G+ Education INFO

WINTER **2018** • Newsletter nº 28

2550 Daniel-Johnson Blvd., Suite 650
Laval, Québec H7T 2L1
T 450.973.4020 1 877 218.4020
F 450.973.4010

Director: Danilo Di Vincenzo, CIRC
Editor in chef: Linda Bernier, CIRC

RECENT **DECISIONS**

1 In the absence of vexatious conduct, there can be no harassment

A teacher, also president of the local union, claimed he had been harassed by a new principal during general assemblies and meetings. He claimed that the principal made impatient gestures, acted disrespectfully towards his ideas and his right to speak, interrupting him inappropriately and making degrading comments. According to the arbitrator, the principal did not choose to treat the employee as she did: she was forced to do so because of his defiant attitude, his aggressive and angry behaviour during certain encounters, his negative criticisms and his systematic objection to any initiative or decision on her part in the context of the exercise of her management right, or of the implementation of the Board's directives, that ran afoul of his own views. The evidence showed that the employee would defend his viewpoint and present his arguments with a lot of demands and ultimatums. In the absence of vexatious conduct, there can be no psychological harassment. The grievance was rejected.

Commission scolaire des Grandes-Seigneuries
v. *Syndicat des professeures et professeurs de Lignery*
SAE 9241, 2017-12-05, Jean Gauvin

2 An intimate relationship with a teacher: the student can testify by videoconference

An arbitrator was petitioned by a School Board to allow a testimony by videoconference. This testimony was to be given by an adult student who allegedly to have had a sexual and romantic relationship with the complainant, who was her teacher at the time of the alleged facts. In an affidavit, the student stated that she attempted to end her life as a result of these events, and indicated that the complainant still held sway over her. She expressed concern that she would be unable to provide full, detailed and sincere testimony in the presence of the complainant. According to the arbitrator, an employee's right to be present throughout the hearing of his grievance is not materially impaired when a witness testifies as suggested by the Board. He deemed that videoconferencing would allow the student to testify in a much more serene manner, which was in the interest of the sound administration of justice. The arbitrator therefore granted the request and allowed the student to testify by videoconference.

Commission scolaire du Val-des-Cerfs
v. *Syndicat de l'enseignement de la Haute-Yamaska*
2017EXPT-2048, 2017 QCTA 763, Gilles Ferland

3 The School Board can express its expectations without resorting to disciplinary action

The Superior Court heard an appeal for judicial review of a decision in which the arbitrator concluded that meetings held with female teachers to find solutions to problems raised by parents constituted an administrative measure. According to the judge, these meetings and the letters resulting from them were, based on the School Board's own admission, voluntary meetings that did not have consequences for the employees, at least at a disciplinary level. They were intended to solve operational and functional problems. Notwithstanding the collective agreement, the Board is still in a position to deal adequately with what is not specifically provided for in this agreement. Thus, voluntary interventions with teachers to find solutions to problems raised by parents, the organization or students should not be a straitjacket curtailing management rights. In short, it is paradoxical, to say the least, to want an employee to be disciplined for a process that, in the mind of the administration, has no consequences. The arbitrator's decision was reasonable and the appeal was dismissed.

Syndicat de l'enseignement de la Jonquière v. *Morency*
2017EXPT-2340, 2017 QCCS 5201, Martin Dallaire

4 Where there is no relevant provision in the collective agreement, management right takes precedence

The grievance related to the interpretation of the clause concerning absences of more than three consecutive days for personal reasons. According to the employer, in order to take such a leave of absence, teachers must previously obtain an authorization, which the union disputes. The collective agreement provides that teachers are entitled to nine days per year of sick leave or leave for personal reasons. It also provides that the employer must accept a written statement from the teacher stating the cause of the absence for any absence of three days or less. After three days of absence, the employer may require a medical certificate. However, there is no provision dealing with an absence for personal reasons exceeding three days. Notwithstanding this omission, the arbitrator found that the clause is unambiguous and should not be interpreted. Where there is no relevant provision in the collective agreement, management rights take precedence. The arbitrator's role is limited to determining whether the employer acted in a reasonable, rather than an arbitrary and discriminatory manner. In this case, the rule is that a teacher must apply for prior authorization for more than three days, which is quite reasonable. The grievance was denied.

Syndicat des enseignantes et enseignants du Collège Charles-Lemoyne
v. *Collège Charles-Lemoyne de Longueuil inc.*
2017EXPT-1632, 2017 QCTA 555, André G. Lavoie

5 Union leave: the union must reimburse salary insurance benefits

A School Board claimed reimbursement of amounts paid to an employee as salary insurance benefits. The employee was given a leave for union activities for one year. During this period, he was declared disabled and received salary insurance benefits. The collective agreement provides that the employee on union leave is entitled to his salary, for the duration of his leave, including social benefits and all other benefits to which he would normally be entitled. However, it also provides that the union must reimburse the Board for any amount paid to the employee on leave. The union argued that the leave ended when the employee became incapacitated because he no longer took working time for union activities. The arbitrator rejected this interpretation, holding that a union leave lasts as long as it has not reached the end of its term. The leave is not interrupted by a disability. The union was therefore required to reimburse the amounts paid as salary insurance benefits. The employer grievance was upheld.

Commission scolaire Harricana
v. *Syndicat des employées et employés de la Commission scolaire Harricana*
SAE 9180, 2017-05-18, Jean-Guy Ménard

6 Forfeiting the right to claim from the CNESST

An employee challenged a decision of the CNESST declaring her claim inadmissible. She was absent due to major depression, of mild severity, and this injury was classified as minor and in partial remission four months later. However, the employee submitted her claim more than a year after her medical leave, when she had six months to submit a claim following the injury. She alleged that a developmental disorder diagnosis affecting her son upset her and prevented her from taking care of her affairs. Her doctor and the employer never informed her that she could make a claim to the CNESST. According to the tribunal, the employer's duty of assistance arises only when an employee has decided to file a claim and has expressed her intention to do so. The employee, however, never expressed this desire. The doctor was not obliged to inform her of her rights, or even to produce a medical certificate for the CNESST. The medical evidence did not show psychological incapacity to act within the legal time limit. The claim was inadmissible.

Alberici v. *Commission scolaire de Montréal*
2017 QCTAT 5349 (SST), Bernard Lemay

7 The harshness of our winters

A School Board challenged the denial of a cost transfer by the CNESST. It claimed that the fall sustained by a special education technician and the resulting sprains were mostly attributable to a third party, and that it would be unfair to charge the Board for the ensuing costs. The employee fell in the parking lot of a CEGEP where she was doing an internship. The employer submitted weather records for the month in which the accident occurred. According to these records, there was no exceptional snowfall on the day of the accident (only 4 cm) or rainfall that would suggest the presence of ice. Nor had the employer proven a lack of maintenance by the third party, the CEGEP, which manages the parking lot where the fall occurred. Therefore, there was no evidence that the accident was mostly attributable to the CEGEP. The mere fact that the fall occurred in its parking lot is not enough. The tribunal also upheld the CNESST's arguments to the effect that it is not unfair for the employer to bear the costs of the accident. The employee had to go to this location for her internship, as part of her work, assuming the risk that the roadway might be slippery during the winter. The challenge was dismissed.

Commission scolaire de la Rivière-du-Nord v. *Cégep de Saint-Jérôme*
2017 QCTAT 4568 (SST), Michel Canuel

8 Arbitrator and CNESST: each has a specific role to play

A high school teacher challenged the CNESST's dismissal of his claim for a psychological injury. The School Board filed an incidental motion alleging that the employee could not challenge an arbitral ruling concerning the same events and seek a different conclusion. The teacher was suspended with pay after a physical altercation with a student. Under the terms of the investigation, the teacher was then suspended without pay for 40 days. He filed two grievances against those suspensions and a third grievance following his transfer to another school. The teacher submitted a claim to the CNESST for an adjustment disorder three months after the last grievance. The arbitrator dismissed all three grievances on the basis that the employee had engaged in conduct that justified both suspensions and the relocation. The incidental motion was dismissed. The arbitrator analyzed the same facts, but to determine whether they justified the employer's decisions. The analysis that the tribunal will have to make is different. The administrative judge will have to decide whether the employee has suffered an employment injury, whether the events were related to his work and whether they were objectively traumatic.

Lapointe v. *Commission scolaire de Montréal*
2017 QCTAT 5165 (SST), Isabelle Therrien

9 Cost transfer granted: false charges make a difference

A School Board challenged the refusal of a cost transfer. Initially turned down by the CNESST, the teacher's claim was accepted by the CLP (the tribunal at the time of the decision) due to unjustified complaints and interference by parents, i.e. events that reach beyond the normal scope of work. These behaviours led to a medical leave due to a major depressive disorder. The CLP also described the parents' allegations as totally unacceptable and hardly credible. The employer submitted its cost transfer application after this decision. The CNESST concluded that charging the employer for the costs was not unfair and that its application for a transfer was filed past the deadline. According to the tribunal, the employer could not have sent its application for transfer within the one-year legal deadline from the date of the accident, since the claim had been dismissed at the time. Its application, filed diligently after the CLP's decision, was therefore admissible. The injury was mostly — if not totally — caused by third parties. While a teacher may expect stressful interactions with parents, false allegations of improperly touching a student are beyond the risks inherent to educational activities. The transfer was granted for all allocated costs.

Commission scolaire Sorel-Tracy
2017 QCTAT 4529 (SST), Michel Watkins

Comments

The statutory time limit for requesting a cost transfer for an accident attributable to a third party is one year from the date of the accident. When the transfer is granted, the CNESST cannot charge the employer any of the amounts paid as compensation for the resulting employment injury. The employer can sometimes file an application after this legal deadline, as soon as it becomes aware of a new reason for a transfer. In this case, the tribunal held that the employer could not request a transfer until the CLP accepted the claim, and that it acted promptly after the decision. As for injustice, the administrative judge recalled that although a situation might be considered abnormal and amount to an unexpected and sudden event, to the point of justifying compensation for an employee, that does not mean it is necessarily unfair for the employer to bear the costs. In this situation, the seriousness of the parents' unfounded allegations made the difference. In addition, if the employer had chosen to send a cost transfer application within one year, to protect itself due to the teacher's challenge to the rejection of her claim, and since it already knew the role of the third party, it would have been prudent to mention that the transfer was requested without admission or prejudice.

10 An employer cannot dismiss an employee solely on the basis of criminal charges

A teacher challenged his dismissal after being charged with selling Viagra, trafficking cocaine and obstructing a peace officer. After the termination of employment, the charges were withdrawn and the employee pleaded guilty to a reduced charge of simple possession of cocaine, for which he was granted an unconditional discharge. The arbitrator recalled that case law recognizes that an employee facing criminal charges related to the nature of his work may be administratively suspended for this reason. However, an employer may not dismiss an employee solely on the basis of the charges, unless the employer can prove the facts supporting the charges or the evidence of autonomous facts. In this case, the employer's investigation did not show that the employee had ever used drugs at the college or sought to sell drugs there. The employee's only offense was the presence of cocaine in his car at the time of his arrest, which he admitted. This alone did not justify dismissal. The employee was reinstated without compensation.

Syndicat des enseignantes et enseignants du Cégep de Matane v. Cégep de Matane
2017 QCTA 818, 2017EXPT-2229, Jean-Pierre Villaggi

Comments

The employer does not have to thoroughly investigate the circumstances surrounding the criminal charges against an employee before imposing a suspension, as it does not have to verify the merits of such charges. However, an employer who decides to dismiss an employee as soon as it becomes aware of criminal charges brought against him must ensure that it has the evidence to prove that the alleged actions were indeed committed in order to demonstrate that there is a link between the criminal offence and the duties performed. In this case, however, at the time the CEGEP made the decision to dismiss the employee, only the latter's admission of the presence of cocaine in his vehicle justified the imposition of a disciplinary measure. This was not about drug trafficking or consumption in the workplace. The employee's behaviour had always been exemplary at the college, and he had been a role model in the workplace and in the presence of students.

Incompetence: should reassignment be considered?

By Marc-André Laroche and Shwan Shaker
Le Corre & Associates

On October 4, 2017, a Superior Court ruling shook the rule of law with respect to administrative dismissals in Quebec, which, until then, had been relatively well established[1]. To rule on the validity of dismissal for incompetence, it should be noted that the Quebec courts generally apply the criteria set out in the matter of *Costco Wholesale Canada Ltd.* v. *Laplante*[2]:

- ✓ The employee must be aware of the company's policies and of the employer's expectations in this regard.
- ✓ His deficiencies were brought to his attention.
- ✓ He was given the necessary support to make amends and achieve his objectives.
- ✓ He was given a reasonable period of time to adjust.
- ✓ He was warned of potential dismissal should there be no improvement on his part.

However, in the arbitral ruling subsequently upheld by the Superior Court, the arbitrator apparently added an additional criterion to this analysis.

The facts are relatively simple. The employee was working for the School Board since 1998 and he had been an administrative technician for 10 years. Nonetheless, he was unable to perform the simplest of tasks without making mistakes and was fired for incompetence in 2014. Based on his assessment of the evidence, the arbitrator found that the Board acted in good faith and without discrimination. The Board was fully justified in noting the employee's incompetence and imposing a performance improvement plan on him that was appropriate under the circumstances. Finally, the arbitrator acknowledged that the employee had not improved his productivity. However, he rescinded the dismissal, finding that the Board had acted improperly in failing to find a reasonable alternative to the dismissal, despite the fact that it had offered him a receptionist position. The arbitrator found that the Board had acted unreasonably by requiring the employee to respond to his offer in only three days, making the offer bogus.

According to the arbitrator, given the lack of improvement in the employee's performance and considering his years of seniority, the Board was obliged to try to "*reassign him to less demanding tasks*".

Before the Superior Court, the School Board mainly argued that this obligation did not exist in Quebec labour law. In the reasons for his decision, the judge traced back the origin of the criteria for administrative dismissal for incompetence to an arbitral ruling rendered in British Columbia 36 years ago, in the case of *Edith Cavell*[3]. The test set out in that decision included the obligation to reassign an incompetent employee, to the extent possible, and this decision was upheld by the Supreme Court in 2004. According to the judge, this ruling is part of Quebec law and, in applying it in its entirety, there was no error on the part of the arbitrator.

Does this mean that all employers in Quebec must now try to reassign an incompetent employee before terminating his or her employment following the criteria set out in the *Costco* case? The Superior Court answered this question in the negative. Without drawing up an exhaustive list of the parameters for applying this additional new criterion, it stressed that certain characteristics of the position and the enterprise must be taken into account when the question comes up. Following is what the judge wrote on this matter:

> "For example, an employee who has just been hired to perform specific tasks (e. g., teaching ancient Greek) could hardly expect to be reassigned elsewhere in the organization. Also, it is generally more difficult to reassign within a small business where some positions are unique and different from others (e. g., an accounting clerk in a garage selling tires)."

These aspects were considered by the arbitrator when he took into account the fact that the employee had worked 14 years without being reprimanded for his performance, as well as the availability of the receptionist position, which was better suited to his skills.

An application for leave to appeal the Superior Court judgment has been filed with the Court of Appeal and will be heard in the near future. Given the specific nature of the facts of this case, the test applied should not be automatically applied to any termination of employment for incompetence.

---

1. *Kativik School Board* v. *Ménard, 2017* QCCS 4686.
2. 2005 QCCA 788.
3. *Edith Cavell Private Hospital* v. *Hospital Employees' Union, Local 180,* [1982] BCCAAA No 495, (1982) 6 L.A.C. (3d) 229.

Rethinking how meetings are run

Michèle Barsalou, M. Sc., Organizational Development Consultant
Grisvert

When was your last efficient meeting?

Our clients increasingly report that their meetings are not very efficient. Overall, 15% of an organization's time is spent in meetings.[1] We have even seen the emergence of the expression *"meeting culture."* We seem to have resigned ourselves to the fact that meetings are mandatory breaks in the day.

Yet meetings are invaluable for building both collective intelligence and teams. Basically, meetings have the ability to drive organizations.

If your organization's meeting suddenly became extremely efficient, what might that create? Here are some tips and questions to think about to get the most out of your meetings and increase efficiency.

A bit more attention beforehand…

- ✓ Take the time to be crystal clear about your intentions. What question do you hope this meeting will answer? What is the desired outcome?
- ✓ Choose the right attendees. Who will help you achieve your purpose? What is your main need that can be met only by this meeting? What is the main need of attendees that can be met only by this meeting?
- ✓ Prepare participants. How can they prepare to contribute their best during the meeting?
- ✓ Design an inspiring invitation that makes the purpose of the meeting clear. When you invite participants, be clear and concise in presenting the purpose of the meeting. You can state the purpose in the form of a question: *"We will try to answer the question: […]"* or *"We will try to find strategies to […]."*
- ✓ Prepare discussions that must take place to achieve the desired result. What major topics must be addressed? Which are priorities? What questions will allow participants to make the contribution you want from them?

A bit more heart during…

- ✓ Pay attention to how you welcome people; use the approach you would use if you were receiving them at home.
- ✓ When you start the meeting, use colourful language to explain what prompted you to call it. It is always more motivating for participants.
- ✓ Ease participants into the meeting. At the start of the meeting, you may want to ask participants where they stand on the topic: what frame of mind have they arrived in, what do they know about the project, and so on. You will be better able to guide them during the meeting.
- ✓ During the meeting, stay in tune with participants' level of energy, and check on their concerns, needs and assessment.
- ✓ Encourage everyone to contribute; don't worry about hierarchy.

A bit more effort to keep the flame going afterward…

- ✓ Think about the content you want to gather. What are the essentials?
- ✓ Prepare the materials to gather the information. What tools will allow you to make visible, in real time, conclusions of discussions that take place during the meeting?
- ✓ What are the next steps after the meeting?
- ✓ When following up, choose face-to-face over written contact.
- ✓ Leverage the interests of the people you involve in the follow-up to cultivate their involvement: talk about what in the project is important to them.

In short, with a bit of attention before, during and after meetings, they can be productive, motivating moments for project participants.

---

1. Mankins, Michael, Brahm, Chris and Caimi, Greg. (2014). "Your Scarcest Resource," *Harvard Business Review*, link: https://hbr.org/2014/05/your-scarcest-resource