RETOUR DU DOSSIER À UN ADJUDICATEUR DISTINCT (p. 1636)

Bien que moyen de partialité rejeté (pp. 1630-1631)

[1997] R.J.Q. 1625 à 1636

Cour supérieure

COMMISSION SCOLAIRE CRIE — THE CREE SCHOOL BOARD,
demanderesse, c.
M^e FRANÇOIS FORTIER,
défendeur,
et LISE LAVALLÉE et autres,
mises en cause*

TRAVAIL — grief — mesure disciplinaire ou non disciplinaire — manquement du salarié — mœurs — harcèlement sexuel — enseignant.

TRAVAIL — grief — compétence de l'arbitre (principes) — compétence exclusive et contrôle judiciaire — question ne relevant pas de la compétence spécialisée — harcèlement sexuel — norme de contrôle — justesse de la décision.

ADMINISTRATIF (DROIT) — contrôle judiciaire — cas d'application — arbitre de griefs — mesure disciplinaire ou non disciplinaire — mœurs — harcèlement sexuel — congédiement — enseignant.

ADMINISTRATIF (DROIT) — contrôle judiciaire — contrôle des erreurs de fait et de droit — norme de contrôle — arbitre de griefs — congédiement — harcèlement sexuel — justesse de la décision — refus d'entendre une preuve — équité de la procédure — appréciation de la preuve et des témoins — erreur manifestement déraisonnable — obligation de motiver une décision.

Requête en révision judiciaire d'une sentence arbitrale ayant accueilli un grief contestant le congédiement d'un enseignant. Accueillie.

La commission scolaire crie a décidé de mettre fin à l'emploi d'un enseignant pour cause d'inconduite et d'immoralité. On lui reprochait essentiellement une forme de harcèlement sexuel envers ses élèves et collègues, consistant en des propos vulgaires et déplacés. Deux fois auparavant, on avait décidé de ne pas le réengager pour l'année scolaire suivante mais, les deux fois, le grief a été réglé et son retour, autorisé conditionnellement à son engagement d'observer une conduite adéquate. Dans la décision visée par la présente requête en révision, l'arbitre a accueilli le grief contestant son congédiement et a ordonné sa réintégration. La commission scolaire invoque la partialité de l'arbitre, qui, avant d'entendre la preuve, aurait demandé si « [c'était] vraiment sérieux cette affaire-là » et n'aurait, par ailleurs, aucunement tenu compte de la culture crie, mise en preuve. Elle lui reproche aussi : d'avoir refusé d'entendre une preuve pertinente, soit celle des faits ayant entouré les décisions à l'origine des deux griefs précédents ; de n'avoir pas suffisamment motivé la décision, au regard de l'abondante preuve à charge contre l'enseignant, d'une part, et des simples dénégations de ce dernier, d'autre part ; et, enfin, d'avoir rendu une décision manifestement déraisonnable au regard de toutes les circonstances de l'affaire.

Décision

Trois normes différentes de contrôle judiciaire sont applicables au cas à l'étude, selon la question étudiée. La première est celle de la justesse de la décision de l'arbitre au regard de la question de fond concernant le harcèlement sexuel, qui n'est pas à proprement parler une question d'interprétation ou d'application de la convention collective sur laquelle il a une compétence exclusive. Il s'agit plutôt d'une question générale de droit couverte par les chartes des droits, qui sont des lois prépondérantes mettant en cause les droits fondamentaux des personnes visées par le harcèlement. La deuxième est l'équité de la procédure en ce qui concerne le refus d'entendre une preuve ; dans certains cas, un tel refus peut constituer un accroc aux règles de justice naturelle, bien que ce ne soit pas nécessairement le cas si ce refus n'a vraisemblablement pas eu d'effets sur l'issue de l'affaire. Enfin, pour les questions d'appréciation de la preuve et des témoins, c'est la norme de l'erreur manifestement déraisonnable qui s'applique.

Juge Nicole Duval Hesler — C.S. Montréal 500-05-023600-966, 1997-04-21 — Robert Mainville et associés, *M^e Guylène Beaugé*, pour la demanderesse — *M^e Kathleen Cahill*, pour les défendeurs.

Suivi : Appel (C.A.M. 500-09-004961-975). Appel rejeté le 15 juin 2000.
97-02-1412
J.E. 97-1101

Quant au fond, les propos reprochés à l'arbitre étaient déplacés mais ne sauraient constituer à eux seuls un fondement de révision judiciaire. Par ailleurs, le fait que la commission scolaire n'ait pas demandé la récusation de l'arbitre lors de l'audience devant lui n'est pas une fin de non-recevoir à un tel moyen de révision judiciaire ; il faut différencier les causes de récusation fondée sur des faits étrangers à la façon dont l'arbitre préside un débat et la conduite qu'il a pu avoir durant l'instance et qui indique une forme de partialité de sa part. Dans ce dernier cas, l'argument de partialité peut être invoqué après que la décision a été rendue. En ce qui concerne la culture crie, l'arbitre n'a pas commenté le témoignage de l'anthropologue venu affirmer le caractère totalement réprouvé de propos tels que ceux que l'enseignant a tenus devant des élèves cris. Cependant, le fait qu'il semble n'en avoir aucunement tenu compte ne saurait à lui seul constituer un motif de révision judiciaire. L'arbitre n'a pas évalué le harcèlement sexuel allégué pour ce qu'il est dans la forme en cause, c'est-à-dire un cas où ce sont des propos déplacés par une personne en situation d'autorité qui gênent et dérangent profondément son entourage, en l'occurrence des élèves qu'il a pour mission d'éduquer. La preuve, constituée des témoignages de sept élèves, de la sœur de l'une d'elles, de huit enseignantes, de deux spécialistes d'affaires étudiantes, du directeur et de ses assistants, d'un anthropologue, d'un conseiller pédagogique et de la personne responsable de la gestion du personnel, a établi que l'enseignant a, par son comportement, créé un climat hostile à l'endroit de ses élèves. La preuve présentée en défense a consisté en des dénégations invraisemblables de l'enseignant et en des témoignages de trois enseignants ayant affirmé qu'ils n'avaient pas de connaissance personnelle des circonstances entourant les événements ayant donné lieu au grief. Dans ce contexte, au lieu d'appliquer le critère de la prépondérance de la preuve, l'arbitre semble avoir cherché à trouver différentes manières pour ne pas qualifier le comportement de l'enseignant de harcèlement sexuel, notamment en soulevant des doutes et interrogations sur plusieurs éléments de preuve. Il a aussi apprécié la preuve d'une manière qui comporte des stéréotypes, comme en acceptant que des remarques que l'enseignant admet avoir faites puissent constituer de l'humour pouvant être toléré dans ce contexte. L'omission de motiver suffisamment une décision ne constitue généralement pas un motif de révision judiciaire, à moins qu'il n'existe une obligation explicite de motivation, mais les tribunaux doivent, à tout le moins, pouvoir déterminer quels sont les faits prouvés. Ici, l'arbitre admet que l'enseignant a prononcé des paroles non appropriées devant ses élèves à plusieurs occasions, mais il a conclu que ses propos vulgaires ne justifiaient pas son congédiement. Compte tenu des questions de droits fondamentaux en cause, sa décision est incorrecte et, comme c'est la norme de contrôle relative à la justesse de sa décision qui s'applique quant à la question de fond de harcèlement sexuel, il y a lieu d'accueillir la présente requête. L'affaire doit être entendue de nouveau, par un autre arbitre. Par ailleurs, la commission scolaire a omis d'alléguer dans sa requête qu'il y a eu objection à la preuve de faits antérieurs et que cette objection a été maintenue. La sentence arbitrale est muette sur cette question. Dans les circonstances, le motif allégué quant à l'omission de permettre une preuve pertinente ne saurait fonder la révision judiciaire. Toutefois, une telle preuve était pertinente et son omission de l'admettre priverait la commission scolaire d'une audience équitable. Enfin, même au regard de la norme de contrôle de l'erreur manifestement déraisonnable, la requête aurait dû être accueillie. En effet, la conduite de l'enseignant méritait clairement une mesure disciplinaire. L'arbitre a systématiquement atténué l'importance de certains reproches, a recherché de la corroboration là où ce n'était pas nécessaire ou a tenté de faire profiter l'enseignant d'un doute raisonnable, comme si les reproches devaient être prouvés d'une façon plus forte que par une preuve prépondérante. Dans l'ensemble, il n'a pas saisi ce que constitue le harcèlement sexuel et s'est laissé guider par des mythes et des stéréotypes ayant occulté une réalité pourtant évidente, à savoir que la forme de harcèlement sexuel en cause est totalement inacceptable dans une salle de classe.

Législation citée

Charte des droits et libertés de la personne (L.R.Q., c. C-12).

Jurisprudence citée

Académie Lafontaine inc. c. Ménard, C.S. Montréal 500-05-013702-947, le 2 mai 1995 (D.T.E. 95T-812) ; *Doyle c. Sparling*, [1992] R.J.Q. 11 (C.A.) et (1992) 43 Q.A.C. 16 ; *Murphy c. R.*, C.S. Bedford (Cowansville) 455-36-000015-941, le 18 décembre 1996 (B.E. 97BE-120) ; *Newfoundland Association of Public Employees c. Terre-Neuve (Green Bay Health Care Centre)*, (1996) 2 R.C.S. 3 (D.T.E. 96T-589 et J.E. 96-1001) et (1996) 134 D.L.R. 1 (S.C.C.) ; *Proulx c. R.*, (1993) 54 Q.A.C. 241 et (1993) 81 C.C.C. 48 (Que. C.A.) ; *Roberval Express Ltée c. Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, local 106*, (1982) 2 R.C.S. 888, [1983] R.D.J. 3 (C.S. Can.), (1983) 144 D.L.R. 673 (S.C.C.), (1983) 14 C.L.L.C. 12,102 (S.C.C.) et (1983) 47 N.R. 34 (S.C.C.) ; *Ross c. Conseil scolaire du district n° 15 du Nouveau-Brunswick*, (1996) 1 R.C.S. 825 (J.E. 96-739) et (1996) 133 D.L.R. 1 (S.C.C.) ; *Société des loteries du Québec c. Bolduc*, C.S. Montréal 500-05-017937-960, le 21 juin 1996 (D.T.E. 96T-844) ; *Syndicat de l'enseignement de Lanaudière c. Commission scolaire Le Gardeur*, [1997] R.J.Q. 268 (C.A.) (D.T.E. 97T-119 et J.E. 97-290) ; *Université du Québec à Trois-Rivières c. Larocque*, (1993) 1 R.C.S. 471, (1993) 53 Q.A.C. 171 (S.C.C.), (1993) 101 D.L.R. 494 (S.C.C.) et [1993] C.L.L.C. 12,104 (S.C.C.).

Doctrine citée

Dussault, René et Borgeat, Louis. *Traité de droit administratif*. 2e éd. Tome 3. Québec : P.U.L., 1989. 1342 p., p. 199 ; Garant, Patrice. *Droit administratif*. 4e éd. Volume 2. Cowansville : Y. Blais, 1996. 789 p., p. 394, 395 ; MacCrimmon, Marilyn T. « Trial by Ordeal », (1996) 1 *Rev. can. D.P.* 31, p. 41, 43, 45, 47.

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TEXTE INTÉGRAL DU JUGEMENT

Mr. Pepabano was hired by the Petitioner (the School Board) in 1978, as a teacher. His contract was renewed tacitly until 1989. That year, the School Board informed Mr. Pepabano that his contract would not be renewed. An ensuing grievance was settled on the basis that Mr. Pepabano would be given a leave of absence of one year without pay.

The settlement document, signed by Mr. Pepabano, acknowledged that the school committee had received complaints from parents, students and teachers in relation to Mr. Pepabano's behaviour and language in school.

The settlement document also provided that Mr. Pepabano was to undergo a behaviour follow-up with a professional and was to furnish proof of such follow-up before returning in the ensuing year, failing which non-reengagement would be considered.

In the spring of 1990, the Executive Committee of the School Board adopted a resolution not to re-engage Mr. Pepabano. The reasons cited are "incapacity; negligence in the performance of his duties; misconduct; immorality."

However, the only reasons mentioned in the letter to Mr. Pepabano advising him of his non-reengagement are incapacity and negligence in the performance of his duties.

A new grievance ensued, as well as a new settlement document. The latter provided that the School Board was to reinstate Mr. Pepabano as of May 21st, 1991. Under that same settlement, Mr. Pepabano agreed to "maintain in his classroom an atmosphere conducive to learning" and recognized "the need to *respect the physical and psychological integrity of each and every one of his students* in the performance of his duties as a teacher" (emphasis added).

On July 6, 1994, the School Board adopted a resolution that Mr. Pepabano be dismissed for "misconduct and immorality" towards his students. The letter of dismissal sent to Mr. Pepabano accused him of having touched some female students on their genital parts, of having threatened to have intercourse with their mothers and/or grandmothers, of having made sexual comments and remarks in his classroom and/or in the school in the presence of students and teachers, and of having used a vulgar vocabulary on several occasions in his classroom and/or in the school, in the presence of students and teachers.

A new grievance ensued. This time, there was no settlement. The matter went to arbitration. The Arbitrator ordered Mr. Pepabano re-instated with full compensation. The School Board is seeking judicial review of the Arbitrator's Award.

The positions of the parties

At the hearing, the School Board identified the following grounds for judicial review:

1. That the Arbitrator failed to adhere to the principles of natural justice. More particularly:

a) that the Arbitrator refused to admit relevant evidence, particularly evidence relating to Mr. Pepabano's previous history at the School Board, which is a violation of the *audi alteram partem* rule;

b) that the Administrator showed an obvious bias in his handling of the case;

c) that the Arbitrator's Award is so insufficiently motivated as to constitue an excess of jurisdiction. For instance, the Arbitrator does not explain why he chose to believe what the School Board describes as Mr. Pepabano's self-serving, uncorroborated and patently false denials rather than the several witnesses heard on behalf of the School Board. Petitioner contends that this violates the rules of natural justice.

2. That the Award is manifestly unreasonable in that:

a) for the most part, it rests not on the evidence but on hypotheses and speculations by the Arbitrator; what interpretation of evidence there is in the Award is illogical, unreasonable and irrational;

b) it ignores a significant aggravating factor, which is the nature of the position held by Mr. Pepabano, since a teaching position calls for high moral standards;

c) the Administrator disregarded the moral and social values of the Cree community, particularly as to what is expected of teachers to the young, and substituted therefor his own moral and social values, thus unreasonably refusing to apply the collective agreement as written between the parties, particularly section 5-7.13 thereof;

d) the Award imposes no sanction at all on Mr. Pepabano despite the proof adduced. At the very least, another disciplinary sanction should have been substituted;

e) in view of the wrongful behaviour of Mr. Pepabano, it is patently unreasonable to award him all lost pay since his dismissal.

The Teachers' Union, on behalf of Mr. Pepabano, argues, in essence, as follows:

1. The Arbitrator was not partial. Furthermore, the proper response to a perceived bias would have been to ask the Arbitrator to recuse himself. No such request was made and the Board is now estopped from raising this argument, having failed to raise it before the Arbitrator.

2. The School Board made no "formal" request to present evidence relating to Mr. Pepabano's previous history. In any event, questions on the settlement documents were allowed for the purpose of testing Mr. Pepabano's credibility. In addition, such evidence was properly excluded since past misconduct is not relevant when the employee is found not to have been at fault in the events under scrutiny.

3. There is no manifestly unreasonable error in the Award; in addition, the sanction is strictly within the Arbitrator's jurisdiction. The Court cannot subsitute its own sanction even were it to find fault with the Arbitrator's Award.

4. Findings of fact made by arbitrators are owed the same deference by courts whether they concern social values of the community or whether they relate to other facts or circumstances. In any event, the evidence in the case at hand tends to show that the Arbitrator was right. For instance, the principal complainants did not raise the issue of Mr. Pepabano's conduct until the spring of 1994, even though the alleged events would have taken place before Christmas 1993. At any rate, Section 5-7.13 of the collective agreement does not mean that the Arbitrator must take into account Cree values in appreciating the credibility of witnesses. The interpretation of evidence and the appreciation of credibility are strictly within the purview of the Arbitrator. The latter was not bound by the testimony of the anthropologist who testified on Cree values on behalf of the School Board in arriving at his interpretation of the evidence and his appreciation of the credibility of the witnesses.

In its written proceedings, the School Board raises an additional ground for review: that the Arbitrator did not comply with the delays provided in the collective agreement for making his Award. However, the School Board did not argue this ground at the hearing. In any event, as the Teachers' Union points out, the collective agreement specifically provides that an Award made outside of delays is not thereby automatically nullified. At best, says the Union, the delay may be relevant in deciding whether the order for payment of all retroactive salary is patently unreasonable.

It will not be necessary for the Court to deal with this issue, as it finds that the Arbitrator's Award must be set aside for other reasons.

The issues to be resolved

In order to adjudicate this matter, the Court must determine:

A. Which standard of judicial review is applicable — that of correctness, or that of the manifestly unreasonable error, or indeed some other standard.

B. 1) Whether the Arbitrator should have recused himself on grounds of bias;
2) Whether the School Board should have asked the Arbitrator to recuse himself on grounds of bias, failing which it is now precluded from raising the issue.

C. Whether the Arbitrator's Award is subject to review under the applicable legal standards.

Whether or not evidence was improperly excluded will be analyzed as a separate issue.

1. Standards of judicial review

It is settled that arbitrators have exclusive jurisdiction over the question of whether or not an employer has shown just cause for the dismissal of an employee. If such were the only issue here, the applicable standard for judicial review would be that of the manifestly unreasonable error.

However, matters are not so simple. This case is not one which calls for the application of a single standard for judicial review.

The Supreme Court of Canada has reaffirmed recently that courts should not interfere with decisions of properly constituted arbitration boards concerning the interpretation of a collective agreement unless they are patently unreasonable. The Supreme Court of Canada has also reaffirmed that when such a board or tribunal "interprets and applies questions of general law," its decision is reviewable on a standard of correctness, [1] i.e., will be set aside if wrong.

This case poses the question of what constitutes sexual harassment in a classroom context, of what burden of proof applies in such cases, and of apparent bias and prejudice shown in the handling of such issues. These are topics which do not fall within the exclusive purview of labour arbitrators. They are matters of general law, reviewable on a standard of correctness.

Indeed, it could be argued that the present case also deals with human rights law, in that the fundamental rights to personal dignity and privacy of the students, both rights guaranteed by the *Quebec Charter of Human Rights*, [2] may, if Petitioner is correct, have been infringed by Mr. Pepabano. Although Mr. Pepabano's students are not parties to these proceedings, their interest and well-being are a relevant concern. Arbitrators are bound by the hierarchy of laws. Charters of human rights are predominant laws. If they are incorrectly interpreted or applied, or inappropriately overlooked, that is cause for judicial review on a standard of correctness.

As regards the exclusion of evidence by an arbitrator, it was formerly held that the refusal by an arbitrator to hear admissible and relevant evidence in itself constituted a case of excess of or refusal to exercise his or her jurisdiction. [3] However, the Supreme Court of Canada has now ruled that the exclusion of relevant evidence does not necessarily constitute a breach of the rules of natural justice and therefore an excess of jurisdiction. The arbitrator's ruling to exclude evidence will only constitute an abuse of jurisdiction if it impacts on the fairness of the proceedings. If it does, whether or not excluded evidence may have affected

(1) *Newfoundland Association of Public Employees c. Green Bay Health Care Centre de Terre-Neuve*, (1996) 2 R.C.S. 3, 11. See also a recent decision of the Quebec Court of Appeal: *Syndicat de l'enseignement de Lanaudière c. Commission scolaire Le Gardeur*, [1997] R.J.Q. 268 (C.A.).

(2) *Charte des droits et libertés de la personne* (L.R.Q., c. C-12).

(3) *Roberval Express Ltée c. Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, local 106*, (1982) 2 R.C.S. 888.

the outcome becomes irrelevant, as the denial to a fair hearing always renders a decision invalid. (4)

For these reasons, three standards of judicial review apply in the case at hand, depending on the issue being analyzed: that of correctness on matters of the general law, that of the "patently unreasonable" error for matters within the specialized field of the Arbitrator, and that of fairness of the proceedings overall on the exclusion of relevant and admissible evidence.

2. *The issue of recusation for bias*

Upon analysis, it can be seen that the School Board bases its accusation of bias on two grounds.

The first is that the Arbitrator made dismissive comments during the hearing. In particular, he questioned whether the case at hand was "serious" even before having heard any evidence, in the following words: "Est-ce que c'est vraiment sérieux cette affaire-là?"

Arbitrators must act in an impartial manner, but a show of partiality will not of itself nullity the Award if it is justified by sufficient proof. (5)

> La Cour d'appel et la Cour fédérale ont décidé que la formulation de la part d'un président de tribunal de remarques qui laissent à désirer au point de vue objectivité ne suffit à donner naissance à crainte de préjugé ; la Cour d'appel estimait « qu'un manque passager de sérénité », « un moment d'impatience » ne suffisent pas non plus à constituer un déni de justice naturelle. En revanche les remarques à caractère sexiste ou manifestant une condescendance envers les femmes ont été considérées comme inacceptables. (6)

While recognizing that a comment such as "Est-ce que c'est vraiment sérieux cette affaire-là?" may lead a party to have genuine concerns for what lies ahead, and that it is therefore inappropriate in most instances, the Court finds no ground for review on the basis of that single circumstance. (7) Hearings are meant to be, amongst other things, an exchange of views. The parties have a right to be heard, but it would serve no purpose to muzzle the trier of fact who might simply be seeking enlightenment as to the exact nature of the case before him/her. Obviously, as my colleague Mr. Justice Bellavance recently pointed out: (8)

> Ce qui importe, est que le juge ne s'emmure pas dans une position immuable que les parties ne pourraient tenter d'influencer.

That is not to say that a comment such as that above may not betray some automatic adherence to stereotypes and myths likely to significantly cloud the decision maker's understanding of the issues before her/him. Such a mindset would, however, be systemic in nature. It would not constitute a bias of which the fact-finder would normally be aware (such as kinship with a party, for instance, or ownership in the stock of a party, or undue animosity towards a party or his/her attorney) and which would dictate that he or she should withdraw from the case. A mindset bias is by nature unperceived by the decider of facts. Unperceived biases obviously cannot serve as an indication for withdrawal to the decision maker. Therefore, one cannot fault the Arbitrator for not having withdrawn voluntarily from this case.

Neither can one fault the School Board for not insisting that he do so.

The Teachers' Union argues that the case of *Doyle c. Sparling* (9) in the Quebec Court of Appeal stands for the proposition that a cause for recusation based on the attitude of the presiding judge must be invoked before that judge. It does not, as the following extract demonstrates: (10)

> Cette proposition est mal fondée. Si les deux premières causes de récusation invoquées par Doyle et qui ont été résumées plus haut (partialité du juge résultant de la production des deux rapports et du dépôt du jugement dans l'affaire Balestreri) devaient être invoquées sans délai et, en tout état de cause, avant le prononcé du jugement, le moyen par lequel Doyle prétend avoir le droit à un nouveau procès à cause de l'attitude du juge lors du procès peut être invoqué à l'intérieur du pourvoi. On imagine mal comment Doyle aurait pu faire valoir ses prétentions en présentant une requête en récusation en première instance et en priant un collègue du juge de se prononcer sur la façon dont celui-ci présidait les débats. *Si les causes de récusation basées sur des faits qui sont étrangers à la façon dont un arbitre préside un débat doivent être invoquées avant la décision de cet arbitre, on peut toujours invoquer en appel le fait que, durant le débat, l'arbitre a eu une conduite qui témoignait de sa partialité.*
>
> [Emphasis added.]

(4) *Université du Québec à Trois-Rivières c. Larocque,* (1993) 1 R.C.S. 471.

(5) Patrice Garant. *Droit administratif.* 4e éd. Volume 2. Cowansville : Y. Blais, 1996. P. 394.

(6) *Id.*, 395.

(7) *Proulx c. R.*, (1993) 54 Q.A.C. 241. See in particular the opinion of Mr. Justice Nichols at p. 254.

(8) *Murphy c. R.*, C.S. Bedford (Cowansville) 455-36-000015-941, le 18 décembre 1996 (B.E. 97BE-120), p. 5 du jugement.

(9) [1992] R.J.Q. 11 (C.A.).

(10) *Id.*, 20.

The second ground for the claim of bias is the alleged disregard by the Arbitrator of community values deeply held by the Crees, as well as a disregard of Cree culture in the analysis of the evidence presented before him.

That second ground poses more of a challenge.

Several witnesses testified before the Arbitrator that Mr. Pepabano made inappropriate gestures and comments of a sexual nature to students, sometimes in the presence of colleagues. However, several witnesses were reluctant to repeat the offensive language.

Proof was made through an anthropologist that the Cree people will prefer to use general language such as "to talk dirty" rather than repeat dirty words. Proof was also made that sexually loaded language is only to be used between persons of the same age. It is totally inappropriate when directed by older persons to younger ones. The attitude of the community in this respect is conservative, and even "Victorian."

According to the same anthropologist, it is totally unacceptable to tell young people that one intends to sleep with their grandmother.

Having summarized this testimony, the Arbitrator makes no further use of it. It is as though it were not part of the record. Failure to consider relevant and uncontradicted evidence on cultural perceptions is indeed erroneous, but the appreciation of the evidence is a matter for the arbitrator, subject to the "patently unreasonable" standard. The apparent failure by the Arbitrator to take Cree culture into account does not constitute, in and of itself, a patently unreasonable error, although it may contribute to the irrationality of the decision as a whole. It is therefore necessary to pursue the analysis of the Arbitrator's Award and to consider the other grounds for judicial review.

3. *The grounds for judicial review*

Based on what he himself describes in his Award, the Arbitrator was presented with evidence which would give pause to anyone. By way of example:

The mother of an eleven-year-old girl testified that her daughter did not want to attend Mr. Pepabano's class on the Cree language because Mr. Pepabano touched her "behind." She saw changes in her daughter's behaviour: she cried without reason, had nightmares and did not want to sleep in her bedroom because she saw Mr. Pepabano's figure in the mirror. Since Mr. Pepabano's departure, those problems (the list of which is not exhaustive) have disappeared and the child is happy in school.

The nineteen-year-old sister of a fourteen-year-old student of Mr. Pepabano testified that her sister did not like to attend Mr. Pepabano's class because he had touched her. The mother of the same student said that her daughter did not like to go to school because she did not like what Mr. Pepabano would say to her.

That fourteen-year-old student testified that she did not like to go into the classroom of Mr. Pepabano because he would touch her shoulders, her behind, her breasts, most of the time in the classroom, when she was at the back of the classroom by herself. She did not like it. She asked her mother not to attend his classes any more. She also mentioned the matter to another teacher and to her sister.

The same student testified that Mr. Pepabano told her she was very pretty and old enough to sleep with boys. *He said as much to the boys as well, in the classroom.*

Another student, ten years old, told her grandmother that Mr. Pepabano had said that "midgets" who came to the school to give a performance would make good sexual partners because their genitals were probably the right size. At the time, that student refused to go back to school. By the time of the hearing before the Arbitrator (when Mr. Pepabano was absent from school, having been dismissed), the same student testified that she liked school.

A fourteen-year-old male student testified that he did not like attending Mr. Pepabano's classes because he was afraid of him and did not like it when he said that he would sleep with his grandmother.

A thirteen-year-old female student said that she did not like attending Mr. Pepabano's classes because he told her that he would accompany her to the washroom. She also did not like sexual comments he made to the students.

Teachers at the same school testified that students had told them that Mr. Pepabano talked dirty to them and on occasion were reluctant to attend his classes.

One heard him say: "You're gonna be a nice girl when you grow up" and adds that the student was embarrassed. The students would tell her that Mr. Pepabano talked to them about their body and about their looks.

Another teacher heard Mr. Pepabano make some comments to a male student about his genitals. She confronted him (Mr. Pepabano) on the spot, but did not advise the School Board.

This recitation is by no means exhaustive. The facts were disturbing, no matter what reserves one may harbour about this type of evidence. The Court adds that the Arbitrator makes absolutely no mention of a motive for a concerted attack by students and teachers on Mr. Pepabano's character, nor indeed of the existence of a concerted attack against him by the seven students who testified. None of Petitioner's adult witnesses had an interest in the outcome of the proceedings, other than the interest of the children as they perceived it.

Neither does the Arbitrator comment on the fact that Mr. Pepabano gave implausible answers at the arbitration hearing, to wit: that he had never before been reproached by the School Board for his conduct towards students, that he had never taken a leave of absence, that he had never signed the settlement documents referred to earlier. Again, this compilation is not exhaustive, and those answers fly in the face of the evidence, documentary as well as oral. The Teachers' Union did not attempt to explain or justify Mr. Pepabano's denials in any way.

In addition to its other aspects, this case involves sexual harassment. Cases of sexual harassment are seldom clear-cut, particularly when no actual sexual interaction is involved and the victims are minors in a situation of dependence on the authority of the alleged harasser, in this instance, a teacher. The present case is no exception.

Sexual harassment is characterized both by abuse of power and undertones—not necessarily express statements—of sexual attraction. It may take many forms. Its will typically turn the victims into an object of sexual desire, by-passing in the process their fundamental value as human beings and their inherent right, assuming they are old enough to do so, to alone determine to whom and when they are sexually available. Where minors are involved, the abuse is all the greater, for obvious reasons.

Sexual harassment does not necessarily entail the exercise of authority or economic power over the victim in order to procure the harasser actual sexual satisfaction. Sexual harassment may well consist of *exposing the victim as a sexual object* to peers, for instance, by emphasizing the victim's attractiveness as a would-be sexual partner *to persons other than the harasser.*

In cases of sexual harassment, as in cases of sexual abuses, stereotypes can undermine a proper analysis of the facts. That is because "stereotypes determine the range of interpretations, thereby limiting and closing off alternative interpretations."(11) Stereotypes introduce discriminatory beliefs into judgment making. For instance, one widely held stereotype holds that a delay in reporting incidents is cause for doubting the complainant's credibility. A discriminatory mindset may well be at play when a reason for disbelieving complainants who are young or female is the delay in lodging their complaint. The Teachers' Union did argue before the Arbitrator as well as before this Court that the delay in complaining in the present case brought into question the complainants' credibility. The Court disagrees.

Even were the Teachers' Union right, it has been pointed out that "the fact that a stereotype may sometimes be true does not reduce its discriminatory effects."(12) It should therefore rest upon those who advance the truth of a stereotype to show why the generalization is true in the case at hand. If the Teachers'

(11) Marilyn T. MacCrimmon. «Trial by Ordeal», (1996) 1 *Rev. can. D.P.* 31, 45.

(12) *Id.*, 47.

Union wished to argue that the delay in reporting Mr. Pepabano's conduct in this case meant that the complainants were less credible, it had to show why.

In any event, the Arbitrator readily espoused the stereotypical approach of the Teachers' Union to the present case. The following passage in his Award is telling:

> Dans un dossier de la nature du présent dossier, il doit exister *une preuve claire et convaincante*, ce qui n'est pas le cas. Tout ce que l'on a, ce sont des situations qui ont été prises hors contexte, que l'on a tenté de colorer. Encore-là, David Pepabano a montré comment il tapait sur les épaules des étudiants pour les encourager et encore-là, on y a vu de l'abus sexuel, *ce qui est tout à fait injuste pour un enseignant qui enseigne la culture crie depuis 1978 et qui a agi comme pionnier.*
>
> [Emphasis added.]

For one thing, this is tantamount to judging the credibility of specific witnesses relating specific facts based on the length of another witness's career track. What does being a "pioneer in the field" have to do with what the complainants were alleging? Particularly if, as the School Board contends, similar previous misconduct by the same individual was excluded from scrutiny by the Arbitrator?

One may well ponder what is meant by the Arbitrator when he refers to the need for "clear and convincing evidence." He had before him two versions, one advanced by several witnesses who told of a series of circumstances that showed at the very least that some of Mr. Pepabano's students were greatly disturbed by his comments and behaviour. In addition to seven pupils of Mr. Pepabano, the School Board produced as witnesses three of their mothers, one sister, eight other teachers, two student affairs specialists, the principal and her assistants, an anthropologist, a psychologist, a former secretary general of the School Board, a pedagogic advisor and the personnel manager. The one reasonable conclusion from this evidence was that Mr. Pepabano's conduct created a school environment which was hostile to many of his young charges. The other version consisted primarily in the denials of Mr. Pepabano and the lukewarm endorsement of three fellow teachers who seemed to have no personal knowledge of the circumstances surrounding the events complained of.

Why should the burden of proof not have been the usual one, i.e. the balance of probabilities? This was no criminal matter. Yet the Arbitrator, in essence, treated it as such, constantly looking for some measure of doubt to apply to each element in evidence, with somewhat contradictory results, as we shall see. He quite simply disregarded the abundantly proven impact of Mr. Pepabano's behaviour in his students. The latters' right to their personal dignity and privacy was also quite simply overlooked.

The Arbitrator also chose to ignore the special role that teachers are called upon to play in our society:(13)

> Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their position. The conduct of a teacher bears directly upon the community's perception on the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole.
>
> [...]
>
> By their conduct, teachers [...] must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system.

There are additional indications that the Arbitrator approached the evidence in a stereotypical fashion. He appears to have unquestionably accepted the assertion that Mr. Pepabano liked to compliment women because of his "gallic" sense of humour. That same sense of humour would apparently have justified several tawdry remarks *admittedly made by Mr. Pepabano.* Such assumptions are neither justified nor valid. Decision makers are not at liberty to blindly adhere to their own set of values when put in the position of having to judge the behaviour of those who appear before them. Neutrality involves acceptance of the values of the community at large, not those of a dominant group, the whole in a manner compatible with the substantive equality objectives of the Charter.

> In a democratic country, judges should not be free to use any views of the world they choose, but should apply views which are representative of society at large and which are consistent with Charter rights.(14)

(13) *Ross c. Conseil scolaire du district n° 15 du Nouveau-Brunswick*, (1996) 1 R.C.S. 825, 857.

(14) *Loc. cit. supra*, note 11, 41.

Elsewhere, the Arbitrator makes the following, equally telling, comment:

> Quant à E.P., il a affirmé qu'en parlant de sa grand-mère, David Pepabano lui aurait dit qu'il était pour aller au lit et faire l'amour avec elle...
>
> Ces propos rapportés par S.D. et par E.P., s'ils ont été tenus de cette façon, sont à la fois surprenants et répréhensibles de la part d'un enseignant face à de jeunes élèves.
>
> Toutefois, l'on peut douter que ce soit exactement de cette façon que ces paroles ont été prononcées. Aucun autre élève n'a corroboré ces témoignages malgré qu'ils aient été faits en pleine classe et je suis d'avis que si de tels propos avaient été tenus dans ces termes, ils ne pouvaient passer inaperçus et les témoins n'auraient pas manqué.

One cannot help but notice that no finding of fact is made one way or the other. The inference, quite simply, is that the statements may have been made, but something else must have been said, otherwise a sizeable cohort of the class would have volunteered corroborating evidence. This is mere supposition. The Arbitrator advances no other reason for disbelieving two students in the absence of any indication of some plot by the two to discredit Mr. Pepabano, or of some personal dislike of Mr. Pepabano by them.

The assumption that children will rally in droves to support fellow students who object to a teacher's comments or behaviour may well be a stereotype. It is certainly unsupported by any evidence adduced before the Arbitrator.

Let us now consider the following passage:

> Une enseignante... aurait entendu David Pepabano pendant l'année scolaire 1992-1993, dire à une élève qu'elle serait une jolie fille quand elle serait grande. Je ne crois pas que passer de telles remarques constitue de l'immoralité ou de l'inconduite, *pas plus que de dire à S. qu'elle était assez vieille pour aller au lit avec les garçons.* Cette dernière remarque est tout simplement inappropriée et si elle a été ainsi faite, n'aurait pas dû l'être.
>
> [Emphasis added.]

Well, the issue was, did the Arbitrator believe the comment was made or did he not? If not, what was it in the evidence that led him to that conclusion? If yes, what was the School Board to do about it? Was it excepted to disregard the student's right to her personal dignity and privacy?

While the failure to sufficiently motivate a decision does not constitute ground for judicial review unless there exists an obligation to motivate, [15] the reviewing court should at least be able to determinate what findings of fact were made.

The Arbitrator goes on:

> Que David Pepabano ait dit en classe, *en parlant de la mère d'un ou de plusieurs élèves qu'elle était ou qu'elles étaient jolies est, quant à moi, sans conséquence et l'on ne peut lui reprocher de telles remarques.*
>
> [Emphasis added.]

Surprisingly, the Arbitrator, after downplaying in similar fashion yet other instances of unacceptable language by Mr. Pepabano, concludes nevertheless that he is convinced that he must have made inappropriate comments to his students on several occasions. He then goes on to state that vulgar language and inappropriate comments do not justify a dismissal and reinstates Mr. Pepabano with full benefits since the date of his dismissal with not as much as a slap on the wrist. It is as though nothing had ever happened.

Having in so many words acknowledged at least some wrongdoing, the Arbitrator in effect refused to allow that any sanction was called for. It seemingly never entered the mind of the Arbitrator that the mere fact that several children were disturbed by Mr. Pepabano's behaviour, some greatly, ought to be reason enough for some disciplinary measure.

As mentioned previously, the test here is that of correctness: we are dealing with notions of general law as well as Charter rights, not concepts lying within the specialized area of a labour arbitrator—that of labour relations and the interpretation of collective agreements. The Arbitrator was wrong in his analysis of what may constitute sexual harassment of students by a teacher and seemingly oblivious to the rights of the students to a school environment free from that type of harassment.

(15) René Dussault et Louis Borgeat. *Traité de droit administratif.* 2e éd. Tome 3. Québec : P.U.L., 1989. P. 199. See also *Société des loteries du Québec c. Bolduc,* C.S. Montréal 500-05-017937-960, le 21 juin 1996 (D.T.E. 96T-844), p. 14 *et sqq.* du jugement.

For that reason alone, his Award is to be annulled and the file is to be returned for a new hearing before another arbitrator.

4. *The improper exclusion of evidence*

There is no reference in the Award to an objection to proof of the events leading to the settlement agreements of May 1989 and May 1991 being sustained. The affidavits filed by the School Board are mute on the topic. The attorney who represented the School Board before this Court was the same who appeared for the School Board before the Arbitrator. What is clear is that she maintains that an objection to that evidence was sustained by the Arbitrator and that the attorney for the Union (also the same who appeared before the Arbitrator) objects to that evidence on the ground that it is irrelevant.

The omission of this ground in the affidavits in support of the Motion for Judicial Review means that it cannot be considered by this Court in arriving at its decision. However, since the Court is returning the file to be heard anew by another Arbitrator, as previously mentioned, it may be helpful for it to deal with the issue in order to avoid additional legal wranglings in a dismissal case which is already nearly three years old.

In light of the evidence adduced before the Arbitrator, evidence pertaining to the circumstances having led to Mr. Pepabano's earlier undertakings as a result of complaints concerning his conduct towards his students, particularly his undertaking "to respect the physical and psychological integrity of each and every one of his students" is, in the opinion of this Court, relevant. Those earlier incidents, at least insofar as one can glean from the file, were of a similar nature to those complained of at the time of Mr. Pepabano's dismissal.

This is not a case where the settlement documents of 1989 and 1991 between the parties can be interpreted as a renunciation by the School Board to its right to raise the grounds for dismissal that it had found before entering into same. [16] Quite to the contrary, those settlement documents contained undertakings which Mr. Pepabano was bound to honour if he wished to see his past behaviour erased from his record. Furthermore, there is evidence to the effect that they were entered into by the School Board only because the latter had not followed the prescribed procedure for cases of non-reengagement.

Arbitrators do possess the jurisdiction to administer the evidence as they see fit. They can sustain objections, just as they can overrule them, on the basis of the relevance of the evidence sought to be adduced as they perceive such relevance. On the other hand, they may not exclude clearly relevant evidence if they thus deprive one of the parties of its rights to a full hearing. In addition, their assessment of what is relevant must be unbiased: [17]

> Fair trials require that courts and legislatures scrutinize the commonsense generalizations underlying *relevance assessments.* This requires a recognition of the cognitive limitations of the decision-maker. What is the underlying reasoning process? What irrationalities might be operating?
>
> [Emphasis added.]

Assuming that an objection was indeed sustained, the Court would have to consider that in this instance, failure to hear this evidence deprived the School Board of a full hearing. There were clear indications that Mr. Pepabano may previously have shown a pattern of inappropriate behaviour impacting negatively on persons whom his employer had entrusted to his care. To that extent, his past history as a teacher was clearly relevant.

As we have seen earlier, whether the exclusion of such evidence constitutes such an error as to make the Award reviewable *per se* depends on its impacts on the fairness of the proceedings. The exclusion of relevant evidence is particularly harmful to the neutrality of the proceedings in the context of a disciplinary hearing which does not carry the same consequences, for the alleged abuser or harasser, as that of criminal proceedings. In the case at hand, it prevents the School Board from placing Mr. Pepabano's conduct in the proper context, with due regard being given to his role as a teacher and the need for him to command the respect and confidence of the community, not to mention those of his students. The suppression of this evidence would therefore, in the opinion of the Court, deprive the School Board from a full and fair hearing and render proceedings unfair.

(16) *Académie Lafontaine inc. c. Ménard,* C.S. Montréal 500-05-013702-947, le 2 mai 1995 (D.T.E. 95T-812), p. 12 *et sqq.* du jugement.

(17) *Loc. cit. supra,* note 11, 43.

Having found that the Award infringes the standards of correctness and fairness as they apply to this case, the Court deems it appropriate to also address the standard of patent unreasonableness.

The Court finds, regrettably, that the Arbitrator's Award is indeed manifestly unreasonable.

While an employer shoulders the burden of showing just cause for dismissing or failing to re-engage an employee, the applicable standard of proof remains that of the balance of probability, not that of proof beyond a reasonable doubt. Nowhere in his Award did the Arbitrator profess to doubt the truthfulness of the witnesses adduced by the School Board. Instead, he stated that events had been blown out of proportion. Consistently, he chose to downplay events, or demanded more corroboration, or preferred an interpretation at odds with what the facts clearly suggested. In short, he was always looking for an element of reasonable doubt to apply in Mr. Pepabano's defense. In so doing, he did not do justice to Mr. Pepabano's students. To the contrary, he allowed himself to be blinded by common misconceptions, myths and stereotypes which clouded even the definition of sexual harassment. Playing up a student's sexual attractiveness to others in the classroom, or the attractiveness of their mothers, or the sexual attractiveness of their grandmothers, commenting on the size of genitals, etc., constitute sexual harassment. In addition, they show a grossly inadequate conception of the teacher's role *vis-à-vis* his or her student. This is behaviour which clearly calls for a disciplinary measure of some kind.

The evidence before the Arbitrator was such that anyone who applied the proper standard of proof had to be convinced that something deeply disturbing to many of his students was happening in Mr. Pepabano's class. Not only did the Arbitrator choose to ignore evidence of what the Crees consider appropriate or inappropriate behaviour on the part of a teacher, he concluded that there was no ground for *any* intervention by the School Board. The reinstatement of Mr. Pepabano with full benefits in the circumstances described above is clearly irrational.

Given the conclusions the Court has come to on the merits, it deems it necessary to return the file to another arbitrator.

For these reasons, the Court:

Grants Petioner's Motion;

Annuls the Arbitrator's Award R-24 bearing no. 5111-91-06476 of the Greffe des tribunaux d'arbitrage du secteur de l'éducation;

Orders that the file be returned to another arbitrator for a new hearing on Respondent's grievance.

The whole, with costs.