G+ Education

INFO

SPRING **2016** • Newsletter n° 23

Follow-up:

The arbitrator rendered a reasonable decision in concluding that the suspension without pay imposed on a special education teacher should have been a suspension with pay, despite the fact that the latter was facing criminal charges of assault on a student and that his parole conditions prevented him from performing his work (See Decision # 9, Winter 2015): 2015 QCCS 5926

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RECENT **DECISIONS**

1 Surplus students: recognition of a school's discretionary authority

The plaintiff filed a mandamus against the school and the school board demanding that her 12-year old son be readmitted to the school. The defendants challenged this application because the student did not meet the admission criteria at the time of registration, as his place of residence was then outside the school board's territory. The plaintiff alleged that her son attended the school since kindergarten and, at all relevant times, resided within the school board's territory. However, the evidence showed that during the registration period, the child resided in a municipality outside the school board's territory. Also, as there was a surplus of eight students registered in the school's sixth grade for the 2015-2016 school year, the defendants had the discretionary right to choose which students would be transferred to another school. In view of the fact that the defendants had not acted in an abusive manner by turning down the child's registration, the Court ruled that it could not intervene.

Filiatrault v. *École Léopold-Carrière*
2015 QCCS 5660, Karen Kear-Jodoin

2 Summoned too quickly to a disciplinary meeting

A secondary-level teacher challenged the notice to attend a disciplinary meeting sent to her on June 26, 2014, for a meeting scheduled to take place on August 13, 2014. Though the collective agreement does not prescribe a time frame within which the school board must give a disciplinary measure or hold a disciplinary meeting, the arbitrator emphasized that the investigation process should be completed within a reasonable time period. The arbitrator found that the employer had committed an abuse of rights by issuing the notice so early, and because this notice gave insufficient details related to the charges against her. The employer could have met the employee before the end of the school year, completed the investigation, and summoned her after the summer, or given her more information regarding the nature of the charges. The arbitrator ruled that the employer would compensate the employee for moral damages, but that no amount would be awarded as punitive damages since this was a matter of an administrative oversight.

Cree School Board v. *Association des employés du Nord québécois*
DTE 2016T-48, 2015 QCTA 943, Pierre-Georges Roy

3 Time allowance for learning

An attendant to handicapped students who had applied for the position of Class II Storekeeper challenged her administrative dismissal for incompetence and inability to perform the tasks associated with the position. The employee obtained the storekeeper's position because she had the greatest seniority, although she had no experience. According to the arbitrator, the school board chose to post the position without adding any specific requirements. The posting should therefore have anticipated that the employee would be faced with a steep learning curve and set up an introductory training program, notably by keeping the incumbent on duty to train the employee. The employer prematurely assessed the employee's job performance while the latter should have been allowed a reasonable learning period. The employer did not meet the requisite criteria, established in case law, to justify an administrative dismissal. Since the employee did not get the necessary assistance and support to correct the situation, the dismissal was overturned.

Syndicat des employées et employés de soutien de la Commission scolaire des Laurentides v. *Commission scolaire des Laurentides*
DTE 2016T-34, 2015 QCTA 919, Richard Guay

4 The risk of recurrence of depression does not make a teacher totally disabled

A teacher challenged the school board's decision that refused to consider him disabled and pay him salary insurance benefits. In order to be deemed disabled and to be eligible for salary insurance benefits, the collective agreement states that an employee must have an illness that requires medical care and makes him totally unable to perform his usual duties. In the case at hand, the teacher claimed that he was disabled due to depression. However, the evidence showed that the employee's state of health had significantly improved, that he was no longer totally unable to perform his tasks and that the attendant physician had only extended his medical leave in order to improve his chances of recovery. In this context, the school board was justified in concluding that the teacher no longer met the criteria to be eligible for salary insurance. The arbitrator also added that the mere risk of recurrence of depression, without the presence of other symptoms, is not sufficient to meet the definition of total disability.

Syndicat de l'enseignement de Lanaudière v. *Commission scolaire des Samares*
DTE 2016T-5, 2015 QCTA 844, Jean-François Laforge

5 Administrative suspension upheld, despite more lenient parole conditions

A teacher was suspended without pay when she was charged with having committed inappropriate gestures of a sexual nature involving two students under 16 years of age some ten years earlier. Her parole conditions notably prohibited her from being in a schoolyard and from holding a job that placed her in a relationship of trust and/or authority. She challenged the employer's decision to maintain her suspension without pay, when these parole conditions had been amended to allow her to resume work. Since this was an administrative measure, it was up to the union to prove that the school board's action had been abusive. According to the arbitrator, the latter had legitimate interests to protect its reputation and that of its staff, and the trust that its students and their parents must have towards its teachers. Even though the charges held against the employee dated back over ten years ago, and despite the fact that the employee did not appear to pose a threat to society, a link between these charges and the position at stake still remained. The grievance was rejected.

Commission scolaire de Montréal v. *Alliance des professeures et professeurs de Montréal*
DTE 2016T-311, 2016 QCTA 116, Claude Martin

6 A fall during a physiotherapy session: the cost transfer is granted

The employer challenged a decision of the CNESST stating that he had to cover all of the costs related to the employment injury sustained on January 7, 2014, by a teacher, i.e. a sprained neck and shoulder that occurred when she attempted to hold a child who was slipping on the steps of a bus. In his view, the income replacement indemnities (IRI) paid as a result of the accident that occurred on March 6, 2014, while the employee was receiving physiotherapy treatments, should be removed from his file since it was a treatment-related injury. Indeed, the physiotherapist's examination table collapsed as the employee sat on it, which caused a lower back sprain and a leave from work. The judge deemed that this new injury, which occurred as the employee was making a progressive return to work, was a separate incident from to the initial injury. Furthermore, this new injury was related to the treatment she was receiving. Finally, the temporary assignment would have continued as planned on March 6, had it not been for this new incident. Consequently, the IRI paid between March 6, 2014, and the consolidation of the injury had to be removed from the employer's financial file.

Commission scolaire de Montréal
2016 QCTAT (SST) 322, Anne Vaillancourt

7 Termination of the right to care and treatment: upon consolidation of the injury

The employer challenged a decision by the CNESST to terminate the right of an early childhood educator to receive care and treatment related to an employment injury as of July 17, 2015, i.e. the date of the decision by the CNESST following a notice from the *Bureau d'évaluation médicale* (BEM). According to the employer, this right should instead have been terminated five months earlier on February 25, 2015, i.e., since that was the date of consolidation of the injury as stated by the BEM. The judge found that the costs incurred subsequently to the February 25th consolidation date were unrelated to the employment injury. To conclude otherwise would amount to deny that the CNESST or the TAT are bound by the BEM's position or to declare that the employee is entitled to care and treatment that are not ultimately related to the employment injury. The employee's right to the care and treatment of her employment injury, which was consolidated on February 25, 2015, ended on that date. The employer's challenge was upheld.

Commission scolaire Marie-Victorin v. *Cuenca*
2016 QCTAT 1790 (SST), Francine Charbonneau

8 Inadequate intervention and investigation by the DYP: not an employment injury

An early childhood educator challenged the CNESST's rejection of her claim. In the course of an intervention with a child having a temper tantrum, the employee sat and tied the child to a chair, which she then tied to a fence. The parents notified the DYP. The investigation showed that their complaint was justified. However, the employee did not face criminal charges, but was ordered to follow certain recommendations. Following these events, she consulted a doctor who diagnosed acute stress and generalized anxiety disorder and recommended a medical leave. In the administrative judge's view, the events reported by the employee did not exceed her normal and predictable work duties. The trigger for the situation in which the employee now found herself was her inadequate intervention. She was the instigator of her demise by resorting to an intervention that was inadequate and reprehensible. Consequently, she did not prove that she was the victim of unpredictable and sudden events. Her challenge was rejected.

K... L... v. *CPE A*
2015 QCCLP 6910, François Aubé

9 Having a difficult class does not exceed the normal work duties of a teacher

A secondary-level teacher challenged the CNESST's rejection of her claim. She alleged that she fell into major depression due to her abnormally difficult classes and the lack of support of the school administration in this regard. The administrative judge found that the employee had personal classroom management and discipline issues in her classes, which were challenging to some degree, though not exceptional. She took no steps to deal with her problem and relied solely on the administration to alleviate what she considered to be excessively difficult classes. Her job consists of teaching students, which involves motivating them to learn by adapting her approach according to their individual needs and academic level. The evidence did not reveal circumstances exceeding the normal and predictable work duties of a secondary-level teacher. Having difficult classes does not in itself make them too heavy. The challenge was dismissed.

L.D. v. *Commission scolaire A*
2016 QCTAT [SST] 1561, M[e] Andrée Gosselin

Comments

In this case, the tribunal deemed that this was a question of perception on the part of the employee rather than an objective reality. Indeed, two weeks after the start of the school year, the employee quickly felt overwhelmed, exhausted and stressed out over not being able to teach, and she was unable to build a productive relationship with her students. This had to do with normal classroom management, which is part of her job description and main duties, and the employee should have adapted her teaching approach to the clientele she was called upon to teach. In addition, the evidence showed that the employee had several tools at her disposal to help her in her task, but she did not avail herself of these tools and was not open to the advice given to her by fellow teachers and by the administration. In this context, the tribunal concluded that the evidence did not show any occurrence of a sudden and unforeseen event.

10 Reasonable grounds to justify surveillance

A teacher challenged the termination of her employment. The union objected to the presentation of evidence arising from video surveillance, alleging that the school board had no reasonable grounds to resort to such a method. The evidence showed that the employee had just been denied a third year of leave without pay when she submitted a medical certificate confirming a diagnosis for major depression. In addition, the principal made two unsuccessful attempts to contact the employee at the start of her absence, and, on two other occasions, she refused to report to the school board as summoned. Finally, on April 1st, 2014, the school's principal sent some information to the school board which cast additional doubts on the employee. Indeed, the employee posted on her Facebook page that she had moved 119 km away from the school, as well as photos of her new home decorations, alleging that she was rather proud of her accomplishments. According to the arbitrator, before April 1st, the school board had insufficient doubts to justify surveillance. However, the information received after April 1st gave the school board reasonable grounds to resort to surveillance. The union's objection was denied.

Syndicat de l'enseignement de l'Outaouais v. *Commission scolaire au Cœur-des-Vallées*
DTE 2016T-35, 2015 QCTA 902, Jean-Guy Roy

Comments

Surveillance is a violation of the employee's right to privacy, which is protected under the Charter of Human Rights and Freedoms. For this reason, the courts have established criteria to help define the admissibility of evidence based on a video recording. Thus, surveillance will be admissible providing it was justified by rational motives and conducted by reasonable means. In the case at hand, the issue revolved around the rational motives. The decision to initiate shadowing is generally easier to justify when based on a number of motives. For this reason, the decision to resort to surveillance should not be taken lightly. Even surveillance that is not based on any rational motive, or that was conducted using unreasonable means, may still be declared admissible by some decision-makers on the grounds that its exclusion would have the overriding effect of bringing the administration of justice into disrepute, other decision-makers feel that evidence obtained illegally should automatically be rejected. The reasonable motives that justify issuing a surveillance contract must be present before it takes place, not after.

The Supreme Court of Canada rules: school boards can testify

By Danilo Di Vincenzo and Catherine Gagné,
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On March 18, 2016, the Supreme Court of Canada handed down a significant ruling confirming the duty to testify for commissioners who are members of the Executive Committee of a school board[1]. In this case, the union had assigned three commissioners to testify regarding the decision-making process that led to a teacher's dismissal, in particular the statements made during the in-camera deliberation that preceded the decision. Under section 5-7.02 of the collective agreement binding the two parties, the school board (the "Board") could dismiss a teacher only after "careful deliberation during a session of the Council of Commissioners or the Executive Committee…" The union wanted to have the commissioners testify in order to prove that this requirement had not been met.

The Board objected to this testimony on the grounds that deliberative secrecy precludes interrogation of the members of the Executive Committee regarding what was said in-camera, and that the members of any collective body cannot be interrogated regarding the reasons that led to a decision set out in a resolution, given the principle that "the reasons for decisions of such bodies are unknowable".

The arbitrator hearing the grievance found that interrogating the commissioners was relevant in order to determine whether the deliberation had been "careful", as required by the collective agreement, and he allowed the union to interrogate them on the entire decision-making process, including the statements made in-camera.

Upon judicial review, the Superior Court upturned the arbitrator's decision and concluded that the commissioners could only testify regarding the formal process that led to their decision. Upon appeal, the majority of the judges restored the arbitrator's decision.

The Supreme Court confirmed that the commissioners could be interrogated regarding the entire decision-making process that led to the decision to dismiss a teacher. From the Court's perspective, whether "the case involves an employer in the public or the private sector, an employee has the right to challenge the disciplinary measure imposed on him based on any pertinent evidence"[2], including "interrogating the employer's representatives regarding the reasons for the measure and the decision-making process that led to this decision"[3].

As for the arguments put forward by the Board, the Court determined that they were not applicable in this case. Indeed, when the commissioners make the decision to dismiss a teacher, this decision is of a private nature and is governed by labour law. The Court found that the protection of deliberative secrecy applies only to bodies carrying on adjudicative functions, and the concept whereby "the reasons for decisions of such bodies are unknowable" is only applicable to motives specifically originating from a legislative body, when the latter adopts decisions of a legislative, regulatory, political or discretionary nature. In both cases, these concepts are not applicable regarding decisions of a private nature and cannot be invoked to object to interrogating commissioners on the reasons underscoring their decision.

This ruling by the highest Court of the country clearly states that the commissioners can be assigned as witnesses to report on the decision-making process surrounding a teacher's dismissal, including statements made during an in-camera session preceding the decision. This is certainly a new reality that council members will need to take into account in their deliberations. Indeed, in the future, unions will surely be tempted to call upon commissioners as witnesses during arbitration, notably to challenge the reasons for dismissal or attempt to prove that the deliberations were inadequate. School administrators will therefore need to take this possibility into account by making sure they provide deciding council members with a well documented case file on a dismissal. It would also be prudent to provide commissioners with adequate training regarding the possibility that they may henceforth be called as witnesses and how important it is to proceed with "careful deliberation" based on the facts of a case. Finally, it will also be important to make council members aware that what happens behind the closed doors of an in-camera session is not secret. The employer's management right must therefore be exercised at all times in a reasonable manner and without arbitrariness or discrimination.

1. *Commission scolaire de Laval* v. *Syndicat de l'enseignement de la région de Laval*, 2016 CSC 8.
2. *Id.*, par. 1.
3. *Id.*

Revise Your Candidate Selection Criteria

by Judith Moreau, GC consultant
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Today's work environment is characterized by a constant lack of stability, in any sector, in addition to continual change that is often hard to predict[1]. This has major impacts for recruiting the right candidates.

It therefore is no longer possible to rely on the standard criteria that we have been using for dozens of years. The traditional employment profile is changing. Organizations are required to adapt to a continually changing environment and must integrate candidates who can be flexible in the face of these sometimes puzzling changes. This also means that traditional employment offers must be reviewed and that people's tasks and responsibilities must be adjusted to allow for greater flexibility.

Which criteria should be used?

SPB has analyzed the principal competencies being sought by its clients. We have examined just over 2,000 assessments carried out between May 2012 and February 2014. These analysis have revealed that some competencies are sought much more than others.

Agility, which is the ability to adapt to changes and unforeseen events, is sought in 77% of the potential assessments. In other words, more than three-quarters of our clients require this key competency for a position to be filled, specifically to verify whether the person can adapt to change.

Other key criteria are assessed very often as well. For example, results orientation (i.e. the ability to achieve or exceed expectations) is evaluated in 80% of the assessments and stress management (i.e. the ability to maintain a steady performance when under pressure or when having to deal with change) is evaluated in 77% of the assessments performed.

Cognitive abilities (e.g., the ability to learn new work methods, to extrapolate certain information or to deduce information during periods of ambiguity) also represent key criteria. In fact, organizational psychologists generally agree that such abilities are crucial for learning a new role or a new responsibility.[2] Furthermore, problem-solving skills remain the best predictor of work performance[3].

Other criteria that set high-performing employees apart

The ideal employment criteria are those that best predict employee performance in a specific work context and a particular role. Such criteria must characterize your work environment, in addition to describing what makes someone more effective in this position compared to an average-performing employee. This includes collaboration, a creative approach for finding solutions, being learning oriented in order to always be able to acquire new knowledge and integrate new ways of doing things, etc. Moreover, based on our experience in the education sector, the best candidates in this sector are those who consult with others (rather than flying solo) and who have a strong relational approach.

What to do now?

Working together with managers on the ground, think about what determines performance in a given position. Focus on the key criteria for the position. For example, in the case of a school Vice Principal, it could be thought that the ability to take one's place before a group of employees is as crucial as the desire to see children succeed. Vice-Principals are often described as "fire fighters," i.e. people who must deal with many unforeseen events ("fires to be put out"). Agility is therefore required for this type of position.

Key competencies such as consultation, adaptation, influence and client orientation are simple, yet essential, criteria to succeed in this type of position. Focus on a maximum of 10 key criteria and assess them by way of behavioural questions, cognitive and personality tests, situational judgement tests or potential assessments. The resulting information will allow you to make a better informed hiring or promotion decision since you will have more information about how well the person masters the competency.

With all this information, you will have a good basis for predicting a person's performance in a specific role within your organization.

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1. SULLIVAN, John. (2012). "VUCA: The New Normal For Talent Management And Workforce Planning", Ere Media.

2. PLAMONDON, Myriam. (2016). "Cognitive Skills Assessment in Staffing: Still Relevant?", SPB D-Teck.

3. McDANIEL, M. A. (1985). *The Evaluation of a Causal Model of Job Performance: The Interrelationships of General Mental Ability, Job Experience, and Job Performance.* Washington, George Washington University.