

## THE ARBITRATOR'S DECISION IN THE CASE OF *CENTRE JEUNESSE DE MONTRÉAL* — IT HAS THE AUTHORITY TO SET RULES FOR PROPER DRESS, PIERCINGS, TATTOOS AND PERSONAL APPEARANCE IN THE WORKPLACE

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THE EMPLOYER, *CENTRE JEUNESSE DE MONTRÉAL - UNIVERSITY INSTITUTE* (HEREINAFTER THE "CENTRE"), ADOPTED A DRESS CODE AS WELL AS A PIERCINGS, TATTOOS AND PERSONAL APPEARANCE POLICY FOR ITS EMPLOYEES (HEREINAFTER THE "POLICY").

ALTHOUGH THE VALIDITY OF THE POLICY WAS CONTESTED BY THE *CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4268* (HEREINAFTER THE "UNION"), THE ARBITRATOR, MR. CAROL JOBIN, FOUND NEARLY THE ENTIRE CONTENTS OF THE POLICY TO BE VALID IN AN EXTENSIVE 60-PAGE DECISION RENDERED LAST APRIL 13<sup>1</sup>.

### CONTEXT

The Centre's mission is to "guarantee the protection of young people whose safety or development is compromised; help young people and young mothers experiencing adjustment difficulties to develop the skills and balance necessary to function in their environment; lead young people who have committed offences to put an end to their delinquent conduct and assume responsibility for themselves in society."<sup>2</sup>

The preamble to the Policy indicated that, in light of its mission, the Centre wished to serve as a model for its clientele of vulnerable young persons by requiring its 3,170 employees to project an image of professionalism, thereby also enhancing the credibility and image of the Centre.

The Policy<sup>3</sup> prohibited, among other things, the wearing of "very short shorts",<sup>4</sup> spaghetti strap tank tops, clothing showing membership in certain groups, and flip-flop type sandals. As for tattoos, they were tolerated but "should not reveal more intimate parts of the body of the person (for example, a tattoo above a breast or above the buttocks should not be visible). They must also not make reference to criminal groups or to images of a sexist, violent or racist nature."<sup>5</sup> As for the appearance of hair, it must not be excessively coloured or cut in the "Mohawk" hairstyle. Finally, "piercings on the tongue and earrings inside the earlobe (stretch earrings) are prohibited."<sup>6</sup>

By way of a grievance, the Union contested the validity and sought the immediate withdrawal of the Policy. The arbitrator found nearly the entire Policy to be valid. His conclusions can be summarized as follows:

<sup>1</sup> *Syndicat canadien de la fonction publique, section locale 4628 et Centre jeunesse de Montréal - Institut universitaire*, D.T.E. 2012T-336 (T.A.) (hereinafter the «Decision»).

<sup>2</sup> Pages 5-6, para. 13 of the Decision.

<sup>3</sup> For all the rules, see page 9, para. 13 of the Decision.

<sup>4</sup> Page 9, para. 13 of the Decision.

<sup>5</sup> *Idem*.

<sup>6</sup> *Idem*.

- ▶ The adoption of a dress code policy was a legal exercise of the employer's management rights since its purpose is related to the protection of health and safety and the corporate image;
- ▶ The Policy could apply to all the Centre's staff, including employees who were not in direct contact with the clientele;
- ▶ The employer was justified to require the concealment of tattoos when they only appeared on certain parts of the body ("for example, a tattoo above a breast or the buttocks"<sup>7</sup>) and in prohibiting certain types of piercings;
- ▶ Although the Policy potentially infringed certain fundamental rights and freedoms, it met the test under section 9.1 of the *Charter of Human Rights and Freedoms*<sup>8</sup> (hereinafter the "Charter")<sup>9</sup>.

The arbitrator only found a part of the Policy invalid on the basis that it was abusive, namely, the requirement that the employees "act as models for [their] colleagues".

## THE PARTIES' POSITIONS

The Union claimed that the Policy violated the right to physical well-being, freedom of religion, freedom of expression, and respect for one's private life, all rights protected by the Charter. In the Union's submission, the Centre had not shown that the rights and freedoms protected by the Charter were only minimally impaired.

The Union also alleged that the wording of various guidelines in the Policy was vague and that there was therefore a risk that the managers in the various departments would apply the Policy in an arbitrary and subjective manner, each according to their own specific beliefs and prejudices.

In addition, according to the Union, the Policy ought not to have extended to all of the 3,170 employees because several classes of employees had very limited contact with the clientele.

The Union also claimed that the employer had not shown that there were any tangible effects of the dyeing of hair or piercings on the clientele.

For its part, the Centre maintained that, since 2004-2005, numerous employees had had questions about the guidelines for proper dress and that one of the aims of the Policy was therefore to clarify the situation. In response to the Union's opposition to the application of the Policy to all of the staff, the Centre asserted that they all had to be capable of having contact, whether directly or

indirectly, with the clientele and that the Centre's mission was to serve as a model for the clientele. Finally, the Centre pleaded that the Policy, as drafted, was included in the management rights that were conferred on the Centre in the collective agreement. It maintained that no evidence was adduced on the alleged discriminatory or abusive nature of the Policy, or with respect to an alleged violation of fundamental freedoms.

## ARBITRATOR'S DECISION

The arbitrator's reasons were divided into two parts.<sup>10</sup> The first dealt with the validity of the Policy in light of the principles which have emerged from the case law on the employer's management rights. The second addressed the various breaches of the rights and freedoms alleged by the Union.

### EXERCISE OF THE RIGHT OF MANAGEMENT

The arbitrator explained that the employer had the power to adopt regulations and policies in the exercise of its management rights. The case law has dealt in detail with the parameters for the validity of a policy adopted by the employer. The arbitrator cited with approval a decision which held that a policy must meet six conditions to be valid: "it must be compatible with the collective agreement; it must not be unreasonable; it must be clear and unambiguous; it must be brought to the attention of the employees before being applied to them; they must be informed that a breach can lead to disciplinary measures; and it must be applied with consistency."<sup>11</sup>

In this case, the main objectives of the Policy were to project an image of professionalism, prevent breaches of the dress code, ensure that the vulnerable clientele were not placed in a situation in which the institution's teachers appeared to be contradicted by the image projected by the institution's employees, ensure the institution was in compliance with its statutory obligations, and ensure the health and safety of the employees. The arbitrator concluded that these objectives were legitimate in light of the nature of the Centre's activities. This was therefore a reasonable exercise of the management rights.

<sup>7</sup> Page 9, para. 13 of the Decision.

<sup>8</sup> R.S.Q., c. C-12.

<sup>9</sup> This test is explained in section 3 (ii) of this article.

<sup>10</sup> For the sake of brevity, we will not consider the reasons surrounding the preliminary objection raised by the Centre with respect to the notion of "policy grievance": see paras. 77 to 93 of the Decision.

<sup>11</sup> *Shell Canada Ltée and Travailleurs unis du pétrole du Canada, section locale 121 du SCEP*, D.T.E. 2010T-68 (T.A.) (J.P. Lussier), at page 30, para. 100 of the Decision.

As for whether the Centre could impose the Policy on all its staff, the arbitrator rejected the arguments presented by the Union, holding that the Centre's decision to do so was reasonable. In the arbitrator's view, from the perspective of a child at the Centre, every member of the staff represented the Centre. Thus, "the operability of a differentiation which takes into account these differences [in the degree of visual contact with the clientele] and the control thereof through supervision seems illusory or impracticable without entailing significant and insurmountable drawbacks."<sup>12</sup>

However, the arbitrator held that the obligation in the Policy requiring employees to act as models for their colleagues was invalid on the basis that this requirement largely exceeded the duty of loyalty and obedience applying to employees generally, and was therefore abusive and unreasonable.

As for the Union's fear that the Policy would be applied in an arbitrary, subjective and abusive manner, particularly due to the wording of certain guidelines which it considered ambiguous, the arbitrator concluded that none of these requirements seemed irrational on a reading thereof. He also pointed out that this was a hypothetical issue since the Union had adduced no evidence of the arbitrary or subjective application of the Policy. The arbitrator noted that if the Policy were abusively or unreasonably applied, the Union had remedies available to it and could take measures to correct the situation in such event.

### COMPLIANCE WITH THE CHARTER

The Union alleged that the rights to freedom of religion, respect for private life, physical well-being, and freedom of expression contained in the Charter had been violated.<sup>13</sup>

The arbitrator therefore had to consider, firstly, whether there was a potential infringement of one of the fundamental rights protected by the Charter and, secondly, whether the potential violation was justified pursuant to the test under section 9.1 of the Charter.

### POTENTIAL VIOLATIONS

The Union argued that the prohibition against wearing a cap or scarf could affect the freedom of religion of certain employees, despite the fact that the employer's representative had indicated that this did not apply to the hijab. The arbitrator held that "the risk of an error in judgment does not constitute a breach of a fundamental right".<sup>14</sup> He found that the state of the law on discrimination and the duty to accommodate has been sufficiently developed to prevent this requirement from infringing on freedom of religion.

The Union also claimed that the requirements in the Policy relating to proper dress (particularly the prohibition against wearing string halter tops which allow the bra to be seen) infringed the privacy of the Centre's employees.

In the arbitrator's view, these requirements were more akin to a potential infringement of freedom of expression than of the right to privacy. The arbitrator therefore proceeded to the second stage of the analysis, i.e. the test under section 9.1 of the Charter, which we will consider below.

Finally, the arbitrator concluded that the requirements of the Policy relating to personal appearance (for example, the prohibition against excessive colouring of the hair, displaying tattoos on parts of the body that are described as intimate,<sup>15</sup> and piercings of the tongue) threatened the right to privacy and, potentially, the right to physical well-being and freedom of expression. Therefore, the test under section 9.1 of the Charter also had to be met to prevent this part of the Policy from being declared invalid.

### TEST UNDER SECTION 9.1 OF THE CHARTER

The finding that there were certain potential infringements of the rights and freedoms at issue obliged the arbitrator to apply the test set forth in section 9.1 of the Charter, i.e. to determine whether: 1) the objectives sought are legitimate; 2) there is a rational connection between the imposed restrictions and those objectives; 3) the impairment is minimal; and 4) there is proportionality between the prejudicial effects suffered by the employees and the objectives sought.

The arbitrator concluded that the first stage of the test had been met. The nature of the Centre's mission warranted the adoption of such rules. The arbitrator rejected the Union's argument to the effect that the Centre had to show that the clientele had complained about the manner of dress, since the Centre has the obligation to provide a public social service, and it is not imperative that its Policy be designed to correct a problematic situation.

As for the restrictions on tattoos and piercings, the arbitrator also held that the impairment was minimal because not all tattoos were prohibited, since only certain parts of the body were affected. With respect to piercings and earrings inside the earlobe (stretch earrings), the purpose of the restrictions, "in addition to hygiene and safety, was to prevent self-mutilation, i.e. to protect their personal integrity". The arbitrator noted that the employer

<sup>12</sup> Page 35, para. 122 of the Decision.

<sup>13</sup> Sections 1, 3 and 5 of the Charter.

<sup>14</sup> Page 43, para. 151 of the Decision.

<sup>15</sup> i.e. above a breast or the buttocks.

acknowledged that there was greater social acceptance of this phenomenon and it had not, therefore, prohibited all piercings or facial jewelry. Thus, he also concluded that the impairment was minimal in this respect.

The arbitrator also found that the second stage of the test, i.e. whether there is a rational connection between the objective sought and the Policy, had also been met, since the directives adopted by the Centre sought to limit bad influences on a vulnerable and impressionable clientele and to set a good example for them.

As for the third stage of the test, which considers the degree of impairment, the arbitrator held that the Centre had drafted its Policy in a manner that limited the impairment, for example, by only prohibiting very short shorts and not all shorts. These guidelines met the criterion of minimal impairment, "allowing for real flexibility in the choice of clothing".<sup>17</sup>

The last stage of the arbitrator's analysis, dealing with the proportionality between the prejudicial effects suffered by the employees and the objectives sought, raised more questions concerning the requirement of concealing tattoos on certain parts of the body and the prohibition against referring to criminal groups in tattoos. The Centre argued that these restrictions were warranted on grounds of decency and to set an example for the clientele. After considering these grounds, the arbitrator concluded that the criterion of proportionality required by the Charter had also been satisfied.

## CONCLUSION

The arbitrator confirmed that certain fundamental rights are not absolute in the context of the workplace. In this case, certain rights of the Centre's employees, such as the right to privacy and freedom of expression, must be counter-balanced against the pedagogical values which the Centre must impart to the beneficiaries of its services.

Furthermore, the Centre's efforts to set an example for its clientele, and the mission of the Centre to protect this vulnerable clientele, are certainly factors which strongly influenced the arbitrator's analysis of the test under section 9.1 of the Charter.

It will be very interesting to see what impact this decision has in other contexts not involving the provision by a youth centre of services to a vulnerable and impressionable clientele.

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<sup>16</sup> Page 58, para. 205 of the Decision.

<sup>17</sup> Page 53, para. 180.

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