G+ Education

INFO

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RECENT **DECISIONS**

1 The school board could unilaterally transfer a teacher to another school

The union challenged the school board's decision to unilaterally transfer a teacher to another school. The arbitrator began by pointing out that the employer holds all management rights, except those that are limited by law or by the collective agreement. Section 261 of the *Education Act* prescribes that "*Every school board shall, in assigning personnel to its schools […] take into account the staffing requirements submitted to it by the school principals […], and the applicable collective agreements*". According to the arbitrator, this provision reflects the fact that collective agreements must be applied, where appropriate. On the other hand, in the absence of any provision regarding what needs to be done, the employer's management right will prevail. Now, the employer's right to transfer a teacher against his or her will is not covered by the national agreement or the local agreement. Consequently, in the absence of a provision governing forced transfers, the school board could transfer a teacher if it felt compelled by circumstances to do so. The grievance was rejected.

Syndicat de l'enseignement de la Rivière-du-Nord
v. *Commission scolaire de la Rivière-du-Nord*
2017 QCTA 184, Joëlle L'Heureux

2 An arbitrator emphasized that employment classifications are not airtight

A printing operator was assigned student supervisory tasks, for periods not exceeding 18% of his weekly work schedule. The union wanted a salary adjustment for this work associated with a better-paid employment classification. According to the arbitrator, an employee can be called upon to perform tasks not usually associated with his position without affecting his employment classification. Task assignment is part of management rights, which must not be exercised in an abusive, arbitrary or unreasonable manner. This implies that certain parameters be respected. The portion of work outside the employee's usual job description must not amount to an overly substantial part of his schedule, for this would alter the position held by the employee. In addition, an employer cannot validate imposing a task for which an employee does not have the required skills. In the case at hand, these parameters were complied with. The grievance was rejected.

Commission scolaire du Chemin-du-Roy
v. *Syndicat du soutien scolaire Chemin-du-Roy (CSN)*
2017EXPT-446, 2016 QCTA 987, Pierre-Georges Roy
application for judicial review

3 Suspended 3 days for having denigrated students who asked questions

A secondary-level teacher challenged a three-day suspension for having, on several occasions, denigrated students who asked questions or who didn't understand the subject matter: "*This is easy*", "*You don't need a B.A. to understand this*" were among his answers. The College's position was that, viewed in isolation, such statements might seem trivial, but they instilled fear among students who no longer dared to address the teacher. The administration tried in vain to sensitize the teacher regarding the inappropriateness of his words. The arbitrator found the words of the teacher to be offensive. Even considering that a student's perception is not always a good reference, she nevertheless felt that the reported incidents could be examined from the viewpoint of a reasonable person. In this case, a teenaged student bearing the brunt of such comments would have reasonably perceived them as degrading. The arbitrator therefore upheld the suspension, noting in particular the employee's absence of remorse, his disciplinary record, his choice of words and the repetitive nature of these comments. The grievance was rejected.

Syndicat du personnel du Collège Mont-Saint-Louis
v. *Collège Mont-Saint-Louis*
2017EXPT-328, 2016 QCTA 984, Francine Lamy

4 By forging a signature, he signed his own death sentence

An office agent with 29 years of seniority challenged his dismissal for having stolen at least one executive's identity, denigrated the latter and his employees with government authorities and harassed executives by sending them hate mail. The evidence showed that, following restructuring and the hiring of a new director, 142 anonymous letters had been received, including fifty around before the employee's dismissal and others during the hearing of his grievance. Two letters bearing the Director General's signature and denigrating the newly appointed director were put through three expert graphological analysis, which revealed that the letters had been signed not by the Director General but by the employee. According to the arbitrator, the charge against the employee was proven and the theft of a senior executive's identity justified the severance of the bond of trust. He added that the bulk of evidence showed that the employee was in some way involved in sending the other correspondence denigrating the employer and his employees. The grievance was therefore rejected.

Syndicat des employés de soutien du Cégep de Rosemont
v. *Collège de Rosemont*
2017EXPT-582, 2016 QCTA 1008, Carol Girard

5 Paranoid personality and victimization: mostly a victim of his own behaviour

A teacher challenged his dismissal for his inability to have normal and serene interactions with colleagues and supervisors. The decision to close his case was taken following two psychiatric assessments confirming obsessive, compulsive, paranoid and narcissistic personality traits, and a near certain relapse prognosis. There was ample evidence covering events spread over 15 years: interpersonal conflicts with supervisors, tense relationships with several colleagues, and various unfounded proceedings and/or claims (harassment, air quality, CSST and CLP, Quebec Bar, etc.). In his analysis, the arbitrator indicated that he had to take into account the employee's personality traits as noted in the assessments: the latter were obvious in every event mentioned as evidence, and explained his excessive, aggressive and/or antagonistic behaviour. Though he did not always lose his battles, the employee was incapable of behaving in a reasonable manner; he was always the victim and always right. Finally, the employer's duty to accommodate was fulfilled and there was no evidence that he had acted in an abusive, discriminatory or unreasonable manner. Given these facts, the grievance was rejected.

Syndicat des enseignantes et enseignants du Cégep de Limoilou v. *Cégep de Limoilou*
2017EXPT-90, 2016 QCTA 841, Pierre Cloutier

6 The school was not making her sick

A hairdressing instructor, after cleaning a room in school, did not feel well and went to the pharmacy where she fainted. Afterwards, she claimed that, due to water seepage in the school where she taught, the premises became mouldy and made her sick. The lawsuits in this case gravitated around this issue. To begin with, the court examined the evidence in the case, including a number of assessments, investigations and preventive initiatives by the employer, and came to the conclusion that there was no hazard that might affect the employee's health and safety, and that the exercise of her right of refusal was unjustified. Secondly, the judge came to the conclusion that there had been no occupational injury: since the fainting had occurred at the pharmacy, one could not conclude that it had occurred because of, or in the course of, work. Finally, looking at the possibility of an occupational disease, the judge concluded that it had not been proven that the workplace was contaminated by an allergenic substance and that the plaintiff's rhinitis symptoms were due to this contamination. There is therefore no evidence of an occupational disease, including any work-related pulmonary disease.

Vacca v. *Lester B. Pearson School Board*
2017 QCTAT 1256 (SST), Carmen Racine

7 A case of mild traumatic brain injury: a lengthy consolidation lasting over 15 months

On February 24th, 2014, a special education teacher slipped on a patch of ice and hit her head on the ground during the afternoon recess when she had to walk around the schoolyard outside of the school. The employee asked the court to rule that her mild traumatic brain injury had not yet been consolidated, that it was too soon to draw any conclusions regarding the consequences of her injury and her treatment needs, and to confirm that she was not fit to work. The CNESST, in the context of an administrative review, had upheld the initial decisions based on the position of the Medical Evaluation Board, and had ruled that, as of June 4th, 2015, the employee was fit to perform her work since her injury was consolidated without any functional limitation. Upon examination of the medical evidence, the administrative judge decided to uphold the conclusions of the physician at the Medical Evaluation Board. The employee's contentions were therefore rejected.

Sauvé v. *Commission scolaire Chemin du Roy*
2017 QCTAT 555 (SST), J. André Tremblay

8 Compensation for a volunteer worker who broke his teeth

The plaintiff challenged the CNESST's decision refusing his claim for an occupational injury, given that he was doing volunteer work when the incident occurred. Acting as an accompanying parent during a bicycle tour, the latter braked too suddenly and fell, breaking several teeth. His claim was initially turned down because the employer had not first declared the work of volunteers, as prescribed by section 13 AIAOD. The plaintiff alleged that he should be considered an employee since the school board had paid him by covering the costs of the outing (transportation, lodging, food). According to the court, what was received in exchange for the plaintiff's volunteer work did not exceed what was useful for an accompanying parent. Furthermore, the benefit received by the latter was not a taxable benefit, an important consideration in determining whether there had been some form of compensation. The challenge was rejected.

Caron v. *Commission scolaire Marie-Victorin*
2017EXPT-373, 2017 QCTAT 558 (SST), Marie-Anne Roiseux

9 Rehabilitation: she was free to make a career shift, but not at the expense of the school board

The employer challenged a decision by the CNESST stating that an on-call attendant for handicapped students could hold a suitable job as a SET for another employer. Following an adjustment disorder due to harassment by a co worker, the employee was left with a functional limitation: that of not working in any location where she might come in contact with this co-worker. According to the employer, the employee was fit to take a job in one of his schools: she could provide the same level of availability as before and turn down offers from the school where the co-worker was assigned. The employee alleged that her psychological injury would undermine her chances of being called to work, and that activities involving several schools would not take her limitation into account. According to the court, the limitation related to the workplace and to the co-worker, not to the employer. Ad hoc occasions where the co-workers might find themselves in the same location did not run counter to the limitation. The employee was fit to hold a suitable job as an attendant for handicapped students in another school run by the employer.

Commission scolaire des Bois-Francs v. *Marsan*
2017 QCTAT 1548 (SST), Daniel Therrien

Comments

The employer explained to the court that his labour needs were such that the recall list did not meet the demand. The employee had good chances of being called to work if she made herself available. In addition, the co worker held a permanent position in a given, identified school. It was therefore possible for the employee to accept offers elsewhere. The court emphasized that the objective of rehabilitation is first of all to allow an employee to reintegrate his/her job with the same employer, in similar conditions. This is not about identifying the ideal job or more beneficial conditions. In this case, the limitation did not preclude any form of contact with the co worker. It precluded working in a school where the co-workers might run into each other. There was no guarantee that she would be called if she registered on the recall list, but this was the same situation as that which prevailed before her employment injury. She preferred to look for a job elsewhere. Though she was free to redirect her career because she found her working conditions too hazardous, this was a matter of personal choice not covered by the objective of the law: i.e. to repair the consequences of an employment injury.

10 Assault on a student: 40-day suspension maintained

A secondary-level teacher challenged a house arrest with pay, a 40 day suspension as well as his transfer to another school. The employer charged that he physically assaulted a student who challenged him by disobeying for the second time and entering premises forbidden to him. As evidenced in a video, the teacher violently pounced on the student and repeatedly pushed him, thereby provoking a free-for-all and then brutally tackling him to the ground to immobilize him. According to the arbitrator, in the context of the pedagogical relationship, the mere fact of having one's authority challenged or being the object of insults or rude talk certainly does not justify a teacher's physical intervention with a student. Only in the presence of reasonable and probable cause to believe that one's own or any other person's safety, including that of the student involved, is clearly, immediately and seriously jeopardized or compromised, can a teacher physically intervene. In the case at hand, the nature and seriousness of the teacher's actions, the absence of regret, and the impact of these actions on the relationship of trust between the school and the community were such that a very serious sanction short of dismissal seemed justified and appropriate to the Board. The grievances were rejected.

Alliance des professeures et professeurs de Montréal
v. *Commission scolaire de Montréal*
2017 QCTA 174, André C. Côté

Comments

The context surrounding this case was a determining factor. Indeed, the school in question served a multiethnic community that was vulnerable and wary of authority, in a disadvantaged neighbourhood afflicted with a high rate of violence and crime due to the omnipresence of street gangs. In this regard, it must be noted that, following the events involving the employee, the school administration was advised by a student supervisor that former students and "big brothers" had warned that the administration had better deal with the situation, failing which they would take the matter in their own hands. This particular context became an aggravating circumstance, since the employee's behaviour ran directly counter to every effort made to eliminate violent behaviours from this school. In addition, this behaviour was of such a nature as to jeopardize the bond of trust between the community and the school. This particular context also prompted the decision to reassign the teacher to another school, since his return to the school could have placed his health and safety at risk. In addition, the students could have perceived his reintegration as an injustice when the student had been transferred.

Occasional substitute teachers and the right to holiday pay?

By Danilo Di Vincenzo
Le Corre & Associates

On May 4th, 2017, grievance arbitrator Andrée St-Georges, in a case involving the *Commission scolaire Marie-Victorin*[1], ruled that occasional substitute teachers (hereinafter "OST") were entitled to holiday pay as prescribed by the *Act respecting labour standards* and the *National Holiday Act*. Though the union involved in this case cried "victory", we feel that this ruling should be applied with some restraint, for the following reasons.

The collective agreement already prescribes holiday pay when the occasional substitute teacher holds a full-time or part-time replacement contract for more that two months, or if he/she works more than twenty consecutive business days. Such cases are unrelated to those covered by the grievance at hand. The latter involved occasional substitute teachers without a contract, i.e. those who, based on established case law, are not eligible for continuous service upon accumulating successive day-to-day replacements for a fixed period.

Despite this fact, according to the arbitrator, these occasional substitute teachers are still "employees" in the meaning of the *Act respecting labour standards* and, for that reason alone, they are entitled to receive holiday pay.

In support of her ruling, the arbitrator referred to the amendment concerning legal holidays, which was brought to the *Act respecting labour standards* in 2003, whereby the requirement that employees be able to justify sixty days of continuous service was removed. The arbitrator also took note of the fact that the only requirement now in force is not to have been absent on the working day immediately preceding or following the legal holiday, this working day being the next day when the occasional substitute teacher will be deemed to be substituting! With all due respect, considering the fact that this next occasion can take place at an unspecified date, the practical implication of this line of reasoning is arguable.

Indeed this arbitrator's ruling appears to ignore the basic fact to be considered in determining whether one qualifies as an "employee", i.e. whether one is bound by an employment contract. In this respect, the Court of Appeal, in the case of *Commission des normes du travail* v. *Commission des écoles catholiques de Québec*[2], had clearly recognized the following:

- ✓ the contracts binding occasional substitute teachers to their employer are effectively of a temporary nature;
- ✓ occasional substitute teachers have an employment contract that ends as soon as the regular teacher returns to work;
- ✓ it is the employment relationship, rather than merely the performance of the work, that is terminated at the end of each contract.

It is interesting to note that, in the context of lay-offs, case law has even recognized that the rights and obligations that make up the substance of the employment contract binding an employee to an enterprise are suspended, and therefore that the employer is not obliged to pay holiday pay, barring a specific provision included in a collective agreement or an employment contract. The arbitrator's ruling, therefore, grants more rights to employees who do not have an employment contract than to those whose employment contract is suspended.

Thus, the reference to the amendment to the *Act respecting labour standards* and the fact that the only remaining requirement is not to have been absent on the working day immediately preceding or following the legal holiday is somewhat puzzling: how can one be considered absent if there is no employment contract, and therefore no obligation to perform work? Again, in practice, this ruling's applicability is debatable.

This ruling is certainly likely to be challenged before the higher courts, or not to be applied by other grievance arbitrators who may subsequently be called upon to settle grievances related to paid holidays for occasional substitute teachers. With this fact in mind, before handing out holiday pay to occasional substitute teachers, we feel it would be wise to consult and review the current state of case law.

Finally, regardless of the victory claimed by the union, this ruling raises more arguments instead of providing any final answer and, for this reason, this will likely not be the end of the story but, at best, just one step in a saga unfolding in the coming months.

1. *Syndicat de l'enseignement de Champlain* v. *La Commission scolaire Marie-Victorin*, 2017-05-04, Andrée St-Georges Esq. (T.A.).

2. DTE 95T-887 (C.A.).

Effective Measurement for Better Recruitment: 4 Ways to Improve your Hiring Process

by Myriam Plamondon, MSc., MA, GC, Organizational Psychology Consultant
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Ensuring there is as much objectivity as possible in the recruitment process is paramount when hiring a new resource, but you need to be sure you are measuring the right things. How do you improve your recruitment process to increase the probability you will make the right hire? The key is to improve your recruitment process.

1. Properly evaluate needs

To select the right person for the right job, you must have a thorough knowledge of the challenges and requirements of the position. Even when assessing a vice-principal for the hundredth time in the same school board, the context can change and there may be a new reality, which requires consultation and knowing how to ask the right questions. Here are a few examples.

- ✓ What personality type would work well/not so well with the incumbent superior?
- ✓ Think about the employees who have performed best in this position. What did they do differently than the others?
- ✓ What talents will make the difference in this position and make it possible to deliver the goods?

2. Have specific selection criteria

f we don't know what we want to assess, it will be hard to conduct an objective review of each candidate. You can maximize the chances of assessing your candidates against the relevant issues by first drawing up a list of the most important criteria for the position, determining how they will be measured and assigning a weight to each one at the outset. This exercise will also help you write a job offer that targets the right competencies so you can attract the applications you actually want to receive in your inbox.

The criteria will vary depending on the type of candidate you want as well as the needs assessment you have conducted in advance. Be sure the criteria are detailed enough so you can position each candidate accurately and make a valid comparison with the others.

3. Use valid psychometric tests

Hiring tests are an excellent way to validate your perceptions and increase the objectivity of the selection process. They are an essential component, but must be valid and fair! When you consider including a test in your selection process, make sure you check the psychometric properties (validity and reliability), the comparison group for your candidates and the test's ability to make predictions based on the selection criteria. You also need to ensure the test doesn't put candidates at an advantage or disadvantage due to age, sex or ethnicity.

If you're not satisfied with the answers you receive, then don't use this test! There are so many tools on the market today that you can certainly find some that are objective, well constructed, and meet your needs. Also, ensure that all your selection criteria can be measured with the tools chosen.

4. Check the fit with the organizational culture

Good! You've finally found the most qualified person for the job. The candidate is perfect for the position, but is the position perfect for that person? If you fail to validate the fit with the team as well as the organization's culture and values, you run the risk of having to repeat the whole process a few months down the road. It therefore is crucial to ask candidates about the following considerations.

- ✓ Their motivation for the position and their values
- ✓ The type of environment in which they can deliver their best and what they are looking for in a job
- ✓ Their reason for leaving an organization or job, and what may have discouraged them in the past
- ✓ The times when they felt totally committed to their work
- ✓ Their ideal team and boss and their expectations of the organization

You also need an excellent reading of your organization for a clear understanding of the types of people who fit in, become committed and perform well. This means knowing the following factors.

- ✓ The issues and problems the organization is facing now and will face in coming years
- ✓ The organization's strategic vision for the future and the type of employee best suited to that vision
- ✓ The organizational culture today and to be developed in the near future
- ✓ The profiles that don't work well with the incumbent manager, and those that do

With all this information in hand, you may feel momentarily overwhelmed by the amount of additional data to be analyzed and assimilated. In the long run, however, the value it adds to your organization will convince you of the importance of factoring it into your hiring decision.