



## Education Law eBulletin

A newsletter for educators

September 2009

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### Activities that are Privileges Not Protected Under the *Education Act*

Access to public education in Ontario is both a right and a requirement pursuant to the Ontario *Education Act*. However, school boards are often challenged by parents regarding certain aspects of education which students do not necessarily have a right to participate in pursuant to the *Education Act*. Recently, in *Roczniak v. Hamilton-Wentworth District School Board*, [2009] O.J. No. 2177, the Ontario Divisional Court addressed this issue and spoke of the right to education in terms of rights and privileges.

In April 2009, a student received a 10-day suspension for an incident that took place at a social event at another school. In addition to the 10-day suspension, the Principal denied the student the opportunity to attend his own prom. Subsequent to this decision, the student's parents appealed the suspension on May 5, 2009 on the basis that the prom denial was an additional penalty to the suspension and therefore reviewable. This matter was ultimately brought before the Ontario Divisional Court as there was insufficient time prior to the prom to hear an appeal pursuant to the *Education Act*.

The Applicants argued before the Divisional Court that prom is an integral part of the educational experience protected by the *Education Act*, and the denial of the right to attend prom, especially where the denial is an extension of a previous penalty, is reviewable by the Divisional Court. The Applicants relied on the decision of *Hall v. Powers*, the 2002 decision of the Ontario Superior Court of Justice, where the Court issued an interlocutory injunction against a Catholic school board restraining it from impeding a homosexual student from attending his high school prom with his boyfriend. The Board, however, submitted that the matter of prom attendance, although part of the educational experience, is a privilege, and not a right. The Court in *Hall* did not address whether prom attendance was a right or a privilege under the *Education Act*.

Ultimately, the Court held that the principal's decision in this matter was not a statutory power of decision, but administrative in nature and, therefore, not subject to judicial review. In the alternative, the Court held that, even if the denial was reviewable by the Court, the standard of review would have been reasonableness. In this respect, the Court held that the principal, in making her decision relied on many facts, including facts other than those involved in the suspension, and the decision was therefore reasonable. In this case, the Court agreed that prom attendance was indeed a privilege; however, denial of the privilege must not be made capriciously.

The *Roczniak* case is another in a string of decisions in which the courts have held that they will pay deference to principals and school boards when dealing with administrative decisions. In addition, the *Roczniak* decision made it clear that the Court was not willing to extend an individual's "right to education" to school activities or events which may be deemed to be privileges. Accordingly, school boards may wish to clearly set out in student handbooks and codes of conduct those activities; including dances, proms, field trips, etc. that are privileges. However, caution is to be exercised; it should be noted that *Charter* principles may continue to apply to the denial of certain privileges, as was the case in *Hall*.

## Dismissal For Cause: A Difficult Case to Make

In tough economic times, employers can sometimes fall into the trap of alleging cause for dismissal in order to reduce the workforce while avoiding notice and/or severance requirements. The following case, *Ntibarimungu v. Vancouver Career College Inc.* provides an excellent illustration that, not only can establishing just cause be difficult, but even applying the principles of progressive discipline will not always provide employers with a means to terminate an employee.

In January 2006, the plaintiff entered into a written employment agreement with the Vancouver Career College Inc. (the "College") to work as an instructor. A virtually identical agreement was executed by the parties in August, 2007. The employment agreement provided that the employment relationship could be severed by giving the plaintiff notice or payment in lieu of notice in accordance with the *Employment Standards Act* or for just cause.

On September 12, 2007, the campus manager received concerns from a student regarding the plaintiff's teaching style. In response, the campus manager spoke with the plaintiff about his teaching methods and teaching style. After receiving subsequent complaints on October 12, 2007, the plaintiff was interviewed and allegedly terminated for cause as a result of his "poor attitude".

The British Columbia Provincial Court held that, in this case, the College was unable to demonstrate that the performance issues undermined the employment relationship such that they justified dismissal for cause. In this respect, the Court noted that although the College had taken action to attempt to correct the plaintiff's teaching methods to no avail, it did not provide the plaintiff with sufficient time to respond to improve or address the College's concerns before he was dismissed. The Court therefore awarded the plaintiff \$2,400, representing the amount remaining under the employment agreement.

The *Ntibarimungu* decision helps to remind us that establishing "just cause" for termination can be difficult and requires an employer to demonstrate that the employment relationship has been undermined by the employee's actions or performance. This is determined on a case-by-case basis having regard to both the employee and the conduct or performance issues in question. In addition, this decision further illustrates that progressive discipline can only help establish just cause when the employee has not only been advised that performance falls below the level expected, but has also been given an opportunity to improve.

At Shibley Righton LLP, we have extensive experience in dealing with employment and just cause issues and we would be pleased to speak with any questions you may have on this topic.

### CASES

The Supreme Court of Canada held that a policy which prevented the Canadian Federation of Students from placing political messages in advertising space on the sides of buses was contrary to the Charter. *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, [2009] S.C.J. No. 31.