G+ Education

INFO

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RECENT **DECISIONS**

1 In certain circumstances, the obligation of child custody is an obligation of performance

As guardian of X, a father of a minor daughter with autism claimed $15,000 from the school board, alleging that the staff at the school that his daughter attended failed to meet their child custody obligations by leaving her in the schoolyard without supervision for approximately an hour and a half while it was minus 20 degrees outside. The evidence showed that, contrary to the procedure that must be followed, no staff member took charge of X between the time she stepped off the bus and the time she was found by chance by a staff member. By then she was in a state of panic, and she was numb and freezing. According to the judge, the obligation to look after students who are entrusted to the school, its staff and, consequently, the school board is an obligation of performance, with respect to children who, like X, require enhanced supervision and assistance because of their condition or disability. Acknowledging that there was culpable behaviour on the part of the school's staff, the judge nevertheless refused to award punitive damages because the behaviour was not intentional. However, he awarded $6,500 in moral damages to X.

Duo v. *Commission scolaire des Laurentides*
2018EXPT-2931, 2018 QCCQ 7029, J.-P. Archambault

2 Integration of a service dog in the classroom under certain conditions

The parents of X, a student on the autism spectrum, asked for issuance of an injunction so that their son could be accompanied by a service dog in his specialized class. Being of the opinion that the conditions required by the school board for the integration of the dog into the classroom were inappropriate, the plaintiffs refused to subscribe to them. Yet, according to the judge, these conditions, i.e., confirmation that the plaintiffs have civil liability insurance for the dog, confirmation that their son took Mira training giving him control of his dog, and the implementation of a plan for the dog's movements in the school, are justified. Furthermore, the presence of a student allergic to dogs in the same class as X prevents the integration of his dog into the classroom. Consequently, there are grounds to consider moving X to another school, preferably in a specialized classroom if a place is available. The judge therefore ordered the school board to welcome the dog into one of its schools, subject to the plaintiffs' compliance with the *Règles de fonctionnement sur la présence d'un chien d'assistance dans un établissement* (operating rules regarding the presence of a service dog in a school).

Labonté v. *Commission scolaire de la Capitale*
2019 QCCS 335, Daniel Beaulieu

3 Reinstated after two years for a party with excessive drinking

A school counsellor challenged her dismissal for organizing a party with alcohol in a community room involving minors to celebrate her two teenagers birthdays aged 15 and 16. In addition, the employee recorded an inappropriate video message that was posted on Facebook in which she said, "*Hi. Tonight, there are three rules. We drink inside. We smoke outside. We throw our trash in the garbage can. Rule number four: we drink until we're pissed.*" The arbitrator concluded that the employee had committed two offences, i.e., recording the video and recklessness in developing an immoderate plan. As mitigating factors, the arbitrator noted the employee's confession, the fact that the risks of recidivism were nil, the near non-existence of contact between the employee and the students while performing her duties, the absence of a disciplinary record, and the employee's 19 years of seniority. According to the arbitrator, a reasonable person would not have concluded that the relationship of trust had been severed, and the reluctance or prejudice of some teachers cannot block reinstatement. A three-month suspension without pay was substituted for the dismissal.

Commission scolaire du Lac-Témiscamingue and *Syndicat des professionnelles et professionnels en milieu scolaire du Nord-Ouest*
SAE 9336, 2018-12-05, Claude Fabien

4 Dismissed for serious misconduct and reinstated without compensation

A teacher for adults challenged his dismissal for having had consensual sexual relations with a 25-year-old student he was teaching in his classroom after completing a course. The arbitrator acknowledged the seriousness of the fault, in particular because of the nature of the duties, and the moral damage that the employee caused to the student by notifying her on the same day of the relations that it would not happen again, although he knew that the student was psychologically fragile. However, the arbitrator found several mitigating circumstances: the employee's ten years of seniority, his clean disciplinary record, the absence of premeditation since the student had initiated the sexual relationship, his confession and his collaboration during the investigation. The arbitrator also considered that the employee's faults had not had an impact on the employer's public image or reputation. While acknowledging that a school board was right to apply zero tolerance to intimate relationships between teachers and students, the arbitrator emphasized that zero tolerance does not necessarily lead to dismissal. He therefore ordered the employee's reinstatement without compensation, equivalent to a suspension of over eight months.

Commission scolaire du Val-des-Cerfs and *Syndicat de l'enseignement de la Haute-Yamaska*
SAE 9337, 2018-12-07, Gilles Ferland

5 Mandatory annual leave during a gradual return to work

A special education technician challenged the school board's decision to debit her vacation bank during a gradual return to work. As part of this arrangement, the employee worked six days over a two-week period. When the school closed for two weeks, while the staff were required to take vacation, six days of vacation were debited from the employee's bank. The union alleged that the employee was supposed to be considered on disability and "absent from work" within the meaning of the collective agreement during that two-week period, since she could not be on vacation and on disability simultaneously. According to the arbitrator, the employee had employee or disability status depending on the day: she was either an employee during the six days of work or on disability during the other four days. Since the decision to debit six days of vacation from her bank corresponds to six days of work, the grievance was dismissed.

Syndicat du personnel de soutien scolaire de Lanaudière and *Commission scolaire des Samares*
2018EXPT-1699, 2018 QCTA 401, Pierre St-Arnaud

6 No temporary assignment in the summer

The school board challenged the administrative review decision that revoked a suspension of compensation. It alleged that the employee, a teacher and student supervisor, did not have a valid reason to be absent from the temporary assignment authorized by her doctor during the school vacation. According to the employer, the employee would be at an advantage in relation to other laid-off employees if she kept her compensation during the summer. According to the TAT, the employee has a fixed-term employment contract and is always laid off on a cyclical basis at the end of the school year while the students are on vacation. She never worked during the summer since the beginning of her employment and spends the summer season with her daughter. The decision whether or not to suspend her compensation must not take other employees into account. She could legitimately expect not to work in the summer and her refusal to pursue the temporary assignment, given without a problem before the end of the school year, constitutes a valid reason. The compensation was not suspended.

Commission scolaire de la Seigneurie-des-Mille-Îles and *Bérichon*
2018 QCTAT 5774 (SST), Martine Montplaisir

7 A specific phobia of the gymnasium developed following an accident at work

The school board challenged the CNESST's refusal to grant it cost sharing. A teacher suffered a cervical sprain and cranial trauma during a fall in the gymnasium, and these injuries were consolidated six months later, with no after-effects. The CNESST also recognized a phobic avoidance of the gymnasium, consolidated two years after the accident. The employer alleged that a pre-existing major depressive condition played a predominant role. According to the TAT, medical evidence confirmed the pre-existence of a major depressive condition resulting from the dramatic deaths of relatives a few months before the accident at work. This is a disability. According to the employer's expert psychiatrist, only 4% to 5% of the population suffers from major depression, and these individuals are at greater risk of developing a phobia. During the fall, the employee was afraid of dying and experienced a panic attack, which turned into a specific phobia. Treatments for major depression take from six to twelve months. Only after this treatment, the specific phobia can, in turn, be treated. Cost sharing was granted, and 80% of the costs were removed from the employer's financial file.

Commission scolaire du Val-des-Cerfs
2018 QCTAT 6028 (SST), Jean-François Dufour

8 A teacher was injured while fighting a student

A teacher challenged the CNESST's denial of his claim for a hemithorax contusion and adaptation disorder. He pushed a student who refused the confiscation of his cell phone. They began fighting and the employee was injured. The police had to intervene. The student was expelled. The employee was suspended without pay for 40 days and then transferred to another school. The employer alleged that this behaviour is outside the professional sphere. The TAT found that the employee was performing his duties at the time of the accident, even if his method was regrettable. The presumption of employment injury was applied to the contusion. The adaptation disorder was also accepted. The scuffle and its consequences, in the form of a series of disciplinary, administrative and police measures, constituted a traumatic event. The employee was required to sign a promise given to a peace officer and his case was reported on television before he was transferred and uprooted from his environment. The medical evidence showed a direct link between these situations and the psychological injury. The claim was accepted for both injuries.

C.L. and *Commission scolaire A.*
2018 QCTAT 6283 (SST), Jean-François Martel

9 Upset by a complaint for psychological harassment

A teacher challenged the denial of her claim for adaptation disorder, which was allegedly attributable to the announcement that a complaint of psychological harassment had been filed against her by the assistant principal. HR tried to contact the teacher in the evening at home to inform her promptly of the complaint, as it had done for the other persons mentioned. The teacher did not return the call until the next morning in the school staff room. After the call, the employee immediately left the school to see her doctor and consult her union. She considered that harassment and intimidation were extremely serious accusations and believed that she had been falsely accused. In the absence of a sudden, unexpected event, the challenge was dismissed. The evidence showed that there was a conflict concerning the cancellation of an activity. Such interpersonal conflicts do not extend beyond the normal scope of work. As for the handling of the complaint, it was managed in a reasonable manner by the school board and nothing extended beyond the normal scope of work. The denial of the claim was upheld.

Montbleau and *Commission scolaire des Samares*
2019 QCTAT 611 (SST), Marie-Eve Legault

Comments

The teacher perceived that she had been subject to very serious false accusations and panicked. However, the TAT cannot declare subjective perceptions admissible. The conflict existed before the complaint was filed, even though the teacher said she was surprised by it. The admissibility of the complaint was subject to objective examination before it was handled. HR ensured that the teacher could receive a confidential communication when she had her call. A mediator was quickly appointed but the investigation could not be completed before the start of the school year. The adaptation disorder was already well established at that time and could not result from this period. The TAT does not have to rule on the merits of the complaint but on the existence of an employment injury. The employer has the obligation to prevent and end the harassment, and it complied with its policy, without abuse. Even though being mentioned in such a complaint may be uncomfortable, the appropriate handling of the complaint by the employer demonstrates the absence of a situation that extends beyond the foreseeable scope of work, similar to a sudden, unforeseen event, which is an essential condition for recognition of an employment injury.

10 A report was made too quickly to the Director of Youth Protection

A physical education teacher challenged his suspension with pay and a written notice. During an intervention with a disabled child in crisis, the employee took him by the shoulders, lifted him up and set him down firmly on a bench. After having a teacher report this incident, the principal reported it to the Director of Youth Protection. The investigation revealed that the complaint was unfounded and no criminal charge was filed against the employee. According to the arbitrator, the employer had the obligation to check the information submitted by the teacher. Yet, the employer waived conducting its own investigation. However, the versions obtained, following even a brief investigation, would have provided better insight into the situation and would have provided assurance that the employee, who had 14 years of seniority and a clean disciplinary record, did not represent and never represented a danger or a threat to his students and that he had not committed physical abuse. The absence of a serious investigation into the situation negatively affected the employee's health, safety and dignity and resulted in a suspension without reasonable cause. In addition, the evidence did not support the grounds underlying the written.

Commission scolaire des Premières-Seigneuries and
Syndicat de l'enseignement de la région de Québec
2018EXPT-1931, 2018 QCTA 519, Robert L. Rivest

Comments

The Youth Protection Act provides for a duty to report any physical abuse that a child could suffer. According to the school board, this obligation did not allow it any discretion: it was required to report the situation in order to trigger the investigation process in accordance with the multisectoral agreement. The arbitrator disagreed with this interpretation and wrote: "*[81]... The multisectoral agreement does not provide that the employer loses its managerial powers to determine whether the situation raised by one of its employees constitutes a case of potential physical abuse and to take the necessary measures to conduct a preliminary analysis.*" While acknowledging that a report must be made when there are reasonable grounds to believe that a child's safety is compromised, the arbitrator concluded that the school board had the obligation to check the information submitted given the significant impact that a report entails. In short, before triggering the multisectoral agreement's investigation process and suspending the employee too quickly, the school board should have done a more in-depth analysis of the situation.

Student Surveillance

By Danilo Di Vincenzo
Le Corre & Associates

Schools have a duty to ensure student safety. Installing a video surveillance system is an effective way not only to combat violence and bullying at school but also to protect the security of school property and monitor comings and goings.

Like everyone, students are entitled to the fundamental rights protected by the *Charter of Human Rights and Freedoms*,[1] including the right to privacy, which is also protected by the *Civil Code of Quebec*.[2] Given this, there is reason to question whether installing a video surveillance system in a school violates students' right to privacy.

The Supreme Court of Canada has ruled on this question on at least two occasions. In *R. v. M. (M.R.)*,[3] the country's highest court heard a dispute in which a student suspected of being in possession of drugs claimed his right to protect his privacy in order to avoid a search. The Court specified the following regarding expectations with respect to privacy:

> "A reasonable expectation of privacy, however, may be diminished in some circumstances. It is lower for a student attending school than it would be in other circumstances because students know that teachers and school authorities are responsible for providing a safe school environment and maintaining order and discipline in the school. Students know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items."

Quite recently, in *R. v. Jarvis*,[4] the Supreme Court had to determine whether students filmed by a teacher charged with voyeurism were in circumstances where there was a reasonable expectation of protection of privacy. The Court wrote the following on this subject:

> "[73] ... There is no dispute that students' expectations of privacy with respect to observation and recording are different and must be lower in the common areas of a school than when they are in traditionally private locations, such as their bedrooms. In ordinary circumstances, students in the common areas of a school cannot expect not to be observed by others and may also expect to be subject to certain types of recording...."

A student's expectation of privacy at school is therefore not absolute. What about the expectation of privacy of employees who work in a school while a video surveillance system is active? The law also protects the privacy of the employees. In addition, the Charter provides that every person has a right to fair and reasonable conditions of employment which have proper regard for his or her health, safety and physical well-being.[5] However, the constant and continuous surveillance of all the actions of an employee using a camera may constitute an unreasonable condition of employment covered by this provision.

On this subject, we draw your attention to the decision recently handed down in *Syndicat des employés(es) de l'école Vanguard Québec ltée and École Vanguard Québec inc.*,[6] in which the arbitrator dismissed the union's grievance requesting the dismantling of the video surveillance system installed by the school. The cameras were mainly used to monitor students in common areas where they gathered and walked around: cafeterias, stairways, elevators, corridors and front doors. Although the employees were not directly targeted by the cameras, their image was captured randomly while they moved from place to place, thereby making many of them uncomfortable.

While acknowledging that the installation of the video surveillance system violated the employees' privacy, the arbitrator concluded that the school had demonstrated that it had an urgent and real objective, i.e., to maintain order, safety and discipline for the students in the school environment, protect them from bullying and violence at school, and protect its property against theft, vandalism and drug trafficking. In addition, the choice of the video surveillance system had a rational link with the objective of protecting students and maintaining a climate conducive to learning. Finally, the arbitrator concluded that the infringement of the employees' privacy was minimal, in particular because the only objective sought by installing the cameras was student surveillance, that there were no cameras in the classrooms, offices, washrooms and locker rooms, and that the employees' images were captured randomly as they moved from place to place and in a way that was incidental to the desired objective.

1. CQLR, c. C-12, section 5.
2. LQ 1991, c. 64, articles 3 and 35 to 41.
3. [1998] 3 S.C.R. 393.
4. 2019 SCC 10.
5. Section 46 of the Charter.
6. 2019EXPT-307, 2019 QCTA 13

Hiring a school vice-principal in complete objectivity

By Myriam Plamondon, MSc, MA, OGC
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School boards face particular challenges when it comes to hiring school vice-principals. With succession databases virtually depleted, schools do not have the luxury of access to a wide range of experienced candidates. Sometimes they have to choose between two or three teachers with barely five years' experience and a few graduate courses in education management under their belts. Given the context, how do you make sure you hire the right person, objectively?

You need to make the selection process as objective as possible, because the impact of inequity can be enormous. Not only do you run the risk of not hiring the right person for the position you have to fill, but your school board could also be sued if a candidate feels that the process was not entirely fair.

Here are two mistakes that seriously impair your objectivity and the best practices to avoid them.

Letting your emotions guide you during the interview

It is generally acknowledged that people tend to favour some candidates over others during the hiring process, based on unconscious, but inappropriate, criteria. The following are some examples of bias that can hinder objectivity during an interview:

- ✓ Looking for information that confirms our perceptions while ignoring information that contradicts them.
- ✓ Preferring candidates who are like us and who make a better first impression.
- ✓ Judging all candidates too severely or not severely enough.
- ✓ Preferring someone because we met them right after a poor candidate or viewing someone less favourably because we met an excellent candidate right before them.
- ✓ Placing too much importance on the information provided by a candidate at the start and at the end of the interview.
- ✓ Judging candidates positively or negatively based on certain non-employment related characteristics (e.g., appearance, religion, sex, age, etc.). A study has even shown that 35% of hiring decisions are apparently based on a candidate's weight when obese candidates are being assessed and that this bias is even greater in the case of over-weight women.[1]

How can interview bias be limited? Most forms of bias can be avoided by better organizing the interview, especially by using pre-determined questions and ensuring that all candidates being interviewed for a given position are asked the same questions. Questions should relate to the position and should encourage candidates to provide concrete examples that will support the information that they are providing. It is also a good idea to use various sources of information to measure the same criterion. By ensuring that candidates are not selected based on the interview alone, it is possible to limit the impacts of bias stemming from personal judgement.

Making a hiring decision based on intuition

What is more effective: an objective decision or an intuitive one? Studies show that both approaches may be valid depending on the context. That having being said, however, intuition can lead to errors, especially when the recruiter has less experience.[2] With time, however, our brain can take some effective shortcuts, allowing us to make hiring decisions more quickly. Although these decisions may seem more intuitive, in actual fact they are unconsciously based on our knowledge and experience.

Our intuition can "raise the alarm" when a candidate seems to be saying something that is false or can give us a lead. Although intuition may be useful in some contexts, when selecting a candidate the hiring decision must be supported by objective data. For example, if a candidate gave you the impression that he is not particularly good with interpersonal relationships, try to find evidence to the contrary before taking a position in order to sharpen your judgement and add some nuance. It is also important to remember that some skills are impossible to measure intuitively, whereas a rational approach has had proven results.

In other words, pay attention to your intuition but put it to the test by going into more depth in an interview, checking references or adding a psychometric test to back up your conclusions with objective facts.

In short, when hiring a school vice-principal, it is important not to let emotion or intuition weigh too heavily in your decision. You will have a better chance of hiring the best person, while remaining equitable.

1. Pingitore, R., Dugoni, B. L., Tindale, R. S., & Spring, B. (1994). *Bias against overweight job applicants in a simulated employment interview*. Journal of Applied Psychology, 79(6), 909.
2. Constantiou, I. (2012). *Making Space for Intuition in Decision Making: The case of project prioritization*. In *Proceedings of the New Frontiers in Management and Organizational Cognition Conference*. National University of Ireland Maynooth.