The Right to Refuse, A Dichotomy of Danger and Risk

Following the Québec government’s decision to allow the restart of commercial activities in the manufacturing, retail, and construction sectors, the question that keeps coming up is the application of the concept of the right of refusal. Numerous employers are wondering whether their employees can refuse to return to work after a recall, following the restart of the economy scheduled to take place between now and May 25th.

The right, which is codified by section 12 of the Act Respecting Occupational Health and Safety [“AOHS”], allows employees to refuse to perform work that they believe constitutes a danger to their health, safety or physical integrity or to that of their co-workers. A mechanism provided by the Commission des normes, de l’équité, de la santé et de la sécurité du travail [“CNESST”] makes it that in such a case only one of its inspectors may decide on the matter.

The public in general, and employers in particular, have associated this right of refusal with a possible refusal by a recalled worker to return to work as required. The question is whether this constitutes a right of refusal within the meaning of section 12 of the AOHS?

Here lies the dichotomy between the notions of danger and risk. Simply returning to work in the context of a pandemic is in and of itself a risk for any worker. Regardless of the sector of activity, returning to work will be a risk. When questioned on this subject at the April 28th press conference, Pierre Fitzgibbon, Minister of Economy and Innovation, dodged the question by emphasizing the health measures put in place by employers, based on CNESST directives, which he argued should reassure workers and thus encourage them to return to work.

While section 12 of the AOHS refers to “danger”, here, it is a question of “risk”. These two concepts are distinct and must be analyzed separately. The danger must be immediate, whereas risk is
often related to a perception on the part of the employee.

The refusal of an employee to return to work when recalled is not, in our view, a refusal to work under the meaning of section 12 of the AOHS. This refusal should be treated differently and assessed according to different standards and rules. The questions that arise for every employer, and which make the issue so important if there is a refusal to return to work following a recall, are:

• what are the consequences for the worker’s employment? and
• what are the consequences for that employee’s entitlement to the Canada Emergency Response Benefit?

These are all issues that remain to be debated and will have to be analysed on a case-by-case basis.