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Workplace Dress Code and Fundamental Rights

Éric L'Italien *

1. Introduction

A Quebec grievance arbitration tribunal recently affirmed that an employee, just by being in a relationship of subordination to the employer, does not waive the right to his or her image and personal appearance¹. *A priori*, aspects of an employee's physical appearance benefit from the right to privacy and in certain cases the right to freedom of expression and can be regulated by the employer only for considerations that are substantial and valid and only if the means used to do so are proportional to the underlying objective.

2. Facts

The union was challenging the legality of certain directives issued by the employer, a vocational training centre, in relation to the dress code imposed on teaching staff in its healthcare programs. The union contended that the directives were unreasonable and abusive and infringed these employees' fundamental rights and freedoms, and in particular the right to privacy and freedom of expression.

* Éric L'Italien, Norton Rose Canada LLP - Montreal Office. This commentary has been previously published in Norton Rose Fulbright, <http://www.nortonrosefulbright.com/knowledge/publications/74224/workplace-dress-code-and-fundamental-rights> (Accessed June 10, 2013).

¹ *Le Syndicat de l'Enseignement de Lanaudière et La Commission scolaire des Samares* (October 9, 2012), Grievance Nos. 2010 0003591-5110, AZ-50914116 (T.A.), Maureen Flynn, Arbitrator.

The employer's rules on physical appearance included requirements for the employees to maintain good personal hygiene. Hair had to be a natural colour, long hair had to be tied back and beards had to be covered during practical classes. Nails had to be clean and cut short, without coloured nail polish or artificial nails (clear polish was permitted). Jewellery other than simple jewellery was prohibited at all times and rings and arm jewellery were prohibited during practical classes. Dress code standards provided that instructors were to wear clean uniforms in practical classes and street clothes covered with white lab coats in theoretical classes and in the presence of students. Jeans, miniskirts, shorts and camisoles were not permitted.

While it acknowledged the references made in the rules to concerns about professional image, the need for staff to set an example and perceptions about the teacher's pedagogical role, the union submitted that these considerations cited by the employer were questionable, no directives of this sort having been issued between 1998 and 2009. It went on to note that many private schools where students were asked to wear uniforms did not make such demands of their teaching staff. In short, in the union's view, the rules were based on subjective considerations which could not serve to justify such broad measures.

The evidence before the arbitrator showed that from 1998 to 2009, the employer did not impose any dress code, except in the laboratory and for certain internships. The employer maintained that a dress code had resulted from the recommendations and positions which were adopted in this connection in 2006 by Quebec's nurses' professional corporations, the *Ordre des infirmières et infirmiers du Québec* (OIIQ) and the *Ordre des infirmières et infirmiersauxiliaires du Québec* (OIIAQ). Those recommendations insisted on the importance of dress codes for reasons related to hygiene and professional image.

3. Decision

After analysing the applicable principles and reviewing the evidence before her, the arbitrator declared the rules to be invalid. She noted that labour law principles allowed the employer to regulate employees' physical appearance as necessary for the sound administration of its enterprise, to the degree that such regulation was consistent with the collective agreement and the law, and in particular the Quebec Charter of human rights and freedoms (Charter). Where a measure infringed a right protected by the Charter, not only must the underlying objective be

serious and valid, but the means used to achieve the objective also had to be in proportion to it.

In this case, the rules' stated goal was to allow students to acquire skills in an environment designed to mirror the real-life situations they would encounter at work and to sensitize them to the importance of dress in the exercise of their professional duties. The arbitrator pointed out that the measures had to be assessed in relation to the standards generally acknowledged as appropriate in the teaching environment, not in the work environment, and that the standards applicable in the work environment could not be simply imported in order to justify the impairment of a fundamental right in the teaching environment, as adherence to certain standards did not have the same degree of importance in the two environments (for example, the risk of infection was not present in the teaching environment).

The arbitrator found that the requirement of maintaining good personal hygiene made sense and did not contravene any fundamental Charter rights. As for the natural hair colour rule, it infringed the right to privacy, especially seeing that the restriction extended beyond the employees' working hours. Moreover, the rationale for such a measure had not been demonstrated, as neither the OIIQ nor the OIIAQ had adopted such a requirement. The rule requiring beards to be covered did not infringe any Charter right, corresponding in essence to the OIIQ's and OIIAQ's recommendations on the matter. Indeed, since it flowed from a pedagogical objective that was focused on meeting hygiene standards applicable in the work environment, it could not be considered unreasonable or excessive as long as the employer was prepared to provide the gear necessary for the purpose. The obligation to tie long hair back in practical classes, while it could be considered to impair the right to freedom of expression to some degree, was still legitimate considering that the effects were limited, being confined to a specific period of time. As for the restrictions on nails, the rules were in fact more permissive than the OIIQ and OIIAQ recommendations, which did not allow clear nail polish, the parties having acknowledged that the rules should be consistent with the OIIQ and OIIAQ positions. The restrictions on jewellery constituted an impairment of the right to one's image, privacy and freedom of expression which the arbitrator, referring in particular to the requirement that jewellery be "simple" (in French, "*sobre*"), did not consider justified, finding that choice of jewellery was a matter of taste, not a pedagogical consideration.

As far as dress code was concerned, the requirement that uniforms be worn in practical classes was not illegitimate or disproportionate, in the

arbitrator's view, considering that the impairment of the Charter right that it caused was minimal, the scope of its application was well defined and its pedagogical goal was to mirror the work environment. Regarding the requirement of wearing lab coats in theoretical classes, the evidence submitted by the employer had not been sufficient to establish a relationship between wearing a lab coat and the ability to provide quality instruction. As the primary aim of this measure was to protect its public image, the arbitrator noted that the standard of evidence required of the employer in attempting to justify it was especially high, which burden it had failed to discharge. As for the prohibition on wearing jeans, miniskirts, shorts and camisoles, while it impinged on the employees' privacy and freedom of expression, the ban on miniskirts and camisoles could be justified, on the basis of standards of decency in an educational environment and the proportionality of the resulting impairment and the beneficial effects, whereas the prohibition on jeans could not, as jeans were usually considered suitable attire in public academic institutions. In short, while some of the requirements were considered legal by the arbitrator, the rules as a whole were found to be invalid.

4. Conclusion

This decision serves as a reminder that when adopting rules relating to its employees' physical appearance, an employer must be careful to respect the employees' fundamental rights, including in particular their right to privacy and freedom of expression. In addition to being based on considerations that are substantial and valid, such rules must be designed in a way that ensures that measures which impair one or more fundamental rights are rationally connected to the objective sought and that the impairment of the rights is minimal and in proportion to the measures' anticipated beneficial effects. The decision also emphasizes that standards which apply in the work environment cannot be blindly applied to a teaching environment as the justification for impairing a fundamental right, given the differences in the standards appropriate to the two environments.

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