

Eliminating differences in treatment, a question of fairness!

Under the Act respecting labour standards, a collective agreement or an individual contract of employment cannot contain clauses, the effect of which would be to grant an employee, solely on the basis of his hiring date, a condition of employment that is less advantageous than that which is applicable to other employees performing the same tasks in the same establishment.

What is a difference in treatment clause?

A difference in treatment clause, also known as an “orphan clause”, is a provision, the effect of which is to create, for new employees hired after a given date, conditions of employment that are different from those which employees already on the job enjoy.

Only differences in treatment based **solely** on the hiring date are prohibited. A more advantageous condition granted to an employee by reason of his seniority is allowed. The same is true for other grounds such as professional qualification, experience, performance or job assessment. Distinctions based on such grounds are not considered differences in treatment within the meaning of the Act.

Examples

On September 1, 2004, Louise was hired as a supermarket cashier. As stipulated in her collective agreement, her wage is set at \$7.50 an hour. Her colleagues who perform the same tasks were hired a few weeks prior to the signing of the collective agreement at the rate of \$7.75 an hour. The agreement provides for no catching up between Louise’s pay scale and that of her colleagues.

If no reason other than the hiring date, for example experience and training, justifies the lower wage paid, Louise is the victim of a difference in treatment, prohibited under the Act.

Mary was just hired as a window dresser in a department store. Under the collective agreement in effect in her undertaking, she receives a wage of \$8 an hour. On her first day of work, Mary talks with her colleague Ann who performs the same tasks as Mary does. Ann tells Mary that she has been working for the store for four years and that she now earns \$11 an hour in accordance with the wage progression scale established by the collective agreement.

In this situation, Mary cannot conclude that she is the victim of an illegal difference in treatment, since her colleague’s higher wage is based on her seniority in the undertaking and not on her hiring date.

Some premiums, allowances and indemnities may be in addition to the basic wage. If for example, a night or evening premium was lower for employees hired after a given date, this would constitute a wage difference prohibited under the Act.

Can other conditions give rise to a difference in treatment?

In addition to wage differences, the Act prohibits differences related to other aspects covered by a standard within the meaning of the Act respecting labour standards, namely:

- length of work;
- paid statutory holidays;
- paid annual leave (vacation);
- rest periods;
- absences by reason of illness or accident;
- absences and leaves for family or parental reasons;
- notice of termination of employment or lay-off, and certificate of employment;
- uniform, material and tools provided, training and travel expenses.

It should be noted that the stipulated protection deals **only** with the aforementioned aspects. Different conditions of employment concerning aspects not referred to in the Act cannot be considered differences in treatment.

Moreover, the condition of employment about which an employee is complaining must be compared with the most advantageous condition of employment enjoyed by another employee performing the same tasks in the same establishment and not only the minimum provided for under the Act.

Examples

John, a mechanic, was hired on April 1, 2004. The undertaking that employs him has no unionized employees.

After being with the undertaking for a few days, John learns from a colleague that for several years now, the employer has traditionally given one day of paid leave to his employees on their birthday. However, the employer, having modified his policy effective January 1, 2004, refuses to offer this benefit to all new employees hired after that date.

Although John may find the situation unfair, it does not qualify as a difference in treatment, given the fact that a paid leave at the time of an employee’s birthday is not a condition of employment stipulated in the Act respecting labour standards.

In the undertaking where Angelo works, the employees hired prior to January 1, 2003 and who perform the same tasks as him are entitled to a vacation indemnity of 8%, whereas for the employees hired after that date, the indemnity is 6%. Angelo was hired after January 1, 2003. Although the indemnity stipulated in the Act respecting labour standards is 4%, Angelo could file a complaint to obtain the 2% difference, because he is granted a condition of employment that is less advantageous than that of other employees solely on the basis of his hiring date.

Special conditions

Under some circumstances, employees may benefit from special conditions of employment under the Act respecting labour standards. However, these special conditions cannot serve as points of comparison to conclude that there are differences in treatment. Differences are authorized in the following cases:

- 1 For **handicapped persons**. These persons may benefit from a special arrangement concerning their conditions of employment on a permanent basis.
- 2 In the case of a **reclassification** or **demotion** of an employee, an **amalgamation** of undertakings or an **internal reorganization** in an undertaking. In these cases,

temporary differences are permitted for the time required to take corrective action. As a general rule, the differences are eliminated progressively **within a reasonable period of time**.

- 3 In undertakings where there are **several pay scales** for employees who perform identical tasks within the same establishment. To allow these undertakings to comply with the Act, an employee may receive a remuneration outside the pay scale until such time as the pay scale catches up to the employee’s wage and this wage difference is eliminated. This must occur **within a reasonable period of time**. Indeed, the employer must establish within a reasonable period of time a single pay scale for the employees who perform the same tasks in his establishment.

Examples

Reclassification

Up until just recently, Peter held the position of shift leader in a workshop and his wage was set at \$20 an hour under the terms of his collective agreement. Following several changes made to the administrative structure of the undertaking, Peter’s position was done away with and he was reassigned to an operator’s position remunerated at \$17 an hour.

Despite this reclassification, the employer could agree to temporarily maintain Peter’s wage at \$20 an hour. In such a situation, the other operators in the establishment could not use the wage that is temporarily being paid to Peter as a basis for comparison to claim a difference in treatment.

Amalgamation of undertakings

The maintenance employees of ABC company earn \$15 an hour at the top of the scale stipulated in their collective agreement. With a view to increasing its market share, the ABC company amalgamates with the XYZ company whose unionized maintenance employees are remunerated at a maximum rate of \$12 an hour.

In order to not penalize the employees of the ABC company, the employer could allow these employees to temporarily retain this wage difference, without contravening the provisions of the Act respecting labour standards. The undertaking will however have to establish a single pay scale for all its maintenance employees within a reasonable time period.

Transitional measure

The collective agreement of the SuperPro company provides for two pay scales. For employees on the job since January 1, 1997, the wages are between \$20,000 and \$50,000. For employees on the job since January 1, 1998 the wages vary between \$15,000 and \$40,000. To comply with the Act, the employer establishes a single pay scale for all of his employees who perform the same tasks in his establishment. He determines that the wages of employees will be from \$15,000 to \$45,000.

To prevent those employees who receive wages in excess of \$45,000 from being disadvantaged owing to their integration in the new pay scale, the employer could decide to grant them special wage conditions temporarily, until such time as the new scale catches up to the wage conditions of these employees.

However, to eliminate the wage differences within a reasonable time period, the pay increases offered to these employees outside the scale should not be as great as those granted to other employees. Otherwise, the differences would never be eliminated.

The reasonable nature of the period of time may vary from case to case based on all of the elements likely to affect the elimination of the difference and the means employed to achieve this objective, such as:

- the number of employees;
- the scope of the difference to be eliminated;
- the period of time during which the conditions of employment are in effect;
- the employer's economic capacity.

The elimination of differences is an obligation of results found in the Act. While the employer may justify and maintain differences that ensue from an administrative reorganization for example, a temporary situation cannot last indefinitely, and the parties must work to establish a deadline for eliminating such differences.

The provisions of the Act respecting labour standards are public in nature and the parties to a collective agreement must abide by them. The Commission des normes du travail invites undertakings and unions to make sure that their collective agreements respect the provisions of the Act. Any agreement that violates these standards is automatically null and void.

Whom should you contact to exercise a recourse?

A non-unionized employee should contact the Commission des normes du travail. A unionized employee who has a recourse under his collective agreement, such as a grievance right, may use the procedure stipulated in the agreement. He may also choose to lodge a complaint with the Commission des normes du travail.

If you are a unionized employee or an employee subject to a decree and you wish to lodge a complaint with the Commission des normes du travail, you will have to show, when you lodge your complaint, that you have not resorted to the recourses provided in your collective agreement or in the decree governing you. If you have resorted to them, you will have to abandon these recourses before a final decision is reached.

After having validated the eligibility of your complaint, the Commission will make inquiry. If there are differences prohibited under the Act, the Commission will ask the employer to rectify the situation. If the violations in question are not corrected, the Commission can institute the appropriate legal proceedings.

Have any questions?

Get in touch with customer services at the Commission des normes du travail.

Customer services

Montréal area
(514) 873-7061

Elsewhere in Québec, dial toll free
1 800 265-1414

Internet
www.cnt.gouv.qc.ca

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No discrimination is intended.
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**Commission
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