G + Education

INFO

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NEW WORKSHOP

Accommodement et réadaptation à l'ère de la modernisation du régime de SST

Training session in French presented by Me Reine Lafond and Me Lydia Fournier in fall 2022. For more information:

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EDITORIAL

Duty to accommodate and employment injury: An even greater burden as of October 6, 2022

Me Lydia Fournier, Le Corre & Associates

Although it is recognized that the duty to accommodate is an obligation of means and not of result, it is known that it is a tedious exercise for large parapublic organizations such as School Service Centres. You should be aware that the CNESST will soon become the "project manager" for accommodation. Indeed, the duty to accommodate that has arisen from case law has now been integrated by the *Act to modernize the occupational health and safety system* into new provisions of *the Act respecting industrial accidents and occupational diseases*[1] (ARIAOD) that will come into force on October 6, 2022. They will give increased powers to the CNESST in matters of rehabilitation, particularly in determining the ability of a worker with functional limitations to return to his pre-injury employment, to perform an equivalent employment or to identify suitable employment available in your organization. These legislative changes will have an impact on your practices.

The provisions of the ARIAOD, prior to the modernization, provide that the search for available suitable employment (and the accommodation process) is the responsibility of the employer. Following the *Caron*[2]decision rendered by the Supreme Court, which confirmed that the duty to accommodate also applied to a worker who suffered an employment injury and who still has permanent functional limitations, the CNESST modified its rehabilitation practices to ensure that the accommodation exercise to be carried out by the employer, when identifying suitable available employment, was adequately carried out. As of October 6, 2022, another step forward will be taken: the CNESST will now conduct the accommodation exercise for the purpose of rendering its decisions. Thus, the CNESST will be able to require, from the employer as well as from a union representative (and even from a representative of another bargaining unit of the employer), the information and documents that it deems necessary to determine the worker's ability to perform his employment, an equivalent employment or to determine a suitable employment available. This includes detailed job descriptions, physical requirements of these jobs, their potential availability, accommodation and work reorganization options, and the provisions of applicable collective agreements. Rehabilitation measures such as job redesign, schedule modification or work organization may be determined. The employer must also allow the CNESST to have access to the worker's workstation or to another workstation.

The employer will be required to cooperate in the implementation of the measures that must be carried out in its establishment, unless it demonstrates undue hardship. It is the CNESST that will determine whether suitable employment is available at the employer's premises "*with the collaboration of the worker and the employer*". Depending on the capacity decisions rendered by the CNESST, the employer will even be deemed or presumed to be able to reintegrate the worker into his employment, an equivalent employment or a suitable employment that is available, with the level of presumption varying according to the expiry date of the applicable right to return to work. However, the right to return to work is also extended in the event where that right is more extensive in the applicable collective agreement[3], which is the case in many collective agreements in the education field. For example, you will be deemed to be able to reinstate the worker in accordance with the capacity decision rendered by the CNESST, when this decision is rendered within two years of the beginning of the absence or within one year of the date of consolidation, whichever is later[4]. In short, overturning such a presumption will be no easy task! It is therefore in your interest to work closely with the CNESST in order to demonstrate, with supporting evidence, undue hardship in order to avoid the rendering of a decision of capacity by the CNESST in the first place, since contesting such a decision will be difficult.

Finally, an employer who refuses to reinstate the worker or to comply with the obligations set out will be exposed to a new and important administrative monetary penalty. Mastering these new rules will be essential to document your cases and to intervene effectively with the CNESST, which will have increased powers, while your room for manoeuvre will be even tighter.

1. RLRQ, c. A-3.001, sections 170 to 170.4, in effect October 6, 2022
2. CNESST *v* Caron, 2018 CSC 3
3. Section 240(3) ARIAOD, in effect October 6, 2022
4. As examples, the delays are from clauses 5-10.61 c) of the collective agreement E-6 2020-2023 and 5-9.15 e) of the collective agreement S-1 2020-2023

RECENT DECISIONS

1 Resumption of a probation period is at the discretion of the employer

The School Service Centre appealed to the Superior Court after the arbitrator decided to place the employee on the priority of employment list, whereas the School Service Centre had instead decided that she should resume her probationary period. Although the arbitrator recognized that it was within the employer's discretion to make such a decision following its assessment, and concluded that the School Service Centre's reasons for doing so were not abusive, arbitrary or discriminatory, he nevertheless reviewed the employer's decision. According to the Court, the arbitrator should have ceased its exercise after having concluded that the School Service Centre's reasons justifying that the employee starts over her probation period were well founded. Instead, he assessed the School Service Centre's motives by evaluating the seriousness of the employee's alleged breaches. Consequently, the arbitrator's decision was rendered under a disciplinary lens, and not an administrative one. It is therefore annulled.

Centre de services scolaire de la Capitale v. Ranger
2022EXPT-247, 2021 QCCS 5263, Jacques Blanchard
Motion for permission to appeal and notice of appeal, 200-09-010434-212

2 The teacher is the cause of the harmful work environment he denounces

A substitute teacher filed a grievance in which he alleged to be victim of psychological harassment by the school principal. He also contested the negative evaluation he received at the end of the school year, judging it unreasonable. The employee claims that the harassment took the form of various gestures, including an email from the school principal notifying the other teachers of his departure on sick leave, as well as a report and a warning letter in which he was asked, among other things, to control his reactions and impulsiveness in front of the students. During the hearing, it was not contested that the employee got carried away on several occasions by cursing at his students. According to the arbitrator, the employee was not victim of harassment: it was his own actions and inexperience that were the cause of the harmful work environment in which he evolved. The grievance is therefore dismissed.

Association des professeurs de Lignery et *Centre de services scolaire des Grandes-Seigneuries*
SAE 9579, 2022-02-15, Jean Ménard

3 A teacher was not entitled to her salary while awaiting her test result

A physical education teacher challenges the School Service Centre's decision to deduct days from her sick leave bank while she was in isolation awaiting the result of a COVID test. She alleges to be entitled to her salary during this period, without deduction of days from her sick leave bank. After analyzing the agreement, the arbitrator concluded that the employee's isolation while awaiting her test result did not entitle her to her salary. Indeed, the collective agreement provides that an absence with pay is authorized when a teacher is isolated at home on the order of a doctor as a result of a contagious disease affecting a person living in his home. Also, the arbitrator ruled that the School Service Centre could consider the employee unable to perform her duties while waiting for her test result. The School Service Centre was then justified to deduct days from the employee's sick leave bank. The grievance is dismissed.

Syndicat de l'enseignement de la région de Québec et *Centre de services scolaire des Premières-Seigneuries*
SAE 9581, 2022-03-07, Jean-M. Morency
Appeal for judicial review, 200-17-033402-223

RECENT DECISIONS

4 The massive arrival of asylium seekers and the difficulties in recruiting qualified teachers are not a superior force

The union filed a grievance alleging that the School Service Centre had abused its management right by not respecting the average number of students provided for in the agreement for certain groups of welcoming and francization classes. The School Service Centre recognized it did not respect the average number of students provided for in the agreement, but argues that the massive arrival of asylium seekers was a superior force. According to the arbitrator, the criteria of unforseeability and irresistibility to recognize a superior force are not met, since the number of immigrants had been increasing for two years. The School Service Centre was then able to foresee such an increase. The lack of qualified teachers is also not a superior force. Although the School Service Centre was facing a difficult situation, it was not absolutely impossible to recruit employees in order to meet the agreed upon averages. Finally, the arbitrator noted that the School Service Centre's failure to comply with the agreement did not constitute an abuse of right and partially allowed the grievance.

Alliance des professeures et professeurs de Montréal et *Centre de services scolaire de Montréal*
SAE 9582, 2022-03-07, Nathalie Faucher

5 COVID-19: Contamination at school or in the community?

A high school teacher challenges the CNESST's denial of her claim. She contracted COVID-19 two weeks after school started. She alleges that fans were facing the front of the classrooms and that asymptomatic students contaminated her because they were not wearing masks. The Court found that the teacher had not proven that it was more likely than not that she was infected at school rather than in her community. The disease occurred after several relieves of sanitary measures in the population. The employer had measures in place in its establishments. The outbreaks at the school occurred after she was sick. Furthermore, she socialized and received people that did not live with her, visited several stores and took walks. There are two possible sources of contamination. As the teacher did not meet her burden of proof, the claim remains denied.

Lemay et *Centre de services scolaire des Premières-Seigneuries*
2022 QCTAT 508 (SST), Jean-François Dufour

6 Cost sharing in mild traumatic brain injury

The School Service Centre is challenging the CNESST's denial of cost sharing. A student supervisor was accidentally hit to the face by a swinging student. She suffered a mild traumatic brain injury (MTBI) and a sprain, injuries whose evolution has been laborious. The MTBI was not consolidated until one year after the accident. According to the neurologist mandated by the employer, a generalized anxiety disorder, an attention deficit, chronic insomnia and two histories of MTBI are responsible for the atypical evolution observed. According to the Court, the employee had, before the accident, a psychological vulnerability that deviated from the biomedical norm and extended the consolidation period. Symptoms have increased over time, which is not expected of a MTBI, and are rather the result of other conditions that qualify as pre-existing psychological disability. As a result, 70% of the costs are removed from the employer's financial file.

Centre de services scolaire des Découvreurs
2022 QCTAT 167 (SST), Sophie Sénéchal