# G+ Education
INFO

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# RECENT **DECISIONS**

## 1 Delayed consultation with an expert does not affect the relevance of the latter's testimony

A kindergarten teacher challenged the conditions in which she was expected to do her job and claimed damages for mental anguish. She alleged that her classroom was nauseating, as it was used as a lunch room for students. In the course of the arbitration hearing, the employer challenged the admissibility of a psychiatrist's testimony on grounds that the latter first saw the employee more than a year after the facts giving rise to the grievance, in the context of an application for salary insurance benefits. The arbitrator pointed out that care must be taken before dismissing a testimony on grounds of irrelevance. From the arbitrator's perspective, the psychiatrist's testimony was indeed relevant, since the grievance called for compensation for damages for mental anguish. She also pointed out that, though the fact that an expert assessment was conducted late might affect its probative force, this does not make it irrelevant. The objection was dismissed.

*Syndicat de l'enseignement des Vieilles-Forges (FSE-CSQ)* v. *Commission scolaire du Chemin-du-Roy*
2013EXPT-144, DTE 2013T-56 (T.A.) M[e] Huguette April

## 2 Instruction is the primary mission of a school board

A school board challenged the dismissal of its application for a transfer of costs. It argued that the accident was mostly attributable to a third party, and that it would be unjust to have the school board bear the costs. In this case, a teacher was hit in the face as she came between two students who were fighting. From the perspective of both the CSST and the CLP, the student is a third party in the meaning of section 326(2) of the *Act respecting Industrial Accidents and Occupational Diseases*, a provision that allows the transfer of costs, and the accident was mostly attributable to this third party. However, according to the CSST, since the incident was consistent with the risks related to all of the employer's activities, the employer did not unduly bear the costs thereof. The CLP stated that the accident was not part of the teacher's normal work routine. The tribunal pointed out that the teacher's job involves giving instructions, not separating students who are fighting. The employer's activity, its mission, is to provide instruction to young people, to teach them. The transfer of costs was granted.

*Lester-B.-Pearson School Board* v. *CSST*
2012 QCCLP 8232 (C.L.P.) M[e] Marie-Anne Roiseux

## 3 School integration activities: caution is in order

A teacher challenged the dismissal of her claim by the CSST after she sustained a sprained ankle during an evening of games at her school. She was participating in a friendly race to the school's office when someone bumped into her. Though the injury did not occur during the performance of her teaching duties, there was a significant connection with the job. Notwithstanding the fact that the evening was organized by the school's teaching and support staff committee, that it took place outside of working hours, and that participation was optional and non remunerated, this activity was intended to help integrate new teachers. It had been implemented for many years. Members of the administration took part in the activity. According to the CLP, the fact that the activity was held at the school is important. It involves a degree of subordination, all the more so since administrators are among the participants. The activity generates team spirit, fosters a better working atmosphere, and ultimately improves the quality of instruction. It therefore benefits the employer. The claim was upheld.

*De Palma* v. *Commission scolaire des Affluents*
2012 QCCLP 7802 (C.L.P.) M[e] Daniel Therrien

## 4 An incomplete surgery with negative sequelae: who pays the bill?

A school board challenged the dismissal of its application for a transfer of costs. Following a work accident, an MRI showed that a teacher's anterior cruciate ligament (ACL) was torn. Two months later, a surgeon repaired another ligament but ignored the torn ACL. As swelling persisted and became aggravated a month later, the teacher underwent another MRI. The torn ACL was still there. The surgeon did not repair it and, after various treatments, the injury had consolidated. The teacher sought a second opinion from another surgeon, who proceeded to operate in order to repair the ACL, nearly one and a half year after the accident. The injury consolidated two years after the accident, with significant sequelae. Though it was not up to the CLP to decide whether this constituted malpractice, the CLP concluded this amounted to a failure to provide adequate care to repair an employment injury. Had the ACL been repaired, the injury should have consolidated six months after the initial surgery. The costs subsequent to this probable date of consolidation were removed from the employer's financial file.

*Commission scolaire de la Beauce-Etchemin* v. *CSST*
2012 QCCLP 7997 (C.L.P.) M[e] Michel Sansfaçon

## 5 Though illness was not at issue, the employer was compelled to accommodate the employee

Following an unexpected meeting with a parent on November 25, 2010, a teacher developed an adjustment disorder with depressed mood. On January 14, 2011, the teacher's attending physician extended her medical leave until February 28, at which time the teacher could begin a gradual return to work. On January 31, the psychiatrist appointed by the employer confirmed the attending physician's diagnosis of an adjustment disorder. However, according to his assessment, the adjustment disorder was not related to an illness, but to the teacher's difficult relationship with the school administration, and the teacher was deemed fit to return to full-time work. On March 3, the employer refused to accept her gradual return to work and refused to recognize her absence due to disability. According to the arbitrator, the teacher's absence was not due to a "disability", in the meaning of the collective agreement, as it was not related to any illness. However, he admonished the employer for refusing to implement accommodation measures. The grievance was upheld.

*Syndicat de l'enseignement du Grand-Portage (CSQ)*
v. *Commission scolaire de Kamouraska–Rivière-du-Loup (C.A. Beaupré)**
2012 EXPT-2295, DTE 2012T-803 (T.A.) M[e] Jean Gauvin
Motion for judicial review, 2012-08-15 (C.S.) 250-17-000976-121

## 6 A psychologist is granted expert status in a context involving bullying

A teacher was suspended for two days for criticizing the manner in which the school administration had dealt with an issue involving a student being bullied, in the presence of students in class, then in the presence of the victim's parents. At the grievance hearing, the union wanted to have a psychologist take the stand as an expert witness. The employer objected to the court recognizing the psychologist as an expert witness. In addition, according to the employer, the psychologist's testimony and report were not relevant to the case. According to the arbitrator, a psychologist is an adequate expert for purposes of explaining human behaviours in relation to a given situation. In addition, both the bullying and the teacher's reaction were part of the context in which the disciplinary sanction was handed down. The psychologist is not a specialist on the subject of bullying, but her experience and her interventions within the school environment are such that her knowledge goes beyond that or the arbitrator. She must therefore be recognized as an expert. The objection was dismissed.

*Syndicat de l'enseignement de la Haute-Yamaska*
v. *Commission scolaire du Val-des-Cerfs (Union Grievance)*
2012EXPT-2433, DTE 2012T-867 (T.A.) M[e] Jean-Pierre Villaggi

## 7 Questionnaires used in job interviews are not public documents

The plaintiff applied to the school board for a teaching position. He was called for an interview, but his application was rejected. He asked to be given access to the "regulation used as reference in the hiring of teachers and in the selection committee's decision". The school board refused to provide the information requested, since there is no such "regulation" and the interview assessment grid, which is commonly used for all teachers job interviews, contains the weighting factors and answer elements on which the assessment is based. The assessment grid amounts to a test designed to provide a comparative analysis of an individual's knowledge, abilities, skills or experience, in the meaning of section 40 of the *Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*. The school board's refusal to hand it over to the plaintiff was well founded.

*C.U.* v. *Commission scolaire Marguerite-Bourgeoys*
2012 QCCAI 387, 2012EXP-3843 (C.A.I.) M[e] Teresa Carluccio

## 8 A dismissal is overturned: the decision was made by the wrong entity

Following his dismissal, a teacher referred the dispute to arbitration, in accordance with an in-house agreement between the employer and the teachers' association. A preliminary argument on the part of the teacher was to claim that the decision to dismiss him was made by the Executive Council, rather than by the Board of Directors, which would invalidate his dismissal. The arbitrator upheld this preliminary argument and overturned the dismissal. Indeed, though the Board of Directors approved the final decision made by the Executive Council to dismiss the plaintiff, the actual decision to terminate the teacher's employment came from the Executive Council. The decision to terminate the teacher's employment was therefore not made by the proper entity. This was a defect in substance, rather than just a simple formal defect.

*Charest* v. *Séminaire de Sherbrooke*
2012 QCCS 6785 (C.S.) Justice Gaétan Dumas

## 9 Changing your mind: it's not that simple!

The parties came to a complete settlement of three grievances filed on behalf of the employee. However, before signing the corresponding agreement, the employee changed her mind and asked for higher compensation. The employer then asked the arbitrator to summon the parties to a hearing. During this hearing, the employer produced evidence of the settlement agreed upon by the union, and the parties asked the arbitrator to acknowledge the evidence and reject the grievances. For her part, the employee did not show up and did not produce any evidence. The arbitrator acknowledged that a settlement does not have to be written and signed to be effective. He added that the employee did not even have to be involved, since the grievance belonged to the union. If the latter acted in bad faith or arbitrarily, the employee would then be entitled to file a complaint under sections 47.2 and 47.3 of the *Labour Code*. Finally, the arbitrator pointed out that there were limits to his jurisdiction; when informed that the parties settled a grievance, he must acknowledge it and declare these grievances beyond his jurisdiction.

*English Montreal School Board* v. *Syndicat des professionnelles et professionnels du milieu de l'éducation de Montréal*
SAET 8644 (T.A.) 2013-02-14, M[e] Harvey Frumkin

### Comments

The decision rendered by the arbitrator confirms the state of the law. Indeed, barring a specific provision in a collective agreement, an agreement settling a grievance has legal effects without the need for it to be written or even signed. A simple verbal agreement binds the parties and the arbitrator. Case law consistently shows that the mere fact that an employee changes his or her mind and wishes to obtain better compensation in exchange for dropping a grievance does not constitute an adequate motive to cancel an agreement between parties. In order to have such an agreement cancelled, the employee must prove there was a defect of consent. Finally, it is also interesting to note the procedure applied by the arbitrator who, given the employee's failure to attend the scheduled hearing, decided to schedule a second hearing to ensure that she had an opportunity to defend her position. As she failed to do so, the arbitrator had no alternative but to uphold the agreement between the parties and to declare the grievances beyond his jurisdiction.

## 10 Busy or overloaded: there is a difference

A teacher challenged the dismissal of her claim by the CSST. She alleged that she was suffering from an adjustment disorder due to overwork in the new position in which she had been working for a month and a half. Despite her sixteen years of experience in teaching French as a second language, she felt overwhelmed by the requirements of her new position as a mobile French teacher. Among other things, she claimed that the number of students per class, i.e. five or six, was too high, that teaching materials were inadequate and that she constantly had to reorganize her travel between classes. In addition, the employer had asked her to review student evaluations. On the other hand, she acknowledged that she had not worked more hours than her colleagues. According to the school board, the teacher did not use appropriate materials nor did she follow stated guidelines in the performance of her duties, which led to her having to review evaluations. There may have been some heavy work weeks, but no genuine work overload attributable to the employer. As the CLP was not convinced that the case involved an unusual situation, the claim was dismissed.

*Duhamel* v. *Commission scolaire des Affluents*
2013 QCCLP 1110 (C.L.P.) M[e] Thérèse Demers

### Comments

Even though many employees often feel they have too much on their plate, stress at work is not in itself abnormal. Low stress tolerance, in fact, often affects employees' perceptions. When called upon to decide whether or not to cover a psychological injury, the CSST and the CLP look for evidence of a situation that goes beyond the normal limits of what is likely to occur in the context of a given job. Only facts are considered, not the employees' subjective perceptions. One must therefore go back to the facts in order to prove the absence of an alleged work overload: how many working hours per week were performed during the period of the claim? One must compare apples with apples: what was the situation of employees working in the same position during that same period? One must determine whether the issue relates to the job as opposed to the employee's personality: are the latter's work techniques appropriate, and has the latter accepted any proposed help? Finally, occasional work overloads are generally considered normal. Anyone of us may be called upon to deal with "heavy work weeks" for a given period, without this leading to a ruling in favour of a work accident.

# Air quality in your schools

**By Me Lydia Fournier,** *Le Corre & Associates – Lawyers,*
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In November 2012, the Auditor General of Quebec published a report on air quality in elementary schools following assessments conducted in six elementary schools from three Quebec school boards. In the context of this assessment, the presence of asbestos and moulds was noted in the schools, as well as inadequate ventilation and poor humidity control. The schools' maintenance was also noted as being inadequate, and school buildings are deteriorating, so that the MELS has no assurance that elementary schools provide their occupants with a healthy environment that fosters academic success.

Many of you are facing an ever-increasing number of complaints related to air quality issues in your schools, and this situation is reaching crisis proportions involving employees, unions, as well as parents. Following are some basics facts you need to know as you deal with such situations.

### What are moulds?

Moulds are microorganisms found everywhere in our daily environment, both outdoors and indoors. Normal concentrations of these moulds in the air we breathe as well as on material surfaces do not pose a threat to the occupants' health.

When there is water infiltration or damages that affect porous construction materials with organic matter such as wood, moulds will grow on such damp materials and release airborne spores to colonize other areas of this indoor environment.

### How to check for the presence of moulds?

If a problem is suspected in one of your schools, it is common practice to hire an industrial hygienist who will come and measure concentrations of moulds in the air inside the school. When these concentrations go way beyond outdoor concentrations, it is a safe bet that there are sources of mould growth inside the building. In such cases, typical preventive measures include the following:

- ✓ Conduct a visual inspection of the places where there is evidence of water infiltration or damages.
- ✓ Seal leaks or repair water damages within 48 hours following events.
- ✓ Remove porous materials that have been contaminated for over 48 hours.
- ✓ Quickly dry out all materials affected within 48 hours.

Since moulds do not cause infectious diseases like bacteria or viruses, evacuating occupants is rarely called for. However, when there is large-scale work involved in removing contaminated materials or in drying out other materials, it is good practice to hermetically seal work spaces from other spaces being used by the occupants so that mould spores raised by the work do not contaminate occupied spaces.

### Remedies available to employees?

Employees who fear for their health may exercise their right to refuse to work if they have reasonable grounds to believe that doing their job is hazardous to their health, safety or physical integrity.[1] Under such circumstances, a CSST inspector will come to the premises in order to determine whether or not a hazard is present that would justify an employee refusing to report to work.[2]

The remedies available to your employees can also take the form of an employment injury claim to the CSST.

Finally, employees and/or unions can require an intervention by a CSST inspector, who will come and verify the state of the premises and hand you a report containing his observations.[3] If the inspector deems that you are not complying with the law or with occupational health and safety regulations, he or she can issue orders directing you to perform maintenance or repair work, for example, in order to restore air quality.[4]

As an employer, you will find yourself reacting in the face of such remedies. You need to know that orders issued by a CSST inspector can be challenged.[5] Moreover, you can challenge a decision by the CSST with respect to the admissibility of a claim filed by an employee alleging an employment injury.[6]

When faced with an air quality issue, we suggest the following:

- ✓ Hire the services of specialized experts to perform air quality tests and, when appropriate in any given situation, to present the results thereof to the various stakeholders and to your staff.
- ✓ Develop and implement a transparent communication plan with employees, unions and parents, in order to keep them informed of each stage of development of the case.
- ✓ Bring in your medical adviser, if necessary, to de-dramatize the situation, reassure your staff and allow them to get answers to their concerns.

1. Sec. 12 of the Act respecting Occupational Health and Safety ("AOHS").
2. Sec. 19 of the AOHS.
3. Sec. 180 et seq. of the AOHS.
4. Sec. 190 of the AOHS.
5. Sec. 191.1 of the AOHS.
6. Sec. 358 of AIAOD.

# Getting the next generation interested in management positions: a major challenge in education!

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Over the past decade, the education reform has been the most popular subject of discussion, training and controversy (and even, at times, confrontation) among the different stakeholders in the world of education and the government ministries concerned. Though this reform was intended to promote higher levels of academic success, it also entailed significant changes, especially for the teachers who had to revise both their teaching approaches and the teaching aids used to evaluate the various levels of student learning.

The administrators of the various educational institutions are the people currently affected by government policy, at the university and school board level, through budget cuts and especially as a result of pressure from several lobby groups, such as those behind the "Maple Spring" of 2012. Several of these institutions' administrative and financial management practices are being questioned. Budget cuts have already been implemented, but this is only the tip of the iceberg, according to the conclusions of the latest education summit. Accountability is currently reported as being one of the major concerns among managers of educational institutions.

However, though it seems indeed inevitable that administrative management practices should be scrutinized, what are the tools to be implemented in order to determine the labour requirements for managing these institutions? What process should we adopt in order to ensure that the essential management roles in these educational institutions will be adequately fulfilled by the next generation? As many managers are expected to retire within the next few years, the coming generations will need to step in at this level. Are they ready to take on such duties? Do they show an interest in this type of responsibilities? These young people are aided by massive retirement statistics; the doors of the labour market are wide open! However, this situation makes them far more demanding, as their expectations relating to the workplace mirror their sense of entitlement. They step into the world of employment with a totally different vision of work compared to the prevailing notions of the past.

This change of course, in terms of values, has an impact on the way leadership is perceived today. Our leadership model is under review. Witness the human resources departments of several school boards across Quebec, which are presently recruiting year after year to fill school administration positions: they are hoping, with fingers crossed, first of all to be able to find people interested in filling these types of positions, and secondly to get enough applicants in relation to their immediate needs. How do we explain this labour shortage on the level of executive positions? What strategies are currently being used to attract professional staff in management positions in the field of education? Are workers in this field so little interested in taking over such duties? Are they so poorly informed regarding these positions or so ill prepared to fill them? Are young people ready to take over from their elders who are leaving the labour force? Are generations X and Y really motivated to take on positions of responsibility, where 60+-hour work weeks, high stress levels and problems balancing work and family life are common? (See *Les Affaires*, October 2008). They have watched the leaders of previous generations burn themselves out and act like saviours, and this model is not attractive to them. It then becomes imperative that we, as a society, take a close look at these issues, since traditional leadership is apparently no longer the career path sought by younger generations.

In his definition of "i-leadership", Steve Jobs[1], one of the visionary leaders of our century, summed up what today's leaders would need to develop in order to be inspiring role models for future generations. According to Jobs, "i-leadership" is present and perceptible among the leaders of an organization when they:

- ✓ are passionate about the product to be sold or the service to be rendered;
- ✓ choose quality over quantity;
- ✓ respect their employees and invest in their development;
- ✓ structure the work environment and organization so as to encourage creativity;
- ✓ respond to the needs of their clientele or, preferably, anticipate them.

In order to inspire the younger generations and arouse their interest in filling management positions, one of the most promising approaches would be to take an in-depth look at these competencies, and to implement strategies aimed at fostering their emergence among our current leaders.

The conclusion of this article, published in a subsequent edition, will allow you to discover some of the best strategies in the area of attracting personnel, specifically adapted to the current reality faced by those in charge of recruiting in education.

References

1. *Consume and communicate*, Jay Elliot and William L. Simon, 2011.