G + Education

INFO

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NEW WORKSHOP

DROIT DE L'ÉDUCATION – Au-delà des 104 semaines : guérison, mise à pied ou fin d'emploi ?

Webinar presented on November 10, 2021, from 8:30am to 12:00pm by Me Lydia Fournier and Me Lucie Roy. For more information:

https://www.lecorre.com/fr/formation/103-droit-de-l-education-au-dela-des-104-semaines-guerison-mise-a-pied-ou-fin-d-emploi-.html

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EDITORIAL

Bullying and violence: when schools are put on trial!

Me Lucie Roy

Over the past few years, the media have reported cases of parents or students who have claimed damages against private schools or school boards/school service centers for situations of violence, harassment or bullying[1].

Since the introduction in the *Education Act* (EA) and in the *Act Respecting Private Education* (PEA), of the duty of educational institutions and their employees to provide a healthy and secure learning environment that allows every student to develop his or her full potential, free from any form of bullying or violence[2], it seems that the bar is increasingly high for educational institutions having to deal with these types of situations.

While an educational institution's obligation to ensure the safety and well-being of students and to provide an atmosphere conducive to learning is an obligation of means and not of results, recent judgments appear to place a particularly heavy burden on the educational sector to demonstrate that reasonable efforts have been made.

In light of this, how can educational institutions adequately respond to claims for damages brought against them by students or their parents following acts of bullying or violence perpetrated by classmates?

Let us first recall the general principle of civil liability according to which the guardian or supervisor of a minor child is "*bound, in the same manner as the person having parental authority, to make reparation for injury caused by the act, omission or fault of the minor.*"[3] This mere presumption of fault can be rebutted by showing that there was no fault, i.e., that the supervision, custody or education of the minor was adequate. This is the burden that is placed on educational institutions when a student suffers personal injury as a result of an incident at school or during an extracurricular activity.

The situation does not seem so simple in the case of allegations of bullying, harassment and violence, since in such matters the legal obligations of educational institutions no longer derive solely from their civil liability under the *Civil Code of Québec*, but also from those set out in their constituting legislation, i.e., the EA or the PEA.

Thus, in order to exonerate itself from liability for damages following bullying, violence or harassment, an educational institution would be well advised to demonstrate that 1) it strictly followed and applied the provisions of its policy on the prevention of harassment, violence and bullying; 2) an anti-bullying and anti-violence plan has been duly implemented and communicated to employees, students and parents; 3) that its staff has been trained to react appropriately to such situations; 4) that it has taken initiatives to prevent problematic situations; 5) that it has not used shortcuts (such as simply transferring students) to resolve a problematic situation; 6) that adequate support has been offered to the parents and students involved; 7) that parents have been well informed of the internal complaint process (complaints to the principal or the board of directors/council of commissioners, complaints to the student ombudsman). In short, once the situation is reported, the educational institution has put in place adequate processes to immediately stop the bullying, violence or harassment while keeping the parents involved well informed of the situation.

Of course, this is not an exhaustive list and each case is a unique case. However, a Tribunal would be more likely to recognize that an educational institution has met its legal obligations when the evidence presented in Court demonstrates the seriousness of the approach taken by those involved in the school environment. As in any case presented before the courts, the steps taken by the educational institution will have to be properly documented in order to have greater credibility.

Finally, we would like to remind you that educational institutions with a civil liability insurance policy would be well advised to inform their insurer as soon as they receive a letter of demand, since such claims generally constitute a covered risk.

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1. See in particular: *B.L.* v. *Labrie*, 2019 QCCS 4648; *D.S.* v. *Lester B. Pearson School Board*, 2021 QCCQ 5489
2. Sections 210.1 of the *Education Act*, RLRQ, c. I-13.3 and section 63.1 of the *Act respecting private education*, RLRQ, c. E-9.1
3. Section 1460 of the *Civil Code of Quebec*

RECENT DECISIONS

1 Distance learning during the pandemic: parents call for lower tuition fees

The Superior Court has authorized a class action for price reduction against private educational institutions in connection with their failure to execute contracts for educational services entered into with parents of students during the 2019-2020 school year. In his analysis of the criteria for authorizing a class action, the judge noted that certain decrees adopted by the Québec government during the pandemic had, among other things, reduced the "quantity" of teaching hours to be provided by these institutions, without, however, having an impact on the tuition fees to be paid by parents. For this reason, the class action suit was authorized. However, it is to be noted that the suit was rejected for certain institutions, in particular those with agreements exempting them from the Québec School Basic Regulations, or those offering educational services to special needs students at low or no cost. Conversely, the class action suit was authorized against some institutions despite partial reimbursements to parents.

Bernard v. *Collège Charles-Lemoyne de Longueuil inc. et al.*
2021 QCCS 3083, Justice Pierre-C. Gagnon

2 Vacation request denied: $300 in moral damages awarded

An administrative support officer challenged the CÉGEP's decision to deny her request for a week vacation. The employer justified its refusal on the grounds that it was a busy period and the employee's presence was required at work. However, the evidence showed that the week in question had not been busy, that the employee had not been so much in demand and that the work could have been done by a single employee: the employee's presence was therefore not necessary. The employer justified its decision by alleging that it had to anticipate its needs. The arbitrator concluded that anticipation is not enough and in the absence of an unforeseeable event, the employer's decision to deny the request vacation must be based on real needs. The arbitrator therefore allowed the grievance and awarded moral damages in the amount of $300 to the employee.

Syndicat du personnel de soutien du Cégep de Limoilou et *Cégep de Limoilou*
SAE 9526, 2021-05-20, M[e] Yves Saint-André (T.A.)

3 A "feminine emergency" does not supersede the public health emergency

The employee is challenging the 10-day suspension she received for failing to comply with the mandatory quarantine following her return to Kuujjuak in the context of the COVID-19 pandemic. She went to the grocery store on two occasions as well as to the police station when she had to remain in isolation. She justified one of her trips to the grocery store by the fact that she needed to buy personal hygiene items to deal with a "feminine emergency", which was not justified according to the arbitrator. In the arbitrator's opinion, the employee could have had those items delivered or had someone pick them up instead of breaking her quarantine. Consequently, the suspension imposed by the employer, even if it did not respect the principle of the gradation of sanctions, was reasonable in view of the employee's lack of transparency during the first meeting with the employer on this subject and the failure to comply with the health authorities' directives.

Association des employés du nord québécois et *Kativik Ilisarniliriniq (Commission scolaire Kativik)*
SAE 9538, 2021-08-02, M[e] Jean Ménard (T.A.)

RECENT DECISIONS

4 Risk of serious complications from COVID-19: continuation of teleworking as an accommodation

The Union challenged the School Board's refusal to allow a librarian to perform all of her duties remotely. Following a directive from the employer stating that staff members had to return to the workplace to perform their duties, the employee provided the employer with attestations from her treating physicians recommending that she remain in telework because of the risks of serious complications related to COVID-19 due in view of her various health problems, including severe chronic rhinosinusitis. Despite these medical opinions and the union's accommodation proposals, the employer refused to grant the employee's request to telework, basing its decision on the recommendations of the INSPQ, even though these recommendations stressed the importance of considering the opinions of treating physicians. The arbitrator allowed the grievance in light of the employer's discriminatory refusal to accommodate the employee and retained jurisdiction over the amount of moral damages to be paid to the employee.

Syndicat du personnel professionnel de l'éducation de la région de Québec et *Centre de services scolaire des Premières-Seigneuries*
SAE 9545, 2021-08-19, M[e] André C. Côté (T.A.)

5 Cost transfer granted: she lied to avoid a temporary assignment

The School Board challenges the allocation of the costs and requests a cost transfer. The worker claimed that her condition prevented her from driving and she was unable to report for her temporary assignment. The employer alleged that the worker managed to avoid the temporary assignment for several months by falsely claiming that she was unable to drive. According to the Court, the worker deliberately lied, as she drove her car on several occasions to take her children to the bus stop. She also asked her mother to pick her up from a medical appointment and got behind the driver seat of her car once they were a few blocks away from the clinic. The incompatibility of the temporary assignment was due to the worker's bad faith and actions in trying to avoid the temporary assignment proposed by the employer. The employer was the victim of an injustice and its challenge was maintained.

Commission scolaire des Affluents
2021 QCTAT 958 (SST), j.a. Réjean Côté

6 Reassignment of a pregnant teacher to a speech therapist's position

A teacher challenges the CNESST's decision that her job is safe for her pregnancy. The worker's doctor gave her a certificate stating that her work involved risks for her unborn child, namely the presence of violent students in her classroom. To address this problem, the employer assigned a special education technician to the worker's classroom. When this proved to be ineffective, the employer reassigned the worker to another school. She challenged the reassignment because there were news reports of violence in this new school and that she was not qualified as a speech therapist. However, given the shortage of speech therapists, the employer had to assign more than 50 teachers to speech therapists' positions. According to the Court, the worker was sufficiently qualified to be able to carry out the proposed assignment. Her challenge was dismissed.

Grobon et *Centre de services scolaire de Montréal*
2021 QCTAT 1036 (SST), j.a. Michel Larouche