G+ Education

INFO

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RECENT **DECISIONS**

1 No IRI during summer holidays

An arbitrator had ruled that, in addition to her regular salary, the school board had to pay a teacher the full amount of the reimbursement received from the CNESST during the summer holidays. The collective agreement required that the employer pay full wages to teachers who were eligible for income replacement indemnities (IRI) under the *Act respecting industrial accidents and occupational diseases* and required that the CNESST reimburse the employer for this amount. According to a Superior Court judicial review, the arbitrator erred in his unnuanced finding that during the holidays IRI were intended to compensate loss of earning capacity rather than actual loss of income, and in his focus on the net amount the employer had paid at year-end, rather than on the salary the teacher ultimately received during her disability leave. The arbitrator's decision would have caused the teacher to earn a higher income because she was disabled during the summer. The arbitral award was overturned.

Commission scolaire de la Capitale v. *Ferland*
2019EXPT-872, 2019 QCCS 1093, Judge Gilles Blanchet
Motion for leave to appeal

2 Turning the other cheek to keep your job

A building technician challenged his dismissal for having uttered death threats to a co-worker. Provoked by this co-worker's racist and xenophobic comments, he had told him, *"I'll kill you if you insult my country."* The employer also accused the employee of lying, failing to cooperate with the investigation, and not acknowledging any wrongdoing. The arbitrator ruled that the employee should receive exemplary sanctions because of the employer's obligation to protect the health, safety, and dignity of its employees and to ensure a healthy and violence-free environment. He also found that the employee was at risk of reoffending if reinstated, given his refusal to admit to any wrongdoing during both the investigation and arbitration. The arbitrator found that there had been a serious breach, essentially a criminal offence, that had irremediably severed the relationship of trust between the parties. The dismissal was upheld.

CEGEP Montmorency and *Syndicat des employés du Collège Montmorency*
2019EXPT-745, 2019 QCTA 99, Pierre Daviault

3 Serious grounds necessary before engaging in surveillance

The union contested the school board's surveillance of an teacher who had an employment injury to the right shoulder. The school board claimed that it had serious reason for monitoring the employee, and that the surveillance had been carried out by reasonable means. The union contended that the employer had mere suspicions, which are not sufficient reason to go on a fishing expedition. The arbitrator found that the school board, which had relied on a Facebook post wherein the employee announced that she had passed her SAAQ motorcycle test and referred to a future "road trip," had no serious reason to justify its surveillance of the employee. Having the employment injury and taking the motorcycle test were not incompatible, and the school board could not reasonably doubt the employee's loyalty. In the absence of serious reason, to admit into evidence the surveillance photographs of the employee would bring the administration of justice into disrepute. The surveillance constituted an unlawful invasion of the employee's privacy, and the resulting evidence was therefore inadmissible.

Alliance des professeures et professeurs de Montréal and *Commission scolaire de Montréal*
2019EXPT-206, 2018 QCTA 654, Martin Racine

4 Evening shift leader must act accordingly

The union contested the dismissal of an evening janitorial shift leader who was responsible for supervising employees and ensuring the safety of persons and property, as there was no management on site after hours. The school board had dismissed him for taking food from the school canteen without paying and stealing working time by extending his breaks and by surfing the Internet in his office instead of carrying out his duties. His work was considered unsatisfactory, and he had severed the relationship of trust with his employer, notably by not cooperating with the investigation. The union claimed that the employer's facts were inaccurate, and that it failed to apply progressive discipline. It claimed that the dismissal was disproportionate to the alleged breaches. The arbitrator found that the sanction was in proportion to the number and seriousness of the proven faults. Given repeated misconducts and the nature of the evening shift leader's duties, dismissal was appropriate. The grievance was dismissed.

Commission scolaire des Rives-du-Saguenay and *Syndicat régional des employés de soutien*
2019EXPT-545, 2018 QCTA 790, Claude Fabien

5 Fainting spell at work due to personal condition

A school contested the eligibility of a teacher's occupational accident. The accident occurred on a Monday morning, when the employee was not feeling well as a result of an allergic reaction that had bothered her all weekend. She had gone to work despite this, and as she stood on the stairs watching the students enter the building, she felt faint. She does not remember falling. When she woke up, she was with a student at the bottom of the stairs, having fallen down twelve steps. The fall caused her a lumbar sprain, a mild traumatic brain injury (mTBI), multiple contusions and abrasions, and a cracked tooth. The medical notes referred to a history of sudden drops in blood pressure and stated that the employee had experienced an episode of vasovagal syncope. The Administrative Labour Tribunal found that, before arriving at work, the employee had been symptomatic with a personal condition which had continued to develop at work, and that this condition had been the cause of the fall. There had been no injury arising out of or in the course of work, and the accident could not be connected to the workplace. The claim was dismissed.

Académie des Sacrés-Cœurs and *Painchaud-Laurence*
2019 QCTAT 248 (SST), Francine Charbonneau

6 Suspended for sexual assault at work

A music teacher with twenty years of seniority contested a twenty-day suspension, which was the last measure before dismissal under the local agreement, imposed for having sexually assaulted two colleagues. Faced with contradictory evidence, the arbitrator held that the employee had stood behind a colleague, gathered her hair into a ponytail and pulled it toward him, asking if she liked it when a man did this to her. The same day, he also approached another colleague, bit her hair and, a few hours later, embraced her against her will while asking if she was still married. The arbitrator found that the acts constituted physical assault of sexual nature. The assault of the second woman constituted vexatious, harassing behaviour, as the conduct had been reoccurring. Despite the employee's many years of seniority and clean disciplinary record, the suspension was upheld due to the following aggravating factors: the teacher's model role, the intrinsic seriousness of the acts, the trivialization of the acts, the limited expression of remorse, and the exemplary nature of the sanction.

Syndicat des enseignant(e)s de Pearson and *Commission scolaire Lester-B. Pearson*
AZ-51593123, 2019-04-24, Maureen Flynn

7 Transfer of costs: a change in tasks does not change the nature of the employment

The school board contested a refusal to transfer the cost of medical aid. Such a transfer is possible where an employment injury does not affect the employee's ability to perform normal employment during the consolidation period, even if the employee receives CNESST payments. In this case, the CNESST had found the teacher incapable of performing all her usual duties. The school board provided the tribunal with a description of the tasks and a history of the file. The evidence revealed that no leave had been prescribed. Normal work involved 110 minutes of student supervision for every nine days of work. This supervision was the only task that was withdrawn from the employee's workload and was done only for the first weeks of her seven-week consolidation period. The tribunal found that this ad hoc change affected only a small part of the teacher's schedule and did not change the nature of her employment. The teacher had continued in her teaching duties until her consolidation. The employer was entitled to the transfer. The medical aid costs must be removed from the file.

Commission scolaire des Grandes-Seigneuries
2019 QCTAT 685 (SST), Yolande Bernier

8 Carpal tunnel syndrome and word processing: not an occupational disease

The school board contested the eligibility of an office agent's bilateral carpal tunnel syndrome as an occupational disease. According to the employee, computer data entry represented 85%-90% of her work. The school board described her other tasks as working at the reception, mail, telephone, filing, photocopying, etc. According to the school board's expert physician, the medical literature does not support a link between computer work and bilateral carpal tunnel syndrome. Furthermore, risk factors like repetition, force, restrictive positions, and vibration were not present, nor were extreme wrist positions. Women of the employee's age have increased rates of carpal tunnel syndrome regardless if they work. The tribunal found that the employee had failed to demonstrate that her condition was related to the specific risks of her work. Although data entry involves some repetition, it does not involve the other risk factors, in part because of breaks and a diversity of tasks to be performed. The claim was dismissed.

Commission scolaire Harricana and *Quévillon*
2019 QCTAT 819 (SST), Simon Corbeil

9 Recovery: time is not a treatment

A teacher challenged the consolidation of her employment injuries. After she was struck in the face by a frozen ball, her claim for a cervical sprain, nasal trauma, and a mild traumatic brain injury had been approved. Five months later, a BEM physician confirmed the consolidation of all her injuries, stating that the residual mild traumatic brain injury symptoms she was experiencing would clear up with time. The teacher contended that she still experienced headaches and sound and light sensitivity, and that her mild traumatic brain injury could not be considered consolidated if time would improve her symptoms. The tribunal first specified that "consolidation" does not necessarily mean a person is cured, but that they have reached a treatment plateau. The BEM physician explained that scientific literature does not support continuing treatment for mild traumatic brain injury beyond three months. The BEM neurological exam was detailed and normal. The alleged symptoms were not objective. The passage of time was not considered a treatment and so could not be used to extend the consolidation period. Accordingly, the teacher's injuries were found to be consolidated without limitation, and she was considered capable of resuming her employment.

Larin and *Commission scolaire de la Seigneurie-des-Mille-Îles*
2019 QCTAT 1078 (SST), Virginie Brisebois

Comments

In this case, the BEM physician had conducted a thorough, comprehensive exam and confirmed normal neurological results. He emphasized that the accident had not caused the teacher to lose consciousness, which generally decreases the severity of mild traumatic brain injury. It was this opinion that led to the consolidation of the employee's injuries, without functional limitation, allegedly despite her allegedly ongoing symptoms. Mild traumatic brain injuries are increasingly common and can complicate cases like these. Furthermore, mild traumatic brain injuries frequently occur in conjunction with other injuries and can involve a panoply of ambiguous symptoms affecting different spheres (headaches, visual problems, dizziness, etc.). Mild traumatic brain injury victims may also have pre-existing medical conditions, such as anxiety or migraines, for example, that are just as likely, or even more likely, to be causing their symptoms. Medical evidence based on the advice of a specialist, preferably a neurologist, is essential to provide perspective and objective opinions on the consequences of a mild traumatic brain injury. Sometimes, this opinion can help rule out symptoms that are actually due to other conditions and therefore should not prevent consolidation.

10 The employer is not a physician

A certified maintenance worker contested the school board's claim for reimbursement of the employment insurance benefits he had received. The evidence revealed that the employee had been experiencing various personal problems and had been absent due to an adjustment disorder for about a month. The school board would not recognize the employee's disability because no treatment had been prescribed. The arbitrator found that, based on a balance of probabilities, the medical evidence demonstrated that the employee was in fact unable to work, since the medical certificates had not been issued under false pretenses, and because the employer did not submit a medical opinion that contradicted that of the employee's physicians. The balance of probabilities also showed that a non-pharmacological approach to treating adjustment disorders with mood variations did constitute "medical care," as defined in the employee's collective agreement. The grievance was allowed.

Canadian Union of Public Employees, Local 1365
and *Commission scolaire de la Baie-James*
2019EXPT-305, 2018 QCTA 763, Pierre St-Arnaud

Comments

The arbitrator contended that the school board had made its decision in haste, without truly examining the diagnosis of the two physicians who had examined the employee three times. The school board had not asked for any additional information from the physician who filled out the disability report. The collective agreement also allowed the school board to have the employee examined, which it had not done. Moreover, the school board could have asked for clarification from the physician whom the employee had already consulted, before asking him to submit to further expertise. The importance of contacting the attending physician for additional information cannot be overstated, as this can save both time and money. Finally, it should be noted that an employer is not a physician, and vice versa.

Use caution when communicating with union members during negotiations

By Danilo Di Vincenzo
Le Corre & Associates

If an employer negotiates directly with its unionized employees, it could be in violation of section 12 of the *Labour Code*, which prohibits employers from seeking to dominate or hinder the formation or the activities of a union.

Therefore, employers must be cautious if they communicate directly with employees during negotiations, as their actions will come under close scrutiny in the event of a court case.

Consider the case of *Syndicat de l'enseignement de la région de Québec* et *Commission scolaire des Premières-Seigneuries,*[1] in which the Administrative Labour Tribunal allowed a union's complaint of employer hindrance during negotiation of a local agreement. The union claimed that the school board had interfered in union activities with three notes that it sent to teachers and one to parents. The school board contended that the notes had been sent to inform and reassure teachers and parents, and that it had been the union's conduct that had prompted it to send the notes.

When it examined the notes, the tribunal found that the school board had interfered in the union's activities. In the following summary of the tribunal's findings, we see that what is not expressly said is at times just as important, or more important, than the actual written words.

Note 1 – The administration set out its position on special leave, which it considered too costly to maintain. It then spoke of the "generosity" that the school board had shown thus far in its broad application of special leave, without consideration, something it had not been required to grant since the provincial agreement had come into force. It states that this showed the school board's openness to pursuing negotiations and its hope of reaching an agreement "swiftly." The tribunal found that this was an attempt to convince teachers of the school board's good faith and the reasonableness of its position, to go around the union, and to put pressure on the negotiations by discrediting the union. The note warned teachers that they would lose their right to special leave for reasons of superior force if the union did not sign an agreement by June 30, 2017.

Note 2 – The tribunal found that, under the pretext of sharing information, the note implied that the union would be the party responsible for the failure to come. It also suggested that the union was not working to resolve the dispute and was putting critical conditions of employment at risk, including spring break. It aimed to shock and to benefit the employer, who expressed real willingness to come to an agreement.

Note 3 – This note concerned the school calendar, specifically, spring break, which is a highly sensitive topic for teachers, other employees, and students' families. The note specified that the school board's interpretation was not endangering spring break. The tribunal found that this implied then that the union's interpretation was what was causing problems and putting spring break at risk.

Note to Parents – In response to parents' concerns about spring break being cancelled, the chair of the school board sent a note to reassure them. The note stated that the school board and the union would be able to agree on reorganization of the school calendar, but also assured parents that the school board had not requested the change and that the board wished to maintain the spring break. The tribunal found that doubt had once again been raised, with the burden of uncertainty again falling upon the union.

The tribunal found that when the four notes were sent, both individually and collectively, they clearly contributed to weakening the union. They therefore constituted an attempt to hinder within the meaning of the *Labour Code*.

If you decide to address your unionized employees during negotiations, use caution to avoid engaging in practices that are prohibited under the *Labour Code*. Your intervention must not aim to harm the union but must be a legitimate exercise of your freedom of expression. Even then, the wording of your message is crucial, as the tribunal will not only consider what has explicitly been written down, but what the message allows one to infer as well.

1. 2019EXPT-298, 2019 QCTAT 129, Myriam Bédard.

To resolve conflicts quickly, go to the balcony

By François Rabbat PhD
Organizational Psychologist – SPB

Contrary to what you might think, interpersonal tension at work is a fact of life. The top-performing vice-principal teams aren't those with no conflict; they are those that know how to effectively address it and the pitfalls to avoid.

A healthy work environment has interpersonal conflicts, but it also provides psychological safety that endures despite the conflicts.

When conflict arises, how do you resolve it without making matters worse?

The advantages of going to the balcony

When we are overwhelmed with emotion, it can be difficult to see all the causes – and therefore the potential solutions – of the conflict we are engaged in. We can also surprise ourselves by saying things that add fuel to the fire rather than putting it out. That's human nature: when we are seething inside, our mouths tend to move faster than our brains. How can we do this differently? By heading up to the balcony!

Negotiation expert William Ury suggests imagining that your discussion with someone is taking place on a stage in a theatre. By taking part of your mind to the balcony rather than leaving it on the stage, your perspective changes: from up top, you can see things you didn't see before.

With elevation also comes greater mental and emotional detachment that lets you stay calm and centred on what is most constructive. What is the goal of the discussion? Do I just want to vent, or do I want to improve students' satisfaction and teamwork?

In the heat of the action, taking a moment to head up to the balcony will help you avoid saying something you could regret and will help you think about the most productive form the discussion could take. It also lets you consider the other causes of the conflict, which can be difficult to see from up close.

The causes that don't occur to us

We often attribute conflicts to a first type of cause, i.e. related to the person and our interactions with them: an assistant manager who is self-centred and careless; a teacher who doesn't listen to feedback; a parent who is small-minded, etc. While this is the sort of cause we often think of, there are others worth exploring to break the impasse.

Organizational causes include factors related to the organization's structure and operations. This second type of cause can explain tensions independent of the personalities of the people involved in the conflict. Are roles and responsibilities clear? Are the school's rules, policies and procedures defined, known and applied? Does everyone agree with the school's mission and vision to accomplish it? A discussion on this topic can reduce tensions and increase harmony on the team.

History is a third type of cause of interpersonal tensions. Events in the life of a team or a school can leave their mark or result in accumulated frustration: a change or a decision that wasn't understood, a colleague's action that has never been digested, or nostalgia for the management style of a principal who has left the school. It is important to recognize and respect the impact of past events, while working together to find the best way to turn the page.

A valuable approach for yourself and others

Whether you are an actor in a conflict or a third party trying to help colleagues break an impasse, a change of perspective and exploring the three types of causes help address conflict in a way that is not threatening to those involved.

The sense of psychological safety this creates gets people to trust that their school and colleagues care about their well-being and professional success. These are values that go a long way to standing out as a school.