SYMPOSIUM GRH 2014 | HR SYMPO 2014
21-23 NOVEMBRE 2014

→ ARBITRATION AWARD CASE

Case study prepared by Mélanie Gagnon, Ph.D., CIRC[1], regular professor

A Case Study of Arbitration Award

DRIVERS' UNION

Hereinafter called "the union"

And

TRANSIT CORPORATION

Hereinafter called "the employer"

The nature of the grievance : Transfer to another position

Collective agreement: Collective labor agreement between the Transit Corporation and the Drivers' Union in force from August 1st 2010 to July 31st 2015.

1- The motives

On May 21st, the complainant, a bus driver received the following letter from his employer:

On May 21st

Subject: Result of the convocation on April 30th

Dear Sirs,

According to the stipulated rules in the collective agreement, you were summoned to our office on April 30th with your union representative, due to the tattoo you have on the right side of the face from the beginning of the year and the receipt of a complaint to that effect.

This tattoo gives you a negative image and contrary to what the employer desires to give to his customers. In addition, a customer complained to our Customer Contact Center for letting us know.

[1] CIRC : Certified industrial relations counsellor

During the meeting, we asked your explanations about the very apparent tattoo you actually do on the face without considering your work as a bus driver, which involves the direct contact with customers, or asking for authorization from your employer.

As you have mentioned, you believed you had the right to such an act and you thought your employer was not affected by this choice. On the other hand, you have specified that you could not remove the tattoo completely without remaining the significant marks, which will be seen worse than the tattoo itself.

We have explained that the employer encouraged a sober and neutral image as his drivers who represent the company. We have also criticized you for not having received permission to get a tattoo on the face, which significantly cannot be masked in any way.

In addition, we have discussed with you the possibility to remove your post of the bus driver and transfer you, if possible, to another position in the company where you will not have contact with customers. You disagree with this possibility. We ended the meeting by telling you that we will evaluate the case and inform you about our decision.

Since then, we have informed you, through your union representative, we found it better to transfer you to the post proposed by the bus assignment until an arbitration decision is made. During this period, we have agreed to keep your driver's conditions regarding to your particular remuneration. This treatment should however be revised to achieve the decision made by the arbitrator considering the grievance of both parties.

You will be informed on the outcome once a final decision has been made on this issue.

Mario Chicoine
Chief Operating Officer

c.c. President of the Drivers' Union

On Mai 29th, the union questioned this letter through grievance and announced the decision. It was subsequently referenced by the arbitration and assigned by the undersigned.

At the opening of the hearings, the parties agreed that the complaint had been made in accordance with the union agreement and the arbitrator was accordingly called upon.

They also admitted that the motive, which has justified the exclusion of the complaint as a driver, on the technical level, did not prevent him from driving a bus.

They subsequently agreed on three things:

1. the moment during the complainant has a tattoo and the employer decided to ask him to remove it will not be considered as an acceptance of the situation on the part of the employer;

2. in the event of denying the grievance, the employer will offer the choices to the complainant for removing the tattoo on his face, or being assigned to another post depending on the availabilities. If the complainant chooses to remove his tattoo, the employer will maintain his current assignment but with the applicable working conditions until he completes this type of treatment;

3. for the timing issues, the arbitrator could firstly make a summary decision that could arise in grievances then submit the detailed reasons justifying this decision.

II- SUMMARY STATEMENT OF THE PARTIES

According to the prosecutor of the union, even if the complaint challenges the mutation of the complainant, the real issue submitted to the arbitrator is to decide whether the employer may prohibit some tattoos among his drivers and especially the tattoo on the complainant's face. **The complaint thus relates directly to the expression of human rights and fundamental freedoms of the complainant. The arbitrator will have to question the power of the employer, which interferes into the private lives of his employees, and limit their rights to physical integrity and their freedoms of expression.**

The prosecutor of the employer indicated that he was partly in agreement with his colleague. However, according to him, the fundamental rights are subject to limitations if they are reasonable, correspond to a legitimate aim and rational as well as the intended purpose. The questions submitted in the case, emphasized by the prosecutor of the employer, arise in a given context, particularly in the context of managing a service business that considers the image very important.

III – THE PROOF

Four witnesses were heard in evidence. They said this substantially.

The complainant is a bus driver working for the employer since 1990. His appearance has changed little since his hiring. He always wore many bracelets, rings and earrings. He is completely shaved for 16 or 17 years. It never happened that his appearance had been discussed with the employer. At work, he wears a uniform consisting of gray trousers and a light colored shirt with long sleeves.

On January 5th, he tattooed a pattern designed by his wife on the right side of the face. He chose his right side, for, he says, it is his best profile. For him, this tattoo represents him and it is consistent with his style. Instead of adding a ring on one of his hands, he decided to opt for this solution.

He did not ask permission of his employer before getting tattooed. As two of his driver colleagues had such tattoos, he did not believe that was necessary.

He drove the bus until the end of April. He had various customer feedbacks about his tattoo like "this is good", "it makes you well" or "it must have hurt." On April 30th, his employer told him if he wanted to keep working as a driver, he had to remove the tattoo and mutated to a job he does not like, while waiting for the employment officer's assignment. His place is behind the drive-wheel of a bus, he said. He took the information about the time and the cost to remove a tattoo. It would cost him more than $ 3,500 in addition to taxes to remove it during a period of two years.

Regarding the tattoos of his colleague on his upper arm, as he wears a shirt with short sleeves all year, they are visible all the time. So the customer can read "Forever Marlene" on his left arm for two or three years, and on his right arm "Bad Compagny" for a year. During his testimony, the colleague said he neither had any discussions with the employer nor disciplinary notice because of his tattoos. Just as the complainant, in addition to tattoos, his appearance has changed little since his hiring, he has always worn his long hair and the employer never asked him to cut or tie it.

As for another driver colleague of the complainant, he wears his tattoo, an eagle with outstretched wings, on the back of his baldhead for 5 years. During his testimony, he said he never had any discussions with the employer or any disciplinary notice because of the tattoo. However, it is true when he works, an opaque wall stands behind him from floor to ceiling of the bus. His tattoo is only visible when he turns his head to the left or advances towards the steering wheel. The employer has never required him to wear a hat.

The complainant wears his tattoo on the right side of the face, which shows to customers boarding the bus.

The two tattooed colleagues also received similar comments on their tattoos as those of the complainant. Some customers also had a sense of humor, especially the one who asked "Since when the employer hires the bikers? ".

The general director did not dispute the content of the testimony of the complainant and his two colleagues. In fact, the testimony of the latter is built on the survey about the physical appearance of the bus drivers, achieved after the job swap of the complainant.

With the employer, in six or seven years, the survey has been used over twenty times in particular to assess customer satisfaction, probe non - clients and identify pertinent opinions. A few years ago, the employer began to use the software Voxco for conducting the online surveys to his employees. This solution engendered more flexibility and reduced the costs. To assess the reliability of this new tool, an online survey was simultaneously made and compared to a classic survey. The results of both surveys presented a deemed reasonable difference. The survey is not a perfect tool; it is always a victim of bias.

At the end of May or beginning of June, the employer conducted an online survey on the physical appearance of his bus driver. To reduce the costs associated with the use of such a tool, he used the bank of the email club and built internally the questionnaire. The club has nearly 6000 email addresses obtained voluntarily from the customers. The customers can register to obtain information, especially the schedule changes. As the employer has an online survey, he sends an email to notify the club members. To attract the respondents, he also

holds a contest with prizes. In this case, more than 500 people taking part into the survey. Among them, only 430 participants were selected after eliminating the duplicates.

One of the survey questions concerned directly the subject of this present litigation. The respondents were asked to give their assessments on the appearance of a bus driver who could have a tattoo on his face. Unlike the other choices of the proposed answers in the previous symmetrical sections, which the positive answers are the same as the number of the negative answers except a neutral answer, the question section was provided with a photo to an asymmetric response, the negative answers were more. Respondents were asked to choose between "likes", "indifferent", "does not appreciate" and "would be fearful." The general director explained about this methodological choice, saying that he wanted to validate it if the proposed situation exceeded the acceptability to fall into fear. The employer set the threshold of the tolerance. In this present case, the number of the respondents with a negative assessment to the driver tattooed on the face exceeded 86%, and more than a half to express the fear.

During the study of these results, the employer realized that the profile of respondents could not represent his customers, especially because of the age of the respondents. The survey did not have a scientific value; it was essentially a straw poll to get an idea of the customers' opinions. However, for correcting the problem of the respondents, the director has made an attempt to emphasize on multiplying the percentages obtained from his actual customers, according to the 10 years' survey data. Overall, 47% of the clients said they were fearful of the tattoo on the complainant.

About this, the director admitted that there was no policy prohibiting the wearing of visible tattoo when the cases were under study.

The testimony of the union's expert on the research and survey, the vice-president of a well-known survey company, has highlighted the limitations of the survey conducted by the employer. He firstly confirmed the statement of the director that the survey had no scientific value, explaining that only the surveys from a probability sampling, consisting of a random basis, can be extrapolated to the entire population to represent the survey. Thus, as the law of large number, such a sampling is usually the representative of the population if it meets the criteria. The probability samplings have margins of error and the thresholds of the known confidence. Regarding the employer's survey, the sampling is not probabilistic because it was not formed randomly, but voluntarily and the people supposed to represent is not the customers of the employer, but the members of the email club. The results reflect only the opinions of 430 respondents. In the absence of the specific data of the email club's members, it could not objectively tell if this population was representative of his customers or not. However, because of the large disparity between the age profile of the survey and the customers, non- representativeness of this survey, for him, was very clear.

Even if it were a non-probability sampling, he added, it would have been possible to try to correct the problem of the representation by performing results weighting. But the exercise given by the director is not a true weight; he has contaminated the survey results.

Except the problem of the representativeness of the sampling, the survey of the employer also had a problem with some of the answer choices. According to the expert witness, the answer

choices must always be an odd number as the same number of the positive, negative and neutral responses. In the employer's survey, some answer choices have a number of pair modalities. This means there is an asymmetry in the answer choices. In this case, having one more answer choice than the other can influence the respondents because they implicitly suggest the desired response. We note, for example, the answer choices to the question " Could the appearance of the bus driver cause you to change your travel habits? " The respondents have to choose between a negative response "not at all" and three positive responses "possibly", "probably" and "definitely". The asymmetry is obvious. The answer choices to the questions associated with the photo, especially the one with the tattoo on his face, are an even number: a positive response "appreciate", a neutral one "indifferent" and two negatives "do not appreciate" and "fearful". Therefore, there is a possibility of bias in the use of the asymmetric method.
Following the testimony of the union's expert, the director testified again to propose a new weighting which took into account the comments reformed by the expert witness.

This new weighting was done according to the principles of the expert witness. Thus, on the third step, the manager calculated the weighting factors for all age groups and applied to the survey results.

The new balancing exercise yielded similar results to the previous one of the employer.

IV - SUMMARY STATEMENT OF THE PARTIES

a) Union's position

As a preliminary remark, the prosecutor of the union pointed out, despite the fact that he was the first to present this case; the employer had the burden of proof in this case.

He continued by arguing that in this case, but the parties did not dispute the facts. In January, there was no policy prohibiting the visible tattoos with the employer. There was only a policy on uniforms. In fact, the cases of two other colleagues clearly show that the visible tattoos were even allowed.

On the side of the complainant, his style has always been special. Before getting tattooed on the face, he wore a multitude of rings, bracelets and earrings and had completely shaved head.

Now, the requirements from the employer to him violate his fundamental freedoms. First of all, it is his private life: the complainant has the right to choose his style.

The fundamental freedoms allow us to make these decisions with the respect to our personal lives.

Moreover, the appearance is a form of expression. The complainant expresses his singularity in style.

The charters protect all forms of opinions, especially the minority opinions that are more likely to be suppressed.

The society has evolved, the tattoos and the body jewelries are now accepted and widespread, especially among young people.

The right of an employer to regulate the appearance of their employees is an exceptional law, subject to the charter. The employer may require the wearing of a uniform. He can also restrict the messages sent by his employees, especially the hate messages and control the temporary appearance elements, but he cannot go as far as he asks to the complainant. He cannot act on the employee's permanent look because this is a matter of the fundamental rights protected by the charter.

According to the case, to get what he wants, the employer had to prove his economic loss and the image harm. He had to provide a justification. However, the evidence showed nothing of it. Why is the visible tattoo allowed to another colleague (there are only a few centimeters' difference from the complainant's) if that was so harmful to the employer?

There is therefore a lack of evidence, justification and customer complaints in this case.

The employer has not even investigated during the four months when the complainant worked with a tattoo on his face. There is no evidence of the loss or the decline for the employer.

So, there is an unjustified limitation of fundamental rights for the complainant in this case.

In fact, there is no evidence of any harm; the employer operates from his prejudice.

Requiring the removal of the tattoo of the complainant, which is in the absence of a clear policy of the employer, adversely affect the physical integrity of the complainant, because it is a long process that may leave scars, but the complainant did not violate any rule or policy and the request of the employer, which happens afterwards.

Regarding the survey of the employer, it is inadmissible in evidence.

Firstly, it is irrelevant; because they are the fundamental rights of the complainant as we concerned. In a survey, no one can give his opinion to the users of a service and then justify depriving someone of his rights in measuring discrimination.

It is not in one of the cases of Article 20 for the charter either.

Moreover, the survey has no reliability. Generally, the surveys are made from a probability sampling and a scientific extrapolation allowing them to a given population. The survey of the employer may not even be extrapolated to the email club's members, much less than the customers of the employer. It cannot justify any argument.

According to the expert witness, in weighting the results of a survey, the doctrine prohibits the use of weighting factor greater than two, because in such a case, it attaches great importance to the opinion of a very small number of people. For example, if only two English native speakers had answered a survey on Quebec sovereignty by agreeing with the idea, a weighting of these answers with a factor greater than two would not give a true picture of the views of English native speakers on Quebec sovereignty.

Furthermore, more information about the group of respondents is missing. We cannot know how many women and English native speakers answered the survey. Some choices of the answers are asymmetrical, which could influence the respondents. However, these are only the trivial details, as the survey does not have the scientific value.

In addition to the problems inherent in the survey, the prosecutor of the union said it was an element of the subsequent evidence to the employer's decision about the tattoo of the complainant. However, such evidence may be only admitted to explain the employer's decision but not to support it. So we cannot give the probative value to this survey.

Finally, in case the arbitrator reject the arguments based on fundamental rights and freedoms of the complainant, the prosecutor of the union argued anyway that when the complainant got tattooed on his face, there was no any employer's policy on this and two other bus drivers with their visible tattoos so that the new policy of the employer may not be enforceable against the complainant, nor applied to him retroactively.

b) Position of the employer

From the start, the prosecutor of the employer has made a comeback on the arguments presented by his colleague of the union.

He initially stressed, the union's argument about the employees who have an absolute right to determine their permanent appearance carries its own limitations. Indeed, following this reasoning, an employee could come to work with all kinds of tattoos because they are permanent. This is unthinkable.

The classical approach to this problem by the courts is rather to recognize the right of the employer to determine the limits to the physical appearance of his employees.

Concerning the claim of another employee, that the employer could not justify his decision, is not valid. At the reading of the letter from the employer in relation to the suspension of the functions of the complainant, it appears that the employer has clearly justified his position.

Regarding the suggestion of the union's prosecutor, the employer has not suffered economic loss; this brings its own limitations. The service provided by the employer may be substituted by other forms of transportation such as cars or cycling. It is therefore wrong to claim that the employer may be prejudiced.
Finally, contrary to the argument of the union's prosecutor, the survey made by the employer demonstrates his reasonable decision and the rational connection between the stress imposed on the complainant and the objective of the decision.

Thereafter, the employer's prosecutor offers an argument in three points.

As a preliminary remark, it emphasizes on the need to establish the contours of the dispute. He stressed at the outset that the matter of the subject is not restricted to the language of the grievance and the arbitrator should make a policy decision that not only solve the grievance,

but also determine the legality of the employer's decision concerning the appearance of the complainant.

The issue in this case is to determine the extent of management rights in this matter and, in this context; the argument to the effect that there was no clear written and known standard with the employer is irrelevant. If such a written standard existed, the union would have disputed it as the exercise of unreasonable direction to a right.

The employer committed, in case of rejection of the complaint, providing the complainant with a choice between two options. This commitment is clearly stated in his detailed argumentation plan:

"It was stressed, however, that if the court should dismiss the complaint and recognize the right of the employer to determine the appearance standard and prohibit his drivers to display tattoos on their face as clear and similar to the symbol of the complainant, he would provide the following options:

Hold his driver's post and remove his tattoo. During the procedure of the intervention, the driver could continue the current assignment with the applicable conditions.

Keep his tattoo and continue the current assignment with the applicable conditions until all needs. Until then the term of all needs, the employer could hold a priority for the complainant to fill any position or assignment for which he has the normal requirements.

The employer does not intend to terminate the employment of the complainant in case of rejection of the complaint and requested his commitment of that effect to be legally recorded. This also reflected the reasonableness of the exercise of his management rights in this case, which did not lead to the dismissal of the complainant either."

The prosecutor of the employer insisted that the employer did not dismiss the complainant. He gave him a temporary assignment to the same conditions as his regular job. He also submitted the dispute to an expedited arbitration process and committed to giving a choice to the complainant in case of rejection of the grievance. The employer is neither unfair nor unreasonable.

After analyzing the evidence, the prosecutor of the employer argued this as follows. The employer hires 450 bus drivers, which have the function to receive and lead the customers. As it is clear in the driver's Guide, the customer is a prime concern of the employer. The employer strives to serve the greatest number in order to benefit the community both environmentally and economically.

The dress code certainly relates to the uniforms, but its scope is much larger. Any reader of good faith will understand that the dress code also relates to the physical appearance and therefore the complainant's situation. It refers in particular to singular situations such as an excessive makeup. However, it is clear that a tattoo on the face is associated with such an unconventional position. There is a clear difference between the tattoo of the complainant and his colleagues'. Arm tattoos are generally accepted. If he had read the dress code, he should

have asked the employer before making the decision to get a tattoo on the face. A policy reads as follows:

The majority of the employees are in contact with the clients served daily across the country.

This important contact requires the application of certain dress code rules and appearances of the general staff. The image of the employer is highly determinant upon employee translation given by those who directly or indirectly provide the transportation service.

The dress code is designed to support this positive image to the public and users. It provides a symbol of quality and professionalism. In addition, it allows the public to quickly recognize an employee of the employer and standardize the appearance of the staff clothing. In return, this contributes to the development of pride in belonging to the employees and their satisfaction of providing qualified service to all point of views.

The employer shall provide, especially the staff in contact with customers, required uniforms at a specified replacement frequency. Wearing of these uniforms is a particular requirement of his duties. This is a job requirement. Any violation of these standards may result in sanctions [...]

3.1 *Appearance*

[...]

The hair must be clean and well groomed all the time. They should never fall on the face. Only the conventional and appropriate haircuts in the workplace will be tolerated.

If the hair is left free, it must not exceed the shoulders. The longer hair should be tied back, braided or picked up in a bun. In addition, the hair must be clean and tidy.

If the hair is dyed, it must be a natural color.

If the employee has the makeup, it must be applied with discretion; for example, do not wear long false eyelashes, do not use too much eyeliner, eye shadow, nail polish and an excessive makeup.

3.2 Badges, lapel pins and jewelry

Except the rods, the rings, the earrings and the watches, the apparent wearing of the jewelry and the ornaments is prohibited when wearing the uniform.

None of the apparent necklace is accepted.

The chain should be worn under the shirt; it should never be worn over the shirt.

If necessary, you can wear a simple tiepin.

If necessary, a plain collar pin can be worn under the tie to hold the collar of the shirt.

Only wearing the gold or silver color bracelets is authorized and these should be worn with discretion.

It is important to mention that the complainant was involved in a similar issue in 1995: the wearing of the ostentatious necklace. Under the arbitration decision made following the events in question, the employer is convinced that the complainant had a good understanding of the physical appearance's issue and he was likely aware of this problem.

The evidence showed that the complainant had thought and discussed with his wife before getting his face tattooed, so it was not a spontaneous gesture. However, he did not care about the opinion of his employer before getting a strange tattoo. He felt authorized to do that his colleagues did with their visible tattoos, but for the employer, the tattoos of his colleagues were more acceptable than his.

The employer's decision showed the measurement, the "reasonableness" and the judgment.

The survey was the only tool to demonstrate the legitimacy and "reasonableness" of such a decision. The director knows it well. He used it a lot in the past and he always uses the same way. Currently, he uses online survey software and solicits the email club's members to reduce the costs associated with the survey. This medium also allows the use of photographs or other multimedia techniques to avoid confusion. The use of the email club provides an easy access to customers. Thus, the employer can contact with the customers directly. Meanwhile, the reliability of the tool was demonstrated by this classic survey. Truly, it is not free of deficiencies; it has a relative bias sampling. We should take it as a straw poll, a Vox populi (a public opinion). But this tool has proven its value, especially in the context of satisfaction surveys.

The results associated with the question on the tattoo of the face indicate that 56% of the respondents did not appreciate or they were fearful of a bus driver wearing the same tattoo as the complainant. The weighting provides the same surprising figures, 44% of fearful.

Some choices of the answers are not focused; however, given the responses, the bias is likely to be insignificant.

The expert said that the employer's survey showed the methodological weaknesses in particular because of the voluntary and non-probability sampling. According to him, the survey could be unrepresentative because of the age groups. However, he could not affirm. It says a lot about the probative value of his testimony.

The expert witness also testified that there was a problem with the weight made by the director. He said he saw a defect and the methodological problems. However, a new weighting of the director who took into account the comments of the union expert mainly shows the same results.

The prosecutor of the employer wished to remind the arbitrator that he should not decide in absolute terms, but in the specific situation of the complainant, the circumstances of this case.

Finally, regarding the legal principles inherent in this litigation, the prosecutor of the employer insisted on the existence of the jurisprudence for the two parties to the determination of the analytical framework, which are applied to a case of exercising the right direction on the physical appearance of employees, despite the fact that all the arbitrators say that an employer is entitled to determine the corporate image he wants to give and consequently sets the dress code.

In this case, the action taken by the employer is reasonable. The complainant was not dismissed. The shift of his job is a reasonable measurement and the employer is legitimate to protect his corporate image.

As an arbitrator hearing the grievance, do you agree with the employer's decision to shift another post to the driver or with the grievance of the driver?

Justify your decision according to the claims presented by the two parties under the laws and principles in this case.