G+ Education

INFO

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Follow-up:

Considering the medical evidence and faced with the request for a progressive return to work and, eventually, a full return to work, the school board was right to take into account the risk of relapse because of its obligation to protect the health and safety of the employee. The arbitrator's decision is upheld.
(Refer to Decision 10, Fall 2015): 2016 QCCS 3035

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RECENT **DECISIONS**

1 A feeling of persecution does not constitute psychological harassment

A teacher claimed that his employer engaged in psychological harassment against him and abused his management rights. The union alleged that there were too many events causing a humiliating or demeaning effect on the employee to fit the description of a normal exercise of management rights. The court's view was that the alleged events were administrative decisions or actions taken by the administration for daily management purposes. The fact that the employee found too many of these events offensive was due to his perception of the situations around him, which was not that of a reasonable person placed in the same situations. The employee took every administrative decision that impacted him and other people as a personal offence. This reaction could be attributed to his exacerbated mistrust and stubbornness to consider some facts as irrelevant and false. Even when the administration was not involved at all in a situation, the employee presumed that its intention was to find him at fault. The grievances for psychological harassment were rejected.

Syndicat de l'enseignement de la Rivière-du-Nord
v. *Commission scolaire de la Rivière-du-Nord*
DTE 2016T-754, 2016 QCTA 653, Joëlle l'Heureux

2 Drug trafficking: a suspension without pay is justified

A special education technician challenged her suspension without pay arising from charges of drug possession and trafficking laid against her. At first, having been notified that the employee was in trouble with the law, the employer suspended her with pay and met with her. When the employer learned of the nature of the charges, he changed the measure to a suspension without pay pending the outcome of her criminal trial. The arbitrator began by pointing out that an administrative suspension was a measure that any employer could use under certain conditions, and such suspension was to be with pay, excluding exceptional cases. This was precisely one such case. According to the arbitrator, considering the nature of the charges, the serious prejudice such charges entailed for the employer, the latter's role and mission, the impossibility to maintain the employee in any position, and the necessity for the employer to preserve his image and the parents' and the public's trust, the suspension was reasonable.

Commission scolaire Chemin-du-Roy
v. *Syndicat du soutien scolaire Chemin-du-Roy*
DTE 2016T-832, 2016 QCTA 628, Gilles Laflamme

3 "*Showing signs of aging*" does not make one a disabled person

A teacher, who was absent from work due to psychological issues, challenged the employer's decision to cancel his salary insurance benefits. The initial psychiatric assessment, mandated by the employer, found him able to work, which motivated the employer's decision to terminate his salary insurance benefits. Three months later, a second psychiatrist assessed the employee at the request of the union, and found that the employee was disabled. According to the arbitrator, an employee must be "*totally unable to perform the usual tasks associated with his employment…* ", rather than unable to perform the totality of these tasks. The arbitrator rejected the opinion of the union's psychiatrist, in part because the latter used his own interpretation of the definition of what constitutes disability and of his mandate to arrive to his conclusions. The opinion of the first psychiatric expert matches those of other medical practitioners, thus making it all the more compelling. It appears the employee had simply lost his motivation and no longer wanted to teach younger students, whom he found more difficult to manage. He himself admitted that he was "*showing signs of aging*". Since he was not disabled, he was not entitled to salary insurance benefits.

Commission scolaire des Affluents
v. *Syndicat du l'enseignement de la région des Moulins* (CSQ)
DTE 2016T-788, 2016 QCTA 607, Pierre Daviault

4 Incompatible activities: beware of daily activities

A teacher challenged the termination of her employment due to the fact that she was involved in activities deemed incompatible with her alleged state of health, i.e. a state of major depression. The employer alleged that surveillance proved that the employee had taken her children to school and visited her sick mother, which led him to conclude that she was able to accomplish some activities that appeared to be incompatible with her health condition and justified the termination of her employment. According to the arbitrator, the evidence provided by the employer regarding false medical statements made by the employee was inconclusive. As to the incompatible activities, the arbitrator noted that even the employer's physician admitted that it was possible for a mother suffering from depression to be able to pull herself together to fulfil her parental duties. In addition, the arbitrator noted that the employee's physician and psychologist had registered an improvement of her condition during the period when the surveillance took place. The arbitrator finally added that a person suffering from depression is not condemned to immobility, before confirming that the employee had not engaged in any incompatible activities. The grievance was therefore upheld and the dismissal was overturned.

Syndicat de l'enseignement de l'Outaouais
v. *Commission scolaire Au Cœur-des-Vallées*
DTE 2016T-887, 2016 QCTA 741, Jean-Guy Roy

5 Costly release conditions

The employer filed a grievance claiming reimbursement of salary-insurance benefits received by a teacher while the latter faced criminal charges for sexual assault and touching of a student and was under a court order prohibiting him from attending any educational institution. According to the employer, by failing to declare this change of circumstances related to his criminal record, the employee, who had become disabled in the meantime, received these benefits without being entitled to them, since he would have been suspended without pay before his disability leave. According to the arbitrator, the employee indeed failed to disclose the court order he was subjected to, which rendered him unable to perform his work. Since the inability to work was the result of his release conditions, regardless of the position taken by the employer, the employee could not have been entitled to salary-insurance benefits for a disability that occurred after the court order came into effect. The arbitrator upheld the employer's grievance and ordered the employee to reimburse the sum of $57,917.50 illegally received as salary-insurance benefits, plus interest accrued at the legal rate on said amount.

Commission scolaire de la Rivière-du-Nord
v. *Syndicat de l'enseignement de la Rivière-du-Nord*
DTE 2016T-545, 2016 QCTA 317, Jean-Pierre Villaggi

6 Beware of "high-fives"

A teacher challenged a decision by the CNESST whereby her claim was rejected. On September 25, 2015, she felt a stab of pain when a student gave her a "high-five" while she was seated. Afterwards, she used ice, took Tylenol and Advil tablets, and consulted various therapists (osteopath, massage therapist and chiropractor) for relief. In mid-November, she declared the event to her employer and consulted a physician on December 3. As regards the delayed declaration and first medical consultation, the tribunal decided that there were no grounds to question the truthfulness of the employee's account of the facts. In addition, though the incident might have seemed mundane, this act was sufficient to cause an injury. Indeed, the concept of an unforeseen and sudden event is broad enough to include failure to accurately anticipate the force of an impact and, given the employee's seated position, her left shoulder was likely vulnerable. According to the tribunal, the employee sustained a work injury, i.e. tendonitis in the left shoulder. Taking into account the evidence in support of an unforeseen and sudden event, and the causal link, there was no need to investigate whether the presumption was applicable.

Guimond v. *Commission scolaire de la Région-de-Sherbrooke*
2016 QCTAT 6152 (SST), François Ranger

7 An expert's impartiality: impressions are not enough

Doubting the impartiality of the medical expert witness, the employee asked for a copy of the mandate he had been given by the employer's representative. The employee alleged that the medical opinion was not impartial, since the answers appeared to have been directed and some of them were false and biased. According to the tribunal, such perceived impressions are not enough to cast reasonable doubt or suspicion pointing to a lack of independence or impartiality. The evidence did not show that the physician blindly subscribed to the thesis put forth by the employer's representative, that he had signed a draft submitted by the latter, or that he was in conflict of interest due to close ties with the employer or his representative. In addition, no reasonable doubt or suspicion of interference had been raised, that might have overshadowed the consultant's duty of impartiality or independence. The employee's claim was rejected.

Boyer v. *Commission scolaire de Montréal*
2016 QCTAT 4378 (SST), Renée M. Goyette

8 The "beep" test was not the cause of her back sprain

A physical education teacher challenged the ruling that she had not suffered a work injury. The employee had performed beep tests (Léger/Lambert) with her students on four occasions on September 30, 2015, as a way to motivate them. The next day, she experienced muscle soreness. A lumbar sprain diagnosis was later issued on October 5. According to the tribunal, the preponderance of evidence does not lead to the conclusion that this injury occurred in the workplace while the employee was performing her duties. First of all, there is a five-day delay between the declaration of the situation to the employer and the first medical consultation. In addition, even though the employee did the test four times, she felt no particular pain during and after the test. Finally, in the evening, the employee completed a painting job at her home. The claim was rejected.

Dorval v. *Commission scolaire de la Capitale*
2016 QCTAT 5420 (SST), Sophie Sénéchal

9 A fight between students: whose fault is it?

A student supervisor in a secondary school suffered a work injury by breaking up an intense fight between two female students. The employer applied for a cost transfer, stating that the accident was attributable to a third party. The tribunal concluded that the employee was largely responsible for the injury, since it was up to the special education technician, rather than her, to intervene in this kind of situation. Consequently, in this case, invoking a major third party contribution, i.e. that of the two students, was not sustainable. For this reason alone, the request had to be turned down. Aside from this conclusion, the tribunal added that it was not unjust for the employer to support the costs related to this accident, since the facts that led to the work injury were typical of the inherent risks borne by the employer, and the situation was not exceptional, rare or unusual. Indeed, the risk of occurrence of assaults is part of the employer's reality. The employer's application for a cost transfer was therefore rejected.

Commission scolaire de la Seigneurie-des-Mille-Îles v. *CNESST*
2016 QCTAT 6021 (SST), Isabelle Piché

Comments

The tribunal relied on a restrictive interpretation of the second paragraph of section 326 AIAOD by concluding there was no third-party contribution, since the employee had to bear a significant part of the responsibility for the accident by intervening in order to stop a fight, even though it was not part of her professional duties, the tribunal prioritized a job description over the urgent need for action, safety and good citizenship. Also, by stipulating that the facts leading to the injury fit "perfectly" within the scope of the inherent risks borne by the employer, given the obvious potential for assaults to occur in a school, it downplayed the educational institution's primary purpose and trivializes violence in a school environment. Finally, by calling for statistics and determining that the facts did not amount to an exceptional, rare or unusual situation, the tribunal ignored the employee's testimony, trivialized violence once again, and disregarded the "regular school" status in which such behaviour on the part of the clientele is not usually expected.

10 No reinstatement for the teacher who lost his teaching licence

The plaintiff challenged the decision of the Minister of Education to revoke his teaching licence after he pleaded guilty to four charges of Internet luring. While teaching in a secondary school, he gave his email address to female students aged less than sixteen, and then used his computer to perform five "sexy dances" for the benefit of those who contacted him. He was sentenced to six months in prison with two years' probation. Based on the conclusion that the teacher had committed serious offences against the honour and dignity of the teaching profession, the Minister revoked his teaching licence. At the hearing before the Tribunal administratif du Québec, the plaintiff emphasized in particular the quality of his teaching and argued that he had not had the chance to explain his behaviour, which was allegedly caused by hypoglycaemia. The tribunal rejected these unfounded arguments and reiterated the teacher's duty: "*this is one of the most important responsibilities, that goes beyond the transfer of knowledge in the context of classroom instruction.*" Having no reason to question the decision of the Minister, which it deemed well founded, the tribunal rejected the plaintiff's claim.

Alliance des professeures et professeurs de Montréal
v. *Commission scolaire de Montréal*
DTE 2016T-477, 2016 QCTA 308, Me Jean-Guy Roy

Comments

In the "*In Your Corner*" section of our Fall 2016 issue, we drew your attention to a decision by arbitrator Denis Provençal in the case of *Fédération des professionnelles et professionnels (CSN)* v. *Centre jeunesse de l'Outaouais* (DTE 2016T-386). Let's remember that in this case, the arbitrator took into account the best interest of the child to uphold the dismissal of an educator who had intervened inappropriately in a youth centre. The ruling by the Tribunal administratif du Québec was another illustration of this trend. In particular, the tribunal issued the following comment which we feel is most pertinent: "*In order to assess the impact of the plaintiff's actions, one must examine the detrimental effect of these actions on his ability to perform his duties, but also on the public's perception and its trust in the educational institution and its staff.*" The tribunal added that, considering his status as a role model for the child, the teacher's behaviour must be exemplary. The parents who entrust their child to an educational institution and to a teacher are entitled to expect such a standard of behaviour.

Whistleblowing: what are the conditions?

By Danilo Di Vincenzo and Jacques Provencher
Le Corre & Associates

Air quality in schools has been a topical subject on numerous occasions. Several school administrations have been the subject of complaints related to air quality issues[1], while others were faced with employees who made air quality their hobbyhorse.

By way of example, let us refer you to the case of *Pearson Teachers Union* v. *Lester B. Pearson School Board*[2], in which a hairdressing teacher challenged her two suspensions and eventual dismissal. The employer claimed she had launched a campaign to spread doubts regarding the air quality in the school where she was teaching. In particular, she had sent an email to all of her colleagues, made statements to the press and tried to recruit students to support her cause. The arbitrator began by saying he was troubled by the beliefs and actions of the employee, a smoker, while specifying that he had no doubt as to her respiratory condition. However, air quality was not the cause of the employee's health issues, as numerous technical reports had pointed to the absence of any significant amounts of mould or other contaminants. According to the arbitrator, by campaigning against the interests of her employer, to the point of involving the media, the employee had breached her employment contract and destroyed the bond of trust between her and the school board.

In Quebec, there is no generally applicable legislation to protect against so-called "whistleblowers". On the other hand, given the duty of loyalty, an employee must not damage the employer's reputation. However, this duty is not an absolute requirement, and case law shows that an employee may, under certain conditions, resort to public denunciation of an employer, i.e. whistleblowing. The criteria used by the courts are described as follows.[3]

The employee must have explored all available internal avenues and act in good faith – Public denunciation must remain an exceptional recourse. The employee must therefore give the employer the chance to become aware of the issue, and to respond accordingly, before going public with the information. Consequently, the employee must first use internal resources in good faith to try to have corrective measures applied to the situation found unacceptable.

In addition, the employee must be able to produce serious, objectively defensible reasons to justify this behaviour. The objective of the denunciation must not be to harm the employer, nor must it be inspired by revenge, but must instead be aimed at finding a solution or a remedy to a given issue.

The criticism must be expressed in a reasonable and responsible manner – The employee must exercise judgment and restraint. In this respect, it is important to reflect on the public interest as it relates to the issues at hand: health and safety issues, fraudulent actions on the part of the employer, etc.

The facts being denounced must be pertinent and truthful – The facts being denounced must be truthful and the denunciation must be complete. The courts are generally harsh with employees who make denunciations that prove to be false. Consequently, the whistleblower needs to stick to the facts that have been proven accurate.

Finally, let us emphasize that the whistleblower is responsible for his statements, but he cannot be held liable for exaggerated interpretations or sensationalism on the part of the media.

Though publicly denouncing one's employer is a serious offense, dismissal is not automatic and one must weigh whether the denunciation has led to a severance of the bond of trust, taking into account the following factors: the whistleblower's position (manager, employee or union representative), the intention behind the whistleblowing (informing the public or harming the employer), the substance of the reported facts (are they accurate, are they confidential), and the implementation of internal mechanisms before making a public denunciation. The scope of the damage done to the employer, the effects on his reputation, and the employee's behaviour following the denunciation (regrets, confessions, collaboration) are also important factors to consider before making a decision.

1. See *G+ Education*, Spring 2013, in which the ***In Your Corner*** section was entitled: "*Air Quality in Your Schools.*"

2. 2016-10-19, Michel G. Picher (T.A.), application for judicial review.

3. Regarding the rules pertaining to denunciation, refer to *Canada Post Corporation* v. *Canadian Union of Postal Workers*, D.T.E. 2005T-692 (T.A.)

Group coaching: development in action

by Stella Paillé, Ph.D., Organizational Psychologist
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The professional development of managers is a must for most companies these days, and the field of education is no exception. The pace of change, the arrival of new managers, the particularities of generation Y employees and the drive for growth in a VUCA (volatility, uncertainty, complexity, ambiguity)[1] environment all demand leveraging the development of resources.

In my practice, I have found that group coaching is highly effective in developing teams of managers. Here is how the coaching sessions usually go: the coach goes around the table to determine the level of motivation and understand salient facts about participants. Then the coach initiates a discussion about a problem that affects participants. Discussion among participants follows, and the coach ensures the discussion advances. To solve the problem, the goal is to take a step back to understand the issue together.

These discussions can include scenarios, debates, immediate decisions, required actions or behaviours related to the problem. Each coaching sessions ends with a commitment from participants, and the next session's theme is chosen.

Unlike co-development – where the actors coach each other – group coaching involves a coach who directs how the session unfolds, discussions, exchanges, exercises and reflections. The coach is the one who points out moments for introspection for the group and each of its members to accelerate development.

What results can you expect from group coaching?

Group coaching is beneficial as a solution for learning in action. It enables greater empowerment in one's own development. The solutions are not dictated by the coach. They grow out of discussions among participants in the company of the coach.

Discussions among participants can be emotional or heated, but the coach is always there to intervene, to get the most out of these discussions and to ensure the group advances in its collective development. For example, during a group coaching session I led, a supervisor tried to show how he motivated an employee by pointing out how lucky he was to have a job. The discussion that followed made it possible to pinpoint behaviours that create or compromise employee engagement, as well as the emotional impact of certain statements or the tone used. The supervisor in question had a personal realization and made positive changes to his approach to motivating employees.

This form of development is valued by organizations, because it maximizes the development time of managers, who can get back to work quickly after the session. The frequency of meetings can vary depending on the context and availability of participants: some contexts require weekly meetings, whereas others require monthly or even quarterly meetings. Group coaching also makes it possible to decide on knowledge transfer by observing new behaviours adopted by participants and measuring their progress over time.

What are the conditions of success for group coaching?

For group coaching to be effective, you need to create the conditions for success that will increase the benefits of the practice.

Preparing the terrain – The coach has to prepare the session before getting participants together in the room. He or she can interview key players in the organization to understand the individuals who make up the group, their strengths, areas to watch, action items, as well as the type of problems they face in their duties. The coach can then set development objectives to better direct the discussion, but also to establish realistic, clear expectations.

Ensuring an ethical, confidential process – Group coaching has to be done transparently, with management buy-in and using an approach that respects participants. This is why at the end of each session, the coach and participants agree on the summary that will be provided to management, otherwise the confidentiality of sessions could be compromised.

In short, group coaching is an option for development in action that delivers promising results, without being too time-consuming for managers and executives.

1. Carignan, Julie, Audrerie, Jean-Baptiste et Grégoire, Julie. (2016) *Five Key Trends That Are Transforming HR*, SPB Organizational Psychology https://www.spb.ca/fr/articles/article-2016/five-key-trends-transforming-hr