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EDITORIAL

Labour shortage: preventive withdrawal is not an acquired right

Me Camille Morin, Le Corre Lawyers

Quebec is facing an unprecedented labour shortage in many sectors of activity. Parapublic organizations such as school services centres and school boards are not immune to this situation and must manage with this constraint. In this context, it is possible that some school services centres and school boards will review their practices to compensate for the shortage of personnel in order to accomplish their essential mission, which is to offer an education of quality.

In the school environment, and more particularly at the elementary level, it is common practice for pregnant teachers to be automatically placed on preventive withdrawal as soon as they provide their employer with a certificate[1] to that effect. One of the reasons for this, is to eliminate the biological risks for the pregnant worker or to the unborn child resulting from contact with young children. In this respect, the AOHS[2] allows a pregnant or breastfeeding worker whose working conditions involve a danger to herself or her unborn child to be immediately reassigned to tasks that do not involve such dangers, if she is reasonably able to perform them. It is only if the employer is unable to offer an assignment that meets these conditions that the worker may be removed from the workplace.

In *Centre de services scolaire des Bois-Francs* et *Boucher*[3], the employer had reassigned two elementary school teachers who had already been removed from the workplace to secondary school classes, just a few days before the start of the school year. Given the age of the high school students, the reassignment avoided the risk of contact with identified contaminants, a matter that was not in dispute. The workers were challenging their assignment and were claiming that they were unable to perform it due, among other things, to their lack of experience at the secondary level, their lack of knowledge of the teaching program and their lack of preparation.

The Tribunal administrative du travail, OHS Division, found that the workers were reasonably capable of performing the high school assignment. This criterion is assessed objectively, by looking at whether they have the required training, skills and knowledge. Although the situation is not ideal, the workers are graduates with a specialty in French and are available on short notice to teach this subject at the high school level. Therefore, they cannot refuse their reassignment without having their income replacement indemnity terminated.

This decision reminds us that " [translation] the right is not to be withdrawn, but first to be assigned without exposure to danger" and that the goal is to keep the worker employed. Contrary to some beliefs in the school environment, pregnant elementary school teachers do not have an automatic right to be removed from work. Furthermore, just because some teachers are placed on preventive withdrawal does not mean that all others will be entitled to it. Each case is unique and has its own particularities.

The current context of labour shortage may require a review of the methods used to fill absences in the school system. In this perspective, it is important not to lose sight of the fact that reassignment is the rule and that preventive withdrawal remains the exception. Preventive withdrawal is not an acquired right and the reassignment of a worker to new duties is possible at any time, even if she is already on preventive withdrawal. Although this new approach may come as a surprise, it is legitimate, as the Court stated:

> "[48] [translation] In other words, even if it is preferable for the process to be voluntary, better planned and better supervised, the objectives of the AOHS must be respected, namely, to keep the pregnant worker in her workplace as long as the physical danger identified is avoided, which is the case here. The mere fact that a withdrawal with benefits at home was taken for granted does not make the School Service Centre's action abusive or made in bad faith.
>
> [49] By this decision, future candidates will adjust their expectations and be better prepared psychologically for this approach now known and potentially used by the School Service Centre, all in compliance with the AOHS. [...] "

This is an interesting decision and as the Tribunal noted [translation] " in the context of the labour shortage, the situation may change".

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1. Certificate of preventive withdrawal and assignment of the pregnant or nursing worker
2. *Act respecting Occupational Health and Safety*, c. S-2.1, s. 40
3. 2022 QCTAT 3557, Daniel Therrien.

RECENT DECISIONS

1 Legal requirement for teachers to participate in 30 hours of training activities

Several teachers' unions challenged the constitutional validity of the legislative provisions amending the *Education Act* that require teachers to participate in a minimum of 30 hours of continuous training activities over a two-year school period. They argue that there is interference with collective bargaining, in particular because the challenged provisions were adopted in the absence of good faith bargaining and pre-legislative consultation. According to the Court, there was indeed legislative interference with the collective bargaining process. However, this interference was relative and did not substantially interfere with the right to collective bargaining, since all of the teachers' working conditions, with the exception of the minimum number of hours of training, remained negotiable. Although the challenged provisions do not have the effect of depriving teachers of real freedom of association, any substantial infringement would be justified under the *Canadian Charter* and the *Quebec Charter*. The appeal for judicial review is dismissed.

Fédération autonome de l'enseignement c. *Procureur général du Québec*
2023EXPT-34, 2022 QCCS 4272, Andres Garin

2 A promotion requires a personnel movement

A childcare educator and a janitor were asked to work, in addition to their regular hours, in higher classified jobs. They were paid in accordance with their education and experience in that job classification, but did not receive the pay increase that normally accompanies a promotion. The union claims that the employees received a temporary promotion and is seeking appropriate compensation. Under the collective agreement, in order for an employee to receive the compensation that comes with a higher classification, he or she must be promoted to the higher classification. A promotion presupposes that an employee leaves one job to take another, even temporarily. In this case, the employees only performed the duties of the higher position in addition to those of the job they hold, they never left their job. Therefore, this is not a promotion. The grievances are dismissed.

Syndicat du personnel de soutien des Hautes-Rivières et *Centre de services scolaire des Hautes-Rivières*
2022EXPT-2401, 2022 QCTA 447, Richard Bertrand

3 Teacher suspended 15 days for violent behaviour towards a student

A teacher filed a grievance challenging a 15-day suspension imposed on her for violent gestures towards a student who was part of a class of students with special needs. She was accused, among other things, of yelling at the student, pointing a finger at his face, grabbing him by the shirt and shaking him for a few seconds. The employee only admitted to raising her voice and being frustrated during the event. Faced with contradictory testimonies, the arbitrator preferred the version of the employer's witnesses. He found that the employee's behaviour was contrary to the caring conduct expected of a teacher. As aggravating factors, he noted the employee's experience and the vulnerability of the student, whose "oppositional" behaviour towards the teachers could not be construed as provocation. The employer was therefore justified in disregarding the principle of the gradation of sanctions. The grievance is dismissed.

Le syndicat de l'enseignement de l'Ouest de Montréal (FAE) et *Centre de services scolaire Marguerite-Bourgeoys*
SAE-9640, Patrice Boudreau (T.A.)

RECENT DECISIONS

4 The employer could not reinstate the employee without risk to her health and safety

A childcare educator filed several grievances, in particular to contest the employer's refusal to reinstate her in her position. Indeed, despite a medical opinion establishing that she was able to return to work following an injury, the employer refused to reinstate her, since she had a personal condition of arthritis in her knees and venous insufficiency in her legs that prevented her from performing her duties without risk to her health and safety. This condition limited the employee's ability to walk and stand. The employer tried to accommodate her, but was unable to do so, since she did not meet the requirements of the available positions or that her functional limitations did not allow her to hold them. The arbitrator concluded that the employer was justified in refusing to reinstate the employee, and that it had met its duty to accommodate, since the union had been consulted during the process. The grievances are dismissed.

Syndicat soutien scolaire des Navigateurs et *Commission scolaire des Navigateurs (now known as Centre de services scolaire des Navigateurs)*
2023EXPT-200, 2022 QCTA 544, Yves Saint-André

5 Too early and too far: no accident in the course of employment

A teacher challenges a decision by the CNESST to deny her claim for an employment injury. The teacher suffered a lumbar sprain when she fell on the ice while walking to work in a municipal park adjacent to the school. It appears that the fall occurred 40 minutes before the start of her shift and more than 100 metres from the school grounds. Moreover, she was not paid and was not under the employer's subordination. Under the circumstances, this event is not sufficiently related or relatively useful to the performance of the work to conclude that it occurred in the course of employment. The fall occurred in the course of a personal activity and the route taken cannot be considered as an extension of the usual routes to access the workplace. The challenge is dismissed.

Ouleb-Abdallah et *Centre de services scolaire de Montréal*
2022 QCTAT 5081, Alain Lachance

6 Intervention with a student who seriously injured himself by intentionally breaking a window: transfer of costs granted

The employer challenged the refusal of a transfer of costs by the CNESST. A teacher suffered post-traumatic stress following an intervention with a particularly aggressive student in crisis. The student deliberately smashed a window and inflicted a major laceration on himself. The employee experienced a traumatic event since she had to console the student until the arrival of the emergency services, even fearing for his life because of the abundant bleeding. According to the court, the situation was unfair to the employer because it went beyond the normal scope of work. Although the teacher had to intervene with disorganized students as part of her work, the event that gave rise to the employment injury was highly unusual and unforeseeable. This is an exceptional situation that is not part of the inherent risks that the employer must assume. The full cost of the benefits due in this case will be charged to the employers of all units.

Centre de services scolaire des Bois-Francs
2022 QCTAT 5061, Michel Sansfaçon