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Medical Selection upon Hiring and Applicants' Right to Lie about their Health Status: A

Comparative Study of French and Quebec Law

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Abstract

As democracies respecting human rights, France and Quebec both prohibit discrimination in hiring on the grounds of disabilities. On the other hand, businesses wish to select the most effective job applicants possible in light of the physical and psychological demands of the job. In order to avoid being eliminated from the selection process, applicants may be tempted to hide or even lie about their health status. Consequently, the law has been put to the test, seeking a delicate balance regarding the consequences of applicants' silence or false declarations concerning their health status.

The legal consequences of this situation have been viewed differently in France and Quebec. In Quebec, contractual synallagmatic obligations appear to take precedence over rules limiting the collection of discriminatory information, allowing for a selection that is nevertheless prohibited by the laws protecting human rights. By contrast, in France, the employer has no right to intrude in matters of worker health, and the withholding of information or even lies on the part of applicants can only rarely be used to justify a dismissal.

This interpretation poses great challenges in view of the "safety obligation of result" that is imposed on the French employer. Through a comparative analysis of French and Quebec

positive law, this paper explores the limits of the employer's ability to investigate an applicant's health during the hiring process. It then turns to the question of the right to lie as a way to avoid being discriminated against on the basis of disability, and the consequences of this right on the employment relationship.

Résumé

En tant que démocraties qui respectent les droits de l'homme, la France et le Québec interdisent tous les deux la discrimination à l'embauche fondée sur le handicap. Pour autant, les entreprises désirent choisir des candidats à l'embauche les plus efficaces possible au regard des exigences physiques et psychologiques du travail. Pour éviter d'être écartés d'un processus de sélection, les candidats peuvent être tentés de se taire, voire de mentir, à propos de leur état de santé. Par conséquent, le droit a été mis à l'épreuve, à la recherche d'un équilibre délicat quant aux conséquences du silence ou d'une fausse déclaration du candidat sur son état de santé. Les conséquences juridiques d'une telle situation ont été différemment envisagées en France et au Québec.

Au Québec, les obligations synallagmatiques contractuelles – engageant les deux parties - semblent avoir préséance sur les règles générales limitant la collecte de renseignements discriminatoires permettant une sélection prohibée par les lois protégeant les droits de l'homme. En France, en revanche, l'employeur n'a aucun droit d'intrusion concernant la santé du salarié et son silence ou ses mensonges ne peuvent que difficilement et marginalement justifier un licenciement. Cela constitue un défi au regard de l'obligation de sécurité de résultat qui incombe à l'employeur français. À travers l'analyse comparée du droit positif français et québécois, ce texte précise d'abord les limites des investigations possibles par l'employeur concernant la santé des salariés au moment du recrutement. Il étudie

ensuite l'existence d'un droit au mensonge destiné à éviter la discrimination fondée sur un handicap en observant les conséquences sur la relation contractuelle.

Keywords: *discrimination, human rights, false declarations, disability, employment contract, dismissal.*

Mots clefs: discrimination, droits de l'homme, déclaration mensongère, handicap, contrat de travail, licenciement

Introduction

Businesses seek the most effective employees possible. Nonetheless, most countries aim simultaneously to open the job market to the largest possible share of members of society, including disabled workers. In many industrial and developing countries, legislators have established national anti-discrimination frameworks that particularly address discrimination based on workers' health condition.¹ These frameworks, whether they are restrictive or permissive, are often a source of tension between the objectives of inclusion and performance.

The workforce participation and productivity of people with disabilities is now widely recognized (Fantoni-Quinton, 2005). However, employers may be tempted to favour versatile, high-performing employees without disabilities, capable of performing a variety of tasks to improve their firm's competitiveness. This tendency is likely to compromise access to employment (especially for the most vulnerable workers), while violating anti-discrimination laws. The right to equal access to work may thus be hindered by the competitive demands of the business world.

There is a wide range of available tools for choosing a candidate that is "compatible" with a given work position, including pre-employment medical examinations, medical tests, or self-completed in-depth medical questionnaires to be used by the employer. Such tools rely on the collaboration of workers, which raises the question of the honesty of their responses

¹ In France, this has led to a requirement for all businesses with over 20 employees to ensure that at least 6% of their workforce are disabled workers, in order to overcome the high rate of unemployment in this population, which is two times that in the non-disabled population.

(especially when the incapacities are not perceptible by the recruiter), either during a medical exam or on a questionnaire. Workers may be tempted to lie in order to avoid being eliminated from the hiring process and because they know that once they have been hired, it will be more difficult for the employer to justify terminating their employment.

As democracies respecting human rights, France and Quebec both prohibit hiring discrimination, in particular based on disabilities. Furthermore, loyalty is a pillar of the Civil Codes of both jurisdictions,² which state that honesty should govern employment relations, beginning with the hiring process. However, respect for private life remains of the utmost importance.³ At issue, then, is the recognition of the applicants' right to lie about the state of their health during the hiring process and the legal consequences of this right.

A comparative analysis of French and Quebec positive law could shed light on the arbitration of this delicate balance. This comparison is all the more relevant given that the occupational medicine reform in France currently challenges the role of the occupational physician in the

² Because the French *Labour Code* stipulates that the employment contract is subject to the rules of ordinary law, the employment contract in France is only validly concluded if the consent of one of the parties has not been vitiated by mistake, fraud or violence (article 1109 of the French *Civil Code*). In order for fraud to constitute a lack of consent, which is a reason for invalidating the contract, the alleged facts must have been intended to mislead the co-contractor by inducing him into contracting. Fraud is characterized by ploys (including lying) i.e. "all the stratagems, fabrications and artifices that a person may use in order to obtain the consent of his or her co-contractor" (Terré, Simler & Lequette, 1993: 178, Author's translation).

³ "Every person has a right to respect for his private life," according to section 5 of the Quebec *Charter of Human Rights and Freedoms*, CQLR c C-12 (hereinafter: *Quebec Charter*), as well as section 3 of the *Civil Code of Quebec* and article 9 of the French *Civil Code*.

assessment of job applicants⁴ (Fantoni-Quinton, Héas & Verkindt, 2016). The examination of a regime that grants more rights to the employer in the selection process therefore appears to be relevant in order to compare the strengths and weaknesses of both models. Indeed, the similarities in the civil foundations of contract law in these two jurisdictions allows for such a comparison. After detailing the limits of the employer's ability to investigate worker health (I), this paper turns to the question of the job applicant's right to lie, and the legal consequences and risks for the parties involved (II).

1. The control of investigations concerning worker health

French and Quebec law both protect workers against the risk of discrimination for health reasons and from employers' discretionary or arbitrary excesses appearing in the questionnaires or hiring procedures imposed on job applicants. Yet, it appears that each of these jurisdictions chose a different tipping-point: France unambiguously prohibits any procedure resembling medical selection upon hiring (1); while Quebec limits investigations with the aim of reconciling the interests of the participants (2). The role of physicians, who are sometimes the only participants able to genuinely evaluate the workers' state of health, differs between the two, particularly insofar as a consultation is mandatory in France and optional in Quebec (3).

1.1 The prohibition of discrimination and investigation under French law

The information that employers can request from job applicants, regardless of the form it takes, can only seek to evaluate their ability to hold the available position or their vocational

⁴ New article L. 4624-2 of the French *Labour Code*.

apptitude. In addition to article L. 1132-1⁵ of the French *Labour Code*, which lays down the principle of no discrimination based on health status,⁶ articles L. 1225-1⁷ and L. 1221-6 prohibit conducting searches or having searches conducted for any information concerning the pregnancy of an employee or that is not directly associated with vocational aptitude (vocational aptitude is not to be confused with medical fitness for the position, which is the occupational physician's exclusive domain where work-related abilities are concerned).⁸ Such information must therefore have a direct and necessary connection with the position offered or with the evaluation of the applicants' vocational aptitude. Employers cannot

⁵ Article L. 1132-1 of the French *Labour Code* states that *"no one can be excluded from a recruitment process [...] or be the subject of a direct or indirect measure of discrimination as defined in article 1 of Act No. 2008-496 of 27 May 2008 which contains various provisions to adapt community law in the area of the fight against discrimination, [...] due to (in particular) [...] his or her state of health or disability subject to civil and criminal penalties"*. (Author's translation)

⁶ Article created by Act No. 90-602 of 12 July 1990 on the protection of persons against discrimination on the basis of their state of health or disability.

⁷ Article L. 1225-1 of the French *Labour Code* states that *"the employer must not take a woman's pregnancy into account in order to refuse to recruit her, terminate her employment during her trial period (...). It is therefore prohibited to conduct searches or have searches conducted for any information concerning the state of pregnancy of the person concerned. A woman who is a candidate for a job or an employee is not obliged to (...) reveal that she is pregnant."* (Author's translation). In a judgement dated 8 November 1990 (case. C-177/88), The Court of Justice of the European Union condemned an employer for violation of the 1976 Directive, on the grounds that he had refused to employ a pregnant candidate because her maternity leave would have been prejudicial to him.

⁸ In addition, the employer is also not entitled to investigate the candidate's status as a disabled worker even though the employer must satisfy the obligation that 6% of its employed workers be disabled workers (cf. for example: Court of Cassation, Social Chamber, 18 September 2013, No. 12-17.159).

question applicants regarding their personal life, including, and in particular, regarding their health. Indeed, French law protects worker's health from the scrutiny of their employers with near ferocity. While job applicants are required to respond in good faith to employers' requests for information, in France they also benefit (in a sometimes contradictory way) from the right to "remain silent" – or even to lie under certain conditions.

The choice made by French law is thus a radical one: medical selection upon hiring is forbidden and employers have no right to access any information of a medical nature regarding applicants, even when the position being filled involves particular physical or psychological demands (Héas, 2011). The privacy barrier is airtight. Employers can and must limit their interest to the applicant's work-related abilities, a limit that prevents them from requesting a medical certificate during the interview phase or asking even the slightest question regarding the health or medical fitness of the potential hire. At the same time, applicants may abstain from providing any information on their health status.⁹ Moreover, while a medical examination by an occupational physician is required, either at the time of hiring, before the employee starts the new job or at the end of the trial period at the latest, as will be seen below, this in no way presents a "roundabout" means of selection for employers.

⁹ The case law has stated that information on the state of health of a job applicant can only be entrusted to an occupational physician responsible for the pre-employment medical examination (Court of Cassation, Social Chamber, 21 September 2005, No. 03-44.855 FS-PBI): the Social Chamber therefore considers that *"information concerning the state of health of a job applicant can only be entrusted to a physician, who is responsible for the medical examination, under article R. 4624-10 (ex R. 241-48) of the French Labour Code."* Author's translation.

1. 2 The prohibition of discrimination during the hiring process and the limitation of investigation under Quebec law

In Quebec, several laws regulate hiring practices (Gagné & Laflamme, 2015). Primarily, the *Quebec Charter*¹⁰ prohibits any discrimination based on the enumerated grounds, including a handicap, in all aspects of the employment relationship.¹¹ Other provisions focus on defining how health information may be gathered during the hiring process. We will first explore the scope of protection from disability-based refusal to hire under the *Quebec Charter* (2.1), and then analyze the rules governing the hiring process itself (2.2).

1.2.1 Protection from disability-based refusal to hire and the limitations of the bona fide occupational requirement and undue hardship

In accordance with the case law of the Supreme Court of Canada, applicants (or workers) who believe they have been subject to discrimination must prove the existence of three elements, namely i) a “distinction, exclusion or preference,” ii) based on a “disability” or “handicap”¹² iii) having the “effect of nullifying or impairing” their right to equality in hiring

¹⁰ It should be noted that approximately 10% of Quebec’s manpower is under federal jurisdiction and is thus subject to the *Canadian Human Rights Act*, RSC 1985 c H-6, which likewise prohibits any discrimination based on disability in the context of the employment relationship.

¹¹ *Quebec Charter*, sections 10 and 16.

¹² The Supreme Court of Canada has given a broad and liberal interpretation to the notions of “handicap” and “disability,” an interpretation that includes practically all health-related conditions as well as the negative

or maintaining employment.¹³ Where these elements have been proven, employers benefit from a particular means of defense: the bona fide occupational requirement (BFOR). Indeed, section 20 of the *Quebec Charter* allows employers to justify an *a priori* discriminatory decision by demonstrating that it was necessary because of an aptitude or qualification required by the job. In such a case, the employer must also prove that it satisfied its duty to accommodate, short of undue hardship.¹⁴

Several factors may be taken into consideration in determining the existence of undue hardship, such as undue interference with the proper operation of the business, excessive cost, infringement on the collective agreement, health and safety risks for co-workers and the public, and infringement on the rights of other employees (Brunelle, 2001: 248-251). Small businesses lack some of the possibilities for accommodation available to large-scale businesses with significant budgetary flexibility and vast and diverse employee pools (Laflamme, 2008). The Supreme Court of Canada has ruled that, in order to respect the undue hardship criteria, the necessary accommodations must involve more than a minor inconvenience or interference.¹⁵ However, as the Supreme Court held in a 2008 ruling, the accommodation must not completely alter the essence of the contract of employment, that is, the employee's duty to perform work.¹⁶

perceptions associated with such conditions: *Commission des droits de la personne et des droits de la jeunesse v. Montréal (City)*, [2000] 1 S.C.R. 665, paras. 79 to 81.

¹³ *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525.

¹⁴ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

¹⁵ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

¹⁶ *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 S.C.R. 561, 2008 SCC 43.

Despite the breadth of this protection, it usually proves difficult for job applicants to exercise their rights when they believe they have been subject to discrimination. The rejected applicant must establish a connection between the refusal to hire and a disability. Since the employer is not required to justify its decision, it is difficult to prove such a connection unless the employer or one of its representatives commits an error (compromising notes left in the applicant's file, remarks, etc.). However, the hiring process itself is constrained by provisions protecting privacy and the gathering of personal or discriminatory information.

1.2.2 The rules governing the hiring process: relative prohibition of any discriminatory investigation

According to the *Quebec Charter*, the *Civil Code of Quebec*, and legislation for the protection of personal information, the gathering of information relating to health must respect the right to privacy.¹⁷ Accordingly, when an employer begins the search for and selection of staff, it may only collect information that is necessary to complete its files, and this information must be gathered by legal means. The *Quebec Charter* explicitly forbids seeking information concerning the enumerated grounds of discrimination, including those relating to health *except* (and this constitutes the primary difference with the French system) when a connection can be made to the “aptitudes or qualifications required for an employment”

¹⁷ Section 5 of the *Quebec Charter*, sections 3, 35, 36 and 37 of the *Civil Code of Quebec*, section 64 of *An Act respecting Access to documents held by public bodies and the Protection of personal information*, CQLR c A-2.1, sections 4 and 5 of *An Act respecting the protection of personal information in the private sector*, CQLR c. P-39.1.

(the BFOR defense).¹⁸ Health-related questions are especially justifiable through the employer's obligation to offer working conditions that respect the health, safety, and physical well-being of its employees.¹⁹

Evidently, applicants can refuse to respond to a discriminatory question by virtue of the *Quebec Charter*. However, this situation presents applicants with a difficult choice (Fournier, 2013). Either they refuse to answer the question and are likely to be excluded from the hiring process, or they provide false answers and run the risk of dismissal if the employer later discovers the false nature of their statement. In theory, since the question is illegal, the employer should not have the right to justify a subsequent dismissal on the grounds of a false statement.²⁰ However, as will be seen below, Quebec courts are reluctant to sanction applicants' lies.

Contrary to the case in France, Quebec employers may ask applicants to fill out a medical questionnaire as part of the selection process, as long as these questions are necessary to ensure that applicants have the aptitudes and qualifications required for the job. In certain cases, the employer may also require a pre-employment medical examination by the physician of its choice and at its own cost.

¹⁸ *Quebec Charter*, section 18.1.

¹⁹ Section 2087 of the *Civil Code* of Quebec, section 46 of the *Quebec Charter* and section 51 of *An Act Respecting Occupational Health and Safety*, CQLR c S-2.1. See also: *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur-du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, 2012 QCCA 1867, para. 57.

²⁰ As an example from case law, see: *Syndicat des technologues en radiologie du Québec et Centre hospitalier de l'Université de Montréal (Campus St-Luc) (grief syndical)*, [2004] R.J.D.T. 1816.

1.3 The role of the physician in the “medical selection” process

In France, employers must systematically require that newly hired workers be examined by an occupational physician (3.1) while in Quebec, this practice is merely an option available to employers (3.2).

1.3.1 The pre-employment medical examination in France: A defense against discrimination?

In France, only occupational physicians (with a focus on prevention rather than control, as a deliberate policy choice) are in a position to evaluate the applicants’ health status by means of a medical examination at the time of hiring.²¹ This medical examination can only be administered to workers who have already been selected through an interview process and must take place before the end of the probationary period ²² – with the exception of rare

²¹ The objectives of the pre-employment medical examination are detailed in article R 4624-11 of the French *Labour Code*, which states: “*The pre-employment medical examination has the following objectives: 1) Ensuring that the worker is medically fit to perform the work of the position to which the employer anticipates assigning him; 2) Suggesting possible accommodations to be made to the position or assignment to other positions; 3) Examining the worker to determine whether he may be suffering from a condition that is dangerous to other workers; 4) Informing the worker of the risks of exposure inherent in the position and the necessary medical follow-up; 5) Raising the worker’s awareness of the preventative measures to be implemented.*” (Author’s translation).

²² Case law has specified that information relative to the health status of a job applicant may only be provided to the occupational physician charged with the pre-employment medical examination (Court of Cassation, 21 September 2005, No. 03-44.855): The Social Chamber has ruled that “*information relative to the state of health of a job applicant may only be provided to the physician responsible for the pre-employment medical*

situations for which the law provides for a medical examination by an expert physician before the start of the new job.²³ All information gathered by occupational physicians through medical examinations is protected by professional secrecy and may in no case be transmitted to the employer.²⁴ The only information that physicians can provide to the employer is whether or not the worker is capable of doing the job, excluding the reasons why.²⁵ This is why many employers uphold the notion of medical fitness, which they expect to entail a close correlation between the worker's health status and the position. However, there is no legal definition of the notion of fitness for a workstation or job (Issindou, Fantoni-Quinton, 2015), and neither does it serve as a guarantee on medical grounds.²⁶

The medical examination does, however, have some limitations since workers can also assume the right to lie to the occupational physician, a decision that is somewhat justified by their knowledge that, should they disclose that they have a pathology incompatible with the position, they could lose the designation of "fitness," the ultimate selection criteria for the job. Other than a few very rare exceptions (such as for maritime occupations and airplane pilots²⁷), there is in fact no law specifying that workers have the duty to reveal their medical

examination, in application of article R. 4624-10 (ex R. 241-48) of the French Labour Code." (Author's translation).

²³ High-security positions in railroad, maritime, and aeronautical fields.

²⁴ Court of Cassation, 10 July 2002, No. 00-40.209.

²⁵ It is consequently up to the physician to be cautious in preparing declarations and opinions for the employer. Physicians violating medical confidentiality would be committing an offense punishable by a penalty of one year in prison and a fine of 15,000 euros (Article 226-13 of the *Penal Code*).

²⁶ See developments described later in this text.

²⁷ *Arrêté du 26 février 2013 modifiant l'arrêté du 27 janvier 2005 relatif à l'aptitude physique et mentale du personnel navigant technique de l'aéronautique civile* and *Arrêté du 30 janvier 2015 modifiant l'arrêté du 16*

or surgical history to physicians. Although physicians may of course compensate for this lack of disclosure by conducting additional medical tests to better apprehend a worker's health status, it is difficult to be exhaustive and detect all pathologies in every general, non-targeted medical exam. Moreover, despite the fact that the medical examination is supposed to determine a worker's fitness for the intended position as well as whether the worker is dangerous to others (or himself), in practice, 99.9% of such examinations result in an opinion that the prospective employee is fit for the job (Issindou, 2015). This statistic is explained by potential omissions on the part of workers concerning their health, and also because physicians sometimes favour a worker's right to work and self-censor rather than declaring a worker unfit (Gosselin, 2007).

French employers thus have no right to investigate workers' health status, as it is up to the occupational physician to do so within the observed limitations. In addition, workers also have the explicit right to lie to their employers regarding pregnancy and their overall health because of the key role assigned to the occupational physician, who is the sole authority when it comes to determining the worker's health status. Workers may also remain silent in the presence of this physician. From the workers' perspective, beyond the principles of good faith, good sense, or moral obligation, the obligation to reveal their health status is fundamentally limited. The consequences of this situation are nonetheless significant, not only for the worker but also with respect to the health and safety of potential employees, their co-workers, and others, as well as for employers in the case of accident, illness, absenteeism, or reduced effectiveness on the job. In this sense, the safety obligation

avril 1986 relatif aux conditions d'aptitude physique à la profession de marin, à bord des navires de commerce, de pêche et de plaisance.

imposed on workers might counterbalance the possibility of lying about their health.²⁸

1.3.2 Pre-employment medical examination in Quebec: balancing the interests at play

Contrary to the case in France, in Quebec, with a few specific exceptions,²⁹ the right to require a pre-employment medical examination is the exception rather than the rule. In principle, the requirement for an applicant to undergo such an examination infringes his right to inviolability³⁰ in addition to impairing his right to respect for his private life.³¹ On the other hand, a medical examination may prove necessary to verify the applicant's ability to perform the tasks associated with the position, in the case where the position requires specific physical or psychological qualifications that are essential to the accomplishment of these tasks.

²⁸ Article L. 4121-1 of the French *Labour Code* states that: "*it falls to each worker, according to his training and his possibilities, to look after his health and safety as well as those of other persons concerned by his actions or omissions at work.*" (Author's translation).

²⁹ Section 223, para. 13 of *An Act Respecting Occupational Health*, CQLR c S-2.1, grants the *Commission des normes, de l'équité, de la santé et de la sécurité du travail* the power to establish regulations concerning the requirements for a pre-employment medical checkup or medical examinations during employment. For an example, see sections 2 and 3 of the *Regulation respecting pulmonary health examinations for mine workers*, CQLR c S-2.1, r 7.

³⁰ This right is conferred by section 1 of the *Quebec Charter* and sections 3, 10, and 11 of the *Civil Code of Quebec*.

³¹ As previously mentioned, section 5 of the *Quebec Charter* and sections 3, 35, 36, and 37 of the *Civil Code of Quebec* protect this right. Gathering information during a medical examination is also constrained by legislation relating to the protection of personal information.

The Quebec Human Rights Commission ruled that such an examination should only intervene in an advanced stage of the selection and hiring process, that is, after a conditional job offer has been made (*Commission des droits de la personne et des droits de la jeunesse*, 1998). However, in a recent decision, the Human Rights Tribunal repudiated this interpretation, confirming the legality of the employer practice of making job offers only after receiving the results of the medical examination.³² This practice considerably increases the burden of proof on applicants seeking to demonstrate that they were denied a job due to their health status, especially when there was a large pool of applicants.

A pre-employment medical examination must not be a general examination of the applicant's health; it must be limited to the search for information that is relevant and necessary to analyze the applicant's ability to safely perform the main and essential duties of the job. The necessity of the required information must be measured in relation to employer expectations that are reasonable, non-discriminatory, and respectful of legislation relating to the protection of personal information (Richer, 1999).³³ Applicants who undergo a pre-employment medical examination have a right to access the results.³⁴

³² *Commission des droits de la personne et des droits de la jeunesse v Bathium Canada inc.*, 2015 QCTDP 13, paras. 60 and 61.

³³ *Commission des droits de la personne v. Hôpital Rivière-des-Prairies*, [1991] R.J.Q. 2943 (Quebec Superior Court); *Commission des droits de la personne v. Montréal (Ville de)*, D.T.E. 94T-600 (Quebec Human Rights Tribunal).

³⁴ Section 8 and 30 of An Act respecting the protection of personal information in the private sector, CQLR c. P-39.1; section 44 of the *Quebec Charter*.

The evaluating physician plays an important role concerning the protection of applicants' fundamental rights (Collège des médecins du Québec, 2006). As in France,³⁵ medical expertise is circumscribed by several rules, including, in particular, the *Code of Ethics of Physicians*, which provides that “a physician must, in judging the aptitude of a person to perform work, confine himself to seeking information pertinent to this purpose”.³⁶

The employer must therefore provide the evaluating physician with a precise description of the tasks to be performed by the applicant so as to enable the physician to properly evaluate the applicant's ability to perform them. The evaluating physician should also ensure the confidentiality of the applicant's medical file and only provide the employer with the information necessary to evaluate the applicant's capacity to perform the tasks involved.³⁷ In principle, this information should be limited to providing an opinion of either unconditional fitness, fitness with limitations (with or without accommodations), or unfitness for the position in question (Collège des médecins du Québec, 1997: 7-14).

Conclusion of part one

The distinct approaches taken in these two jurisdictions result from different conceptions of occupational medicine. In France, the evaluation of applicants' health is entrusted to occupational physicians and is a field of investigation that entirely escapes the employers' control. In Quebec, on the other hand, this role falls under managerial medicine, practiced by physicians who most often work in specialized private clinics offering their services to

³⁵ Article 108 of the French *Code of ethics of physicians*; section R.4127-108 of the *Public Health Code*.

³⁶ *Code of ethics of physicians*, CQLR c M-9, r.17, section 68.

³⁷ *Code of ethics of physicians*, CQLR c M-9, r.17, section 67, para. 3.

businesses (Plante, Bherer & Vézina, 2010).

One might be surprised by the intransigent legal construction found in France, especially in light of the inherent paradox underlying this protection. On the one hand, job applicants are well within their rights to conceal their health status from employers, while at the same time, employers have to take account of newly hired employees' health in their decisions, especially under their "safety obligation of result," that is, employers' legal obligation to protect the health and safety of workers.³⁸ In Quebec, discriminatory questions in a pre-hire questionnaire are permitted as long as they are necessary to evaluate the applicant's ability to perform the tasks associated with the position in question. If the employer chooses to request a medical examination, the physician must, as is the case in France, limit his investigation to issues that are relevant to developing an opinion in this regard.

That said, in both France and Quebec, since employers are not required to justify their decisions, it can be difficult for applicants who believe they have been subject to discrimination to establish a connection between the refusal to hire and a real or perceived disability.

This is why, both in France and Quebec, applicants may be tempted to hide or even lie about their health status, to increase their chances of being retained in the selection process. The law has thus been put to the test, seeking a delicate balance regarding the consequences of silence or false declarations on the part of applicants concerning their health. The legal consequences of this situation have been viewed differently in France and Quebec.

³⁸ See developments described later in this text.

2. Remaining silent or lying about one's health: What are the legal consequences?

While the anti-discrimination rationales in France and Quebec overlap (with differences in implementation), the legal consequences of remaining silent or making false statements differ radically in these two jurisdictions. The similarities in the civil foundations of contract law do not appear to have had the same consequences in terms of the weight of individual rights and freedoms in Quebec (1) and France (2).

2.1 In Quebec, a risky right to remain silent or make false statements

A serious bone of contention has developed over the legality of employer dismissals due to false declarations by applicants during the selection process. Over the years, arbitral case law³⁹ has established certain criteria for determining the circumstances under which the dismissal of a worker is justifiable. These criteria concern:

- 1) The relationship between a false declaration and the employee's duties;
- 2) The fact that the employer would not have hired the employee if it had known the truth;
- 3) The voluntary nature of the false statement.⁴⁰

³⁹ In Quebec, in unionized environments, such disputes generally fall within the jurisdiction of arbitrators.

⁴⁰ The case law is summarized by the *Court of Appeal* in *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur-du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, 2012 QCCA 1867, para. 60.

When the omission concerns a subject that is off-limits for discriminatory reasons, such as the worker's health status, the courts have adopted different analytical methods, some of which emphasize the protection of fundamental rights while others adhere to the contractual approach.⁴¹

Arbitrators have sometimes refused to uphold a dismissal despite proof of an omission or false declaration, on the grounds that it concerned a consideration that was discriminatory, and therefore illegal.⁴² In other cases, dismissals have been upheld because the worker's omission or false statement led to a lack of consent on the part of the employer (the employer can argue that it would never have hired the employee if it had known of the

⁴¹ See the following arbitration award: *Syndicat des chauffeurs d'autobus, opérateurs de métro et employés des services connexes au transport de la STM, section locale 1983, SCFP et Société de transport de Montréal (M^{me} A)*, [2011] R.J.D.T. 818, which summarized various approaches in paras. 168 and 169.

⁴² *Syndicat des technologues en radiologie du Québec et Centre hospitalier de l'Université de Montréal (Campus St-Luc) (grief syndical)*, [2004] R.J.D.T. 1816 (in this case, the arbitrator concluded that the medical questionnaire was illegal).

latter's health condition, which the employee deliberately hid)⁴³ or constituted misconduct justifying the termination of the employment.⁴⁴

In 2012, a case pertaining to this question was referred to the Court of Appeal.⁴⁵ The case concerned the dismissal of a licensed practical nurse for a false declaration on a pre-employment medical questionnaire. The highest court in Quebec recognized the legality of the dismissal on the basis that the applicant had consciously made false statements regarding information directly related to the job that would have impacted his hiring, even though the medical questionnaire was too invasive. The serious nature of the psychiatric history that had been hidden and the sensitive nature of the position in question undoubtedly influenced the Court's decision. However, this decision is highly objectionable given that the Court of Appeal ultimately supported the use of a medical questionnaire of decidedly dubious legality.⁴⁶

⁴³ For some examples, see: *Syndicat des métallos, section locale 4796 et Mines d'or Wesdome Itée (complexe minier Kiena) (Marcel Rouillard)*, D.T.E. 2013T-589; *Syndicat des chauffeurs d'autobus, opérateurs de métro et employés des services connexes au transport de la STM, section locale 1983 – SCFP et Société de transport de Montréal (Steven Reid)*, D.T.E. 2013T-367; *Syndicat du préhospitalier (FSSSOCSN) et Corporation d'Urgences-santé (Alexandre Bonin)*, D.T.E. 2012T-232; *Centre de santé et de services sociaux des Aurores Boréales et Syndicat des travailleuses et travailleurs des Aurores Boréales (CSN) (Linda Maillé)*, D.T.E. 2012T-286.

⁴⁴ *Syndicat des chauffeurs d'autobus, opérateurs de métro et employés des services connexes au transport de la STM, section locale 1983, SCFP et Société de transport de Montréal (M^{me} A)*, [2011] R.J.D.T. 818.

⁴⁵ *Syndicat des infirmières, inhalothérapeutes, infirmières auxiliaires du Cœur-du Québec (SIIIACQ) v. Centre hospitalier régional de Trois-Rivières*, 2012 QCCA 1867.

Building on this decision, arbitrators have applied the reasoning of the Court of Appeal when dealing with dismissals for misrepresentation, even in the presence of an illegal questionnaire. Lying is not tolerated, unless it relates to information that has not determined consent.⁴⁷ The fact that the employee can demonstrate that he would have had to benefit from a reasonable accommodation and, as a result, that the employer would not have been entitled to refuse to hire him, is not considered relevant.⁴⁸

In a recent case, the Quebec Human Rights Tribunal ordered the reinstatement of an employee who was dismissed for failing to disclose that she was suffering from multiple sclerosis during the employment interview. In the Tribunal's view, this case was different from that heard by the Court of Appeal. According to the evidence, the candidate did not have any restrictions that prevented her from performing her job and, moreover, no specific question had been asked about her state of health.⁴⁹

Although, in Quebec, contractual synallagmatic obligations appear to take precedence over the rules limiting the gathering of information that is discriminatory or infringes on workers' privacy, this is not the case in France, where employees' rights on this issue are absolute, even where false statements are concerned, and employers' obligations to protect a worker's health and private life are not limited to the prohibition of dismissing an employee.

⁴⁷ *Syndicat des professionnelles en soins de Saint-Jérôme (FIQ) et Centre de santé et de services sociaux de Saint-Jérôme (Nathalie Girard)*, D.T.E. 2015T-56, confirmed by the *Superior Court of Quebec*: 2016 QCCS 2680.

⁴⁸ *Syndicat des chauffeurs d'autobus, opérateurs de métro et employés des services connexes au transport de la STM, SCFP, section locale 1983 et Société de transport de Montréal*, 2016 QCTA 254.

⁴⁹ *Commission des droits de la personne et des droits de la jeunesse (Paquette) v 9208-8467 Québec inc. (Résidence Ste-Anne)*, 2016 QCTDP 20.

2.2 The right to lie in France?

In France there is indeed a genuine right to lie during the hiring process (much more obviously so than in Quebec), or at least to refrain from disclosing one's health status, known by the euphemism of "reluctance."⁵⁰ The legal consequences of this right are significant: employers are prohibited from breaking employment contracts on these grounds, even in cases where there is an incompatibility between the employee's health status and the duties associated with the position, and even when the employee made a false statement or withheld information regarding a pre-existing health condition that was incompatible with the requirements of the job for which he applied. However, the need to maintain a balance between the two parties in the contract and the rise of the obligation to ensure employee welfare (Radé, 2012) might lead to a reconsideration of the possibility of terminating contracts in cases of confirmed lies that are dangerous to the health or safety of the employee and other workers (1). Moreover, it must be taken into consideration that the employer is bound by a series of obligations with respect to an employee who is considered incapable of occupying his position, even if this incapacity results from a state of health that was not declared at the time of hiring (2).

2.2.1 Prohibition against terminating the contract in the case of dishonesty to the employer and/or occupational physician

⁵⁰ It is established case law today that the employee does not have to disclose his state of health to the recruiter (Court of Cassation, 7 November 2006, Appeal No. 05-41.380).

While judges generally make an effort to excuse workers' sometimes underhanded behaviour where protecting personal information is concerned,⁵¹ the typical indulgence⁵² of case law for workers' reluctance to reveal elements of their private lives⁵³ is almost the rule in the field of health (Puigelier, 2003). Indeed, workers have the right, explicit in the case of pregnancy and implicit in other cases, to lie or remain silent regarding their health during employment interviews, despite the fact that loyalty is a fundamental principle of the contractual relationship. In this regard, judges appear to put the obligation to contract in good faith somewhat on the back burner. At the very least, when there is an impediment to establishing a good-faith contract, the duty of loyalty would normally require that the party who is aware of such an impediment to inform the other (Cf. articles 1130 to 1137 of the French *Civil Code*).

However, it is impossible to find intentional fault or a failure of consent when the worker remained silent regarding elements pertaining to his health status. The employer has no right to use this type of information to reverse its decision to hire, as the occupational physician is the only entity with the power to judge the worker's physical capacities. The

⁵¹ Such that concealing a conviction is not necessarily a reason for dismissal, Cf. Court of Cassation, Social Chamber, 25 April 1990, No. 86-44148.

⁵² The Court of Cassation only penalizes the concealment of facts and lying if it constitutes a fraud to the detriment of the employer. Thus, the dismissal for disciplinary reasons is allowed in case of a fault committed by employees who did not have the skills required for the functions for which they were recruited (cf. Court of Cassation, Social Chamber, [30 March 1999, No. 96-42912](#): Bull. civ. V, No. 142 and Court of Cassation, 25 Nov 2015, No. [14-21521](#)).

⁵³ On a worker's "reluctance" or dishonesty regarding his health status during hiring and the nullity of the employment contract, see: Court of Cassation, Social Chamber, 21 September, 2005, No. 03-44.855 FS P+B+I, Assoc. Languedoc aides et services c/ Guibal: Juris-Data No. 2005-029795.

workers' disloyalty will therefore not be legally decisive in such a case. According to this hypothesis, unlike in Quebec, there is a consensus among legal commentators that French workers even have the right to lie when the employer demonstrates illegal curiosity, since refusing to reply could be interpreted as an admission and be used against them (Bourgeot & Verkindt, 2010: 56).

This right to remain silent is undoubtedly related to the fact that the French system anticipated that the occupational physician, the sole evaluator of workers' medical fitness, would be the one to study the question of compatibility between health status and the demands of the position in question.

In one instance, case law ruled against a business that terminated the contract of a worker who was receiving disability benefits and had chosen to keep this fact from the employer.⁵⁴ Today, case law consistently upholds the right of workers' not to disclose their health status to employers.⁵⁵

And yet this protection does not condone a widespread right to lie, especially to the occupational physician. Indeed, although the legislation is silent regarding the right to lie to occupational physicians, wouldn't the safety obligation weighing on workers limit the right to stay silent or lie in any case? In this sense, might bad faith and the worker's disciplinary responsibility be implicated in cases where an incompatibility between one's health status and the job applied for are revealed after the fact? We would argue that the situation is

⁵⁴ Court of Cassation, 9 January 1991, No. 88-41.091.

⁵⁵ Court of Cassation, 7 November 2006, No. 05-41.380.

almost Manichean. Indeed, in the absence of any legal obligation requiring workers to reveal their health status (even to the occupational physician), and given that workers are not physicians and that it is difficult for them to accurately evaluate the compatibility of their disability with the job in question – as they might believe that they could compensate for a potential weakness or underestimate its impact –, the bad faith of an employee would not likely be retained.

Employers remain helpless in the face of workers' dissimulations and lies, whatever the basis of the deceit, be it from a worker's dereliction of his duty of loyalty or his inability to do the tasks for which he was hired. At most, employers can take disciplinary measures when they are able to show that the worker knowingly failed in his safety obligation by deliberately putting his own health and safety and that of his colleagues at risk. This would only be possible if the employer was able to prove both that the worker had perfect knowledge of his pathology or disability, and that "according to his training and his possibilities,"⁵⁶ he could not have misunderstood the danger that his health problem represented to his own safety and that of others.

Faced with the belated discovery of a pre-existing health condition that is incompatible with the job, the employer is not only unable to terminate the employment contract, except in very limited cases, but also bears obligations related to the safety of its workforce.

2.2. 2 The consequences of workers' lies for employers

French employers thus face a paradoxical situation (Bourgeot & Verkindt, 2010): legislation prohibits them from considering workers' health status when making hiring decisions, while

⁵⁶ Article L. 4122-1 of the French *Labour Code*. (Author's translation).

at the same time, they find themselves obligated to organize work in such a way as to take account of weaknesses resulting from workers' illnesses.

Thus, the employer's "safety obligation of result,"⁵⁷ that is, its legal obligation to protect the health and safety of workers, remains intact, despite the impossibility to be informed of even the slightest issue pertaining to workers' pre-existing weaknesses or physical or psychological ability to hold a position. Poor knowledge of a pre-existing condition of vulnerability or disability does not exonerate employers from this duty, insofar as judges believe that it consists of taking all adequate precautionary measures against occupational risk, regardless of the knowledge of a particular health status. Although the employer's safety obligation has shifted since 2015 (Court of Cassation, Social Chamber, 25 November 2015, 'Air France', No. 14-24444 and subsequently, Court of Cassation, Social Chamber, 1 June 2016, No. 14-19.702 where the employer can escape liability for mental harassment by taking the necessary measures to stop and prevent such a situation), it must nevertheless prove that it has taken all general and specific preventative measures. Yet, its ignorance of an employee's state of health could prevent it from implementing the appropriate measures.

⁵⁷ Articles L. 4121-1 to L. 4121-5 of the French *Labour Code* require that employers ensure the mental and physical health of their employees. Faced with this general obligation of legal origin, since 2002, judges in France have held that employers are under the "obligation of security of result" to each and every worker, which requires them to take the measures necessary to ensure their safety and protect their health. Employers must ensure the effectiveness of such measures (Cass. Soc. 06.10.2010: No. 08-45609; 16.06.2009 and 08-41519). Under the "obligation of security of result", employers are thus required to take adequate preventative measures as soon as an occupational risk is identified. Failing to take such measures constitutes a breach of the employer's "safety obligation of result", necessarily causing prejudice to the worker involved.

Concerning the obligation to keep workers employed and adapt working conditions, in the case of a belated disclosure (or dissimulation) of a functional disability requiring subsequent accommodations of the job or workstation, employers are required to proceed to adjustments and cannot terminate the employment contract without running the risk of an invalid dismissal.⁵⁸ Indeed, with the exception of cases where employees are medically determined to be unfit,⁵⁹ employers are prohibited from dismissing employees on health grounds.⁶⁰ Thus, since the employer cannot accuse an employee of lack of loyalty for failing to divulge health problems during the hiring process, the revelation of such problems after the fact has only one possible outcome: the employer must direct this worker to the occupational physician, who alone will be the judge of his fitness for the job. If the physician determines that the worker is able to occupy the position, even if this would require adapting and arranging the workstation or job accordingly,⁶¹ the employer's only recourse other than compliance is to contest this opinion with the Labour Inspection Services.⁶²

⁵⁸ In one such case it was deemed that the worker, who was subject to an invalid dismissal but was not seeking to be reinstated to the position, had the right to severance compensation and, due to the illegal nature of the dismissal, compensation for full damages at least equal to that provided for by article L. 1235-3 of the French *Labour Code* (Court of Cassation, 27 June 2000, No. 98-43439), and equal to at least six months' salary (Court of Cassation, 6 October 2010, No. 09-42283).

⁵⁹ See article L. 1133-3 of the French *Labour Code*.

⁶⁰ Especially *Court of Cassation*, 7 April 2009, No. 08-40.073, 13 March 2001, B, No. 84, 4 February 2004, No. 01-46.921 (For a study of this issue, see: Bourgeot & Frouin, 2000).

⁶¹ Court of Cassation, 26 January 2011, N, No. 09-72.834, Bull 2011, V, No. 29: in this case, the employer had been found guilty of discrimination for non-renewal of a limited-duration employment contract after an employee's determined level of fitness had been reduced.

⁶² Article L. 4624-1 of the French *Labour Code*.

Should the occupational physician consider a worker to be unfit for a previously occupied position, the employer's obligations do not come to an end, since it then has an obligation to reclassify the worker (Gosselin, 2010), except in cases where, in the context of unfit occupational origin, the *"occupational physician specifically mentions that any form of retaining the worker in the business would be seriously prejudicial to his health."*⁶³ It should be noted that the concept of *"undue hardship"* developed in order to limit the employer's duty to accommodate under Quebec law has no real parallel in France.

Conclusion

The law has thus been put to the test, seeking a delicate balance regarding the consequences of silence or false statements on the part of job applicants concerning their health.

An analysis of Quebec law shows that medical selection at the time of hiring is constrained by several legislative measures that aim to protect applicants from a discriminatory refusal to hire them and limit the extent of the investigation employers may conduct on the state of applicants' health. Nonetheless, the burden of proof and the limited recourses available to rejected applicants make it difficult for them to exercise their rights. In addition, an applicant's decision to give a false or misleading response to questions that he finds discriminatory, in order to avoid being eliminated from the pool of applicants, carries significant risks. Under the current state of law, unless an applicant's false statements clearly

⁶³ Article L. 1226-12 of the French *Labour Code*, as amended by Act No. 2015-994, of 17 August 2015, article 26.

only concern information that the employer had no right to consider or an insignificant element that was not decisive in the decision to hire, these statements could justify a subsequent termination of employment. Consequently, despite the legislative framework, in practice, Quebec employers enjoy a wide discretion in selecting candidates.

By contrast, in France, the employer has no right to intrude in matters of worker's health, and silence or lies on the part of a worker can only rarely and with great difficulty be used to justify a dismissal. At best, it is possible to mobilize the worker's safety obligation, referred to above, with its limitations, or the criminal remedies in response to the endangerment of the lives of others, in the case where a worker deliberately hid a health condition that could endanger the health or safety of his co-workers, and was aware of this risk.

What is the objective of French positive law? It most likely aims to re-enforce the rights and autonomy of individuals in a challenging employment market, in an era when holding and retaining a job is an essential element of citizens' place in society. But is this a tolerable and realistic balance for businesses? Might employers, faced with the paradoxical obligation to protect workers' health without knowing anything about the health status of these very workers, not be tempted to obtain medical information in a roundabout way?

In sum, although Quebec law does not always effectively protect applicants from health-related discrimination, French law may err on the side of an excessive protection of this right at any cost. This situation could be considered as being to the detriment of employers, who are nonetheless held to a "*safety obligation of result.*" However, one should not give too much emphasis to the difficulty companies are facing due to the rights that protect

employees at the time of hiring, given the possibilities enjoyed by an employer to dismiss an employee who is medically unfit, especially during the trial period. The recent rise of the worker's safety obligation may also help limit this underlying right to withhold information regarding one's health status, at least from the occupational physician.

Abbreviations

BFOR: the bona fide occupational requirement

CQLR: Compilation of Québec Laws and Regulations

CJCE: European Court of Justice

Competing Interest

The authors declare that they have no competing interests

Authors' Contributions

SFQ conceived of the study and co-authored the text (re: legislation in France)

AML co-authored the text (legislation in Quebec)

Both authors read and approved the final manuscript

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