

IN YOUR CORNER

2

Managing inappropriate behaviour at work is not an option

RECENT DECISIONS

3

Falling in love with a student: an unforgivable act [1]

Dismissed after sexting with a teenager [2]

Dismissed for unavailability one day before his release from prison [3]

Absent employee receives prorated sick leave [4]

Snowstorm did not justify absence [5]

Special education technician hit with hockey stick by elementary school student [6]

Choosing salary insurance benefits over Income Replacement Benefit... then changing one's mind [7]

Cost transfer granted: teacher performed most of her duties [8]

Cost sharing: obesity must be a factor before the accident [9]

Teachers may not promote their personal values [10]

SPECIAL COLLABORATION

6

The art of delivering difficult feedback

FOLLOW-UP:

The Court of Appeal upheld the judgement of the Superior Court in the case of *Commission scolaire Kativik v. Association des employés du Nord québécois* (2019 EXPT-1166, 2019 QCCA 961). In the Court's view, the arbitrator was justified in concluding that the employee's administrative dismissal for unsatisfactory performance was an abusive measure, given the unacceptable context of the employer's offer of another position and the absence of steps to find a "reasonable alternative solution". According to the Court of Appeal, it cannot be concluded that this decision led to an obligation on the school board's part to reassign the employee. [See "**In your Corner**", Winter 2018]

Le Corre Lawyers, LLP
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

LECORRE
lawyers dedicated
to employers

**Beyond theory:
lawyers who share
their experience**

Visit us at
lecorre.com



Managing inappropriate behaviour at work is not an option

By Marie-Josée Sigouin, CIRC – Le Corre Lawyers

The adoption of psychological harassment provisions has helped raise awareness about the lack of civility on the job at various workplaces. And sometimes, when the situation degenerates due to the employer's failure to intervene, psychological harassment complaints are filed. It is therefore crucial to intervene quickly in response to inappropriate behaviour at work.

Although the obligation to stop harassment is one of means, rather than of result, an institution's management must remain proactive and intervene as soon as they have been informed that an employee has behaved improperly in the workplace, even if the alleged victim asks not to intervene.¹

Very recently, an arbitrator accepted a grievance of psychological harassment filed by a teacher. The case stemmed from a dispute between two colleagues over the signing of a form. The arbitrator reported the event as follows: "Elle reprend alors les paroles [du collègue] qui lui dit : «*J'ai compris ce que tu me demandes maintenant dégage.*» Et poursuivant sur l'échange, elle lui dira : «*Je vais décaler quand je vais avoir terminé de te parler et que je vais avoir ma feuille...*»"²

That same day, the colleague sent a threatening text message to the complainant's spouse, a special educator working for the same school board, warning him: "*Tu jaseras avec ta blonde... je suis de nature extrêmement violent et si elle est encore en un seul morceau, c que g un IMMENSE respect pour toi !!! Qu'elle ne me refasse jamais ce qu'elle m'a fait...*"

These facts were quickly reported to the school principal. A few weeks later, a mediation meeting was held with the two teachers, and the principal avoided talking about the text message, considering that it was not a work-related message. She then linked the dispute to a conflict between two teachers and, as the latter committed themselves to behaving professionally, she closed the file. No disciplinary sanctions were imposed on the colleague in connection with the text he had sent. The complainant then filed a psychological harassment grievance and the subsequent investigation concluded that she had been the victim of psychological harassment.

Alleging she had followed the recommended protocol for such circumstances, the principal submitted that she had fulfilled her obligation to provide the complainant with a harassment-free workplace. The arbitrator pointed out that he would have been of that opinion if he were limited to the spat about signing the form. However, there was the text

message, which was the core of this case and an integral part of the whole file. According to the arbitrator, the school's administration could not ignore the text message by claiming that it belonged to the personal sphere, nor could she rely on the personality of the colleague, who was described as "*a big cuddly bear, nonchalant and muddled,*" or on that of the complainant, who was described as having a "*propensity to distort reality, amplifying situations unduly*" in order not to intervene. In this regard, the arbitrator wrote:

"[258] Autant de situations, de part et d'autre, qui laissent croire que la situation n'est pas réglée, et bien qu'aucun événement d'éclat ne survienne, le conflit larvé perdure sans aucune intervention de l'employeur.

[259] L'ignorance du texto du 24 octobre 2014, la supposée bonhomie [du collègue] et la personnalité amplificatrice de [la plaignante] ont conforté [la directrice] dans son inertie.

[...]

[262] Malgré les signaux reçus, les inquiétudes et la peur exprimées par [la plaignante], [la directrice] s'est cantonnée derrière le processus d'enquête prévu à la politique de l'employeur, refusant ainsi de voir la réalité de la situation.

[263] Avec respect, en affirmant que tout va bien, [la directrice] fait preuve d'aveuglement volontaire, refusant l'objectivité de la situation, préférant compter sur le temps pour que s'estompe une conjoncture sur laquelle elle n'a visiblement aucun contrôle."

The arbitrator concluded that the employer had not taken all reasonable steps to stop the psychological harassment and that the complainant was entitled to damages and interest. However, he reserved his jurisdiction for any disagreement concerning the assessment of damages.

As this decision clearly illustrates, you need to intervene quickly when a conflict arises, whether or not there is an allegation of psychological harassment, in order to restore a healthy, harmonious and harassment-free workplace.

1. *Brochu and 9139-8891 Québec inc.*, 2017 EXPT-1410, 2017 QCTAT 3083 (DRT), Annie Laprade, request for review denied, 2018 QCTAT 797
2. *Syndicat de l'enseignement de la région de Québec et Commission scolaire de la Capitale*, 2019EXPT-1429, 2019 QCTA 319, André G. Lavoie, par. 16.

RECENT DECISIONS

1

Falling in love with a student: an unforgivable act

A primary school teacher challenged his dismissal for fuelling a love relationship with a 12-year-old student. As part of their relationship, he taught her private courses and had dinner with her. No acts of a sexual nature were committed by the teacher. The police could not find any fault and neither the child nor the parents filed a complaint. The employer alleged that a teacher must conduct himself beyond reproach, given his status in society. The arbitrator concluded that the employee had contravened his duty to give priority to the needs of his pupil and to the right of his pupil to an education that would promote her development. Through his actions motivated by his feelings for this student, the employee committed an unforgivable error in judgement justifying the breach of trust, despite his 20 years of service and a clean disciplinary record. The decision to dismiss him was therefore upheld.

*Syndicat de l'enseignement de la Mauricie
and Commission scolaire de l'Énergie*
2019EXPT-1635, 2019 QCTA 396, Richard Bertrand

2

Dismissed after sexting with a teenager

A recreational technician was challenging her dismissal for having had a sexual conversation on Messenger and Snapchat with a 17-year-old student. The employee took part in a seduction game with the latter through explicit text messages and sent him a photograph showing herself in underwear, with bare breasts. The arbitrator first noted that the age of the victim or the absence of apparent trauma in the victim were not significant mitigating factors, since a young person must, regardless of age or condition, enjoy the right to an adequate learning environment. He then concluded that the extrinsic severity of the fault justified vigorous intervention by the school board, particularly because of the employee's status as a recreational technician, her 15 years of experience and the repeated nature of the actions of which she was accused, and maintained the dismissal.

*Commission scolaire XYZ and Syndicat des employé(e)s
de soutien de la Commission scolaire XYZ*
2019EXPT-1591, 2019 QCTA 370, Pierre-Georges Roy

3

Dismissed for unavailability one day before his release from prison

A worker challenged his dismissal for unavailability because of his 30-day incarceration, after pleading guilty to an impaired driving charge. As the employee was incarcerated on March 9, he was to be released on April 8, a Sunday. The school board dismissed the employee on April 5, when he only had Friday left to serve before going back to work. The thread of events led the Court to conclude that the employee's unavailability was not the real reason for his termination. Where incarceration does not result in unavailability, the Court is justified in concluding that the real reason for the sanction was the conviction. The dismissal was therefore illegal, as it violated section 18.2 of the Charter. The reinstatement of the employee was ordered and the Court retained its jurisdiction to establish a quantum for moral damages.

*Association des employés du Nord québécois
and Commission scolaire Crie*
2019EXPT-1784, 2019 QCTA 414, Joëlle L'Heureux

4

Absent employee receives prorated sick leave

The union was objecting to the school board's decision to reduce the number of sick leave days credited to an employee who had been on sick leave for a portion of the years in question, by prorating it to the number of full months of service. According to the employer, the granting of sick leave is associated with the performance of work. Referring to the text of the collective agreement, the employer alleged that sick leave days are a credit, a loan or an advance, and that this is not a gift. According to the arbitrator, the employee had "left his employment," even if not permanently. The arbitrator considered that temporary departures, such as sick leave or disability leave, are covered by the expression "left his employment". Thus, the school board could reduce, in proportion to the number of full months of service, the number of sick leave days credited to the employee for the years concerned.

SEPB, section locale 578 and Commission scolaire Marie-Victorin
2019EXPT-1466, 2019 QCTA 224, Huguette April

RECENT DECISIONS

5

Snowstorm did not justify absence

A teacher was disputing the employer's decision to cut her salary because of her absence during a storm. According to the employer's policy, staff must go to work despite classes being suspended due to a storm. The union claimed that this was a *force majeure* absence and that the employee would be entitled to a paid absence. According to the employer, this was not *force majeure*, since the vast majority of the staff came to work. The absence would not have resulted from the storm, but rather from the employee's fear of driving. According to the arbitrator, the event was not unforeseeable, irresistible and foreign to the employee; therefore, it was not *force majeure*. A "reasonably informed, prudent and diligent" teacher could have checked the weather forecast, left earlier or used some other means of transportation. The salary cut was therefore maintained.

Syndicat de l'enseignement de l'Ungava et de l'Abitibi-Témiscamingue and Commission scolaire Harricana
2019EXPT-1210, 2019 QCTA 229, Jean-Guy Ménard

6

Special education technician hit with hockey stick by elementary school student

The school board was contesting the CNESST's refusal of a cost transfer, after a special education technician sustained a head contusion when she was assaulted by an elementary school student. During a trip, the student grabbed a hockey stick and used it to strike the technician so forcefully on her head that the stick blade broke. The student threw it at her and continued hitting her. A complaint was filed with the police. The CNESST associated the accident with the risks inherent in the employer's activities. According to the Court, the incident was tantamount to an armed assault or assault, within the meaning of the *Criminal Code*, which *ipso facto* eliminates the notion of risks inherent in the employer's activities. Even if the student had behavioural problems, the employer could not prevent such an outbreak. It would therefore be unfair for the employer to bear the costs. The transfer was granted.

Commission scolaire de la Seigneurie-des-Mille-Îles
2019 QCTAT 2790 (SST), Denys Beaulieu

7

Choosing salary insurance benefits over Income Replacement Benefit... then changing one's mind

A teacher was challenging the rejection of her depression-related claim. She had submitted her claim one year after her work stoppage. To explain her six-month delay in claiming, the employee argued that it was due to her psychological disability, her fear of facing her principal who had allegedly harassed her, and a feeling of injustice that came belatedly. According to the notes of the employee's medical practitioner, the employee had been promptly informed that she needed to file a claim and her sense of injustice was already present. The employee proved her ability to manage her affairs, as she took steps to obtain disability benefits, started psychological follow-up and was driving alone to her medical follow-ups. She therefore had the ability to claim in a timely fashion. However, she did not do so until after her disability benefits had ended. There were no reasonable grounds for her delay. The claim was inadmissible.

Lemire and Commission scolaire des Samarres
2019 QCTAT 3685 (SST), Marie-Eve Legault

8

Cost transfer granted: teacher performed most of her duties

The school board was objecting to the CNESST's refusal to transfer medical assistance costs for an injury that had not rendered a teacher unable to perform her job. She had sustained paracervical bruising when she fell after her chair broke. A few days later, she consulted a physician, who did not recommend a work stoppage, suggesting instead that the teacher not perform supervision duties during recess. The employee returned to her teaching job without carrying out recess supervision duties until her injury had been consolidated. She was absent only for treatments and received her normal salary. The challenge was accepted. The recess supervision exemption did not change the nature of her usual work. Where the bulk of one's tasks are carried out without any days off for disability until an injury heals, the treatments cannot be recorded in the employer's record. The cost transfer was granted.

Commission scolaire des Premières-Seigneuries
2019 QCTAT 3694 (SST), Jean-Luc Rivard

9

Cost sharing: obesity must be a factor before the accident

The school board was challenging the CNESST's refusal to grant cost sharing. A teacher was diagnosed with post-traumatic stress and depression as a result of a student attack which left the teacher with knee and ankle injuries. The employer alleges that pre-existing disabilities contributed to the appearance of psychological damage and the aggravation of physical injuries. The challenge was accepted, but the cost sharing was granted only in regards to the psychological damage. In fact, several recurring psychological histories show a pre-existing personality disorder that had weakened the teacher. Obesity, however, is not a disability. Its pre-existence nor its deviation were proven from the biomedical norms. Without any other health status perspective, Body Mass Index is not enough to prove a disability. 90% of the costs were removed from the school board's financial file due to psychological disability.

Commission scolaire de Montréal
2019 QCTAT 3497 (SST), Philippe Bouvier

Comment

The Body Mass Index (BMI) documented one year after the accident was deemed to be morbid obesity. However, there is no evidence that this was present before the accident. The teacher alleged that she had gained 80 pounds since the accident. In order for obesity to qualify for cost sharing, the majority of the tribunal's caselaw requires a higher weight number. BMI is a baseline measure, based on weight and size. Medical evidence is generally required about the history of obesity, the distribution of body fat and muscle mass to determine whether this is indeed obesity, whether it deviates from the norm and, therefore, whether there is a disability. The role of obesity in the onset or worsening of occupational injury must then be demonstrated. We should avoid relying entirely on a BMI calculation. Fortunately, in this case, another disability, which was more conclusive, nevertheless allowed for cost sharing.

10

Teachers may not promote their personal values

An English teacher was challenging the letters sent to her by the school board reminding her that she had to respect the school curriculum, stop imposing her textbook choices without consultation and stop promoting her personal values. According to the arbitrator, the content of the letters was not intended to punish the employee, but rather to inform her of complaints by parents or colleagues, support her in an effort to meet the expectations of the school community and offer her assistance. The arbitrator concluded that the three letters were administrative in nature and dismissed the union's claims that these were unreasonable and abusive, in that they infringed the employee's right to freedom of expression and professional autonomy. The arbitrator reiterated that a teacher performs his or her duties within the legislative and contractual framework provided for, under the conditions and constraints that this implies, and that the teacher cannot do what he or she considers to be valid in isolation. The grievances were dismissed.

*Commission scolaire des Trois-Lacs and
Syndicat de l'enseignement de la Région de Vaudreuil*
2019EXPT-1870, 2019 QCTA 420, Pierre Daviault

Comment

In this case, the employee's comments and behaviour caused concern among several parents regarding the values conveyed at this school. According to the arbitrator, the employee had caused an imbalance between the rights of students, parents and colleagues, and her right to freedom of expression, by promoting her personal values (for example, that Santa Claus does not exist, eating meat is unhealthy, etc.). As for the employee's professional autonomy, the arbitrator agreed that the employee did not present a balanced approach in her educational process: the use of teaching tools and materials, the use of videos she had created, and an unsecured site that had not received the approval of her peers or the school's administration, justified the school board's intervention, given the feedback from parents and the school community.



The art of delivering difficult feedback

By Jacinthe Ouellet, MPs, ACC, Organizational Psychologist & Coach | SPB

Professional development requires good self-knowledge. Feedback provided by a colleague or our immediate supervisor is very useful in keeping us focused on the talents we must hone and the pitfalls we should avoid. In a team, it even helps to strengthen group cohesion, such as finding a solution to a difficult situation between two teachers or optimizing task distribution among administrative support teams.

However, it may be difficult to provide feedback to a teacher or a vice-principal, for example, as we're not always sure how the person will react. We have targeted the three most difficult types of situations to manage as well as useful tips for effective communication on both sides.

The Silent Type — This person accepts feedback without comment. There is no reaction, just an icy silence. They may not be used to self-analysis, could be very reserved or even be intimidated by the situation. They may also place little importance on the feedback. Here are a few tips for giving effective feedback to a silent individual:

- ✓ Slow down your speech.
- ✓ Leave plenty of space for silences and wait for an answer.
- ✓ Ask open-ended questions.
- ✓ Lower your tone of voice, speak more softly, shift into "introvert" mode.
- ✓ Adjust the height of your chair to the other person's level.
- ✓ Follow up on the meeting and reiterate the points raised.

The Defensive Type — This person does not accept feedback: they justify themselves, find all types of excuses, and cast blame on external factors or other people. They could feel like they are losing control or that they are not up to the task. They are probably very demanding of themselves, competitive or proud. Here are a few tips for giving effective feedback to a defensive individual:

- ✓ Remain neutral and objective.
- ✓ Reframe the interaction and put the focus back on the meeting's objective.
- ✓ Give power and importance to the person you are speaking to, ask for permission.

- ✓ Prove them right on certain aspects and reinforce these points.
- ✓ Communicate strategically and tactfully, weigh your words.
- ✓ Openly state that the situation is difficult "here and now".
- ✓ Compare them to an athlete and explain that feedback is the key to a competitive athlete's successful performance.

The Emotional Type — The person is emotionally affected and appears to be on the verge of tears, or has already started crying. They could be very sensitive or tend to overreact and dramatize situations. They easily deprecate themselves, lack self-confidence and tend to take on the victim role in critical situations to win over the other person. Here are a few tips for giving effective feedback to an emotional individual:

- ✓ Communicate strategically and tactfully, weigh your words.
- ✓ Normalize the situation, put things back into perspective and reframe the context; chase away irrational thoughts and replace them with rational facts.
- ✓ Highlight the importance of failure in highly successful people's development.
- ✓ Focus on only two critical points and forget about the rest.
- ✓ Hold out a box of tissues.
- ✓ Be empathetic and say things like "If I understand correctly, this is the first time you have dealt with rejection" or "I can understand how this affects you."
- ✓ Use humour to lighten the mood.

For reasons that are primarily cultural, we do not like conflict and are generally sensitive to criticism. Negative feedback affects us, and we tend to take it as a personal attack. Positive feedback surprises us and can make us uncomfortable or even throw us off balance.

Being overly affected by criticism is a barrier to our development. If we turn our attention to a remark or deprecate our value, we are wasting what could be an invaluable gift: honest feedback about ourselves.

Giving feedback requires courage on the part of the person who provides it. Therefore, we must be open to receiving it!