G+ Education

INFO

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RECENT **DECISIONS**

1 Employer could not prevent the boycott of a training session by demanding a medical certificate to justify absence

A school board sent a directive to all of its teachers stating that they would be obliged to produce a medical certificate in order to justify any absence during a compulsory training day. This directive was meant as a preventive measure, in response to the union urging teachers not to take part in training sessions regarding the new report card. The arbitrator found that the concern regarding teachers calling in sick was unjustified, as the union had not called for teachers to be absent from work. This directive had the effect of casting suspicion on any absence on that date, while the collective agreement contains provisions for monitoring absences. Thus, the employer can demand a medical certificate, but this request must be based on serious and reasonable grounds. He could not assume that absences would result from an act of solidarity. The employer's argument to the effect that this was a one-off measure was dismissed. The arbitrator upheld the union's grievance.

Alliance des professeures et professeurs de Montréal
v. *Commission scolaire de Montréal*
2017EXPT-820, 2017 QCTA 217, Robert Côté

2 Remarks of a sexual nature result in a three-month suspension

A union was partially successful in its challenge of the dismissal of a school psychologist. The employee had met the mother of a student with language problems, in order to offer personal support. The woman reported to the school board that the employee had, on that occasion, made inappropriate remarks about her and that he had touched her thigh, very close to her crotch. Following these allegations, the school board proceeded with the dismissal of the psychologist and filed a complaint with his professional order. After reviewing the evidence, the arbitrator accepted that the employee had likely made vulgar comments with a sexual connotation, but that these comments were not meant as an invitation to have a physical relationship with him. As for his actions, the arbitrator found that the contacts arising in a therapeutic context could not be construed as sexual touching. Consequently, he changed the sanction and substituted a three-month suspension instead of dismissal.

Syndicat des professionnelles et professionnels de l'éducation de Laurentides-Lanaudière v. *Commission scolaire des Samares*
2017EXPT-974, 2017 QCTA 307, Martin Racine

3 Substitute teacher does not accrue continuous service

The employer objected to a grievance challenging the termination of employment of a student supervisor hired on an ad hoc basis between January 2014 and April 2016 as a substitute and during work overloads, arguing that the latter did not meet the criteria for eligibility to avail herself of the grievance procedure. The collective agreement states that a student supervisor must have completed the equivalent of 60 actual working days or have been employed by the school board for a period of 9 consecutive months in order to be entitled to challenge her dismissal. The union contended that the employment relationship was maintained during the entire period of substitutions. Yet, there were several clues to the contrary: 1) the employee's name was never entered on a priority or recall list; 2) she was never laid off and then recalled; 3) at the end of each school year, an employment statement was issued by the employer with the mention "*Recall not expected*"; 4) the employee was not granted any level advancement; 5) there is no evidence showing that the school board had committed to recall the employee at the end of an assignment. The arbitrator upheld the objection and dismissed the grievance.

Syndicat des employées et employés professionnels-les et de bureau, Local 578
v. *Commission scolaire Marie-Victorin*
2017EXPT-777, 2017 QCTA 183, Huguette April

4 Relationship with a student: he should have listened to reason rather than his heart

A 36-year old teacher challenged his dismissal for having a romantic relationship with a 31-year old student, and for having had sexual relations with her, most of which occurring on the employer's premises. The administration was made aware of this relationship when anonymous messages sent by the student's husband, to whom she had confided in following the deterioration of her relationship with the teacher. The teacher admitted to everything during the investigation, but felt he had done nothing wrong, since this was a relationship between two consenting adults. The arbitrator first concluded that there was no evidence of abuse. However, the teacher's duty of impartiality, as stated in the *Education Act*, prohibits such relationships, regardless of the age of the people involved. This romantic relationship placed the teacher in an untenable conflict of interest situation. In addition, the fact of having sexual relations on the employer's premises is a serious offence in itself, one which could have damaged the reputation of the school establishment. Finally, the fact that the employee did not appear to acknowledge the seriousness of his actions sealed his fate in the eyes of the arbitrator. The dismissal was upheld.

Syndicat des professeurs de l'État du Québec
v. *Government of Quebec (Institut X)*
2017EXPT-1246, 2017 QCTA 344, Pierre St-Arnaud

5 Dismissal upheld for a teacher beyond redemption

A teacher lodged four grievances challenging different disciplinary measures, including his dismissal. According to the school board, over the years, the employee had behaved in inappropriate ways and exhibited constant insubordination toward the administration of the schools where he had been assigned. In this regard, the evidence showed that the teacher met each of the board's disciplinary and administrative measures with written responses, which were often more wordy than the disciplinary letters themselves. According to the arbitrator, the teacher engaged in a veritable "guerrilla warfare" against his supervisors, and the school board had been patient with him. Indeed, the arbitrator noted that the teacher had admitted to the facts brought up against him, yet stated that he had acted properly and confirmed that he would do exactly the same thing in the future. Under the circumstances, since the teacher had no intention to change, keeping him employed was incompatible with the school board's ability to ensure a harmonious working environment and with its educational mission. The dismissal was upheld.

English Montreal School Board
v. *Association des enseignantes et enseignants de Montréal*
SAE 9186, 2017-05-31, André Dubois

6 Disability then CNESST: changing one's mind and taking action too late

A teacher challenged the decision of the CNESST, which deemed his claim inadmissible. He lodged his claim after two disability insurance periods, the first going back three years. It was only seven months after the second medical leave that a "CNESST" medical certificate was forwarded to the CNESST and to the employer, with neither a claim nor an explanation. The actual claim followed five months later. According to the TAT (*Tribunal administratif du travail*), the claim was submitted past the legal deadline. The employee admitted that he and his physician had from the outset linked his psychological state to an overload of work. Therefore, he had six months, from the first medical leave, to submit a claim to the CNESST. To later obtain and submit a medical certificate to the CNESST did not constitute a valid claim. The employer had no obligation to urge the employee to submit a claim. There was no reasonable justification for the employee's delay: if he was able to submit his disability files, he was able to manage a claim to the CNESST. One must conclude that he chose not to submit a claim. Consequently, his claim was inadmissible.

Cantin v. *Commission scolaire Marie-Victorin*
2017 QCTAT 2604 (SST), Jean-François Beaumier

7 Student in training or probationary employee protected under the law?

A student challenged the dismissal of her claim by the CNESST based on the fact that it was not covered under the AIAOD. During her professional training in truck transportation, she fell on the ice in the parking lot of the professional training centre, and suffered a back injury. She was attending a training session on the pre-departure inspection of a truck. She alleged that she was covered under the law, since she had signed a training contract with the school board and the inspection of the truck benefited this employer. According to the TAT, the AIAOD extends its coverage to students who provide services to an employer, in the context of a practical training course, which services are comparable to those of an employee. This coverage cannot be extended to students who are merely receiving training, outside of this specific context. In this case, the mechanical failures on the trucks provided for inspection were simulated, for the sole purpose of monitoring comprehension of the theoretical concepts that were being taught. The accident occurred during an intrinsic activity that was solely associated with the training. The claim was rejected.

Marcil v. *Commission scolaire de la Rivière-du-Nord*
2017 QCTAT 3125 (SST), Daniel Pelletier

8 Falsely reported to the DPJ: recognized occupational injury

An educator in a childcare centre challenged the rejection of her claim. She linked her adjustment disorder to being falsely reported to the DPJ by parents who objected to her remarks regarding their child's behaviour, accusing her of hitting him on the head on several occasions. Following this complaint, the employee was removed from her post pending investigation. The complaint was deemed unfounded, whereupon the employee went on vacation. When she returned to work, she avoided any contact with the parents in question. Noting the employee's growing anxiety as the weeks went by, the employer tried to reorganize her work. She stopped working five months later. According to the TAT, the school board treated the case diligently and expeditiously. However, though there may have been no evidence of abuse in the employer's exercise of management rights, this did not preclude recognition of a sudden and unforeseen event beyond the normal work setting. There is a distinction to be made between a parent's mere dissatisfaction and a complaint falsely alleging physical abuse. Such facts were objectively traumatizing. Nothing in the employee's personal background could explain the injury. The claim was upheld.

Oualou v. *Centre de la petite enfance de l'Université de Montréal*
2017 QCTAT 2763 (SST), Catherine Bergeron

9 Following an accident, pain was so intense that she forgot to mention this accident to her attending physician

A nursing teacher challenged the denial of her claim by the CNESST for a lumbar disk herniation. She alleged that, while she bent down and turned to take a backrest from a cart, she experienced a sudden acute pain as she straightened back up. A colleague who witnessed the event gave her advice on ways to alleviate the pain. Yet, two hours later, the pain being too intense, the employee went to see a doctor and submitted her claim to the CNESST two weeks later. Her challenge was rejected. The employee admitted that she had already experienced lower back pain on a regular basis before the accident, which she associated with a premenstrual syndrome. However, notes taken by the doctor on the day of the alleged accident revealed additional medical history. There was mention of a fall, two years earlier, followed by painful episodes, the most recent of which occurred two days prior to the alleged accident. The court had trouble understanding why the employee mentioned such history to the doctor, without discussing the work accident that had occurred just two hours earlier. The employee's explanation to the effect that the intense pain had made her momentarily "forget" the accident was not credible. The claim was denied.

Mc Innis v. *Cégep de Sainte-Foy*
2017 QCTAT 1507 (SST), Jean-Luc Rivard

Comments

The TAT emphasized that the employee's version was seriously compromised by inconsistencies and the "fatal" omission of failing to provide information regarding prior episodes. These inconsistencies undermined the presumption that she suffered an occupational injury. Despite a diagnosed injury, the mention of a witness and a medical consultation the very same day as the alleged accident, it was impossible to conclude that the accident was a consequence of an occupational injury. This decision shows how important it is to consider the circumstances surrounding a declaration of event, especially when the accident seems quite mundane in relation to the diagnosis, in this case a herniated disk. The medical records made it possible to prove the employee's lack of credibility. Besides, the TAT added that the fact that a co-worker was a witness to the "accident" could not be considered since the employee did not assign her to testify. The employer had also taken care to require a medical expertise confirming not only the pre-existence of the pains, but also the absence of a potential link between the mundane action described and the serious diagnosis of a herniated disk. This shows that a detailed investigation and documentation of any given case can make all the difference despite initially credible appearances.

10 Lawyer's fees not protected by professional secrecy

A daily newspaper went to court to find out the amount of the lawyers' fees incurred by four school boards against whom some parents had initiated a class action. According to the school boards, this information was protected by solicitor-client privilege. They also alleged that disclosing such information might be prejudicial to them, as it might reveal the size of the financial resources available to these school boards for their defence. According to the Court of Appeal, in order to invoke professional secrecy, the information must fit within the scope of the secret. Otherwise, there is no professional secret. Now, though professional secrecy enables a public body to offer a comprehensive defence against legal actions taken by third parties, this does not release it from its accountability to the people it serves. Since the total amount of the fees paid to the lawyers did not reveal any confidential information, the appeal was upheld.

Kalogerakis v. *Commission scolaire des Patriotes* et *als.*
2017 QCCA 1253

Comments

Though this ruling goes far beyond the scope of labour relations, we feel it is important to bring it to your attention. Indeed, following this decision, it would not be surprising to see more and more requests sent to school boards to reveal the fees paid to their lawyers. However, it is worth pointing out that, although this decision indicates that the amount paid as professional fees is not necessarily protected by solicitor-client privilege, the details regarding these fees are another matter since, in our opinion, it would amount to reveal information that is indeed covered by professional secrecy. In the case at hand, the only information requested concerned the amount of the fees paid by the school boards. Nevertheless, it will be interesting to see if this ruling will be referred to the Supreme Court.

A return to work that goes awry is in no one's interest

By Lydia Fournier
Le Corre & Associates

Absences related to mental health issues have increased exponentially over the last few years. Such absences generate significant costs and have a major impact on work organization, especially in the field of education. Nevertheless, it is important not to authorize an overly hasty return to work, as a return to work that goes awry is in no one's best interest. Let's not forget that the challenge is not returning to work but staying at work.

When an employee submits a medical certificate stating that he is able to return to work, you are under no obligation to accept. First, you need to verify, from a medical standpoint, whether or not the attending physician is referring to the employee's ability to perform his duties. You then have the option either to accept the medical certificate and authorize the employee's return to work, or to obtain more specific information from the attending physician before making your decision.

You can also contest the medical certificate and ask the employee to undergo a medical expertise before authorizing his return to work, in order to find out his actual state of health. The right to require a medical expertise before authorizing a return to work is enshrined in most collective agreements in the education sector, which state that a school board can require an employee to undergo a medical examination in order to ascertain whether he has recovered enough to go back to work.

Consequently, when you have reasonable grounds to believe that an employee is not fit to work, you can refuse to reintegrate him as long as he has not submitted to a medical examination. There are several reasons that could justify such a request: a long period of absence, a terse medical certificate, imprecise, contradictory or dubious medical information, or even a "miraculous" recovery just before his 104 weeks of salary insurance benefits are about to expire.

When an employee's absence is the result of a mental health issue, a gradual return to work is often suggested by the attending physician. This is in fact a form of accommodation generally deemed reasonable. Now, an employer is under no obligation to accept a gradual return to work in its entirety. This is all the more true in education network, where collective agreements prescribe that a gradual return to work is subject to an agreement between the school board and the employee, and that certain conditions must be met. Thus, before accepting such a request, you can require that the following conditions be met:

- ✓ the employee must have been absent for at least 12 weeks;
- ✓ the medical certificate must state that the period of gradual return will immediately be followed by a return to full-time work;
- ✓ the period of gradual return must generally not exceed 12 weeks;
- ✓ the terms of the gradual return must be known and reasonable, i.e. the proportion of time worked vs not worked;
- ✓ the employee must be able to perform all of his duties according to the agreed upon proportions.

As a manager, you have surely been faced with medical certificates containing a mention such as: "*tentative gradual return to work*". You are under no obligation to accept such a gradual return to work. You can demand that the medical certificate state a date for the employee's return to full-time work at the end of a gradual return period. Indeed, the gradual return to work is not an opportunity to extend a period of disability or convalescence in the workplace. On the contrary, a gradual return to work implies that the employee is fit to return to full-time work, but, due to a long period of absence and, in order to ensure a successful return to work, the attending physician recommends and, the parties agree, to a gradual reintegration.

We also frequently see gradual returns to work spread over long periods of time, interspersed with periods of half-time work and vacation days. When the parameters of the gradual return seem questionable or difficult to implement, you can ask the attending physician to provide objective reasons to justify them, in order to determine whether you should accept them. For instance, what medical reasons would make an audio-visual technician able to work only on Tuesdays, Wednesdays and Thursdays? In some circumstances, you can deny or simply postpone an employee's gradual return to work. However, your refusal must be reasonably justified.

Developing a difficult employee

by Myriam Plamondon, MSc., MA, GC, Organizational Psychology Consultant
SPB Organizational Psychology

Have you ever had to manage employees who work only on projects they know they will do well on, who are easily discouraged in the face of obstacles? When you provide constructive criticism regarding their work, you get the impression that they are much more worried about defending themselves and providing justifications than about making improvements. They tend to lose motivation when receiving feedback—even constructive feedback that is provided diplomatically. You therefore are tempted to avoid making constructive comments so you don't need to manage their reactions.

These are behaviours that suggest a fixed mindset, i.e., employees who are driven by the belief that their skills and talents are innate and can't get any better or worse. They think you've either got it or you don't. These people believe that their efforts will have little impact on results. They will therefore tend to be less committed and will make little effort to develop professionally.

A development mindset is closely tied to how people react to criticism and failure. This is why this type of person is more concerned with appearing talented than developing professionally. They make limited effort because they don't believe they can influence the final result. Their talent is what makes the difference. They take on easier tasks so success is assured, because if they fail, their talent will be called into doubt. They tend to compare themselves to others and may feel threatened when they see their colleagues succeed. These beliefs and attitudes are so engrained that they colour their reactions and behaviour.

A manager having to deal with this type of situation may find it difficult to support the person's development. How can this employee be helped to adopt a development mindset?

Underline the importance of effort

With employees with a fixed mindset, you need to talk in terms of challenges and progress rather than focus on problems and performance. It's a good idea to come up with an ambitious action plan or objective that can be accomplished in several realistic, less intimidating stages, and give honest, diplomatic and ongoing feedback about things they do well and less well. If they succeed at something, emphasize their effort rather than their talent or the result.

Keep fostering perseverance

To accelerate their development, encourage employees to step out of their comfort zone by taking on tasks and projects that are slightly more ambitious than their usual responsibilities. If they encounter a problem, encourage them to try a number of strategies before throwing in the towel. If they fail, ask them about what worked and what didn't. Tease out possible solutions to adjust and do better next time.

Empower them for their own development

Employees who have a fixed mindset may be less accepting of criticism and passive about their development. This is why it is important for you to work with them to find concrete measures for improvement and give them constructive feedback (even if they react strongly!) and feedforward. They need it even more than others. Explain that their defensiveness is holding back their development and tactfully point out their share of responsibility in the difficulties they are experiencing.

Plus, when putting together their development plan, let them take charge and set their own objectives and the means for reaching them. You will probably need to begin by working on their motivation to develop their skills before putting together the development plan. Encourage them to list all of the potential benefits of professional development so that they see all the ways that this can impact their performance. To empower them even more, encourage them to share any problems with you and possible solutions.

Basically, by focusing on effort, perseverance and empowerment, you can instill in people with a fixed mindset a more positive attitude about their own development, allowing them to accelerate in their career. Your organization and the employee will both benefit.