Investigate, then decide, not the other way around

By Me Danilo Di Vincenzo and Ms. Linda Bernier, *Le Corre and Associates - Lawyers*

In the event of a disciplinary infringement, it is essential to conduct an investigation before handing down a disciplinary measure. Indeed, the investigation is the cornerstone of discipline management.

Therefore the first step is to verify the facts that you intend to refer to. You will not be able to rely on statements made or rumours circulated, even if you believe them to be true. Also, you will need to take time to verify the extent and the truth of the facts brought to your attention. To do this, you need to interview the witnesses as quickly as possible. We recommend that you take the witnesses' statements in writing so as to be able to refresh their memory during a hearing, or to avoid having them change their version of the facts in the meantime.

The second step will be to verify the context by examining the involved employee's file and checking what previous disciplinary measures may have been handed down by the school board for an infringement of same nature. Finally, it is also important to check whether there were extenuating circumstances, as it is most unpleasant to find out about them at the time of a hearing. Knowledge of extenuating circumstances at the time of the investigation will allow you to have all the facts before you in order to make an informed decision.

An employer who foregoes an investigation or who botches the investigation could be ordered to pay moral damages in the event of a grievance being upheld. In this respect, we refer you to three decisions rendered in the educational community. In the case of *Syndicat de l'enseignement des Deux-Rives* v. *Commission scolaire des Navigateurs*[1], the school board was ordered to pay $15,000 in moral damages to a physical education teacher who had been suspended for fifteen days, then dismissed, following events related to his vigorous intervention with a primary school student. The arbitrator upheld the suspension, but partially allowed the grievance regarding the employee's dismissal, based notably on the fact that the school board had decided to dismiss the employee without getting his version of the facts, without conducting a serious investigation and without verifying the student's allegations. According to the arbitrator, the employer had already made his decision on the severity of the sanction without even hearing the employee's version.

In the case of *Commission scolaire Chemin-du-Roy* v. *Syndicat de l'enseignement des Vieilles-Forges*[2], the arbitrator also came to the conclusion that the employee was entitled to moral damages (which he did not quantify), since the school board had made no effort to verify the facts alleged against the employee. In this case, the school board had removed the employee's name from the substitute teachers' recall list following the distribution of naked photographs of the employee. The school board had relied solely on statements heard by a teacher during a general assembly concerning the publication of photographs. According to the arbitrator, even though the employer needed to be sensitive to the teacher's report, this did not absolve him from proceeding with caution. Yet it made no attempt to verify the facts. Had it done so, it would have found that the pictures were dated eight years earlier, that they were no longer posted on the Web, that they had circulated without the employee's knowledge and against her will, by email, between school board employees, and that they had not circulated amongst the students. By failing to meet the teacher who denounced the situation, the school board had relied on an accumulation of statements based on hearsay to make its decision.

Finally, in the case of *Commission scolaire des Découvreurs* v. *Syndicat de l'enseignement des Deux-Rives*[3], the school board was ordered to pay $15,000 in moral damages to a moral education teacher with 25 years' experience, who was suspended following complaints by two female students who accused him of using disrespectful language, of making statements of a sexual nature and of offering a cup of coffee to a female student in which the latter had found an as yet unidentified substance. The substance in question may have been sperm, but this information, which was used to justify the employee's suspension, was never given to him. According to the arbitrator, the school board took the students' version at face value, when it could have waited to get the results of the tests before handing down the suspension. In addition, when the suspension was lifted, the employer did not rectify the situation, while rumours were circulating to the effect that the employee had put drugs into the student's coffee…

These three examples refer to specific, sensitive situations, where the school boards were moved to intervene quickly. However, even in such cases, it is important to verify the facts since, in the event of a legal challenge, the reasonable nature of the employer's decision is what will be examined by the arbitrators, rather than the presence or absence of any intention to harm the employee.

1. DTE 2014T-130 (T.A.) Me Francine Beaulieu.
2. SAE 8586 (T.A.) Me Denis Tremblay.
3. SAE 7911 (T.A.) Me Jean-Pierre Villaggi.

Detecting and attracting talent: a real challenge in education!

By Ms. Nadine Mercier, M. A., c. o., Organizational Psychology Consultant,
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Educational reform, ambiguity, complexity and retirement: those are among the challenges currently fuelling the winds of change and the questions pertaining to the profile of tomorrow's leaders in education. As in many areas of activity, executive recruitment is turning out to be a major challenge on many levels. Who are these leaders who will be able to meet these challenges? What are the best strategies available to an organisation to be seen as proactive and to attract talent? What are the measures to be put into place in order to optimise the contribution of such talented individuals?

Identifying tomorrow's leaders

To better identify leaders with promising potential, certain distinctive skills seem particularly crucial to meet the changing realities of management among our various institutions. The leadership model developed by SPB illustrate these main areas of competence:

But what exactly are the assets that will make the difference in terms of a leader's performance in their role, based on the context and the needs of your institution? Are we talking about relationship skills that enable one to rally others, to properly convey the institution's vision and to generate commitment? Should the leader be an "accomplishment" wizard by contributing to meeting the challenges of reinventing processes thanks to his or her keen tactical knowledge and by proving to be an efficient decision-maker? Should it be a leader with a "vision", capable of getting an accurate reading of his or her environment and making an important contribution in terms of innovation and alignment? An executive who can rely on strong "self-management" skills to reflect his or her agile ability to cope with change and turbulence? We need to reflect in order to succeed in identifying the area of greatest desirable impact based on the short- and long-term challenges and outcomes to be met.

This challenge is leading human resource (HR) professionals to switch from their old role as "inspectors" to that of "prospectors". The focus then becomes an assessment of the whole person so as to assess the match between his or her interests, values and needs and the profile arising from the reality of the position. Going beyond standard staffing practices focused on a generic model and specific skills, the current trend is to place the candidate at the centre of the process. The talk is then about "focusing" on the individual's talents. What is meant by "talent" is the distinctive contribution value that an individual can bring to his or her organisation. The trend is moving towards creating opportunities and making roles and responsibilities more fluid in order to use this distinctive value to leverage performance. It then becomes interesting to also assess the candidate's predisposition towards self-development, so as to base the hiring decision not just on how well the candidate matches the desired profile, but also on the potential for development of the future executive-employee. We place our bets on the candidate's talents, while managing risk and coaching the employee in areas where a lower level of mastery is obvious. We rely on the principle that the greatest potential for the individual's development and self-realisation resides in his or her main strengths.

Attracting the best people

The use of social media as recruitment tools is becoming a must. Polishing the employer's image and optimising HR marketing also prove to be valuable strategies worth considering. The staffing process used as a calling card reflects the corporate culture, and it helps define the brand image it projects. If we want the desired candidates to choose us as employers, it is also important to provide them with the best possible conditions for integration by sounding them on their expectations and adapting our approach accordingly. The same goes for the follow-up with candidates for whom the process is not materialising as desired: a constructive experience is just as important in their case, since these candidates may become good ambassadors and also, who knows, potential future collaborators. Organisations thus try to create an uncommon candidate experience, from the prospecting stage to the end of the recruitment process.

The continuation of this article, published in future issue, will allow you to discover some of the levers that foster commitment towards the organisation.

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1 Teachers on preventive withdrawal are entitled to their summer pay

The Superior Court upheld an arbitrator's ruling whereby summer pay for teachers who had been put on preventive withdrawal due to their pregnancy should not be reduced, as the school board's salary policy, modified as it was, had the effect of creating discrimination based on pregnancy. In this case, the school board was no longer paying summer wages to teachers who had been on preventive withdrawal, since they did not receive any compensation during this period, as they were compensated by the CSST. However, during the summer season, these teachers received no benefits from the CSST, and they were losing the benefit of receiving their full summer pay as a result of the exercise of a right. According to the Court, since these teachers had not been reassigned, the employer's obligation to accommodate made it mandatory for him to treat these employees as if at work, so that their pregnancy would not result in losing a right to which every other teacher was entitled.

Commission scolaire des Découvreurs v. *Beaulieu*
2014 QCCS 615 (C.S.) Justice Gilles Blanchet

2 Teacher accused of possession of child pornography barred from his place of work

The union challenged the fact that the suspension imposed on a teacher charged with possession of child pornography was without pay, since the conditions of his release did not prevent him from doing his work. The school board justified the absence of compensation by the fact that this was an exceptional case. According to the arbitrator, when the school board made its decision, it had enough information to intervene as part of its responsibilities before the case was publicised. The employee worked in a school environment with young children, he was involved in the community and was fairly well known. Considering the charges against him and the duties of the employee, it was not unthinkable that the children, parents, co-workers and even the general population would strongly react to the employee's return to his place of work, all the more since he worked in a public corporation with a key role in education and consequent responsibilities. The grievance was rejected.

Commission scolaire du Lac-Témiscamingue v. *Syndicat des professionnels du Nord-Ouest*
2014EXPT-119, DTE 2014T-47 (T.A.) Me Pierre A. Fortin

3 The security agency is the students supervisors' actual employer

The union asked the *Commission des relations du travail* to declare that the school board was the actual employer of the students supervisors and guards provided by a security agency. According to the Commissioner, the security agency was the one to broadly assume all the prerogatives of an employer. If one examined, as a whole, the working conditions of the agents concerned with respect to the claim (hiring, work schedules, holidays, discipline, health/safety, group insurance, pay, etc.), one had to conclude that the security agency is the organisation holding the greatest control over all aspects of the work of the agents in question and over their working conditions, notably by applying the *Decree respecting security guards*. The union could not isolate some elements of the employer/employee relationship from the whole entity in which they belong, based notably on the fact that the latter are occasionally expected to supervise exams, take part in certain training sessions organised by the school board or in certain festivities at the school where they are assigned. The security agency is the actual employer of the students supervisors and guards.

Syndicat du soutien scolaire des Bois-Francs (C.S.N.) v. *Commission scolaire des Bois-Francs*
2014 QCCRT 0114 (C.R.T.) Me Jacques Daigle

4 Managing aggressive behaviour is not part of the mission to teach

The school board challenged a denial of cost transfer. The evidence showed that a grade-one student in the regular sector, who was only known for his tendency to resist instructions, became aggressive when a teacher was preparing to check his day planner. He then hit her in the legs and pulled on a cord she was wearing around her neck, and she suffered a lower back sprain. The employer emphasized that his mission is to promote and foster the students' education, as per the *Education Act*. According to the CLP, there can be no doubt that this accident was caused by a third party, i.e. the student. This also extends beyond the inherent framework of the employer's activities. Having to deal with such aggressive behaviour is not part of the mission to teach. In fact, the school board had only three other cases of aggression on record in the course of the school year. The situation was sufficiently unusual to warrant the acknowledgement that it extended beyond the usual teacher/student relationship patterns. The cost transfer was granted, and all related costs were removed from the employer's file.

Commission scolaire Marie-Victorin
2014 QCCLP 945 (C.L.P.) Me Lucie Couture

5 Tripping by a student is not unusual

The school board challenged a denial of cost transfer. The CSST deemed that the employer's liability was not unjust, despite the fact that the accident was caused by a third party. The accident occurred when a special education technician (SET), with the help of a teacher, brought a disorganised student to her office and the latter tripped her. She fell and suffered injuries to the cervical area and to her shoulders, which were consolidated three months later with no permanent impairment nor functional disability. According to the CLP, just liability is determined by taking into account the insured risk for an employer. A student can sometimes behave inappropriately, but the situation must be assessed based on the student's characteristics. The SET was working in support of a teacher, and she intervened at the latter's request. She knew she was escorting a disorganised student. Though the student's behaviour was reprehensible, this was not an exceptional or unusual situation. The cost transfer was denied.

Commission scolaire de la Rivière-du-Nord
2014 QCCLP 543 (C.L.P.) Me Michel Lalonde

6 Able to perform the major portion of her work

The school board challenged the CSST's refusal to grant a cost transfer for medical expenses under section 327 of the *Act respecting industrial accidents and occupational diseases*. The evidence showed that an early childhood educator suffered a lower back sprain after handling folding tables and chairs. Her physician had cleared her for "light duties", providing she avoided lifting loads. She therefore continued to work for two months heeding this restriction, and her injury was consolidated without permanent impairment nor functional disability. The CLP granted the cost transfer. Indeed, the educator's main duties are to organise, prepare and conduct activities that foster students' development. Lifting loads amounts to a minimal percentage of her job. She was never replaced. She has been able to perform almost all of her duties, and those she could not handle could easily be accomplished by her co-workers without infringing upon their own ability to perform their duties. The total amount of the medical assistance costs was consequently removed from the employer's file.

Commission scolaire des Affluents
2014 QCCLP 1332 (C.L.P.) Me Guylaine Moffet

7 The Appeals Committee is not expected to assess the competence of administrators on probation

The employee had been hired as Vice Principal of a high school in July 2011. By the fall of that year, her immediate supervisor had brought her unsatisfactory performance to her attention on a number of occasions. On April 13, 2012, the supervisor notified the employee that she would make a recommendation to the school board that her probationary period be considered a failure and that her employment be terminated. Following this recommendation, the school board terminated the employee's employment. The Appeals Committee rejected the complaint. It specified that its authority went no further than verifying whether the school board had acted in bad faith, had made an arbitrary decision or had acted in a discriminatory manner towards the employee, since the latter was on probation at the time of termination of her employment. Indeed, its role is not to conduct an assessment of the qualifications of school administrators, as the school board's management is in a better position to do so. There was no evidence to suggest that the school board's assessment of the employee was in any way arbitrary, discriminatory or founded on illegitimate principles. Consequently, any intervention on the part of the Appeals Committee would be unjustified.

Association of Administrators of English Schools of Quebec v. *English Montreal School Board*
February 12, 2014, Me Harvey Frumkin

8 Significant damages awarded to an employee who was harassed by a co-worker

The arbitrator, who ruled that a special education technician had been harassed by the home-room teacher for the special class where she was assigned, had to decide on the damages to be awarded to the employee. Regarding moral damages, the arbitrator awarded $15,000 to the employee to compensate for serious permanent consequences on a professional level. He also awarded her $10,000 for the exceptional aggravation of the situation resulting from the school principal's behaviour, who sided with the perpetrator of the harassment. Finally, an additional amount of $10,000 was awarded to the employee by way of "consolation". As for punitive damages, the arbitrator took into account the passivity and silence of the Director General, who did nothing to enforce the board's policy against harassment, despite evidence of acts of harassment over a period of six months, aggravated by the principal's behaviour. The school board was also ordered to pay $10,000 to the employee and to set up awareness-raising and training activities on psychological harassment.

Commission scolaire des Hautes-Rivières v. *Syndicat du personnel de soutien des Hautes-Rivières*
2014EXPT-518, DTE 2014T-190 (T.A.) Mr. Claude Rondeau
(Application for judicial review, 2014-03-21 (C.S.) 755-17-001910-143)

9 Caretaker and carpal tunnel syndrome: studies by the IRSST are not enough

A caretaker challenged the denial of his claim regarding an occupational disease. He alleged that his bilateral carpal tunnel syndrome was due to the performance of his work over a period of eight years. To prove that his disease was characteristic of his work as a caretaker, the employee produced a study by the IRSST. Yet according to the employer's medical expert, that study was merely a compilation of data. The CLP ruled that the scope of the study was indeed limited, and it did not provide sufficient evidence that the disease was typical of the work of a caretaker. The employee also did not produce substantial evidence to the effect that his work involved specific risks of developing a carpal tunnel syndrome, i.e. flexing, extending and/or radial/ulnar deviation of the wrist, finger flection or forceful hand gripping, in awkward postures. In actual fact, he performs a wide variety of movements for short periods of time. In addition, his obesity constitutes a personal risk factor that could lead to the development of this disease. The claim was dismissed.

T. Billingsley v. *Lester B. Pearson School Board*
2014 QCCLP 1310 (C.L.P.) Me Marco Romani

Comments

The CLP offered a reminder that any occupational disease claim must be based on substantial medical evidence and be specific to the job performed. Studies that merely list the occurrence of a disease following the performance of certain types of jobs, such as the one by the IRSST held as a reference in this case, do not constitute epidemiological evidence such as required by the CLP before it will state that a disease is characteristic of a given line of work. The required studies must provide evidence of significant prevalence of the disease in a given job, in relation to the general population. As regards to the specific risks of developing the disease in a given job, the evidence must show that the risk factors recognised in medical literature are indeed present. The mere allegation of a repetitive task is obviously not enough to fulfill this burden of proof. In addition, carpal tunnel syndrome can be due to several causes, and a large number of these are of a purely personal nature. Documenting the file with a medical assessment reviewing the existence of risk factors inherent to the work as well as those of a personal nature is essential in order to meet the requirements of the burden of proof.

10 A disability is no grounds for cancelling a progressive retirement agreement

A teacher challenged the refusal by the school board to cancel a progressive retirement agreement due to the fact that she was not able to resume work on a full-time basis. According to the agreement, the employee had a 100% workload, but was remunerated for 90%, in addition to having a 20-day leave arrangement. Since she had become disabled and could not avail herself of this leave, the teacher requested the cancellation of the agreement. The arbitrator came to the conclusion that the purpose of the progressive retirement plan is not to provide a leave of absence. Thus, despite the regrettable fact that the teacher could not avail herself of the time off granted under the terms of the agreement, this did not amount to circumstances under which the agreement could be cancelled. According to the arbitrator, the provisions of the collective agreement and of the Regulation under the *Act Respecting the Government and Public Employees Retirement Plan* that would allow the cancellation of the agreement do not mean that the teacher can stop participating in the plan without consequently entailing an end to the reduction in time worked. The grievance was rejected.

Association des professeurs de Lignery v. *Commission scolaire des Grandes-Seigneuries*
2014EXPT-224, DTE 2014T-83 (T.A.) Me Huguette April

Comments

Recently, the Superior Court ruled quite differently in a case involving similar facts compared to those involved in this ruling (2013 QCCS 5763), by upholding the decision of the arbitrator who had concluded that the school board could not refuse to cancel the leave without pay of a teacher suffering from leukemia. The difference between these rulings can be explained, in part, in terms of the purpose of the progressive retirement agreement, which is very different, according to the arbitrator, from that of a leave of absence. Also, in the case of the ruling by the Superior Court, the collective agreement left no room for discretion on the part of the school board, as the employee could cancel her leave by simply giving notice to that effect. There is, however, a significant difference between these rulings since, according to the Superior Court, the school board's refusal was discriminatory, in view of the fact that, had it not been for the employee's disability, her request would have been accepted. As regards to the presently discussed ruling, the arbitrator concluded that, had it not been for her condition, the teacher would not have asked for the cancellation of the progressive retirement agreement, adding that the teacher's goal was simply to boost her disability insurance benefits, and this is not part of the school board's obligation to accommodate, which is merely intended to facilitate an employee's return to work.