

Procedural Fairness, Public Institutions, and Workplace Investigations

Ryan Edmonds
Ryan Edmonds Workplace Counsel

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A recent case out of Quebec discusses the level of procedural fairness that may be owed during a [workplace investigation](#) for a public institution.

In *Ditomene c. Boulanger*, two employees at a CEGEP (a public school) filed a complaint of psychological harassment under Quebec law against their superior, Mr. Ditomene. The CEGEP retained Ms. Boulanger as an external investigator. During the course of the investigation, Mr. Ditomene refused to cooperate because he felt Ms. Boulanger was not following the CEGEP's harassment policy. However Ms. Boulanger continued her investigation, and based on its outcome, the CEGEP terminated Mr. Ditomene. He sued Ms. Boulanger under Quebec's civil law version of negligence, alleging breaches of procedural fairness in the investigation process as the faults which caused him harm.

Because Ms. Boulanger's contract as an external investigator was with a public institution, the Court held that she was under a duty to follow the judicial concept of "procedural fairness". The Court also noted that Ms. Boulanger's contract referred to the CEGEP's harassment policy, which itself stated that investigators had a duty to "ensure the fairness of the process" and included a non-exhaustive list of ways to achieve this fairness.

How Was Procedural Fairness Breached?

Based on this, the Court found that Ms. Boulanger breached her duty to follow procedural fairness in several ways:

- Ms. Boulanger did not provide Mr. Ditomene with a full copy of the complaints made against him. This clearly violated the CEGEP's harassment policy, and also violated the general principle of fairness that Mr. Ditomene was entitled to know the allegations against him.
- Ms. Boulanger did not provide Mr. Ditomene with the testimonies of the complainants or the witnesses. This also affected Mr. Ditomene's ability to know the allegations against him.
- The internal co-investigator was replaced during the course of the investigation. This violated the principle that "[she or he] who hears must decide."
- Ms. Boulanger did not provide Mr. Ditomene with sufficient notice of investigation meetings, to the point where Mr. Ditomene was unable to attend several meetings.
- Ms. Boulanger's report was deficient, as it did not contain any analysis of the evidence.

The Court then considered how these violations actually affected Mr. Ditomene, concluding that Ms. Boulanger's conduct could not be the cause of Mr. Ditomene's termination, as he would

likely have been fired even if the investigation had been fair. As a result, Mr. Ditomene's damages were limited to \$3,000 for the anxiety and stress caused by the unfair investigation.

What Does this Mean for Employers?

On one hand, because *Ditomene* was decided under the *Civil Code of Quebec*, it has minimal precedential value outside of that province.

However, on the other hand, the Court relied heavily on the judicial concept of "procedural fairness", which applies to public institutions across Canada. As a result, though the underlying cause of action may not translate outside of Quebec, *Ditomene* likely still speaks to the level of procedural fairness owed by public organizations and their external investigators when carrying out workplace investigations.

We understand that the case has been appealed to the Quebec Court of Appeal, though no hearing date has been set.

Ryan Edmonds is the owner of [Ryan Edmonds Workplace Counsel](#), a boutique law firm that provides employment, human rights, and workplace investigation services to both employers and employees. Ryan can be reached at 647.361.8228 or Ryan@TorontoWorkplaceCounsel.com.