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Congédiement illégal — Une mise-à-pied est-elle un congédiement au sens de la loi ?

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Résumé de l'article

An employee who is laid off is dismissed in the sense of Sections 21a) ff. A lay-off for union activities is a mischief that the legislator intended to suppress by the said enactment. To decide otherwise would be to open the door to an unscrupulous employer, who in the guise of a lay-off, would effectively dismiss an employee, thereby indirectly achieving the illegal purpose which is directly forbidden to him by law.

Jean-Paul Duhamel, requérant, vs Glo-Hill Cutlery Co. Ltd., intimée; M. le juge Allan B. Gold, vice-président; M. J.-Eucher Corbeil et Me Claude Lavery, commissaires; Commission des Relations ouvrières de Québec, D-272, Montréal, 19 mars 1962; Me René Beaudry et M. J.-J. Desroches, pour le requérant; Me Laurence Marks, pour l'intimée.

do we draw the line ? If one day is excusable, why not two days, and then why not a week or a month ? The delay of fifteen days within which the Complaint must be presented would then become an indeterminate delay, left to us alone to decide. This is clearly not the intention of the legislator — one has only to read the text to see that — but indeed it can be stated with certainty, to be contrary to his intention. For in those cases where the Courts are given the right to excuse the default and/or to extend the delay, the statutes say so clearly and unequivocally ; and in our case the statute is silent.

For us to embark in the present case upon a venture of correcting the Act, by adding to it something which it does not contain in order to make it say something which it does not say, but which we believe should be said (assuming that we have come to that conclusion), is to usurp the role of the legislator, and to put aside the role of judge. It may be that in the instance before us the law is harsh, that there is a gap in it, and that it should be changed — we neither hold nor express an opinion upon this point, indeed it is not for us to do so — but if this is the case, then the remedy lies in legislative amendment, and nowhere else. It is to Parliament that the citizen must address himself to obtain this change, not to us.

VI

...In view of the conclusions to which we have come on the question of the delay it becomes unnecessary for us to deal with the evidence which we heard on the merits of the Complaint itself.

VII

Considering, therefore, that the Complaint in this case was presented to the Board beyond the delays provided by law ;

Considering that the said Complaint is tardy and out of time ;

Considering that the Complainant has forfeited his right to the relief prayed for ;

Considering that the said Complaint is unfounded in law ;

FOR THE FOREGOING REASONS the said Complaint is hereby dismissed, for all legal purposes.

CONGÉDIEMENT ILLÉGAL

UNE MISE-À-PIED EST-ELLE UN CONGÉDIEMENT AU SENS DE LA LOI?

An employee who is laid off is dismissed in the sense of Sections 21a) ff. A lay-off for union activities is a mischief that the legislator intended to suppress by the said enactment. To decide otherwise would be to open the door to an unscrupulous employer, who in the guise

of a lay-off, would effectively dismiss an employee, thereby indirectly achieving the illegal purpose which is directly forbidden to him by law. [1]

...The issues which divide the parties, (and which in reality constitute the general allegations in demand and in defence), may be summarized as follows :

A) THE COMPLAINANTS CONTEND :

1) That the dismissals, lay-offs or reduction of working hours were acts done by the Company in order to prevent or hinder certification, and/or as acts of intimidation and reprisal, directed towards keeping the Union out of the plant ; and

2) That Complainants were dismissed, laid off or had their working hours reduced because of their trade union activities, the whole contrary to the Act ;

B) THE COMPANY IN TURN CONTENDS:

1) That the reduction of its labour force by lay-off or reduction of working hours was due to the reorganization of the plant made necessary by adverse business conditions, and by the seasonal nature of its operation ;

2) And that accordingly, these lay-offs and reduced hours were made for good and sufficient reason, and not due to the Union activities of the employees.

At the opening of the trial, learned counsel for the Company respectfully declined the jurisdiction of the Board, and requested that the appropriate entry be made in the proces-verbal of the proceedings, which was done.

After hearing argument, the Board ruled that it had jurisdiction to hear the present complaint, and ordered the parties to proceed.

Accordingly, the trial proceeded.

...It is therefore necessary to recur to this question in order to indicate the reasons which led the Board to decide as it did.

It should be stated at once that learned counsel for the Company did not decline the jurisdiction of the Board on the ground that the Labour Relations Act is ultra vires of the Legislature of the Province because the Act is contrary to Sections 96 ff., of the British North America Act, 1867. This has been settled once and for all by the judgment of the Judicial Committee of the Privy Council in the case of the *Labour Relations Board of Saskatchewan vs John East Iron Works Ltd. (1949 A.C. 134).*

(1) Jean-Paul Duhamel, requérant, vs Glo-Hill Cutlery Co. Ltd., intimée; M. le juge Allan B. Gold, vice-président; M. J.-Eucher Corbeil et Me Claude Lavery, commissaires; Commission des Relations ouvrières de Québec, D-272, Montréal, 19 mars 1962; Me René Beaudry et M. J.-J. Desroches, pour le requérant; Me Laurence Marks, pour l'intimée.

Nor did he question, in particular, the constitutionality of Sections 21a) ff., of the Act, added by recent amendment. This issue was also decided in the John East Iron Works Ltd. case (supra) where similar legislation enacted in Saskatchewan was held to be intra vires. Furthermore Sections 21a) ff., have been held to be intra vires of the powers of the Legislature in the recent case of *La Grenade Shoe Manufacturing Limited v. Commission de Relations Ouvrières de la Province de Québec et autres (1961 S.C. 305).*

Learned counsel for the Company based his argument on a much narrouer issue. His argument may be summarized as follows :

a) Sections 21a) ff., deal only with dismissal, suspension or transfer of an employee ;

b) The evidence before the Board will show that the employee in question was *laid off,* and not dismissed, suspended or transferred ;

c) Sections 21a) ff., are exceptional provisions, exhorbitant of the common law and must be interpreted restrictively ;

d) These sections do not provide for any penalty for lay-off ; hence the Board is without jurisdiction to decide a case of lay-off.

This argument, as we understand it, is that if we decide that « lay-off » is « dismissal », we decide wrongly, rather than we lack jurisdiction to decide at all.

...It now becomes necessary to state the reasons we gave when we dismissed this objection, and to add such other reasons which now appear from the evidence made before us.

First of all, how is « lay-off » defiined ?

The Oxford English Dictionary (Volume VI)

Lay-off : to discontinue, to discontinue the working of ; to dismiss (a workman) usually temporarily.

Webster's New International Dictionary

Lay-off : to cease to operate or employ, esp., to dismiss (a workman).

Harrap's Standard French and English Dictionary

Lay-off : Débaucher, congédier (des ouvriers).

Corpus Juris Secundum (1948 Edition) Volume 56

Master and Servant (No 29) at page 411 : « Labor Separations » are classified as « Quits » defined infra No. 40, « discharges » defined infro No. 41, and « layoffs », which have been defined as terminations of employment at the will of the employer, without prejudice to the worker, and may be due to lack of orders, technical changes or the failure of flow of parts or materials to the job, as needed.

It appears from the foregoing that lay-off is nothing more or less than a termination of employment.

Under the Civil Law when an employee is laid off, his employment is effectively terminated at that time, even if it is the intention of the parties that he come back to work at a subsequent date, and irrespective of whether or not in fact he does so. During this intervening period, the contract of employment (louage de services) is at an end. There is no legal relationship of master and servant between the parties; the employee is not under the direction or control of the employer, nor does he receive any orders or instructions from him; furthermore, the employee having rendered no services, receives no wages. It may well be that the parties may modify or derogate from this rule by personal agreement or by collective labour agreement but we are not called upon to decide this point in this instance.

For the purposes of the case before us, it is sufficient to state that no proof was made of any such agreement and in fact there was none. When the Complainant was laid off his consent was not asked for, nor given by him, nor was there any agreement between the parties that his employment was continued under a suspensive condition. Nor are we called upon to decide the abstract issue as to whether a lay-off is or is not the same as a leave of absence without pay or even a vacation without pay. These issues too may arise as a result of an agreement, personal or collective, between the parties concerned. What we are concerned with however is the application of Sections 21a) ff., of the Act to the facts presented before us. In this case, what we have to decide is whether the so-called lay-off of Complainant is in violation of the Act.

We have concluded that an employee who is laid off is dismissed in the sense of Sections 21a) ff. We are of the opinion that lay-off is covered and included in the said sections, and that lay-off for union activities is a mischief that the legislator intended to suppress by the said enactment. This appears from the clear intent and purposes of the legislation itself. To decide otherwise would be to open the door to an unscrupulous employer, who in the guise of a lay-off, would effectively dismiss an employee, thereby indirectly achieving the illegal purpose which is directly forbidden to him by law.

For who is to judge how long an employee must be laid off and not called back to work before this so-called lay-off become a dismissal? Is it a month? Is it six months? Is it a year? Is it longer?

To put these questions is to answer them. For it appears to the Board that the issue to be decided is not the length of time during which the employee is without employment, but whether the termination of his employment, for a temporary period or forever, was brought into being as a result of his union activities, or was for another cause deemed good and sufficient by the Board.

Sections 21a) ff., must be interpreted to give to them the meaning and the purpose that the Statute intended to achieve.

THE INTERPRETATION ACT (R.S.Q., 1941, CHAPTER I)

« *Section 41.* Every provision of a statute, whether such provision be mandatory, prohibitive or penal, shall be deemed to have for its object the remedying of some evil or the promotion of some good.

Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit. »

WILLIAMS v. BOX — SUPREME COURT REPORTS I AT PAGE 10 :

« If we would interpret correctly the meaning of any Statute or other writing we must understand what those framing it were about, and the purpose it was intended to execute... »

AT PAGE 22

« I think, adopting the language used in HEYDAN'S CASE (3 Co. REP. 7b) that there appears here the « true reason for the remedy » and that our duty is « always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief, and proprivato commodo, and to add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono publico. »

MAXWELL — The interpretation of Statutes (10 Edition)
AT PAGE 68 :

SECTION 2 BENEFICIAL CONSTRUCTION
To suppress the mischief and advance the remedy.

« It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words. For instance, the repealed Sunday Closing (Wales) Act, 1881 (c. 61) s. 1, which required that public-houses should be closed at certains hours on Sundays, was held incapable of being construed as extending to Christmas day. So it was held that statutory rule directing that applications for new trials in cases tried by a jury should be made to the Court of Appeal could not be extended to cases tried by an official referee. If, however, there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning, that sense may be given to it. »

AT PAGE 77

« Sometimes the governing principle of the remedial enactment has been extended to cases not included in its language, to prevent a failure of justice and consequently of the probable intention. »

AT PAGE 114

« The office of the judge is, to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief. To carry out effectually the object of a statute, it must be so

construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined. Contra legem facit, qui id facit quod lex prohibet. In fraudem vero legis facit, qui salvis legis sententiam ejus circumvenit ; and a statute is understood as extending to all such circumventions, and rendering them unavailing. Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud. « Whenever it can be shown that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly. » When the thing done is substantially that which was prohibited, it falls within the Act, simply because, according to the true construction of the statute, it is the thing thereby prohibited. Whenever courts see such attempts at concealment, « they brush away the cobweb varnish » and show the transaction in its true light. They see things as ordinary men do, and so see through them. Whatever might be the form or colour of the transaction, the law looks to the substance. For this purpose the Courts go behind the documents and formalities, and inquire into the real facts. They may, and therefore must, inquire into the real nature of that which was done. An Act is not to be evaded by putting forward documents which give a false description of the matter. In all such cases, it is, in truth, rather the particular transaction than the statute which is the subject of construction, and if the transaction is found in reality to be within the statute, it is not suffered to escape from the operation of the law by means of the disguise under which its real character is masked. »

Furthermore the provisions of the Act must be read together and interpreted the one by the other giving to each of them the meaning derived from the whole.

MAXWELL (op. cit.) AT PAGE 28

« Passing from the external history of the statute to its contents, it is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself. Incivile est nisi tota lege prespecta una aliqua particula ejus proposita judicare vel respondere. Such a survey is often indispensable, even when the words are the plainest ; for the true meaning of any passage is that which (being permissable) best harmonises with the subject and with every other passage of the statute. It is, of course, impossible to construe particular words in a statute without reference to their context and to the whole tenor of the Act. »

CANADA SUGAR REFINING CO. LTD. V. QUEEN (1898)
A.C. 735 (Privy Council)
PER LORD DAVEY AT PAGE 741

« Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter. »

Thus Sections 21a) ff., must be read together with Section 21.

A simple reading of Section 21 confirms the view herein adopted by the Board.

«-21. No employer, nor person acting for an employer or an association of employers, shall refuse to employ any person because such person is a member or

an officer of an association, or seek by intimidation, threat of dismissal or other threat, or by the imposition of a penalty or by any other means, to compel an employee to abstain from becoming or to cease being a member or an officer of an association.

This section shall not have the effect of preventing an employer from suspending, dismissing, discharging or transferring an employee for good and sufficient cause, proof whereof shall devolve upon the said employer. »

Having come to this conclusion, it becomes unnecessary to decide whether « lay-off » has a secondary meaning which brings it into the scope of « suspend » under Section 21a), though undoubtedly considerable authority exists to support this thesis. Certainly, the definitions above cited lend weight to this interpretation, as well as those listed hereunder :

JERAUTE : Vocabulaire Français-Anglais et Anglais-Français de termes et locutions juridiques : Suspension — suspension (de fonction, de traitement, cessation temporaire (Jur.)... Suspension d'emploi mise-à-pied, mise en non activité.

STROUND's Judicial Dictionary of Words and Phrases (3rd Edition — 1953) at page 2957 :

When applied to a contract of employment « suspend » means that the workman ceases to be under any present duty to work and the employer ceases to be under any consequential duty to pay. (Bird vs British Celanese Ltd. (1945) K.B. 336.

OXFORD ENGLISH DICTIONARY 1961 Edition Volume 10 :

Suspend : To debar usually for a time from the exercise of a function or enjoyment of a privilege.

But there is yet a further and other reply, if any were needed to the submission of counsel for the defence, and which came to light after th evidence was made in this case. This is to be found in the Company's notice to Complainant when, according to it, he was laid off.

...An examination of this exhibit clearly indicates that though the Company used the word « laid-off » in the English portion of the text, the French portion of the text employs the word « congédier ».

It is hardly necessary to point out that Section 21a) of the Act in the French language uses the term « congédié ».

This document is printed on the Company's letterhead, signed by its President and emanates from it. In the case of doubt as to its interpretation, it must be interpreted against the Company.

It is in evidence that the Complainant was never called back by his employer.

...Counsel for the Company urged before us that Complainant should have asked the Company to take him back, and that not having done so, he is in a

sense the author of his own misfortune. The Board does not believe there is any substance to this argument.

His so-called lay-off commenced December 1st, 1960, and almost a year later at the hearing of this case was still in effect. The Company had advised him that they would let him know when they required him and in fact never did so.

What better proof is required that the Company deemed this so-called lay-off to be a dismissal and treated it as such ?

It may be useful to recall that it is settled law that the best rule of interpretation of an agreement is the manner upon which the parties have acted upon it.

See BENTLEY & SON LTD. v. LEVY & SONS LTD. — 61 S.C. 322 (Rinfret, J.) and the authorities therein cited.

FOR THE FOREGOING REASONS, the Board is of the opinion that the objection raised by the Company to the jurisdiction of the Board is unfounded, and we hereby confirm, insofar as it may be necessary to do so, the decision rendered *cour tenante* at the opening of the trial, dismissing the said objection for all legal purposes.

CONVENTION COLLECTIVE

VALIDITÉ DE CERTAINES CLAUSES
CARACTÈRE LÉGAL D'UN ARRÊT DE TRAVAIL DESTINÉ À LES RESPECTER

1. *A clause in a labour agreement, according to which an employer undertakes not to require an employee to work on domestic non-union shop goods, or on goods imported from a specified country is perfectly legal and valid.*

2. *A refusal on the part of employees to carry out work which an employer would require them to carry out in violation of such a clause would not constitute an illegal stoppage of work.* [1]

The points at issue on which the consent of both parties exists, are the following :

1.—The interpretation and application of certain clauses of the present collective labor agreement existing between the parties, which are Section 11 of the Agreement of October 28, 1958, and Section 9 of the Agremnt of May 12th, 1960.

2. The complaint of the First Party against the Second Party for the illegal stoppage of work by blockers on imported hoods prior to, and during the pendency of the discussions, correspondence and negotiations for arbitration proceedings

(1) The Association of Millinery Manufacturers vs The United Hatters Cap and Millinery Workers International Union, Local No. 49; Judge Emile Trottier of the Court of Sessions of the Peace, single arbitrator. A.L. Stein, Q.C., counsel of the Association, and Me Philip Cutler, counsel for the Union, Private arbitration.