



Education Law eBulletin

A newsletter for educators.

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● Earth Day
April 22, 2005

private schools

Procedural fairness owed on readmission decision

In *Kaufman (Litigation Guardian of) v. Leo Baeck Day School* (August 2004), the Ontario Superior Court of Justice granted an interlocutory mandatory order requiring the private school, Leo Baeck Day School, to reinstate a 7-year-old student who had been denied readmission based on his parents' dispute with the school in an unrelated matter involving their older son who also attended the school.

The 7-year-old plaintiff, Elliot, was refused, without a hearing, readmission at the school for the following school year as a result of a dispute between his parents and the school that arose over the school's handling of allegations of bullying by other students directed at Elliot's older brother. The parents brought an action against the school and others, and brought the motion for an interlocutory mandatory order requiring the school to readmit Elliot. The school argued that it had a discretionary right to require the withdrawal of any student at any time; and that a future working relationship between the school and the boys and their parents was impossible because the atmosphere had been poisoned by the parents. The Court rejected both of these arguments.

The Superior Court granted the parents' motion and ordered reinstatement holding that they met the three-part test for mandatory interlocutory injunctive relief: there was a serious issue to be tried; the plaintiff would suffer irreparable harm if relief was not granted; and the balance of convenience favoured the plaintiff. The Court determined that the plaintiff's case against the school was very strong. There was no legal precedent or principle supporting the school's argument that it had a discretionary right to require the withdrawal of any student at any time. Further, the argument that a future working relationship between the parties was impossible flew in the face of the responsibility of schools to children generally.

With respect to the second branch of the test, the Court held that this case represented one of the clearest cases of irreparable harm. The denial of readmission to an innocent 7-year-old, based upon a dispute between his parents and the school concerning an older sibling, would cause irreparable harm to both the child and his parents. In addition, upholding the school's decision would necessarily have a severe negative impact on the child's perception of justice and fairness.

Concerning the final branch of the test, the Court found that the plaintiffs would clearly suffer greater harm by the denial of readmission than the defendant would by admitting the child to the school.

The significance of this case is that, although not governed by the *Education Act* and its provisions concerning suspensions, expulsions or admittance criteria, private schools will still be held accountable for their actions where individuals' interests and principles of fairness are concerned.

caselaw

Spiegel v. Seneca College of Applied Arts and Technology

Ontario Divisional Court

The Divisional Court found that procedural fairness was owed to a student appealing a decision of the College to require his withdrawal.

Tessler (Re)

British Columbia Labour Relations Board

The Labour Relations Board overturned an order of the British Columbia Teachers' Federation that disciplined a teacher for conducting drama rehearsals and performances outside school hours, during a lawful "essential services" strike.

Re City of Toronto and Toronto Civic Employees Union, Local 416

Ontario - D. Randall

An arbitrator held that employers were free, given the different burdens of proof in criminal matters and arbitration proceedings, to attempt to prove theft as a cause of dismissal in the wake of a criminal acquittal or dismissal or a withdrawal of charges.

Summaries of these cases and others can be found in the *Shibley Righton Education Law NetLetter* published by *Quicklaw*. Visit www.quicklaw.com.

labour matters

Employer has right to refuse to recall employee on layoff where physically unable to return to work

In the recent labour arbitration decision, *CAW Local 195 v. Colonial Tool Group Inc.* (February 2005), the arbitrator had to determine whether an employee on lay-off, who was not fit to return to work as a result of having surgery, should have been recalled. The employer, being aware of the employee's surgery, made several requests of the employee to inform and provide evidence to the employer regarding when he was fit to return to work. The union argued that since the collective agreement required only that recall would be done in the reverse order of layoff, the employer was not justified in requesting evidence of fitness. The union's position was that the employee should have been recalled as he had a right to receive sick and accident benefits pursuant to the collective agreement.

The employer argued that it could consider an employee's capacity to perform the required duties or work when recalling employees. The employer further argued that, unlike an employee on sick leave who cannot be laid off until he has been deemed fit for work because the benefit had crystallized prior to the layoff, the benefits in this case had not crystallized and the employee should not be recalled simply for the purpose of claiming sick and accident benefits.

The grievance was dismissed. The arbitrator held that the employer was entitled to evaluate a laid-off employee's capacity to perform required duties before issuing a recall, and that the employer has the right to refuse to recall an employee on layoff on the basis that he or she is not physically able to return to work.

Despite the fact that the collective agreement before him did not explicitly provide that recall would be based on factors other than seniority, the arbitrator held that an employer may properly consider an employee's medical status and fitness to perform the work in question and evaluate whether the employee has the requisite capability to undertake the necessary work. (Note that the issue of accommodation was not before the arbitrator.) Additionally, the arbitrator noted that the income replacement scheme provides that the right to be paid sick and accident benefits is conditional upon the employee being in active service when the right to the benefit accrues. Ultimately, the arbitrator concluded that because no benefits had crystallized prior to the recall, the employer's actions did not interfere with any of the employee's vested rights.

Shibley Righton LLP acted for the employer in CAW Local 195 v. Colonial Tool Group Inc.

internet issues

Blogging in the Workplace

Web logs, or blogs, are becoming a popular means by which people express their own personal thoughts, likes, dislikes and opinions on-line on personalized web pages. This practice, while undoubtedly therapeutic for the author, may lead to employment-related problems for the "blogger" if he or she begins writing about life in the workplace. When the blogger starts discussing details about the employer or fellow employees, he or she crosses a proverbial line, and could face employment repercussions culminating in termination. The list of fired "bloggers" is growing, with employers citing as "just cause" the misuse of company time and assets, and improper disclosure of confidential business information.

Employment principles governing employee-employer relations apply to blogs and on-line diaries. For instance, an employee misusing company time by writing his or her blog during work hours is akin to persons being disciplined for "surfing the net" or for operating a side business. (Caselaw dealing with side-businesses may be relevant in those cases where the blog is popular enough that it attracts on-line advertisers thereby providing income for the blogger.) Additionally, a blogger may be disciplined (or terminated where appropriate) if his or her on-line commentaries divulge confidential business information or depict the employer in an unfavourable light that could affect the employer's interests or reputation. Moreover, the blogger may run afoul of the employer's policies or code of conduct dealing with the use of technology in its workplace.

While blogs are not yet considered mainstream, their numbers are steadily increasing. Consequently, employers should be aware of this activity, and may wish to put blogging policies in place to advise employee-bloggers of their responsibilities and duties to the employer, and to remind that anything published on-line, even during off-duty hours, can fall within the employment domain.

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

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reminder of upcoming conference

Equity, Diversity and Inclusiveness in Education

On May 25-26, 2005, Insight Information is presenting a conference entitled "Equity, Diversity and Inclusiveness in Education - Building Opportunities for All Students to Succeed" at the Courtyard By Marriott in downtown Toronto. This research-based conference programme is designed to provide insights into the latest approaches being developed for improving inclusive education practices for a wide range of diversity factors and outcome goals including academic performance, school learning environment, character development, teacher training and community integration. The faculty consists of leading education administrators, researchers, policy-makers and other professionals, including our own J. Paul R. Howard and Sheila MacKinnon, who are tackling these challenges at multiple levels.

A pre-conference workshop entitled "A Legal Primer for Educators: Focus on Equity, Human Rights and Safety" is taking place on May 24, 2005 from 1:00 p.m. to 4:00 p.m.. This intensive workshop will offer in-depth coverage of the legal contexts and key statutory provisions educators need to be aware of as they tackle the challenges of educating a diverse student population and students having special needs. The workshop leaders will be Brian Ellerker, J. Paul R. Howard, and Sheila MacKinnon.

To register for the conference, go to: order@insightinfo.com or telephone: 1-888-777-1707. When registering, mention Shibley Righton LLP, Paul Howard or Sheila MacKinnon and receive 10% off the registration fee. Insight Information's website is located at: www.insightinfo.com