



THE LEGAL INSIDER

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LABOUR LAW

Rules & Principles Governing Dismissals in Québec

In the scope of the relations with its employees, a business entertains both rights and duties. The employee retains similar links toward the business. The subject of the present *Legal Insider* shall be to discuss the employer's options when he must end an employment contract. In the context of this parting, what are the rights and obligations of each party?

The question of an employee's seniority within the business is a cornerstone framing the obligations of the parties. In the province of Québec, Section 124 of the *Labour Standards Act* establishes two years of seniority as the landmark for non-union employees. Before this two-year seniority is attained, the employer may thus, as a general rule, dismiss an employee without difficulty. The employer must then simply respect the provisions regarding the notice of termination. He needs not provide any justification.

After two years within the same business, an employee gains the right to maintain his employment. His employer may no longer terminate his contract at will. However, it remains possible to dismiss an employee for a serious fault. The courts have given a strict interpretation to the term "serious fault".

Furthermore, the law makes a distinction for dismissals made when a business must abolish a position for economical or technological reasons. In this context, the seniority of the dismissed employee is not a factor.

The situation of an employee with less than two (2) years of employment seniority is discussed in a first time. In a second time, the situation of the employee with two (2) or more years of seniority shall be discussed.

I. The situation of an employee with less than two (2) years of uninterrupted employment with a given employer

As long as an employee has not accrued at least two (2) years of employment with a given business, the employer retains a large amount of flexibility. If he desires to dismiss an employee, he need not justify his decision. However, an obligation remains: to respect the provisions governing the notice of termination of employment. This notice constitutes an employer's obligation to inform in writing the employee that he is dismissed. For the employee, the notice constitutes the right to be informed in advance of the date on which his employment shall be terminated. Hence, the obligation of the employer to provide a prior notice of termination of employment is subject to a given length of time, provided by law. More specifically, the notice of termination must be communicated to the employee a given number of weeks, proportionate to seniority, before the effective date of the dismissal.

The *Labour Standards Act* provides the following length of notice to be respected by the employer:

- Less than three months of uninterrupted service: No notice
- From three months to one year of uninterrupted service: One (1) week

- From one to two years of uninterrupted service: Two (2) weeks

As a rule, the employee receiving a notice of termination of employment must continue to work for the employer for the length of the notice and remains paid for his services. However, if the employer wishes for the employee to leave the business immediately upon reception of the notice (example: the employee occupies a key position, justifying that he leaves immediately), the employer must pay to the employee a sum equivalent to the salary the latter would have received should he had continued working for the length of the notice.

However, the employer is not required to give a prior notice of termination of employment when the employee has perpetrated a serious fault or a series of fault justifying an immediate dismissal. The conditions permitting to qualify whether the employer has good and sufficient cause to dismiss his employee shall be further discussed in Paragraph II below.

To sum up, an employer need not, as a general rule, justify the dismissal of an employee with less than two (2) years of uninterrupted service. However, an employee with more than two (2) years of seniority may not be dismissed without sufficient cause.

II. The situation of an employee with more than two (2) years of uninterrupted employment with a given employer

An employee, having accrued more than two (2) years of seniority within a given business, cannot be dismissed at will by his employer. Indeed, the employer intending to dismiss his employee must justify his decision by the existence of a good and sufficient cause, or must dismiss him under reasons of an economical or technological order. Thus, it becomes more complex for the employer to break the employment relationship once the employee has attained more than two (2) years of seniority.

Québec's *Labour Standards Act* distinguishes between two forms of dismissal: (a) *congédiement*—a dismissal made for causes relative to the employee's own faults or personal characteristics, and (b) *licenciement*—a dismissal made for economical or technological reasons relative to the employer's situation. Although they create different rights and obligations for the parties and while the courts of the province of Québec have long recognized the distinction between them, the English-language text of the *Labour Standards Act* fails to provide different nomenclature for these two concepts. As a result, the following will refer to both concepts by their French names.

A. "Congédiement" Dismissal

"*Congédiement*" dismissal is the termination of the employment contract for subjective causes related to the employee's own characteristics. In other words, the dismissal results from a fault committed by the employee. However, every fault is not necessarily ground for an immediate dismissal, when the employee has accrued at least two (2) years of seniority with the employer. Indeed, the *Labour Standards Act* requires the existence of a "good and sufficient" cause for dismissal to be an appropriate measure. What constitutes a "good and sufficient" cause? The answer lies in the analysis of the Québec courts.

The tribunals of the province of Québec have qualified dismissal as a sanction for the fault, or faults, committed by an employee. Jurisprudence has enunciated a principle of the necessary gradation of sanctions, with dismissal as the ultimate sanction. Before resorting to dismissal, an employer may avail himself of various means of sanctioning an employee at fault, such as a notice, a suspension without pay, a change of affectation, etc. Before dismissing an employee, the employer must first apply sanctions proportionate to each fault, of a gradually increasing severity. However, each case must be treated individually. Even though an uncommon occurrence, certain situations justify dismissal as the first sanction for a first fault.

Example: An Airbus A380 pilot takes the controls of his aircraft after having consumed alcohol – in such a case, an immediate dismissal would be justified.

What must one do, as a further example, with an office clerk that arrives at work late one morning? Such a situation is hardly ground for an immediate dismissal. However, the employer may certainly give this employee a notice, a warning, or a reminder of the work schedule he must abide by. If the

employee continues to arrive late repetitively despite the warnings, the employer could then impose a suspension without pay. If after this last sanction the office clerk does not amend his conduct, his employer would then, in all likelihood, be justified to dismiss him.

In real practice, few small and medium businesses apply this process of gradual sanctions. However, by relying solely on verbal reprimands to their employees, these businesses are hard pressed when comes the time to justify a dismissal. Before an employee's situation becomes a problem, it is highly suggested to document that employee's file and to impose gradual sanctions. Thus, an eventual dismissal becomes more easily justifiable by the employer.

In sum, an employer can have good and sufficient cause to dismiss an employee with more than two (2) years of seniority in two situations:

- a) Existence of a serious fault, ground for immediate dismissal, or
- b) A series of repetitive faults that were the object of gradual sanctions.

B. "Licenciement" Dismissal

"*Licenciement*" dismissal is the act through which an employer terminates the employment contract of one or many of his employees for reasons of an economical or technological order.

A business can be crossing dire financial straits or implement a technological change to its production methods. As such times, its current human resources may no longer correspond to its needs. The economical situation of the business may necessitate a reduction of its workforce; the change in means of production may require an adaptation of its human resources. Indeed, when a business undergoes a modernization process and acquires new equipments, it is possible that certain employee do not have the requisite training or competencies to work with this new technology.

In such cases, the employer can dismiss its employee lacking the newly required competencies. This dismissal would be deemed made for technological causes. Likewise, a business under financial strains that restructures its workforce can proceed to dismissals for economical causes. This may happen when the business suffers a deficit, or simply when its financial results are unsatisfactory.

While "*Congédiement*" dismissal arises from the employee's fault and is thus a function of his personal acts, the "*Licenciement*" dismissal is a function of the enterprise itself. As the business undergoes an economical or technological restructuring, the personal characteristics of the employees do not factor in the dismissals effected. The employer may then terminate an employment contract without taking into account the employee's seniority. In other words, the employer may choose freely the employee(s) to be dismissed. He may elect to dismiss one given employee rather than another without needing to justify his choice. The jurisprudence has repeatedly upheld this principle of the managerial freedom by refusing to intervene in the decision taken by employers.

While the employer is free to dismiss the employee of his choice, he must nonetheless give that employee a notice of termination of employment pursuant to the *Labour Standards Act*:

Employee's years of uninterrupted service	Length of notice
From two to five years of uninterrupted service:	Two weeks
From five to ten years of uninterrupted service:	Four weeks
More than ten years of uninterrupted service:	Eight weeks

To conclude, it must be noted that dismissal for economical or technological reasons must not be lightly applied by employers. It must not be used as a pretext to disguise an effective "*Congédiement*" dismissal! The process must be based upon real and precise objectives. It is suggested to retain supporting documentation.

Conclusion:

An employer must remain conscious of his employees' seniority when he needs to let them go. While an employer may dismiss an employee without justification during the first two (2) years of employment, the situation becomes more complex once this two-year delay has passed, as the employer must then provide a good and sufficient cause before doing so. Only when an employee perpetrates a fault deemed to be serious (a rather sparse occurrence), or when a series of faults has been the object of documented, gradual sanctions, does the ultimate sanction of dismissal be inflicted upon an employee. Yet, these conditions need not apply in the case of dismissals of an economical or technological order.

When a business must resort to personnel cut-backs as a result of technological or economical necessities, it is a matter of "*Licenciement*" dismissal. In such cases, the dismissal may affect any of the employees, without the employer needing to invoke a good and sufficient cause and without preoccupation with the said employees' seniority. The only condition concerns the reality of the economical situation or of the technological change, so as to insure that the dismissal does not result from a false pretext.

Regardless of the seniority he has accrued with the business, an employee holds by law a right to receive prior notice of his dismissal, unless he is dismissed for a good and sufficient cause. At the employer's option, this notice may take the form of an indemnity equal to the salary the employee would have earned by working for the period of the notice.

Labour laws seek to find a balance between the protection and flexibility. In Europe, the term "flexicurity" is used to define this objective of balance between flexibility of the labour market and employment security for workers. Workers must adapt to the demands of the market, in consideration of which they receive additional rights and increased protection. In the province of Québec, flexibility is optimized during the first two (2) years of employment for a given employee. After accruing two (2) years of seniority, an employee receives considerable protections. Such is the compromise that the province of Québec has struck in incorporating in its legislation Europe's twin objectives of flexibility and security.

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