A New Legislative Framework For Managers?

March 3, 2022 – The Court of Appeal recently ruled on an issue that had been causing a clash of long-established principles in labour relations in Quebec: the exclusion of managers from the application of the *Labour Code*, and therefore, the prohibition of unionization.

For the longest time, junior managers have been considered as representatives of upper management: their exclusion was therefore necessary to prevent employer interference in the association process. Now, as the Court of Appeal points out, hierarchical structures opposing management and workers have become increasingly fluid.

The case in question is between the Association des cadres de la Société des casinos du Québec [Association], an association of junior managers employed by Quebec casinos, and their employer, the Société des casinos du Québec inc. [Employer]. The Association had filed an application with the Commission des relations du travail to be certified with the Employer as the representative of the group of employees comprising the first-level managers. Before the Tribunal administratif du travail [Tribunal], which replaced the Commission, the Employer raised the inadmissibility of the application, since certification is restricted to employees, and managers are excluded from the definition of "employee", at section 1 (l) (1) of the *Labour Code*. The Tribunal allowed the Association's application, but the Superior Court quashed that decision in judicial review.

In *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec Inc.*, 2022 QCCA 180, the Court of Appeal reversed the Superior Court's decision, thus reinstating the Tribunal's judgment, which had concluded that the exclusion in question infringed the freedom of association guaranteed by the Charters.

Sections 2 (d) of the *Canadian Charter of Rights and Freedoms* and 3 of the Quebec *Charter of Human Rights and Freedoms* guarantee freedom of association and protect against any substantial impediment to the unfettered ability of employees to conduct collective bargaining.

Junior managers have the possibility of forming groups, as the Association has done, and working out arrangements with employers. However, despite that possibility, the Court of Appeal affirms the Tribunal's statements that excluding them from the scope of the *Labour Code* deprives them from the possibility of invoking certain mechanisms otherwise available to employees falling under section 1 (l) 1° of the *Labour Code*.

For instance, the Association and the Employer had indeed agreed to a Protocol, but which did not include a mechanism for the settlement of disputes, had no expiration date and contained no provision compelling the parties to renegotiate its conditions as needed or at predetermined dates.

According to the Court of Appeal, this deprived junior managers of their independence of choice and independence from management, thus constituting a substantial impediment to their genuine ability to conduct collective bargaining.

Although it confirmed the Tribunal's decision which had declared section 1 (l) (1) of the *Labour Code* inoperative in the context of the Association's application for certification, the Court of Appeal nevertheless suspended this conclusion for 12 months in order to allow the government to react and make the required statutory amendments, if necessary.

The impact for employers and businesses

The impact of this decision remains to be seen. It will be interesting to see the new guidelines that the legislator will adopt in the wake of this reversal.

The Court of Appeal rests on the finding that the relevant provision does not meet the minimal impairment test, since "the exclusion of managers from the general certification regime is made without any distinction as to their rank in the company, the nature of their duties, whether or not they have access to confidential information, their participation in negotiations with unionized groups and so on." [para 180; our translation] It will therefore be interesting to see if and how the legislator will organize the levels of managers to be covered by the *Labour Code*.

The difficulties arising from this new régime will be less in situations where junior managers have less decision-making power, which will be especially the case with major employers. Otherwise, the managers' role of making several decisions binding the employer may put them in a conflict of interest, especially if they must position themselves against the employer in the context of collective bargaining.

Since junior managers with less decision-making capacity are likely to be included in the scope of the *Labour Code*, it will be appropriate for the employer to review the management hierarchy in order to define clearly where the increased decision-making powers reside.

Will these junior managers have to be part of independent bargaining units? As the multiplicity of bargaining units is recognized as a source of discord and potential disruption within a company, the impact of this decision will also be felt on industrial peace.

Finally, it will also be interesting to see if and how the legislator will modulate the "anti-scab" provisions of the *Labour Code* (sec 109.1 et seq.). Indeed, managerial employees are practically the only people who can ensure that an employer's activities will continue when there is a strike. Will the right to work during a strike now be reserved for senior management? This is another issue that will have to be clarified by legislation.

The next steps of this case will be crucial. In all likelihood, the next leg of the debate will occur before the Supreme Court. If not, the National Assembly will have to set the new rules. That will be an issue to monitor in the near future.

by Roxanne Cloutier-Peace (Robinson Sheppard Shapiro LLP)
CLC (Canadian Litigation Counsel)