



Education Law eBulletin

A newsletter for educators

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Review of Recent Ontario Teachers' College Disciplinary Decision



Recently, Shibley Righton LLP's own Brian Nolan successfully litigated a grievance in which the grievor, a teacher, argued that he had been discharged without just cause. In *OECTA v. St. Clair Catholic District School Board*, the teacher, who had been employed for approximately seven years with no formal record of discipline, had made "grossly offensive" sexually explicit remarks about a female student to certain of her male classmates who were members of a local hockey team. The offensive remarks quickly came to the attention of the female student, much to her embarrassment. In the course of the proceedings, the Union agreed that the comments were made and that they were grossly offensive, but argued that although some discipline was warranted, the discharge was unnecessary.

The arbitrator found that there was no question that the grievor's sexually explicit remarks were egregiously inappropriate and were, in fact, "the very antithesis of what one might expect from a teacher – a putative role model...". Further, the arbitrator found that the grievor's behaviour represented a marked departure from the standard of professional conduct that can be reasonably expected of a teacher in a Catholic high school. Also of note was that there were allegations of similar comments, about which the grievor had been warned although no formal discipline had been issued. The arbitrator did find this significant however, as he noted that the grievor was on notice that such behaviour was clearly unacceptable.

Although the arbitrator agreed with the Union that an employer should "not lightly leap to discharge – particularly for a 'first offence,'" there were additional factors considered by the arbitrator. Specifically, the arbitrator noted that the manner in which the grievor conducted himself during the proceedings was unusual insofar as he chose to abandon the arbitration proceeding by not attending and declined to testify. Consequently, the arbitrator had no direct evidence about the grievor or from the grievor to determine if reinstatement was appropriate in the circumstances. This proved salient in the arbitrator's decision that the School Board's actions in dismissing the grievor were not unreasonable or unjust in the circumstances.

The Arbitration in this matter continued over an extended period of time, during which the grievor was also a "respondent/defendant" in a complaint of professional misconduct brought before the Disciplinary Committee of the Ontario College of Teachers (the "OCT"). On October 11, 2006, prior to the arbitrator's decision discussed above, the OCT concluded that the grievor was guilty of "professional misconduct" and that his statement was "disgraceful, dishonourable and unprofessional, and constitutes conduct unbecoming a member." In addition, the grievor treated the OCT hearing with the same disdain as the arbitration proceedings. This notwithstanding, the penalty imposed by the OCT amounted only to the suspension of the grievor's teaching licence for a period of one month and the requirement that he enroll in a counselling program prior to returning to teaching.

The penalty meted down by the OCT in the above-mentioned decision is interesting in light of another recent decision of the Discipline Committee of the Ontario College of Teachers. In *Ontario College of Teachers v. Fromm*, the OCT heard allegations of anti-Semitism found Mr. Fromm guilty of professional misconduct. The OCT considered that the appropriate discipline in these circumstances was the revocation of Mr. Fromm's teaching licence.

Of particular significance is that Mr. Fromm was not accused of spreading his views in his classroom. In fact, there were no allegations that Mr. Fromm ever brought his personal beliefs into the classroom or engaged in improper teaching practices. Moreover, the College stated that it was asking the OCT to make a statement about "the fundamental values of the teaching profession in Ontario...". Ultimately, the OCT held that Mr. Fromm had failed to achieve and maintain the highest degree of professional competence and uphold the

honour, dignity and ethical standards for the teaching profession, that Mr. From had failed to show consistent justice and consideration in all his relations with pupils, and that Mr. From had failed to concern himself with

the welfare of his pupils. Although there were no allegations that such activities took place in the classroom, the OCT held that Mr. Fromm's continued actions "significantly affected students and staff and resulted in creating a poisoned school environment and these actions were inconsistent with the values of the profession."

It may be difficult to reconcile the OCT decision in *Fromm* with its decision regarding the teacher in the *St. Clair Catholic District School Board* decision. In both cases, there is no question that the reprehensible conduct occurred and that the conduct was equally reprehensible. Although the conduct in *Fromm* had been ongoing and continuing for a long period of time, at issue was off-duty conduct which was not alleged to affect his classroom teaching. The question which arises is not whether Mr. Fromm should not have been disciplined as severely as he was, but whether the OCT's discipline consisting of a one-month suspension and mandatory counselling for the "grossly offensive" sexually-related in-school remarks exhibited by the grievor in the *St. Clair Catholic District School Board* decision was adequate. Although we do not draw any conclusions with respect to these two decisions, it is interesting that improper and offensive in-school classroom was subject to far lighter disciplinary measures than those imposed by either the arbitrator in the *St. Clair Catholic District School Board* matter or by the OCT in *Fromm*.



Cases

The Supreme Court of Canada granted leave to appeal to hear the issue as to whether adults testifying about historic childhood sexual abuse should have their evidence assessed in the context of their age at the time the sexual assaults took place. *F.H. v. McDougall*, [2007] S.C.C.A. No. 328.

The Supreme Court of Canada granted leave to appeal to hear the issue as to whether the British Columbia *University Act* precludes the University of British Columbia and its faculty from negotiating collective agreements which provide for full arbitral review of employment decisions and the determination of the appropriate standard of review under the *Administrative Tribunals Act* when an expert tribunal protected by a privative clause considers an external statute when determining a matter within its exclusive jurisdiction. *University of British Columbia v. University of British Columbia Faculty Assn.*, [2007] S.C.C.A. No. 275.

The British Columbia Court of Appeal allowed an appeal by the Canadian Federation of Students, finding that the advertising policies of the Greater Vancouver Transportation Authority breached the appellants' right to freedom of expression pursuant to s. 2(b) of the *Charter*. *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, [2006] B.C.J. No. 3042.

The Saskatchewan Court of Queen's Bench authorized the plaintiff to proceed with an action for damages against the defendant School Board of Lanigan School Division No. 40 even though time had expired pursuant to the *Education Act, 1995*. *Kraft v. Lanigan School Division No. 40*, [2006] S.J. No. 706.

The Ontario Court of Appeal allowed an appeal by an insurance company which was seeking contribution from a third party insurance company in respect of a settlement agreement for a student who was injured during a judo class at a University. *Canadian Universities Reciprocal Insurance Exchange v. CGU Insurance Co. of Canada*, [2007] O.J. No. 3612.

The British Columbia Provincial Court awarded damages to two foreign students who had relied, to their detriment, on the defendant College's representations as to course availability and the number of foreign educational credits that would be recognized toward the completion of their respective degrees in Canada. *Haung v. H.K. International Holding Inc.*, [2007] B.C.J. No. 1898.

The Alberta Court of Queen's Bench held that a school board breached its duty of fairness by changing its policy regarding bussing out of area students without consulting the parents of the affected students. *Czerwinski v. Mulaner*, [2007] A.J. No. 1005.

The Ontario Superior Court dismissed an action for breach of contract initiated by a student who had been expelled from a private college for cheating on exams. *Lisyikh v. Canadian Law Enforcement Training College*, [2007] O.J. No. 3621.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

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