

Newsletter



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Avocats • Lawyers

December 22, 2015

Beware of clauses limiting the right to allocate work!

Collective agreements frequently contain clauses providing that tasks normally performed by workers in the bargaining unit cannot be performed by employees who are not members of the unit. Drafting these clauses requires special care.

For a long time, grievance arbitrators have interpreted such clauses restrictively and limited their scope to the establishment to which the bargaining unit is associated. Then, in a 2009 decision in *Parmalat*, an arbitrator gave an extraterritorial application to such a clause. Recently, in *Evotech*, another arbitrator issued a similar decision, compelling the employer to pay substantial compensation to its employees.

Arbitrators increasingly consider that these clauses serve the legitimate purpose of protecting members of the certified association by granting them some employment security.

Such clauses are a major restriction to an employer's management rights. Unless the business is facing definitive closure, the employer's management rights are limited to the exceptions and conditions provided for in the clause, if

any. Thus, unless the clause's geographical scope is expressly limited or otherwise pinpointed, the employer is barred from transferring the tasks to another department, another plant or another region.

Furthermore, the employer cannot raise reasonable grounds, such as unfavourable economic conditions or the need to relocate, to circumvent or elude the clause. By opening the door to such arguments, the arbitrator would be re-writing the clause.

Therefore, an employer drafting such a clause should provide for exceptions and conditions to preserve its management rights and allow tasks normally carried out by employees in the bargaining unit to be transferred to third parties.

Such result can be achieved by specifying that the clause will apply only to the



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premises where the work is carried out, or that it will not apply in cases of partial closure, relocation, transfer or change of operations, restructuring, lease expiry, economic hardship, dismissal, subcontracting or emergency.

¹ Decision confirmed upon judicial review, *Parmalat Canada inc. c. Tremblay*, 2009 QCCS 3926; leave to appeal denied, 2009 QCCA 2002.

² *Peintures industrielles Evotech inc et syndicat des employés de Sico Inc., section Evotech (CSN)*, union grievance, 2015 QCTA 809.

³ *Syndicat des salariés d'acrylique de Beauce inc. (CSD) et Maax Bath inc., division Acrylica, et Centre de distribution Cameron*, AZ-50886406; application for judicial review denied, 2013 QCCS 2572.

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