G+ Education
INFO
FALL 2018 • Newsletter nº 30

Updates:

The union cannot appeal the judgment of the Superior Court upholding the arbitrator's decision stating that the salary insurance plan is not discriminatory with respect to staff in a state of partial disability [See decision no 10, Fall 2016]: 2018 QCCA 840.

The Superior Court quashed the decision of an arbitrator finding that occasional substitute teachers were employees within the meaning of the Act respecting labor standards while they are waiting to receive a replacement offer. According to the Superior Court, these teachers do not have the status of employee within the meaning of the Act respecting labor standards: therefore, they are not entitled to the payment of a daily allowance for bank holidays [See "Among you," Spring 2017]: 2018 QCCS 2107.

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RECENT **DECISIONS**

1 Parental consent is sufficient to publish photos of a student

A female student, upset that the high school she attended published two photographs of her in the yearbook, was suing the school board for damages. Although the student told the school's recreation technician that she refused to appear in the album, the school included the pictures after having obtained the parents' consent. In her lawsuit, the student reported that she felt insulted, humiliated and violated in her privacy. At the hearing, she explained that she did not consider her graduation to be an achievement, that she did not feel beautiful and that she did not approve of the waste of paper caused by this publication. The Court recognized the validity of claiming a right to an image, especially when the photographs are taken in a private place, such as an educational institution. However, the Court noted that only 115 copies of the album were printed and that the pictures were not objectively harmful or degrading. Thus, even though it would have been preferable for the school to obtain the student's explicit consent, the Court refused to find a fault, since it was customary to obtain parental consent. As this had been done, the claim was dismissed.

Shen v. *Commission scolaire de Montréal*
2018EXP-1049, 2018 QCCQ 1800, Justice Daniel Bourgeois

2 Constant supervision is not a fair and reasonable working condition

The union filed a grievance following the written notice issued to a teacher in a vocational training centre for having left work early, as recorded with a surveillance camera. The union was challenging the fact that the employer had used its camera system, installed for security purposes, to impose a disciplinary measure. The Court found that the camera system meant that teachers were subject to constant virtual surveillance. According to the arbitrator, the school board could not use the recorded footage to apply disciplinary measures, in particular because it had no grounds to fault the employee and had no reason to monitor him. Under these circumstances, the use of cameras for disciplinary purposes was illegal since it was contrary to section 46 of the *Charter of Human Rights and Freedoms*, which provides for the right to just and reasonable working conditions. As compensation for the moral damages suffered by the employee, the arbitrator awarded the sum of $100, while the union had claimed $1,000.

Syndicat de l'enseignement de la région des Moulins v.
Commission scolaire des Affluents
2018EXPT-1213, 2018 QCTA 196, Denis Nadeau

3 Return to work: the employer is the one to decide on the choice of expert

A special education technician challenged the school board's decision to refuse her gradual return to work and to have her referred for a medical assessment, when she had been absent for an adjustment disorder and chronic headaches. According to the arbitrator, the collective agreement allowed the school board to refuse the employee's immediate gradual return to work and to have her evaluated by a medical expert. Now, when an employer exercises his right to send an employee for an evaluation or expertise, the choice of the expert falls within his jurisdiction, as long as this choice is made in good faith. In this case, the employee suffered from chronic headaches for 18 months and she tried everything to reduce the pain, to no avail. The employer had reasonable grounds to believe that there was a potential link between these headaches and the employee's cervical osteoarthritis, hence the decision to have her examined by an orthopaedist to further investigate the matter. This decision was not unreasonable and the grievance was dismissed.

Commission scolaire du Chemin-du-Roy v.
Syndicat du soutien scolaire du Chemin-du-Roy
2018EXPT-1380, 2018 QCTA 275, Claude Fabien

4 Repeated falsification of time sheets justified dismissal

An administrative technician challenged her dismissal by the employer for repeatedly falsifying her time sheets. According to the arbitrator, the employee failed in her duties of loyalty and integrity and deliberately omitted to perform her work, while still receiving her salary. He pointed out that even if an employer does not have an obligation to remind his employees that they must perform their normal work, the school board, in this case, had a clear position regarding the accuracy required when recording worked hours. The repeated nature of the offence over a long period of time and the number of hours that were not actually worked were considered aggravating factors. The arbitrator also found that the position held by the employee required honesty, precision and integrity since she enjoyed a certain level of autonomy, and that she had not truly acknowledged her faults or expressed any regrets. Since clemency is at the discretion of the employer, the arbitrator upheld the dismissal.

Association professionnelle du personnel administratif Inc. v.
Commission scolaire de Montréal
2018EXPT-1069, 2018 QCTA 193, Huguette April

5 When she was offered the position, the employee should have disclosed her total temporary disability

An employee on the priority list obtained a position as a documentation technician. Two weeks after obtaining the position, she was put on a medical leave of absence. She contested the school board's decision to remove her from her position and to demand that she reimburse the salary insurance benefits paid for approximately nine months. The evidence showed that, at the time of her application, the employee suffered from a borderline personality disorder and had undergone a total colectomy, while knowing she was temporarily totally disabled for 12 months. The arbitrator first pointed out that an employee who has a medical disability or condition that renders her unable to perform the required tasks must act in good faith by disclosing beforehand this information to the employer. However, when she was offered the position, the employee did not disclose her total disability, thereby invalidating the school board's consent. For this reason, the school board was entitled to request that the employment contract be declared null and void. Finally, the request for reimbursement of salary insurance was also justified.

Syndicat du personnel de soutien de la Commission scolaire des Premières-Seigneuries v. *Commission scolaire des Premières-Seigneuries*
2018EXPT-1300, 2018 QCTA 171, Jean-Pierre Villaggi
(Appeal for judicial review requested)

6 Cost transfer: a snow remover who failed to clear the snow

The school board challenged the CNESST's refusal to grant a transfer of the cost of benefits. It alleged that the cervical, dorsal and lumbar sprain diagnosed in a teacher who fell on the ice in the school parking lot was mainly attributable to a third party, i.e. the snow removal subcontractor. The teacher and the school principal confirmed that the contractor was often negligent. The only defense of the third party was to state that the other schools seemed satisfied with his services. According to the CNESST, the teacher had a share of responsibility in the event since it was up to her to ensure that she could move about safely on her work premises. According to the Tribunal, the third party appears to have been regularly negligent and was therefore primarily responsible for the accident. The school principal had to call him and complain in order to have him provide the services for which he was hired. His negligence was critical in this case. The teacher was wearing winter boots and could not see the ice, since it was covered by accumulated snow. Consequently, all costs were transferred to the units of all employers.

Commission scolaire de la Seigneurie des Mille-Îles
2018 QCTAT 2159 (SST), Sylvie Moreau

7 A four-day week is not a functional limitation

A teacher challenged several decisions rendered by the CNESST. She claimed to have developed Ménière's disease, which was causing severe vertigo attacks. Her doctor recommended several functional limitations: not working during attacks nor for four days afterwards, avoiding overwork and stress, sudden movements, stairs and ladders, and limiting the use of computer. She should also not work more than four days a week, with Wednesdays off for rest. The TAT recognized that Ménière's disease was the result of work-related accidents and accepted the permanent functional limitations as stated, except for the one that restricted work to four days. This limitation will have to be temporarily implemented for two years, as a preventive measure to reduce the number of attacks. However, the Tribunal does not consider part-time work to be a functional limitation. If the employee cannot resume her full-time regular teaching job, the CNESST will have to determine a suitable job that she can do on a full time basis.

Pageau v. *Commission scolaire des Premières-Seigneuries*
2018 QCTAT 1031 (SST), Carole Lessard

8 Leaving from home to attend a training session does not create a link with work in case of an incident

The school board challenged a decision rendered by the CNESST recognizing that an administrative technician had suffered a work-related car accident on his way to attend a workshop given at another school than the one where he worked. It turned out that the employee left from home early in the morning to avoid traffic and save time. He claimed that the accident that happened was related to work since he was granted permission to leave from home by his principal. Besides, the workshop he was going to attend was at the request of the employer and for his benefit. On the other hand, the board was of the opinion that the accident, which happened more than an hour before the start of the training session, occurred in the worker's personal sphere of activity. The TAT decided that the permission granted to the worker was for his sole benefit and did not create a connection with work. Even though the training was useful to the employer, the choice of when to leave, which route to take and the means of transportation were at the entire discretion of the employee. When the accident occurred, he had not started work yet and he was still on his personal time. The decision was therefore overturned and the claim denied.

Commission scolaire de Montréal v. *Desjardins*
2018 QCTAT 2747 (SST), Julie Ladouceur

9 Cost sharing: the burden of proof cannot be higher for a psychological disability

The school board challenged the CNESST's refusal of a cost sharing request. Anxious mood adjustment disorder and post-traumatic stress disorder were diagnosed two months after a teacher was hit by a student. This led to an initial sick leave, followed by a relapse. The teacher had anxiety attacks and was afraid to be in school. Her psychologist noted that personal stressors (including cancer of a loved one and her son's ADHD) as well as anxiety were present before the accident. The psychiatrist appointed by the employer found significant internal emotional tension, anticipation and abnormal fatigue in the face of common life stressors. She found an anxiety frailty and diagnosed a generalized anxiety disorder. In the absence of a significant psychological medical history, the CNESST rejected the cost sharing. However, according to the TAT, a psychological disability can be pre-existing without having manifested itself in any previous history. The pre-existing psychological fragility was not only proven, but it constituted a handicap, which was almost exclusively to blame for the work-related injury. The cost sharing was granted and 99% of the costs were removed from the school board's financial file.

Commission scolaire A.
2018 QCTAT 2169 (SST), Jean M. Poirier

Comments

The psychiatrist explained that the employee's greater fragility generated anxiety in different forms in the face of common stress factors. There was also significant chronic anxiety in her family history. Even if no psychiatric diagnosis was made before the accident, the disability was there. The TAT expressed its disagreement with the CNESST, which required a higher burden of proof in matters of psychological disability, and is already by nature more difficult to prove. By requiring proof of a significant psychological medical history, the CNESST added a criterion to the recognition of a disability. This requirement was contrary to the definition of a disability that has been accepted in the case law for several years. In this case, the event was not exceptional in the context in which the teacher operated. The TAT also made a distinction between this incident and a conventional assault, and concluded that it could hardly explain all the consequences observed. The medical evidence was decisive, not only through access to the psychologist's notes but also through the information gathered by the psychiatrist and her explanations of the pre-existing generalized anxiety, even though it had never been diagnosed before. In cases of this type, where the costs involved can rise rapidly, a medical assessment is often a good investment.

10 Failure to comply with procedure: a second dismissal could be ordered

After dismissing a teacher, while the grievance challenging this measure had not yet been heard, the employer dismissed the teacher again, noting that the procedure stipulated in the collective agreement had not been followed, since the Executive Committee's decision had not been forwarded to the union. The latter objected to the second dismissal 19 months after the events that led to the first dismissal. According to the arbitrator, an employer who commits an error and thus introduces a procedural flaw in the imposition of a disciplinary measure may rectify it by proceeding in the correct manner, provided that he acts within the time limits specified in the collective agreement or, failing that, within a reasonable period of time. In this case, the employer did not wait for an arbitral ruling to confirm that the first dismissal was null and void; less than two weeks after realizing that this would be the likely outcome, he decided to act by sending a new notice of intention to dismiss followed by a new resolution to dismiss issued by the Executive Committee. The union's objection was rejected.

Association of Employees of Northern Quebec v. *Cree School Board*
2018EXPT-1517, 2018 QCTA 389, Jean Ménard

Comments

The facts of this case were unique in that the same arbitrator, before hearing this grievance, had nullified the dismissal imposed on two teachers in a different case on the grounds that the mandatory procedure prescribed in the collective agreement had not been followed. It was in light of this ruling that the school board, in the case at hand, decided to resume the termination process. Moreover, regarding the time limits for imposing the second dismissal, the arbitrator concluded that even though the first dismissal had never taken place legally, the school board had clearly indicated to the employee its intention to terminate her employment, and the union had been notified of this fact. Consequently, they could not now claim to be surprised by the employer's new initiative. The second dismissal was imposed 19 months after the events that led to the first dismissal, but less than two weeks after the arbitrator's ruling that led to the employer's decision to impose a second dismissal.

Cyberbullying: Schools caught between a rock and a hard place

By Emilia Nyitrai
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Cyberbullying, online threats, inappropriate texting: the relative novelty of these phenomena, which regularly make headlines, is the source of a lot of headaches in the education sector.

Of course, the *Education Act*[1] and the *Act respecting Private Education*[2] stipulate that "*Students shall conduct themselves in a civil and respectful manner toward their peers and school board personnel.*" Since 2012, school boards and private institutions have also been required to establish an anti-bullying and anti-violence plan and to have it updated on a regular basis. This plan must include, among other things, "*the applicable procedures for submitting a report or complaint concerning an act of bullying or violence and, more specifically, those applicable to denouncing the use of social media or communication technologies for cyberbullying purposes.*"

In this regard, the legislation confirms that the school's responsibility to provide a safe and healthy environment and to maintain order and discipline is likely to extend beyond the school's walls.

Misconduct towards peers…

Instinctively, it seems that it is mainly cyberbullying between students that one we will seek to prevent or stop. Thus, it is imperative to keep in mind that all decisions made by school administrations may be subject to the scrutiny of the courts.

As an example, the provisional reinstatement order issued this Fall in favour of students suspected of sharing pictures depicting classmates[3] in a sexual context caused a stir in the public opinion. The college had initially informed the accused students that it would allow them to return, before changing its mind in the wake of a media uproar. Pending the final decision, the Superior Court held that the fear of public responses and demonstrations was not sufficient to justify the private college's turnaround and the students were permitted to return to class.

… but also school personnel

In Alberta, the Human Rights Tribunal criticized a school board in 2014 for failing to properly fulfill its obligations towards a teacher following an online defamatory campaign by a student[4]. The latter had repeatedly and persistently sent hateful or threatening messages to the teacher, going so far as to publish slanderous comments online – including allegations of sexual assault against her.

While the school board had offered psychological support to the teacher in question and transferred the offending student, the Tribunal found that it had failed to effectively coordinate its interventions with the student, by merely dealing with each incident separately. The Tribunal indicated that this duty to intervene was based on the school board's obligation to provide a harassment-free workplace and the principle of vicarious liability when the organization concerned has the capacity to take effective remedial measures[5].

Of course, the severity of the standard adopted could be questioned, especially since the Tribunal did not specify the measures it would have considered appropriate in this specific situation. However, this case highlights the need for a centralized and assertive approach to dealing with these matters. Indeed, the risk of being held accountable for students' actions increases the importance, for school boards and institutions, of enforcing a progressive but firm discipline policy.

How to prevent? How to respond?

Ultimately, school boards must contend with both the spectre of legal actions for negligence on the part of employees or families of victims if they remain inactive, and the spectre of legal actions for applying abusive sanctions on the part of families of suspended or expelled students.

In the current context, the adoption and distribution of clear policies on civility and the use of information and communication technologies, as well as social medias, targeting both students and staff members, is an essential first step.

Needless to say, the reports and the resulting disciplinary sanctions must be subject to careful legal scrutiny so that the rights, obligations and interests involved are properly weighed.

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1. RLRQ c. I-13.3, sec. 18.1, par. 1 and 75.1, par. 3 (4)
2. RLRQ c. E-9.1, sec. 63.1, par. 3 (4) and 63.3, par. 1
3. *A* v. *Séminaire des Pères Maristes Inc.*, 2018 QCCS 3866
4. *Malko-Monterrosa* v. *Conseil Scolaire Centre-Nord*, 2014 AHRC 5
5. *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 RCS 84

Connecting for Better Onboarding Management Staff

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The shortage in banks of succession candidates among school boards and low retention rates require schools to reconsider their traditional intake practices of management staff, bringing them closer to assimilation than onboarding.

An increasing number of new integration practices are being promoted. These practices support the person who is new to the role of vice-principal. They are meant to:

- ✓ Recognize the strengths and talents people bring to their new network and the impact on the team of their onboarding.
- ✓ Support the development of a professional network for sharing their expertise.
- ✓ Support superiors as they establish partnerships with them.

Respect the need to be recognized

During an onboarding process for vice-principals, it is better to identify, promote and share the incumbent's strengths, talents and experience than to laud the school's mission and values.

Recognition is the starting point for any interaction. It is more effective in terms of retention and performance, and its benefits are well known.

Onboarding: a question of relationships

A modern school is a place where:

- ✓ The mission is shared.
- ✓ Trust generates cooperation.
- ✓ Interdependence provides an understanding of complexity.

With this new approach, the basic unit for organizing work is no longer the individual contributor; it's the team.

This new paradigm transforms how relationships are established. It may even call into question the foundations of professional identity. In a complex organization like a school, the idea of the hero leader has to make way for collective leadership.

Basically, the best predictor of success or failure in onboarding vice-principals is their ability to develop smooth, effective relationships with key people in the school, e.g., their supervisor, the other vice-principals, teachers and administrative staff.

Partnership rather than subordination

In the first few weeks, principals often stay in the wings to avoid creating the impression that they don't trust their new vice-principal. Vice-principals, in turn, want to prove that the principal made the right call in hiring them by demonstrating their value and expertise. They will tend to avoid asking the principal for advice.

It is during this period that principals can most help new vice-principals and point them in the right direction.

The involvement of supervisors with their new vice-principal guarantees successful onboarding.

This involvement requires that everyone take the risk of being vulnerable and commit to being fair to the person taking the risk to trust them.

To facilitate this involvement, it is a good idea to promote the positive. This creates the proper context for learning, development, and ultimately, onboarding the new vice-principal.

Here are three things the supervisor can do to crystallize this involvement:

- ✓ **Create a context conducive to discussion** – Devote an hour a week to the new vice-principal and let him or her set the agenda for the meeting.
- ✓ **Suspend judgement to reflect together** – Resist judging the new vice-principal's style too hastily.
- ✓ **Give regular feedback** – Share your perceptions and ask for the other person's perspective.

Better retention and improved performance

To improve a new vice-principal's retention and performance, we need to:

1. Recognize that the person joining the school is unique.
2. Enable the development of a network of interpersonal relations.
3. Adjust how work is organized to reflect individual strengths and talents.