G+ Education

INFO

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RECENT **DECISIONS**

1 Non-tenured teachers: watch out for Section 124 A.L.S.

A non-tenured teacher with more than two years of continuous service filed a grievance challenging her termination. The collective agreement makes non-tenured teachers ineligible for the grievance procedure when the employer decides not to include them on the recall list or not to hire them as teachers even though they may have accumulated two years of continuous service. According to the arbitrator, the collective agreement is in violation of Section 124 of the *Act respecting Labour Standards*. Furthermore, the notion of continuous service must be examined in context. Thus, the few days' break between sessions does not have the effect of interrupting a teacher's continuous service, as these breaks are inherent to the nature of the duties performed by this teacher. Consequently, since she had accumulated more than two years of continuous service, the employee had the right to use the grievance procedure, despite her non-tenured status, to challenge the school board's decision not to hire her.

Commission scolaire de la Capitale v. *Syndicat de l'enseignement de la région de Québec*
DTE 2014T-815, 2014 QCTA 916, M[e] Claude Fabien Esq., arbitrator

2 Private school: tuition fees are not optional

A private school sued parents to recover unpaid tuition fees. The parents claimed that the school had not fulfilled the terms of the Educational services contract. According to them, the school was responsible for their son's failure in mathematics and should not have suspended him after finding him guilty of theft. The evidence showed that the parents were the ones who refused to follow the school's recommendation regarding the appropriate level of mathematics required of their son, and that they were warned that there would be no going back on their decision. In addition, there was no evidence showing that the instruction provided was deficient in any way, since the student was the one who had not made the required effort. As to the student's suspension, the Court concluded that the Educational services contract allowed the school to impose such a measure, which was taken according to the rules of natural justice. The school's claim was therefore upheld and the parents were ordered to pay the amount outstanding.

Collège Notre-Dame-de-Lourdes v. *Lapointe*
JE 3014-1761, 2014 QCCQ 8168

3 Suspended 3 days for harassing the technician assigned to her class

A teacher working with autistic children challenged a 3-day suspension for harassing the special education technician assigned to her class. Upon assessment of the evidence, the arbitrator came to the conclusion that the employee's repeated behaviour towards the technician, involving remarks made in the presence of the students, criticizing her work and occasionally ignoring her, amounted to vexatious conduct. The arbitrator dismissed the union's contention to the effect that this was an interpersonal conflict: the fact that the employee challenged the decisions made by the technician and that she did not give her the opportunity to express her viewpoint is rather indicative of the vexatious conduct of a person who seeks to subjugate another person and who does not view this person as a valid interlocutor. Since the local agreement prescribes that a first suspension is normally for one day and cannot last more than three days, the arbitrator concluded that there was no cause to intervene.

Commission scolaire de Montréal v. *Alliance des professeures et professeurs de Montréal*
DTE 2014T-663, 2014 QCTA 720, Mr. Gilles Ferland, arbitrator

4 Termination due to disability upheld

An academic advisor challenged her termination due to her inability to deliver normal job performance. She had been an employee of the school board since January 2009. Her absences due to recurring events of depression began in January 2010 and she received salary insurance benefits until January 2012. After that, the employer granted her a leave of absence without pay until June 2012. He terminated her employment in August 2012, as the employee was not fit to engage in a progressive return to work, according to her attending physician, until the upcoming month of November. Following this, the employee requested an extension of her period of absence until June 2013. The arbitrator noted that the employee's absence had been extended many times, and that her attending physician had consistently deferred her return to work. The employer fulfilled his obligation to accommodate by extending her period of absence until June 2012, and he could not expect a return to work in a foreseeable and reasonable future. The grievance was consequently rejected.

Syndicat des professionnelles et professionnels de commissions scolaires du sud de la Montérégie v. *Commission scolaire des Grandes-Seigneuries*
DTE 2014T-701, 2014 QCTA 736, M[e] Francine Beaulieu Esq., arbitrator

5 An "academic" fraud

In Ontario, a teacher sued his ex-employer, a private school, for damages following his dismissal. The employer claimed that he was guilty of academic fraud by falsifying marks. The Ontario Superior Court took into account the teacher's acknowledgement that he had falsified marks, and noted that he had lied to the employer and during the investigation regarding the way the marks had been calculated. However, the Court maintained that the employer, once aware of the facts, had sent the marks to the students and to parents, without any comment whatsoever regarding their accuracy. In the Court's opinion, this is therefore not a matter of academic fraud per se. The Court also took into account the fact that the teacher had admitted his fault, even if this admission came late. It came to the conclusion that dismissal was too harsh a measure in light of the fault in question, and it granted compensation to the teacher for the loss of his employment.

Fernandes v. *Peel Educational & Tutorial Services Ltd.*
[2014] O.J. No. 5351 (Ontario School Board)

6 Throwing a basketball in the school stairways is to be expected

The school board challenged the denial of a transfer of costs following an accident involving a third party, i.e. a student. A teacher suffered a mild head injury after being hit by a basketball on the jaw. She was walking in the school at the time, during the lunch break. A student hit the ball held by a schoolmate, which caused the accident. The school board alleged that the situation was unjust, since the students were aware of the directive prohibiting ball games inside the school building, and the student responsible for the incident had been negligent in this regard. According to the CLP, charging the costs to the employer was not unjust. It was normal for an elementary school teacher to be walking in the proximity of students, and it was normal for these students to have access to basketballs since they play such games in the schoolyard. It was not surprising that children in this age group would break some rules. Even though the accident involved a third party, imposing the costs on the employer was not deemed unfair since this is part of the liabilities he must face.

Commission scolaire de la Seigneurie-des-Mille-Îles, 2015 QCCLP 157
Mrs. Martine Montplaisir, administrative judge

7 Asbestos and other contaminants: rigorous research is important

A CEGEP challenged the identification of a mesothelioma as an occupational lung disease. The estate of a fine arts teacher filed a study by the CSSS, which assumed that the teacher had used a type of plasticine containing asbestos between 1960 and 1986. The CSSS technician was not able to validate the employee's use of this product, since the latter was deceased. The Committee on Lung Disease acknowledged the disease based on the report by the CSSS. However, Health and Safety officers hired by the employer, studied the purchase orders filed since 1978, the documents related to the disposal of hazardous materials since 1989, and the data sheets pertaining to the products used for modeling (the employee's specialty). This meticulous analysis showed that no products containing asbestos had been used. The study by the CSSS was too several, vague and unclear. In the absence of any exposure to asbestos, the related occupational disease could not be verified. Furthermore, the presence of this disease was not proven. Consequently, the claim was rejected.

Cégep de Jonquière v. *Dumont (Estate of),* 2014 QCCLP 2813
M[e] Valérie Lajoie, administrative judge

8 Tennis elbow in three stages

An assistant caretaker challenged the CSST's rejection of his claim for tendinitis in his right arm. He alleged that he had a "clicking feeling" while lifting the lid on a garbage bin. He then felt a pain in his arm, on that same day, as he removed three big bags from the bin. He notified the school secretary that he had hurt himself and that the bags had been "too full". He nevertheless continued to work and went to see a doctor only three weeks later, after suffering intense pain while using a broom. According to the CLP, the official diagnosis is not always the first one made. The most conclusive diagnosis, based on the medical follow-up, was that of epicondylitis (or tennis elbow). There could be no injury unless the employee sustained a direct hit or significant traction, which was not the case here. In addition, his continuing to work for three weeks was inconsistent with the notion of an injury. In the absence of an injury, the employment injury cannot be presumed. In the absence of a sudden and unforeseen event, there was also no evidence of a work accident. The sudden occurrence of pain is not enough. The claim was rejected.

Lévesque v. *Commission scolaire de Montréal,* 2014 QCCLP 6232
M[e] Pauline Perron, administrative judge

9 Criminal charges: how to respond?

A special education technician challenged the administrative suspension imposed on him when assault charges had been laid against him following a time-out technique with a turbulent student. The employee was eventually acquitted of the charges. Initially, the arbitrator concluded that the suspension should be without pay, based on the employee's release conditions. However, the evidence showed that the conditions required to justify a time-out intervention were indeed present. In addition, the school board did not correctly apply the multisectoral agreement relating not only to students' rights but also to the rights of employees suspected of inappropriate acts. Consequently, the school board should have acted differently and was ordered to reimburse the employee for salary lost during the administrative suspension and to pay moral damages in the amount of $18,000.

SEEPB, Local 578 v. *Commission scolaire Marie-Victorin*
DTE 2014T-660, 2014 QCTA 659, Mr. Daniel Charbonneau, arbitrator,
Application for judicial review, C.S. 500-17-084281-149

Comments

After confirming that a school board can generally suspend without pay an employee facing criminal charges, the arbitrator made an important distinction based on the nature of the charges. He indicated the fact that the charges had to do with actions that the employee had to take in the context of his duties should have led the school board to act differently, even to the extent of defending the employee against these criminal charges, despite the absence of provisions to this effect in the collective agreement. The arbitrator based his decision on the multisectoral agreement relating to students' rights and to the rights of employees suspected of inappropriate acts. In his opinion, this agreement did not prevent the school board from conducting an investigation, even though this was an infringement on these rights. In short, there was no reason to justify the fact that the employee had been left to fend for himself following the assault charges. This decision has significant repercussions since, while it applies to all school boards, it concerns the application of the multisectoral agreement. It will therefore be very interesting to see whether the Superior Court upholds the arbitrator's decision in the context of the judicial review.

10 Trivialisation of violence?

A school board challenged the CSST's refusal of a transfer of costs, relating to a special education teacher who was dealing with aggressive students. Having been hit several times on the arm and having had her scarf pulled on her neck, the teacher notified the school administration that the workplace was hazardous. One of the female students was removed from the class but, shortly after, another student once again became aggressive and hit the teacher repeatedly on her arms and shoulder. The teacher then went to see a doctor who reported a context of repeated assaults and the employee was compensated by the CSST for an adjustment disorder and post-traumatic shock. The employer acknowledged that the two students had been improperly assessed and that they had thereafter been transferred to a special school. According to the CLP, even though the employment injury was mostly attributable to the students, charging the costs to the employer was not unjust. Such behaviours were not unusual with this clientele. The transfer of costs was denied.

Commission scolaire des Affluents, 2014 QCCLP 6232
M[e] Daniel Pelletier, administrative judge (Application for judicial review pending)

Comments

The *Commission des lésions professionnelles* took into account the fact the *Education Act* states that students have a right to instruction services and that the assessment error and the unpredictability of the students' behaviours were an intrinsic part of the hazards associated with this type of clientele. This decision illustrates the importance of choosing the right strategy in this type of cases. If a school board alleges that assaults are not unusual in a given class in order to have a claim rejected, it can hardly request a transfer of costs, when it comes to cost allocation, by arguing that bearing the burden of these costs is unjust. It is worth noting that the information given to the CSST is filed and available when a decision regarding cost allocation must be rendered. Flipping positions, as was the case here, is generally a risky course of action.

Special treatment requested in the guise of accommodation

By Me Marie-Josée Sigouin Esq., CIRC, *Le Corre & Associates Law Firm*

A handicap, in the meaning of the *Charter of Human Rights and Freedoms*, can confer the right to some protection in order to allow equal access to employment. Thus, in the presence of an employee with a handicap, the employer has an obligation to accommodate that ceases to exist when it results in undue hardship. Taking into account this obligation, which comes up often in case law, an employer is expected to bend the rules or ways of doing things, whenever possible, in order to deal with the specific needs of a handicapped employee. Each case is unique. One thing is certain, however: the presence of a handicap and its related limitations is essential before one can even broach the subject of accommodation.

A handicap is a physical or mental abnormality, which may be symptomatic or asymptomatic, and which can entail some functional limitations. Though human resource managers are well aware of this definition, they are nevertheless faced with frequent employee requests that have more to do with comfort and personal preferences. For instance, how do you respond to the following:

- ✓ A medical certificate where the employee has been diagnosed with lower back pain and requires an "ergonomic workstation";
- ✓ A note from a doctor stating: "shoulder pain, must have an Active Board";
- ✓ A call from a teacher demanding to keep the position she has held for the past five years, because a handicap was documented at that time, despite the right of a colleague to that position in view of his or her seniority.

Let us first go back to basics: in each of these situations, is there a handicap at stake? If so, does this handicap entail some limitations? Are there possible solutions that might adequately deal with these limitations?

At first glance, in the first two examples mentioned above, there is no documented handicap or limitation. The onus is on the employee to prove the existence of a handicap and of related limitations. Unless he is aware of a specific problem and of its practical consequences, how can an employer be expected to try to find a satisfactory solution for both parties? In such a case, an employer can begin by talking to the employee about this obligation to inform, and ask him or her for medical documentation regarding the alleged physical or psychological condition.

When things become a little clearer, you can also ask specific questions to the employee's physician in order to confirm not only the existence of a handicap, but also the existence of clear limitations. Demanding an ergonomic workstation is not a clear request, and the appropriateness of a workstation for one employee may prove inadequate for another employee with a different condition. So it is better to find out what movements or positions are to be avoided, and it is up to the employee's attending physician to explain that.

As for the last example, i.e. the teacher who holds up a past accommodation as an argument against a potential reassignment, it is important to stress the fact that her handicap, though it may have been documented in the past, is not a static condition. The evolution of an employee's state of health can influence his or her right to accommodation as well as the arrangements associated with an already established accommodation. There is no acquired right here, and an employee cannot demand to be spared the ups and downs inherent to any work environment, such as, for example, the legitimate choice of a colleague to obtain a position, if the employer can alternatively provide an accommodating solution elsewhere[1]. Managers are often faced with this mistaken presumption to the effect that an employee who was accommodated in the past is not expected to make sacrifices. An employee cannot simply demand an accommodation and sweep away any reasonable offer just because he or she wants to keep a position or is holding out for another[2].

In short, no manager is compelled to initiate a process of accommodation in response to a simple undocumented request from an employee.

1. *Syndicat des salariés de production de Lactancia (CSD)* v. *Aliments Parmalat Inc.*, D.T.E. 2007T-785 (T.A.).
2. *Commission scolaire de la Seigneurie-des-Mille-Îles* v. *Personnel de soutien de la Seigneurie-des-Milles-Îles*, D.T.E. 2013T-391 (T.A.).

The under-utilized path for strengthening organizations' ohs culture

By Martin Cloutier, partner and organizational psychologist
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Mental health issues related to stress and work accidents create a great deal of human suffering and cost businesses billions. It is estimated that lost economic output will reach US$16.3 billion between 2011 and 2030[1].

All organizations, regardless of their line of business, definitely want to develop an organizational culture that advocates occupational health and safety (OHS). However, creating an OHS culture requires many actions over a long period of time: setting organizational goals, implementing indicators, seeking commitment from executives, developing work procedures, launching a health promotion program, training and engaging employees, etc.

One of the useful, yet often ignored, paths for fostering an OHS culture involves hiring individuals who appear to have a propensity for adopting safe behaviours[2]. Many researchers have observed a relationship between employees' personalities and the tendency to engage in safe conduct at work[3]. Dr. Joyce Hogan developed a personality inventory that can assess whether a person is at risk of adopting unsafe behaviours, based on results for the following six scales:

- ✓ **Insubordinate | Disciplined** – The willingness (or unwillingness) to follow safety rules. People with a low score may ignore the company's health and safety rules, and therefore expose themselves to more risks.
- ✓ **Alarmist | Calm and steady** – Stress management, in other words the ability not to panic under pressure and to make fewer careless errors. People who score low in this component have a tendency to manage their stress less effectively and make more mistakes under pressure.
- ✓ **Irritable | Emotionally stable** – Anger and aggressiveness management. People who score low can be quick to anger and become aggressive against a backdrop of personal dissatisfaction. Effective management of one's own emotions helps an employee keep calm and stay focused on the tasks to be performed.
- ✓ **Distracted | Diligent** – An individual's level of concentration. This dimension takes on its full meaning in contexts where it is important to have an excellent level of concentration, to ensure that the safety of the individual (and others) is not jeopardized.
- ✓ **Reckless | Cautious** – The propensity of an individual to take unnecessary risks, even reckless actions. Some individuals like taking risks more than others. This attitude at work can lead to higher risks of accidents.
- ✓ **Arrogant | Desire to learn** – Interest in training, advice and personal development. This dimension refers to an individual's desire to learn. When willingness is combined with opportunity, winning conditions can be established for occupational safety prevention and training programs.

Although this approach is not a panacea, considering an individual's personality during selection provides an opportunity to assess the fit between the requirements related to workplace health and safety and the natural tendencies of the individual, thereby facilitating integration.

Working upstream by assessing the individual characteristics of candidates and employees helps bring together the conditions for success required by the business to optimize the scope of OHS promotion programs.

Finally, by specifically targeting individuals' areas of attention, it is possible to implement more effective communication, awareness, supervision, training and development mechanisms.

1. Excerpt from WHO Global Plan of Action on Workers' Health 2008-2017
2. Furnham, 2014
3. Sources from many studies available on request