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EDITORIAL

Not all contacts with students are of a sexual nature

Me Benoît Labrecque, Le Corre Lawyers

With the emergence of the #MeToo movement, denouncing situations where violence and sexual harassment occur, teachers are expected to avoid any physical contact with their students. However, it's important to distinguish "friendly" contacts from those that are completely inappropriate.

In this regard, a recent decision handed down by arbitrator Nancy Ménard-Cheng caught our attention[1]. In this case, three high school students accused their teacher of having made inappropriate sexual gestures against them. The teacher had 25 years of experience and was the coordinator of the robotics team. He was well appreciated by his students, their parents and his colleagues, and had no disciplinary record.

The complaint filed by the three students alleges a number of inappropriate behaviours from the plaintiff, including "enveloping" them when they asked a question while they were at a computer workstation. He would stand behind them and put his hand over theirs to move the mouse, while pressing his body against their backs. He allegedly also placed his hand behind their backs and sometimes on their thighs, put his hand on a stool to make them sit on it, and swiped a student's ass with a clipboard.

Following this denunciation, the plaintiff was relieved of his duties. He was subsequently dismissed for having made inappropriate gestures of a sexual nature towards these students. The police investigation was conducted in parallel with the employer's investigation, but no criminal charges were pressed.

Arbitrator Nancy Ménard-Cheng overturned the grievor's dismissal, substituting it with a five-day suspension. Relying on established case law, she recognized immediately that touching or gestures of a sexual nature in a school environment constitute a serious misconduct justifying immediate termination of the employment relationship when proven. However, she emphasized that the fact that a teacher touches a student is not necessarily an indication of inappropriate behaviour:

> [56] In other words, just because the plaintiff touched a student, whether on the arm, shoulder or thigh, this does not necessarily mean that it was of a sexual nature or that it automatically justifies the immediate termination of the employment relationship. (Our translation)

According to the arbitrator, to justify dismissal, the employer must prove the inappropriate nature of the gesture and its sexual connotation. The employer must analyze the behaviour in question, taking into consideration the context and other factors, such as the plaintiff's involvement in school and extracurricular activities, his disciplinary record and his seniority.

The arbitrator assessed the testimony given at the hearing and concluded that the students' testimony was not sufficiently reliable to be retained. The arbitrator noted that two of the students were failing the class taught by the plaintiff. She also pointed out that, following a denunciation by the plaintiff, the three students were suspended for stealing school supplies in class and were not allowed to take part in the Christmas party. In light of these elements, but without concluding that there was a conspiracy, the arbitrator points out that it is quite possible that there was a form of concerted action or contamination that led to the exaggeration of some of the reproaches raised.

General statements without context, contradictions in the statements or the fact that they changed over time, lack of plausibility and corroboration when the actions were allegedly carried out during class in front of other students also seriously undermined the credibility of the student whistleblowers.

For the arbitrator, the plaintiff lacked judgment in tapping a student's ass with his clipboard, and failed to take the necessary steps to avoid physical contact with the students. However, she concluded that the employer had not met its burden of proof to show that the gestures were sexually motivated or that the plaintiff was sexually harassing the students.

The arbitrator therefore concluded that some of the plaintiff's actions justified the imposition of a disciplinary measure "to emphasize the importance of maintaining a fair physical distance from the students", but that they could not, in the circumstances, justify his dismissal.

She concludes by stating that she hopes her comments are not an invitation to prohibit any physical contact with students, quoting arbitrator Martin Côté in *Commission scolaire de l'industrie*[2] « […] that teachers should not, for fear of being accused of harassment, limit themselves to giving a lecture from a podium, avoiding circulating among the students and fraternizing with them. […] ».

1. Syndicat de l'enseignement de l'Estrie et Centre de services scolaire de la Région-de-Sherbrooke, SAE 9727, 2024 QCTA 63
2. Commission scolaire de l'industrie c. Syndicat de l'enseignant de Lanaudière, SAE 6027

RECENT DECISIONS

1 Despite the legality of the strike, strikers had to respect several rules

The employer filed a motion for a provisional interlocutory injunction following events that occurred during the teachers' strike. It alleged that several illegal acts were committed by the strikers during their picketing days, including blocking access to the employer's premises to people not involved in the strike, picketing on the employer's property, sticking stickers in various places, damaging property and intimidating workers performing their duties, even requiring police intervention. According to the Court, the criteria for granting the injunction, i.e., the urgency, the appearance of right, the seriousness of the prejudice and the balance of inconveniences, were met. In particular, the Court noted that urgent work was required in some establishments, and that the strikers' actions interfered with the operations and maintenance of the establishments. The manner in which the strikers exercised their striking rights created a serious prejudice to the employer. The motion was partially granted.

Centre de services scolaire de Montréal c. *Alliance des professeures et professeurs de Montréal*
2024EXPT-410, 2023 QCCS 4577, Dominique Poulin

2 The emergency system requiring teachers to provide availability slots did not affect their daily routine

The union alleges that the employer is wrong to impose an emergency system on teachers, requiring them to provide availability periods should the need arise to substitute. The union asked that these periods be included in the teachers' schedules as part of their assigned duties. The arbitrator concluded that the employer could, if necessary, assign a teacher to substitute teaching duties. The arbitrator specified that the objective was not to force teachers to add new hours to their regular schedule, but rather to make themselves available, within their schedule, when they are already at school to carry out their other professional duties. The purpose of this system is to ensure an equitable distribution of substitutes and a proper functioning of the available workforce in the event of an emergency. Scheduling these availability hours does not alter the teachers' daily routine, nor does it add to their workload. The grievance is dismissed.

Centre de services scolaire des Navigateurs et *Syndicat de l'enseignement des Deux-Rives*
SAE 9739, 2024-04-22, André C. Côté

3 Sympathy leave following the brother-in-law's death: who is the brother-in-law?

The union contested the employer's refusal to grant sympathy leave to an employee so that she could attend the funeral of her brother-in-law, the husband of her husband's sister. The employer justified its refusal on the grounds that the terms "brother-in-law" or "sister-in-law" used in the collective agreement refer only to the husband's brother or sister. According to the arbitrator, the employer is correct in stating that the brother-in-law is the husband's brother. However, in the general sense of the term, a brother-in-law's or sister-in-law's husband or spouse is also a brother-in-law or sister-in-law, regardless of the standpoint adopted, since the relationship is not limited to the husband's or spouse's brother or sister. The collective agreement uses the generic term "brother-in-law". If the parties had intended to exclude the spouses or the husbands of the employee's brothers and sisters, they would have clearly stated so. The grievance is upheld.

Centre de services scolaire au Cœur-des-Vallées et *Syndicat du personnel professionnel du milieu scolaire de l'Outaouais*
SAE 9742, 2024-05-03, Éric-Jan Zubrzycki

RECENT DECISIONS

4 Accommodation of a partial disability that has become permanent

The grievance challenges the employer's decision not to maintain four teachers in their regular positions and not to continue the accommodation measures they had benefited from due to their medical conditions during previous school years. According to the union, the employer avoided its duty to accommodate and its decision was unreasonable, abusive and contrary to the provisions of the collective agreement. The teachers' physicians have confirmed that their partial disability is now to be considered permanent. As a result, it is unlikely that these teachers will be able to carry out the normal duties of a full-time regular teacher for the rest of their careers. Since the nature of the disability had changed significantly, the employer was entitled to review the accommodation granted and reassign the teachers to other schools where their needs would correspond to their residual capacity. The new accommodation proposed by the employer, although not perfect and not fully satisfactory to the teachers, was reasonable. The grievance is dismissed.

Centre de services scolaire de Montréal et *Alliance des professeures et professeurs de Montréal*
SAE 9735, 2024-04-08, Claude Martin

5 A personal osteoarthritis condition is the cause of his relapse

A supervisor contests the refusal to recognize a relapse, recurrence or aggravation that occurred two and a half years after the initial employment injury, which was a sprain to the right knee. This diagnosis necessitated several operations and the use of a total knee prosthesis. The employee alleged that the diagnosis of osteoarthritis of his left knee was the result of an overuse of the knee following the numerous surgical interventions he underwent. The employee therefore had to demonstrate a change in his state of health and an excessive use of his left knee, which would normally imply the demonstration of a sustained cadence or repetitive movements. However, this was not demonstrated, given that the employee stated that he had not been very active since his initial injury. Moreover, his osteoarthritis is exclusively attributable to the evolution of a pre-existing personal condition, which is therefore unrelated to the initial employment injury and not eligible for compensation. The claim is rejected.

Gravel et *Collège Français (1965) inc.*
2024 QCTAT 853 (SST), Renaud Gauthier

6 Interference with the employer's right to set up temporary assignments: cost transfer granted

The employer contests the refusal of a cost transfer for an employment injury suffered by a student supervisor. During the summer period, although school supervisors are normally dismissed, it is the employer's practice to offer temporary assignments to supervisors who have suffered an employment injury, in accordance with their functional limitations. Yet, the evidence showed that the union recommended that the supervisors, in such a situation, should refuse the temporary assignments offered. The Court concluded that such refusal, which was not justified by either the ARIAOD nor the collective agreement, interfered with the employer's right to set up temporary assignments. In this case, the employee's refusal is a situation over which the employer has no control, and it is a choice made by the employee that is unrelated to the employment injury. The employer does not have to assume the costs. The challenge is upheld.

Centre de services scolaire des Mille-Îles
2024 QCTAT 1596(SST), Jean M. Poirier