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Employers: to what extent can you control your employees' physical appearance?

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It is generally understood that an employer has the authority to manage and control its employees to ensure its business runs smoothly. In exercising such authority, an employer can adopt and implement policies that govern how employees perform their work. In certain circumstances, an employer can even adopt a policy to control the physical appearance of its employees. However, this power is limited both by legislation and the employment contract. But what are the limits provided by the law with regards to this issue? A recent arbitral decision helped to answer this question.

In *Commission scolaire des Samares*[1], the policy adopted by the employer school board affected all teachers responsible for training future health professionals, primarily nurses and nurses aides. The policy provided the following:

> a requirement that an employee have good personal hygiene;
> a prohibition against wearing a head covering (hat);
> a requirement that an employee's hair colour be natural (dyed hair not permitted);
> a requirement that an employee's nails be short, clean and unpolished (artificial nails not permitted);
> a requirement that an employee wear shoes which are closed and safe (low heels, non-slip with quiet soles);
> a prohibition against wearing jeans, shorts, mini-skirts and camisole-type tops;
> earrings, necklaces and other jewellery must be modest, solidly attached and covered;
> long hair has to be tied back;
> beards must be covered in certain circumstances.

Essentially, the employer adopted this policy to ensure that its teachers provided their students with positive guidance as they would eventually be required to follow similar rules as healthcare professionals.

The Arbitration Tribunal was asked to determine whether these policies were legal. In its analysis, the Tribunal discussed the various laws governing the individual freedoms of employees. First, the *Charter of Human Rights and Freedoms*[2] provides that every person has the right to freedom of expression, respect of his or her private life, and fair and reasonable conditions of employment. The *Civil Code of Québec*[3] provides that every person possesses personality rights, such as the right to

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the inviolability and integrity of his or her person and the right to privacy.

The case law recognizes that an employer has the right to adopt rules regarding the physical appearance of its employees. However, in order for such rules to be valid, they must be justified by the pursuit of a serious and legitimate purpose. This will generally be found to be the case where the objective sought is the promotion or protection of workplace health and safety or the promotion of other legitimate commercial interests, such as the projection or maintenance of the company's corporate image. The policy must also be reasonable, meaning that the employer must have acted sensibly and fairly in adopting it while giving consideration to the objective facts relevant to the quality of the services rendered by its employees. The employer must not act arbitrarily, indiscriminately, capriciously, under the guise of false pretenses, or in such a way as to infringe a right protected by law.

Since, in principle, employees retain their individual fundamental rights and freedoms even while at work, the aspects of one's physical appearance are *a priori* protected by the right to privacy. It is therefore necessary that: (1) the employer's objective in setting up rules relating to physical appearance be important and legitimate; and, (2) the means used to achieve this objective are rational and proportionate, that is to say as minimally intrusive as possible while curtailing as little as possible the fundamental right in question. Note that the employer has the burden of proof in this regard.

Based on these principles, the Arbitration Tribunal assessed certain aspects of the policy adopted by the employer.

With respect to the requirement of good personal hygiene, the Tribunal was of the opinion that this requirement, a matter of common sense, is general in nature and constitutes a trivial interference with the employees' rights. The fact that it is an obvious requirement in the workplace does not make it excessive or unreasonable.

With respect to the rule prohibiting hair dye, the Tribunal espoused the view that it clearly infringes the employees' right to privacy, especially since it extends beyond work hours. Moreover, this rule is more restrictive than those which govern the students' future work environment. This rule is related more to questions of taste than it is to the profession being taught or the profession of teaching itself. In the end, this measure was irrational and the scope of the infringement was not minimal.

With respect to beards, the policy requires that, in some practical classes, teachers cover them while teaching certain methods of care. The Tribunal found that this rule does not infringe any *Charter* rights and that it is neither unreasonable nor excessive. It is in line with the employer's teaching methods and reflects rules governing occupational health, safety and hygiene.

Similarly, the rule requiring that long hair be tied back during practical classes is reasonable, can be justified on the grounds of hygiene, and has a minimal impact. Also, in contrast to the prohibition against dyed hair, the requirement that long hair be tied back does not extend beyond work hours.

With respect to nails, the policies require that they be short, clean, unpolished and not artificial. Although, at first glance, these requirements seem to constitute *a priori* violations of the individual's freedom of expression and right to privacy, they are consistent with the recommendations issued by various professional bodies in the healthcare field and are, therefore, justifiable in this particular context. The same reasoning applies to the requirement that employees wear closed, non-slip shoes, which is aimed at protecting the employees' health and safety.

With respect to jewellery, including earrings and necklaces, the policy requires that they be modest, solidly attached and covered. The Tribunal held that this restriction was overbroad and imprecise

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due to the use of the word “modest” (a rough translation of the word “sobre” in French). The Tribunal was of the view that this restriction was more a matter of taste than a pedagogical issue, and that the infringement of freedom of expression at issue did not satisfy the criteria established by the courts.

In terms of clothing restrictions, the Tribunal was of the opinion that an employer wishing to prohibit employees from wearing jeans or shorts at work must demonstrate that the purpose of such a measure is to preserve the company’s image. This may be the case where an employee’s responsibilities involve direct contact with customers or the public. In the absence of evidence to that effect, and since jeans and shorts are generally considered to be appropriate attire in public schools, this restriction was held to be unreasonable. Although the Tribunal does not expressly address it, it is our understanding that the same reasoning should apply to the prohibition of head coverings, such as hats.

Finally, with respect to the rules against wearing mini-skirts and camisole-type tops, the Tribunal was of the opinion that these rules rightly addressed an issue of general common sense and decency. While these rules do infringe the right to privacy and free expression, they do so in pursuit of an important and legitimate objective. Moreover, the harmful effects of these rules are outweighed by their benefits.

Insofar as some of the rules and requirements included in the employer’s policy do infringe upon the fundamental rights of the employees and moreover, their scope is sometimes inconsistent and/or disproportionate given the employer’s objective, the Arbitration Tribunal declared the policies to be invalid.

To conclude, although an employer has the power to adopt and implement a policy governing its employees’ physical appearance at work, it must be based on serious, legitimate and reasonable objectives. In this regard, employers would be wise to document the process leading to the adoption of such a policy insofar as they have the burden of proving that it is well-founded and reasonable given the environment in which the employees are working.

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[1] *Syndicat de l’enseignement de Lanaudière* and *Commission scolaire des Samares*, D.T.E. 2012T 862.

[2] R.S.Q., c. C-12.

[3] S.Q. 1991, c. 64.

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