G+ Education

INFO

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UPDATES:

The Court of Appeal reinstated the arbitrator's decision regarding *Syndicat de l'enseignement de Champlain* v. *Commission scolaire Marie-Victorin* (2020EXPT-279, 2020 QCCA 1335). According to the court, the arbitrator rendered a reasonable decision by finding that occasional substitute teachers do not lose their employee status at the end of each replacement and that they are entitled to holiday pay for statutory holidays between replacement periods. [See "***In your corner***", Spring 2017]

The Superior Court allowed in part the application for judicial control filed by the school board in *Commission scolaire des Premières-Seigneuries* v. *Rivest* (2020EXPT-222, 2019 QCCS 5627). According to the court, the arbitrator could not fault the school board for failing to conduct its own investigation before reporting an act by one of its teachers to the Directeur de la protection de la jeunesse, as the school board had reasonable grounds for contacting the DPJ. [See "***Recent decisions***", Winter 2019]

The Superior Court upheld the decision of an arbitrator who found that a private school could install surveillance cameras inside its establishment, including in hallways, for security purposes (2020EXPT-341, 2020 QCCS 95). According to the court, the infringement of teachers' privacy was minimal and justified. [See "***In your corner***", Winter 2019]

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For a Safe Maternity: Right to be re-assigned, not to stop working

By Geneviève Mercier, Le Corre & Associates

The CNESST's *Pour une maternité sans danger* (PMSD) program is intended to ensure that pregnant or breast-feeding women can maintain their employment without risking their health. According to the Supreme Court, "The *Act* therefore protects pregnant women in two significant ways: it protects their health by substituting safe tasks for dangerous ones, and it protects their employment by providing financial and job security."[1]

Under the *Act respecting occupational health and safety*, a worker who is pregnant or breast-feeding may request to be re-assigned to other duties that she is reasonably capable of performing and that involve no risks for the foetus or the child she is breast-feeding. If it is impossible for the employer to eliminate the risks by modifying the worker's duties, adapting her workstation or assigning her to other duties that she is reasonably capable of performing, the worker is entitled to stop working and receive income replacement indemnities from the CNESST until the risks no longer exist or until the end of her pregnancy (or breast-feeding). The PMSD program is not an entitlement to leave from work: the employer may choose to re-assign the worker to risk-free duties when she submits a preventive withdrawal certificate or as soon as an appropriate position becomes available. Sometimes, finding a solution can be relatively simple.

For example, in the *Desjardins* and *Commission scolaire des Phares case*,[2] the occupational health and safety division of the Tribunal administratif du travail confirmed the validity of an elementary-school music teacher's re-assignment. The school board had withdrawn her from student supervision and teaching groups including students with behavioural problems. The TAT found that the teacher had failed to show that, despite the employer's solution, there were still risks related to standing for an extended period or handling loads. Her occupational autonomy meant that she was able to change her way of teaching, follow the employer's instructions and avoid risks.

Re-assignment is also possible even if it displeases the worker! Recently, the labour relations division of the TAT found that a pregnant daycare educator who had failed to show up for her re-assignment had effectively resigned.[3] The educator filed a complaint under section 122 of the *Act respecting labour standards*, claiming that she had been dismissed due to her pregnancy. The employer argued that she had in fact resigned, as she had refused a re-assignment to a job as a kitchen helper. It should be noted that this was the first time that the employer had proposed a re-assignment to a pregnant worker. The educator was unhappy with this unprecedented re-assignment. The TAT found that by choosing not to request a review of the CNESST's refusal to grant her an indemnity under the PMSD program, she had accepted that the re-assignment was without risk. She therefore had to act accordingly and show up for work. Her refusal to perform the proposed duties despite the fact that she was medically fit and available for work was equivalent to a resignation, and her complaint was refused. Regarding the PMSD program and re-assignment, the TAT wrote the following:

> "[55] De plus, il ne faut pas oublier que le PMSD est avant tout un programme de réaffectation de la travailleuse enceinte visant à lui permettre de continuer à travailler. Le retrait de la travailleuse du milieu de travail est recommandé seulement si l'affectation est impossible pour l'un des facteurs de risque mentionnés dans le certificat.
>
> [57] La plaignante considère aussi avoir été traitée différemment de ses collègues. Il est vrai que c'est la première fois que l'employeur propose cette réaffectation à une éducatrice enceinte. Il demeure que dans une garderie, les possibilités de réaffectation sont limitées. Le Tribunal retient de la preuve que l'employeur avait besoin d'aide en cuisine, qu'il faisait face à des difficultés de recrutement de main-d'œuvre et qu'il a souhaité réaffecter la plaignante en cuisine durant sa grossesse plutôt que de la retirer du milieu de travail."

Although the costs of the PMSD program are covered by all employers registered with the CNESST and indemnities are not assigned directly to a given employer's financial file, preventive withdrawal of many pregnant workers can be a challenge for human resource departments. Optimum management of preventive withdrawal requests can enable better planning in this time of acute labour shortages in education.

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1. *Dionne* v. *Commission scolaire des Patriotes*, [2014] 1 S.C.R. 765, par. 30
2. 2019 QCTAT 5648 (SST), Delton Sams
3. *Hamidi* and *Garderie Monde Tweety Inc.*, 2020EXPT-176, 2019 QCTAT 5664 (DRT), Véronique Girard

RECENT DECISIONS

1

Assignment of a disabled student to a special education class: School board's discretionary power acknowledged

The Court of Appeal upheld a school board's decision to assign a student to a special education class instead of keeping him in a regular class. It pointed out that the general standard is to integrate a student into a regular class, provided that the integration is in the child's interest and does not cause unreasonable hardship for the institution and the other students. The assessment of a disabled student is thus aimed at determining whether integration into a regular class is beneficial for the child, not how to carry out the integration. The role of the Student Ombudsman is to investigate, submit an opinion and issue recommendations. The Council of Commissioners is not bound by the Student Ombudsman's opinion. To the contrary, the Council has broad discretion, which must always be exercised in the student's best interest. In the Council's opinion, the regular class did not adequately meet the student's needs, and the special education class was better suited to the student's situation.

Commission scolaire de Kamouraska–Rivière-du-Loup v. *Tardif*
2020EXPT-221, 2020 QCCA 89

2

Summer period and maternity leave: Legality of reducing recognized compensation

The Court of Appeal, like the Superior Court, upheld an arbitrator's decision to dismiss grievances contesting a school board's decision to reduce the indemnity paid to teachers on maternity leave during the summer period by the amount of the teachers' Quebec Parental Insurance Plan (QPIP) benefits. The collective agreement provided for the payment of an indemnity corresponding to 93% of 1/200 of the annual compensation for each day of work. According to the court, by subtracting the amount of the QPIP benefits from the maternity indemnity paid to the teachers during the summer period, the school board complied with the collective agreement's objective of granting teachers income security. The teachers in question therefore did not suffer discriminatory or unfair treatment. In addition, if the union's position had been retained, the teachers would have received income substantially higher than their base pay and would thus have received an unjustified monetary benefit.

Syndicat de l'enseignement de la région de Laval
v. *Commission scolaire de Laval*
2019 QCCA 1676

3

Reimbursement of travel expenses incurred for a medical examination

A teacher on disability leave had to undergo a medical examination at the employer's request and incurred travel expenses to attend the appointment. The union requested a reimbursement of these travel expenses. According to the union, the clause in the collective agreement that stipulates that travel expenses are reimbursed only where the employee must travel more than 45 kilometres from the school is less advantageous than the standard set in section 85.2 of the *Act respecting labour standards* (ALS), which is public policy. The arbitrator found that the school board had requested a medical examination by virtue of its status of insurer, within the framework of a wage-loss insurance plan that was clearly more advantageous than the ALS provisions. As travel for a medical examination is not travel for the purpose specified in the ALS, it does not constitute travel in the execution of work, since the employee is not subject to legal subordination. The grievance was therefore dismissed.

Commission scolaire des Affluents
and *Syndicat de l'enseignement des Moulins*
2019EXPT-2053, 2019 QCTA 519, Pierre Daviault

4

Breaks between two classes must be paid

The union claimed that the 15-minute breaks between two classes must be paid, as these periods are part of the educational workload or, at the very least, the complementary workload. According to the union, the presumption set forth in the *Act respecting labour standards* (ALS) whereby employees are deemed to be at work while available to the employer at the place of employment and required to wait for work to be assigned applies. The school board argued that it did not expect teachers to be available during their breaks and teachers were not obliged to remain in the workplace. In addition, as teachers receive an annual salary, there was no reason to pay them for each hour of work. According to the arbitrator, the presumption set forth in the ALS applies. Teachers are not totally free to go about their personal business during the full period of their breaks. The 15-minute breaks therefore have to be paid and are part of the teachers' 27 hours of duties.

Syndicat de l'enseignement des Deux-Rives
and *Commission scolaire des Découvreurs*
2019EXPT-2059, 2019 QCTA 395, Yves Saint-André
Application for judicial review, 2019-09-06 (C.S.) 200-17-030005-193

RECENT DECISIONS

5

Professional disagreements do not justify a six-month suspension

A teacher contested his six-month suspension for having harassed a female colleague, "A." The arbitrator found that the length of the suspension was unreasonable. The evidence was insufficient to retain certain accusations by A based on reported remarks. However, certain behaviours, such as last-minute changes in schedules that the employee imposed on all of his colleagues or his constant criticism of a new program, could have vexed A, even though they were not directed at her personally. In addition, the school board was aware of the difficult relationship between the two teachers and did not intervene prior to the filing of the complaint. The arbitrator found that a one-month suspension was reasonable, given the employee's failure to acknowledge that his behaviour was a problem for A and all of his colleagues, and his persistent denial that he had denigrated A's competence on several occasions.

Commission scolaire de la Riveraine
and *Syndicat des enseignants de la Riveraine*
2019EXPT-2486, 2019 QCTA 537, Claude Martin

6

Allergic to her students' cats

The school board challenged the cost-sharing granted by the CNESST, which had removed 90% of the costs from the employer's financial file, and requested that 99% of the costs be removed. Although a teacher had always suffered from rhinitis and conjunctivitis at the start of the school year, her condition was more serious in the fall of 2015 as nine of her students lived with cats. She presented a throat infection, hives and bronchial hyperresponsiveness. The CNESST considered that her allergies were a pre-existing disability conducive to the advent of her employment injuries. The disability explained the advent of the injuries and was also responsible for the slow progress, medical consultations, desensitization process and several months of leave from work. When a disability is very serious and its role is major, not only with regard to the advent of an injury but also its consequences, 99% of the costs must be removed from the employer's financial file. The challenge was accepted.

Commission scolaire du Lac-Saint-Jean
2019 QCTAT 5562 (SST), Carole Lessard

7

Asbestosis: CNESST may not assign the costs to a new school board

The school board challenged the asbestosis costs assigned to its financial file by the CNESST. A retired teacher had been exposed to asbestos in two schools that were part of a former denominational school board. The CNESST argued that the former school board had been merged with the new school board following the 1998 reform, and that the new school board should be assigned part of the costs. According to the tribunal, the CNESST had relied on the teacher's claims regarding his employer and had assumed, without evidence, that there had been a merger. However, the reform had clearly terminated the existence of the former school board. The teacher had never been employed by the new school board. As the employer for whom the worker carried on employment of a kind that would induce his occupational disease no longer exists, the CNESST must assign the costs to all employers, in accordance with the third paragraph of section 328 of the *Act respecting industrial accidents and occupational diseases*. The challenge was accepted.

Commission scolaire de Montréal
2019 QCTAT 4992 (SST), Marie-Ève Legault

8

The hazards of hopping

A teacher challenged the CNESST's refusal of her claim for a herniated disc that occurred while she was teaching her students how to hop. The employer considered that the herniated disc was a personal condition. The teacher told a colleague about the injury as soon as it occurred on Friday. She reported it to the school principal on Tuesday, when she was able to see him. She worked for two weeks, but saw her physician and received treatments and medication for pain. Leave from work was recommended when the herniated disc was confirmed by an MRI. The presumption of an employment injury applied. The injury had occurred suddenly at work. The teacher was able to keep on working with help from colleagues and treatments. The Tribunal administratif du travail did not retain the opinion of the employer's physician regarding the ordinariness of the game of hopping, and found that the game had caused back stress that aggravated a personal condition. The challenge was accepted.

Charron and *Commission scolaire au Cœur-des-Vallées*
2020 QCTAT 296 (SST), Manon Chénier

RECENT DECISIONS

9

Accident on a church parking lot

A special education technician contested the CNESST's refusal of her claim for a lumbar sprain. Ten minutes before she was due to start work, she fell on the icy church parking lot when getting out of her truck. She explained that she had first driven past the school parking lot, which was already full. The employer claimed that the accident had not happened in the course of work. The parking lot was not under the school's control and the special education technician had used it because her truck needed a bigger space. The evidence showed that a number of employees used the church parking lot because the school parking lot was too small. The parking lots were 50 metres away from each other. Even though the school had asked parents to use the church parking lot, it had never objected to its employees using it. Given the special circumstances, the church parking lot constituted an extension of the normal entries to the workplace. The claim was accepted.

Bouchard and *Commission scolaire des Samarres*
2019 QCTAT 5162 (SST), Marie-Ève Legault

Comments

Although each case is distinct, certain criteria are more broadly recognized in the event of an accident that occurs "in the course of work." For example, temporal proximity between an accident and the start or end of a work shift argues in favour of recognition of an employment injury. The same applies to proximity of location, even if the location does not belong to the employer. A worker who is injured on a municipal sidewalk that he has to use to access his workplace 10 minutes before the start of his work shift thus has a greater chance of being granted an indemnity by the CNESST than a worker who is injured while on the way to have breakfast in a restaurant close to the school an hour before classes. Often, the deciding factor is the notion of personal choice, the absence of a realistic alternative or the employer's tolerance. In the case at hand, the employer's tolerance of the use of the church parking lot and the limited access to the school parking lot appear to have made the difference.

10

Dismissed for recording his co-workers without their knowledge

A vocational training technician contested four suspensions and his dismissal for insubordination. The evidence showed that he had recorded dozens of people in the workplace without their knowledge, both managers and co-workers, and that the employer had met with him several times to put an end to the situation. The employee refused to stop recording or to confirm whether he had been recording, despite clear, unequivocal instructions. He also adopted a confrontational attitude towards his employer. The arbitrator found that the employer had complied with the principle of progressive discipline by imposing several disciplinary measures on the employee before terminating his employment. The dismissal was justified. Given the employee's attitude and lack of remorse, the relationship of trust was irremediably severed. The grievances were therefore dismissed.

Commission scolaire de la Rivière-du-Nord
and *Syndicat du personnel de soutien en éducation de la Rivière-du-Nord*
2019EXPT-1996, 2019 QCTA 493, Alain Corriveau

Comments

According to case law, recording a conversation with someone is not illegal and does not constitute a breach of privacy. However, the systematic recording by an employee of his conversations with his employer is counterproductive and has a negative impact on maintaining a relationship of trust between the parties. In addition, surreptitious recordings can negatively affect the work environment, as they can generate suspicion. Failing a clause in the collective agreement limiting the right to record, it could be a good idea to adopt a policy forbidding recording people at work without their knowledge or taking pictures or filming people without authorization in the workplace, regardless of whether they are employer representatives, co-workers or third parties. In addition to allowing the employer to position itself regarding this new reality, the adoption of a policy would enable the employer to defend itself in the event of litigation.

What's the Big Deal About Incivility?

By Chloe Cragg, MSc, Organizational Psychology Consultant | SPB

In today's fast-paced world, it is easy for busyness and distractedness to be misinterpreted as rude behaviour. As our school environments continue to speed up, it is important to be more aware of the impacts this has on us and develop the appropriate skills to adapt.

While workplace mistreatment is not a new concept, the way it shows up in schools today is perhaps different than it used to be. With the human rights movement, the implementation of HR systems, and the overall emphasis on employee well-being, it seems that workplace mistreatment is shifting from more obvious forms of overt harassment, to more subtle forms of "incivility."

But what exactly is incivility and what role does it play in our schools?

In simple terms, incivility can be likened to rude behaviour. It is low-intensity, deviant behaviour much like talking over a colleague, giving a dirty look, or failing to return a nicety.[1] Though these behaviours seem relatively innocent, their effects are quite impactful.

For individuals – The effects of day-to-day incivility extend beyond the workplace, negatively affecting individuals' after-work well-being.[2] Therefore, repeated exposure to such behaviours causes concern for potential long-term effects.

For schools – Incivility is related to increased absenteeism, reduced organizational commitment, and reduced job satisfaction.[3]

The component of complexity is that incivility is ambiguous, where the intent to harm is not always clear. For instance, that teacher who seemingly gives you dirty looks: are they being intentionally rude, intending to cause harm, or are they simply having an off day, unaware of how their behaviour comes across? As such, the outcome of this subtle behaviour (intentional or non-intentional) can be largely up to the interpretation of the "receiver." While one individual might feel upset at that glaring teacher, another might not be as bothered. See the difference?

So, what can we do?

While we can attempt to mitigate the enactment of intentionally rude behaviour in the workplace through various HR practices, we cannot dictate how individuals will perceive behaviour that is conceivably ambiguous. As such, it is up to each individual to be more mindful in their interactions.

As a "receiver" – Next time a colleague doesn't return a "hello," step back and ask yourself a few questions:

- ✓ Is this their typical behaviour?
- ✓ Is it possible they did not hear you?
- ✓ Is it reasonable to be upset by their behaviour?

Then try positive reframing! This helps us see another's behaviour in a more optimistic way. Next time a colleague or a student acts in an uncivil manner, ask yourself what you can learn from this situation. Perhaps experiencing incivility will help you be more mindful of your own behaviours, or maybe it will help you realize that this co-worker or this student is stressed out and needs someone to talk to. Challenge your assumptions by actively deciding to turn abrupt behaviour into something more constructive.

As an "actor" – It is important to be aware of how others might perceive your behaviours. In and amongst the busy day-to-day, stop to reflect on how your busyness might be affecting those around you. Is there a chance that your behaviour might be taken the wrong way?

In sum, interpersonal mistreatment does not always have to be visible, obvious, or even intentional to cause harm. Therefore, it is up to each individual to be cautious before jumping to conclusions, while at the same time protecting themselves from behaviour that is meant to harm. The onus belongs to each individual to be aware of how they feel when relating to others, mindful of how they are interpreting the behaviours of others, and careful of how their own behaviours may be perceived. When in doubt, communicate, communicate, and communicate with compassion!

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1. Andersson, L. M., & Pearson, C. M. (1999). Tit for tat? The spiraling effect of incivility in the workplace. *Academy of management review*, 24(3), 452-471
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