in detail the context in which the CSSS decided to make use of the employment agencies. This provided a reasonable explanation for the finding that the CSSS was the employer of the nurses who were recruited to fill vacant positions in the Info Santé service, "some of which had been vacant for nearly two years".<sup>6</sup>

### Another perspective

Another recent decision of the CRT provides a different perspective on the same issue of determining who the employer of employment agency personnel is by assessing the situations of the relevant employees separately according to the respective structures and management methods of different agencies used by the same employer.

In the case of *Syndicat des professionnelles en soins du CSSS de la Montagne (FIQ) v. Centre de santé et de services sociaux de la Montagne*, the administrative law judge, Jean Paquette ("judge"), allowed only in part the motion brought by the union to include in its certification unit all the nurses hired through eleven employment agencies.

The CRT assessed the evidence presented by the parties on the functioning of the CSSS, its relationship with each of the agencies, and the nature and duration of the employment of the 228 nurses concerned.

To fill a shortage of nursing staff (due to leave and temporary or longer term assignments), the CSSS made use of agencies without concluding written contracts with them. The agencies were of various sizes, including an agency with only one nurse (a self employed worker using a business name).

After reviewing the jurisprudence of the CRT concerning nursing employment agencies, the judge defined the framework for his analysis by reiterating the importance of weighing the known, albeit non-exhaustive, criteria based on the specific facts of each case.<sup>7</sup>

After a detailed description of the evidence concerning each agency, the judge reached different conclusions for each of them.<sup>8</sup> For instance:

- one agency had a preponderance of the employer's attributes with respect to most aspects of the work, although the nurse was assigned for a lengthy period of time to the supervision of the CSSS;<sup>9</sup>
- another agency shared several employer attributes with the CSSS (training, evaluation, discipline, sense of belonging and continuity of employment), but, according to the length of employment of each nurse with the CSSS, and in light of the high level of integration, the CSSS was found to be the employer of some nurses whose length of employment was sufficient to become an overriding factor;<sup>10</sup>
- in another case, the CSSS was found to be the employer due to the agency's limited role (hiring, assignment, orientation and compensation), while the nurses were fully integrated into the operations of the CSSS and had lengthy terms of employment.<sup>11</sup>

While this analysis of the judge's findings is summary, it will be persuasive in encouraging employers to review the situations in their organizations carefully with respect to each employee and each employment agency concerned.

After this decision was rendered, proceedings in judicial review were brought against the decision in the Superior Court. However, this case demonstrates that nothing should be taken for granted when one is determining the employer of a person hired through an agency.

We therefore advise that a specific and detailed analysis be conducted to identify situations in which an employee may properly claim to be the employee of the agency's client, and therefore claim the benefit of all the working conditions offered by the client. The members of our firm's Labour and Employment Law Group can provide you with useful guidance in this regard.

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1 - *Centre de santé et des services sociaux de la Mitis v. CRT et autres*, 2009 QCCS 5571, AZ-50587474.

2 - [1997] 1 S.C.R. 1015.

3 - Paragraphs 2 and 3 of the Superior Court judgment.

4 - Paragraph 27 of the Superior Court judgment.

5 - Paragraphs 24 to 26 of the Superior Court judgment.

6 - Paragraph 29 of the CRT decision: *Syndicat des infirmières, infirmières auxiliaires et inhalothérapeutes de l'Est du Québec (CSQ) et Centre de santé et de services sociaux de La Mitis*, 2009 QCCRT 0233, D.T.E. 2009T-436.

7 - Paragraphs 97 to 105 of the decision.

8 - Paragraphs 106 to 153 of the decision.

9 - Paragraphs 115 and 116 of the decision.

10 - Paragraphs 117 to 130 of the decision.

11 - Paragraphs 142 to 145 of the decision.

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