DENTONS

Employment and Labour Newsletter - Montréal

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Private sector employers: Do you know your new privacy obligations?

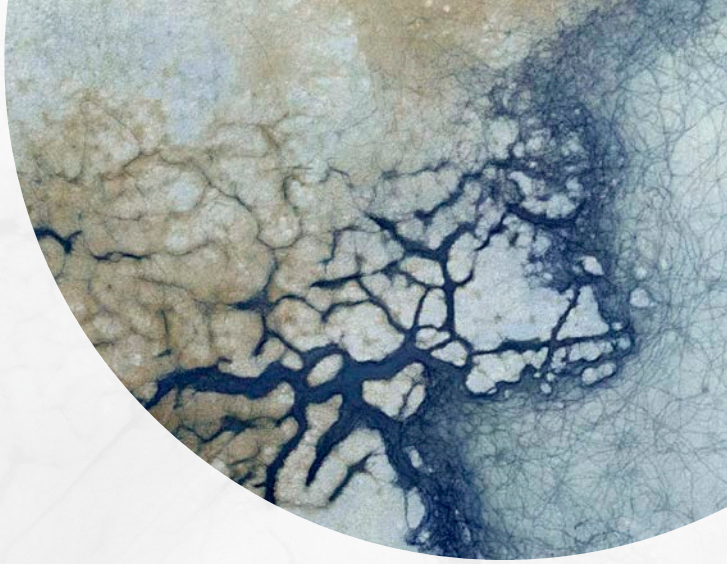
In Québec, the *Act respecting the protection of personal information in the private sector* establishes specific rules governing the collection, use and disclosure of personal information by private enterprises. Bill 25, passed in 2021, modernizes Québec privacy law.

Most of the new provisions came into force on **September 22, 2023.**

Employee information

As of September 22, 2023, a new exception to the scope of the Act pertains to personal information linked to an individual's role within an enterprise (e.g., name, title, and function, as well as the workplace contact detail (address, email and telephone number)).

Please note: other personal information about your employees (such as medical information) is not covered by this exception.



Privacy policies and practices

As of September 22, 2023, it is mandatory to implement a privacy policy and publish it on your website. Since that same date, you must also have published comprehensive information about your privacy policies and practices. This information should cover the following:

- The governance of personal information;
- The framework for the retention and disposal of personal information; and
- The procedures for addressing privacy complaints.

It is also essential to ensure that, when necessary, you obtain and retain proof of the consent of your employees for the collection, use or disclosure of their personal information.

Privacy Impact Assessment (PIA)

Enterprises must now conduct a PIA when initiating an acquisition, development or redesign of an information or electronic service delivery system that involves collecting, using, disclosing, destroying or retaining personal information. Your Privacy Officer must be involved from the outset and may propose privacy safeguards.

The scope of the PIA must be proportionate to: (i) the sensitivity of the personal information involved; (ii) the purpose for which the personal information is used; (iii) the volume of personal information at stake; and (iv) the distribution and format of the personal information in question.

PIA and disclosure of personal information outside Québec

Subject to certain exceptions, companies must seek the individual's consent to disclose their personal information.

To disclose information outside Québec, the company must also conduct a PIA, taking into account factors such as the sensitivity of the personal information, its intended purpose and the safeguards, including contractual ones, that will protect this information.

Disclosure can proceed if the PIA confirms adequate protection of the information. Any disclosure of personal information outside Québec must be governed by a written agreement that considers the PIA results and the agreed-upon terms and conditions to mitigate identified risks.

These obligations equally apply when an enterprise outsources the collection, use or disclosure of personal information to entities outside Québec.

Profile, localization or identification

If your company collects personal information using technology equipped with features for identification, location tracking or profiling of individuals, you must review your policies and practices, as ensuring individuals are informed in advance about the use of such technology and the means available to activate these features is imperative.

Do not forget about obligations that have been in effect since September 2022

Additionally, it is vital to confirm compliance with the provisions that have been in effect since September 22, 2022. These include obligations related to privacy incidents and designating individuals responsible for safeguarding personal information.

If you would like to discuss any of the above provisions, or any questions regarding employers' privacy rights and obligations, please contact **Alexandra Quigley** or any member of the Labour Law Group of the Montréal office.

Decision briefs

Tecsys inc. v. Patrao, 2023 QCCA 879

Facts

The appellant, Tecsys Inc. (Tecsys), appealed a Superior Court's decision that allowed a former employee, Mr. Patrao, to claim damages for a breach of an employment contract.

Tecsys dismissed Mr. Patrao, in March 2017, citing a "cultural fit" issue. This termination occurred during a brief six-minute telephone conversation involving Tecsys' CEO, the Vice-President of Human Resources and Mr. Patrao, who had just returned from vacation. The appellant conditioned Mr. Patrao's request for a letter of recommendation on his signing of a final release for the amounts owned by Tecsys (equivalent to 3.66 months' pay in lieu of notice). Despite his active job search efforts, Mr. Patrao took approximately 20 months to secure new employment at a salary that was 50% lower.

At the time of his dismissal, Mr. Patrao had approximately three and a half years of seniority, held the position of Senior Vice President of Global Operations, was 49 years old and received a total compensation package of around CA$600,000. His performance appraisals at Tecsys had consistently been positive, resulting in generous salary increases year after year. Additionally, Mr. Patrao played a crucial role in significantly increasing the company's sales, leading to record levels from 2016 to 2017

During the legal proceedings, Tecsys initially claimed that Mr. Patrao's dismissal was for cause under the *Civil Code of Québec*. However, shortly before the hearing, Tecsys admitted to terminating his employment without cause, which was also mentioned in the dismissal letter given to Mr. Patrao in March 2017.

Mr. Patrao sought compensation in lieu of notice equivalent to 18 months' salary, an unpaid bonus of CA$95,513 and CA$50,000 for moral damages, hardship and inconveniences.

First instance court decision

The Superior Court judge ruled that the employer should pay Mr. Patrao compensation in lieu of thirteen months' notice, the balance of his annual bonus, $20,000 in moral damages and $20,000 for abuse of process.

In determining the appropriate notice period, the court considered factors such as Mr. Patrao's age, length of service, compensation level and position. The judge also considered the job market conditions in the Montréal area for a position comparable to Mr. Patrao's at Tecsys. Furthermore, the judge took issue with Tecsys' refusal to provide a letter of recommendation and its lack of transparency regarding the dismissal's reasons, which contributed to extending the notice period to reflect the adverse impact on Mr. Patrao's job search.

The judge also noted that Tecsys had committed a distinct fault in dismissing Mr. Patrao, and that this fault had caused its former employee damages that were different from the normal damages usually resulting from a dismissal. The judge puts it this way:

> [78] *[Our translation]* It is completely unacceptable and unworthy to dismiss Mr. Patrao during a six-minute conference call, especially since it occurred the day after his return from vacation and because he is a high-level executive whose performance is important in the company. There is no right way to fire someone, but there are wrong ways to do it, and that is one of them.

Lastly, the judge deemed Tecsys' change in the characterization of Mr. Patrao's dismissal as an abuse of process, warranting damages.

Court of Appeal decision

The Court of Appeal reviewed the trial judge's assessment of the notice period and concluded that no errors were made in considering the applicable factors, and that the length of the notice period was reasonable.

The employee argued that the judge took into account criteria rarely used in determining reasonable notice, such as the lack of transparency regarding the reason for dismissal. However, the

Court of Appeal found that this was not an error since the criteria was linked to Mr. Patrao's post-dismissal job search challenges. However, the Court of Appeal disagreed with extending the notice period due to the refusal to provide a letter of recommendation, because the purpose of the notice of termination is only to indemnify the employee. Rather, the damages flowing from this unjustified denial should be compensated by the award of separate damages in excess of the amount of the indemnity.

Tecsys then argues that the trial judge granted a double recovery because he awarded moral damages for the lack of notice of dissatisfaction prior to dismissal, in addition to taking into account the appellant's lack of transparency in the dismissal process in order to extend the notice period for the termination of employment. The Court of Appeal did not accept this argument and instead confirmed that Mr. Patrao's dismissal was in fact carried out in a particularly brutal manner that showed bad faith on the part of the employer, who undoubtedly abused the right to dismiss without cause.

Lastly, the Court of Appeal overturned the trial judge's decision to award damages for abuse of process to the respondent because it was of the opinion that the appellant's change of course in 2019 on the characterization of the dismissal did not constitute conduct that was so blameworthy or reckless as to justify a declaration of abuse.

Syndicat de la fonction publique et parapublique du Québec (SFPQ) v. Gouvernement du Québec (Secrétariat du Conseil du trésor), 2023 QCTA 280 (Application for judicial review filed)

In the spring of 2015, the Commission de la fonction publique (Québec Public Service Commission) issued a report highlighting errors in the determination of the compensation of certain civil servants hired since May 2012. Subsequently, the Secrétariat du Conseil du trésor (Treasury Board Secretariat) instructed the relevant organizations to rectify these errors. It took more than seven months from the report's release for these organizations to review and adjust the salaries of a significant number of their employees, resulting in pay reduction for some.

Following these developments, the union representing the affected employees filed two union grievances. One challenged all the salary reductions, while the other contested the associated salary recovery process. The Union argued that the employer's rights were time-barred due to the six-month time limit outlined in Article 71 of the *Labour Code*. Additionally, they asserted that employees who experienced pay cuts were being treated unfairly and unjustly. Individual grievances were also filed by affected employees.

On June 30, the arbitrator appointed to resolve these grievances determined that the salary readjustment did not constitute the exercise of a right or remedy as defined in Article 71 of the *Labour Code*. Instead, it was deemed an obligation on the part of the employer to correct an error and ensure compliance with the existing collective agreement and regulatory framework, which is non-prescriptive. Concerning salary recovery, the court acknowledged that the six-month limitation period stipulated in Article 71 of the *Labour Code* extinguished the employer's right.

Furthermore, the arbitrator rejected the union's claims of unfair and unjust treatment of employees based on alleged breaches of their employment contract or the unilateral nature of the review process. It emphasized that compensation determination within a union context not resulting from negotiation between the employee and the employer and that appointment letters issued at the time of recruitment are not contractual and do not constitute employment contracts. Furthermore, given the absence of discretion relating to remuneration within a collective employment relationship context, the employer was obliged to rectify any errors to align with the prevailing regulatory framework. As negotiations had no place in this process, it logically proceeded unilaterally.

Jutras v. La Presse (2018) inc., 2023 QCCS 2506

The Superior Court ordered La Presse to reimburse a former company officer $198,018.84 for professional fees incurred in defending himself against legal actions aimed at preventing him from taking a new job at Quebecor and having these actions declared abusive. The Tribunal found La Presse had abused its right to initiate legal proceedings by seeking an interim injunction and later a protective order to enforce a non-competition agreement that, on its face, was invalid as it did not define the scope of prohibited work. The clause effectively barred the executive from working with any company involved in advertising space sales in Québec, irrespective of whether it was a news media outlet or a competitor of La Presse in the news media publishing sector. Lastly, the claim for $25,000 in damages for stress and inconvenience was considered excessive and reduced to $5,000.

Saint-Lambert (Ville) v. Syndicat canadien de la fonction publique, section locale 307 (Watson Sanon), 2023 QCTA 230

An employee of the City of Saint-Lambert was dismissed due to his dishonesty in responding to inquiries from the employer's representatives and a physician appointed by the employer regarding his drug use. Specifically, the employee repeatedly claimed that he did not use drugs, despite subsequent test results indicating otherwise. When confronted with these findings, the employee eventually admitted to having used drugs a few weeks before the employer's investigation commenced. However, he argued that he did not believe he was obligated to disclose this information since he had never used drugs at work or worked while under the influence of drugs. Additionally, he feared that revealing the truth would result in job loss.

In the arbitration decision regarding the dismissal, the arbitrator initially addressed the union's argument that an employer should not be allowed to discipline an employee for not honestly answering questions about their personal life, due to the very fact that asking these questions violates the employee's right to privacy. Rejecting this argument, the arbitrator clarified that as long as the employer's investigation is legitimate, which it appeared to be in this case, the employee has an obligation to participate honestly and without reservation to such process, even if some of the questions touch on their personal life. Subsequently, in evaluating whether the alleged fault warranted dismissal, the arbitrator acknowledged that failing to fully cooperate in a legitimate employer investigation constitutes a serious fault that could justify a severe disciplinary action against the employee. However, considering the absence of evidence demonstrating that the employee had carried out his duties while under the influence of drugs and taking into account the explanations provided by the employee for his initial lack of honesty, the arbitrator concluded that dismissal was excessively severe. Consequently, the arbitrator replaced the dismissal with a one-year suspension.

Chabot v. Produits forestiers St-Armand inc., 2023 QCTAT 2439 (Application for judicial review filed)

This case pertains to a decision regarding the motion to determine benefits filed by an administrative assistant who was unjustly terminated[1] from her position at the age of 70, after 25 years of service.

Initially, regarding the question of whether the employee should be reinstated, the Administrative Labour Tribunal (ALT) concluded that reinstatement was not appropriate. The ALT reasoned that re-establishing a trustful working relationship was unrealistic due to the evident hostility that

1 For the decision on the merit, see *Chabot* c. *Produits forestiers St-Armand Inc.*, 2022 QCTAT 863 (the employer applied for judicial review of that decision in file 460-17-003151-222).

the principal officer still showed towards the complainant, particularly in a context of a small family business. Regarding the issue of mitigating damages, the ALT found that the employer had failed to establish that the employee neglected her duty to minimize the consequences of her dismissal. Despite the fact that she took over a year to commence her job search and did not send out any resume for over four years, the ALT deemed the employee's actions as reasonable under the circumstances. The ALT acknowledged that the employee had not needed to seek employment for many years and now faced a significantly changed job market. Considering her age, physical capabilities, experience and limited mobility, it was deemed reasonable that she didn't find it effective to apply for jobs impersonally.

Given these circumstances, the ALT awarded the employee compensation equal to her lost wages and other benefits for a period of slightly over four years (from her dismissal to the quantum hearing). Additionally, she was granted compensation for loss of employment, equivalent to 50 weeks' salary, along with $5,000 in moral damages and $5,000 in punitive damages.

***Couture v. Kleen Flo Tumbler Industries Limited*, 2023 QCCS 2175**

After receiving numerous employee complaints within a short span, alleging that the company's director of operations was displaying unacceptable behaviour towards both employees and clients, the employer commissioned an external investigation firm to probe the matter. The report submitted by this firm confirmed that the director frequently engaged in disrespectful comments targeting employees, management, women, individuals of different nationalities, in addition to exhibit inappropriate conduct towards one employee. Consequently, the employer terminated the director's employment without providing a notice period or compensation in lieu of notice. It's worth nothing that the director had nearly 40 years of service and a spotless disciplinary record.

Believing that the employer should have opted for a milder disciplinary measure and that the reasons cited for his dismissal did not, given the circumstances, amount to "serious reason" as defined in Article 2094 of the Civil *Code of Québec*, the director initiated legal proceedings against the employer.

The Superior Court dismissed his application in its entirety, unequivocally concluding that he had indeed been terminated for a serious reason. The judge emphasized that the employers have a legal obligation to protect the health, safety and dignity of their employees, as well as to provide a workplace free from harassment. Thus, when an employer discovers that a person of authority within the company is creating a toxic, humiliating and inappropriate work environment, prompt and decisive action is justified. Furthermore, the Court noted that the concept of progressive discipline does not apply to those occupying the highest echelons of the organizational hierarchy. Even if it were to apply, the Court asserted that the director's deeply ingrained behaviour could not be rectified through disciplinary actions.

Varia

On July 27, 2023, the *Regulation to Amend the Regulation Respecting Occupational Health and Safety and the Safety Code for the Construction Industry* came into force. This regulation introduced several changes related to machine safety, specifically impacting section XXI *of the Regulation respecting occupational health and safety and section 20.13 of the Safety Code for the construction industry.*

Stay tuned!

Legal update for Canadian employers

Join our colleagues Andy Pushalik, Jeff A. Bastien, Kristi M. Wong and Nicolas Séguin for this webinar on September 29, 2023. Register here.

Federally regulated employers: Everything you need to know about the recent and upcoming Canada Labour Code amendments

Read the article written by our colleagues Stephanie V. Lewis and Larysa Workewych on the recent amendments to the Canada Labour Code.

Canadian Occupational Health and Safety Law

Stay updated on legal and regulatory issues concerning occupational health and safety through Dentons' blog.

Half-day training event – Les matinées RH Dentons

Save the date! The first edition of Les matinées RH Dentons, hosted by the Montréal Labor and Employment group, will take place on November 22, 2023.

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