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EDITORIAL

The limits of the Board of Directors' decision-making authority

Me Danilo Di Vincenzo, CIRC, Le Corre & Associates

With the signing, in December 2021, of several national collective agreements, School Service Centers (SSC) and School Boards (SB) will begin their rounds of local negotiations in the coming months.

For this reason, we wish to bring to your attention a recent decision rendered in *Centre de services scolaires de la Riveraine* and *Syndicat des enseignantes et enseignants de la Riveraine*[1]. This decision comes on the heels of the adoption of the *Act to amend mainly the Education Act with regards to school organization and governance*[2].

Indeed, due to changes in the school governance of Francophone SSC, including the abolition of the Executive council, several SSC and SB adopted new delegation of powers regulations in the months following the adoption of this law to reflect the changes made by the Act. By the *Education Act* (EA), these new regulations were adopted following consultation with various groups, including the unions. Therefore, in this particular context, the CSS de la Riveraine's decision was made.

In particular, the arbitrator was seized with a preliminary argument raised by the teachers' union following the non-reengagement of one of its members due to disability. The union alleged that the SSC had not followed the mandatory procedure set out in the local agreement in cases of non-reengagement and that the SSC's decision not to reengage the teacher was null and void since it had been made by the SSC's Director general and not by the Board of directors, under the EA and the local agreement.

Indeed, the local agreement provided for the possibility for a teacher affected by a non-reengagement procedure, as well as his or her union, to address the Executive committee to intervene at the public session and to attend the vote concerning the question of maintaining his or her employment relationship.

For its part, the SSC argued, inter alia, that because of the abolition of the executive committee, the Board of directors could exercise full discretion to delegate some of its powers without restriction to the Director general, as provided for in the SSC's delegation of powers by law, without any collective agreement having the effect of preventing it from waiving the exercise of this discretionary power.

According to the arbitrator, since the Executive committees were abolished, the power to vote on the non-reengagement of a teacher fell by operation of law to the Boards of directors of the SSC. The arbitrator also noted that while Boards of directors do have the ability to delegate some of their powers, "*they cannot do so without taking into account the content of the Act respecting the process of negociation of the collective agreements in the public and parapublic sectors"*, which, we recall, is of public order and requires that such negotiated and agreed upon provisions be respected and produce their full effect as long as they have not been modified, abrogated or replaced by agreement between the parties. Based on this finding, the arbitrator, therefore, upheld the preliminary argument and declared the Director general's decision not to rehire the teacher null and void, and the teacher was reinstated in his duties.

In reading some of the texts of the new national collective agreements recently signed, we note that the negotiating parties have rectified the situation and ensured that the texts of the collective agreements are drafted in such a way as to bring them into line with the texts of the SSC delegation of authority regulations, particularly in cases of dismissal, discharge or non-reengagement.

This being the case, it will be important for SSC and SB to ensure that their local agreements (whether local arrangements or local agreements) are amended along the same lines to avoid the cancellation of termination or non-reengagement due to non-compliance with the procedure agreed upon between the SC or SB and their unions.

Finally, we see this case as a reminder that an employer cannot unilaterally modify the working conditions included in collective agreements without going through the negotiation process. This inescapable principle will guide you in your future local negotiations.

1. SAE 9554, 2021-10-19, Jean-M. Morency
2. LQ 2020, c. 1

RECENT DECISIONS

1 Allowing the employee to perform her work entirely from home was an undue hardship for the students

A guidance counsellor filed a grievance challenging the employer's refusal to accommodate her by allowing her to perform her work entirely from home for an indefinite period of time. The arbitrator first recognized that the employee's major anxiety disorder, which was exacerbated by the pandemic, constituted a handicap requiring the employer to evaluate various accommodation measures. The arbitrator found that the employer had indeed respected this obligation by scheduling a meeting with the employee and the union representative during which accommodation measures were proposed. However, neither the union nor the employee responded or made any counter-proposal to the employer's proposition, even though they have the duty to participate in the search for accommodation measures. According to the arbitrator, requiring the students that they meet the employee, at her request, exclusively virtually is excessive. The employee thus deprived the students of the choice of the mode of consultation, i.e. an in-person or virtual meeting. The grievance was dismissed.

Collège de Valleyfield and *Syndicat des professionnelles et professionnels du Collège de Valleyfield*
SAE 9556, 2021-11-10, Gilles Ferland

2 The powers of the local and national parties regarding the students' break and recess time

The employer filed an application for judicial review before the Superior Court of an arbitration award confirming the possibility of including the students' break and recreational time in the 27 hours of work assigned to teachers in the local agreement, whereas the national agreement provides that it is part of the 5 hours of work of a personal nature. According to the judge, the arbitrator could not come to the conclusion that both local and national parties had the power to negotiate such a clause. In recognizing the power of the local parties to negotiate on that topic, the arbitrator should have concluded that the national parties did not have the power to do so or that the national clauses should have prevail once concluded. In sum, in order to be valid, the clauses or local arrangements must respect Bill 37, which is a public policy statute. The arbitrator could not reconcile local and national provisions like he did. The arbitrator's decision is set aside and the grievance is referred to another arbitrator.

Centre de services scolaire des Rives-du-Saguenay c. *Syndicat de l'enseignement du Saguenay*
2021 QCCS 4837, Jocelyn Pilote

3 Whether a secretary was on probation or a regular employee, her dismissal was justified

A school secretary challenged her dismissal, alleging that she was dismissed without just and sufficient cause and that she was a regular employee at the time her employment ended. The School Board alleges that the employee was dismissed during her probation period, following its failure. The arbitrator first mentioned that both parties had recognized that her probation period had been extended by mutual agreement twice. The end of the second probation period was scheduled to occur on approximately June 30, 2018. Although the meeting where the employee learned that she was terminated occurred on July 5, the arbitrator considered that she was still in probation. Indeed, the June 30 date was approximate and the union had been informed before that date of the failure of the probation period. The arbitrator dismissed the grievance as the employer did not acted unreasonably or abusively. He then added that he would have rendered the same decision even if the employee had had a regular employment status, as the deficiencies in her work had been demonstrated.

Union indépendante des employés de soutien de la Commission scolaire Lester-B.-Pearson and *Commission scolaire Lester-B.-Pearson*
SAE-9560, 2021-11-23, Yves Saint-André

RECENT DECISIONS

4 Effects of unsuccessful assisted reproduction procedures: the disability is recognized

A teacher challenged the employer's decision to discontinue her salary insurance benefits when she had been absent for several months due to an adjustment disorder with depressed mood. The evidence revealed that the employee was suffering from exhaustion after 13 consecutive unsuccessful cycles of hormone therapy in the context of medically assisted reproduction. The employer alleged that the employee's absence did not result from a disability, but rather from her family planning effort. However, only a "family planning surgery" can constitute an illness within the meaning of the collective agreement. According to the arbitrator, the employee was disabled within the meaning of the collective agreement, as she suffered from a state of incapacity resulting from an illness that required medical attention and rendered her unable to perform her duties. The fact that this disease is largely the consequence of assisted reproduction procedures does not change anything. The accumulation of failures resulted in a debilitating adjustment disorder, which escalated into depression after a final unsuccessful attempt. The arbitrator allowed the grievance.

Syndicat de l'enseignement des Bois-Francs and *Centre de services scolaire des Bois-Francs*
SAE 9564, 2021-12-13, André C. Côté

5 Deafness: a specific noise study was not required to benefit from the presumption

A school bus driver challenges the CNESST's refusal to recognize his deafness as an occupational disease. For 53 years, the employee drove a school bus in which there were the combined sounds of the engine, of the thermostatic fan, of the windows rattling when on bumpy roads and of the screams of children. To benefit from the presumption of occupational disease, the demonstration of exposure to excessive noise does not require that a specific noise study be produced by the worker. The reasonable evidence of the workplace knowledge is sufficient as long as it relies on recognized independent data and not on mere allegations. The worker demonstrated that he suffers from noise-induced hearing impairment and that he has been exposed to noises that can be described as excessive in the course of his work. He benefits from the presumption, which was not rejected. His claim is accepted.

Cauchon and *Intercar*
2021EXPT-1671, 2021 QCTAT 2035 (SST), Valérie Lajoie

6 Her pre-existing personal condition allows for cost sharing

The employer challenges the CNESST's refusal to grant him cost sharing for a special educator who suffered a mild traumatic brain injury (TBI) and a whiplash injury. The employer felt unfairly burdened and argued that the worker had pre-existing personal conditions, namely a history of concussion (additive effect), a concentration disorder and an emotional disorder. According to the court, the first event can be considered as banal. However, the pre-existing nature of the conditions favored the appearance of the employment injury and aggravated its consequences by extending the compensation period to 22 weeks, whereas the average consolidation period for a TBI is 4 weeks. The length of the consolidation period is disproportionate compared to the event, and there is an absence of functional disability resulting from the event despite the presence of very little permanent impairment. Cost sharing is granted and 90% of the costs are removed from the employer's financial file.

Centre de services scolaire des Premières-Seigneuries
2021EXPT-1708, 2021 QCTAT 2061 (SST), Jean-François Clément