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employment matters

Employees charged with criminal offences: Can the employer suspend without pay?



Happy
Thanksgiving

In its recent decision, *Cabiakman v. Industrial Alliance Life Insurance Co.*, the Supreme Court of Canada held that in certain situations an employer may suspend "for administrative reasons" an employee against whom criminal charges are pending. The Court ruled, however, that unless there are exceptional circumstances, the suspension cannot be without pay. *Cabiakman* came to the Supreme Court on appeal from the Québec Court of Appeal, and it should be noted at the outset that the law governing the individual employment contract in issue was the *Civil Code of Québec*, a system of civil law that is quite distinct from the English-born common law system that governs the other Canadian provinces. That said, many of the fundamental legal concepts examined by the Supreme Court are common to both legal systems, and thus the Court's decision is not without relevance to the common-law jurisdictions.

Cabiakman was hired as a sales manager of one of the branch offices of the employer, an insurance company. In that capacity, he exercised supervisory powers over branch sales staff and himself sold company products; he also was responsible for the transfer of moneys between institutions. As such, his was a position wherein his personal integrity was of fundamental importance. In November 1995, three months after he was hired, Cabiakman was arrested for attempted extortion; he was charged with conspiracy to extort money from his securities broker. Subsequently, a newspaper article appeared in the Montreal area identifying Cabiakman by name and recounting the circumstances of the charges against him. Upon learning of the article, the insurance company suspended Cabiakman without pay pending resolution of the criminal charges by the court. It administered this "administrative" suspension in order to protect the reputation of its business and the integrity or image of the services provided to its customers, not as a disciplinary measure.

The criminal charges came to trial some two years later, and in October 1997 Cabiakman was acquitted by the court. He was reinstated in his position once the employer learned of the acquittal, and has worked there ever since. Cabiakman commenced legal proceedings against his employer, arguing that his suspension for an indefinite period that ended up lasting two years was tantamount to dismissal. He claimed damages for loss of income during the period of his suspension because he was unable to find another job; the parties agreed that the amount of the damages was \$200,000, if liability were found. Cabiakman was not subject to a collective agreement, and there was nothing in his individual contract of employment that spoke of the employer's power to suspend.

The Supreme Court approached the question on the basis of whether the employer had some implied or residual power under the *Civil Code of Québec* to unilaterally suspend the effects of an individual contract of employment, apart from the employer's power to impose a suspension as a form of disciplinary penalty. Although the *Civil Code of Québec* contained no provisions expressly recognizing an employer's administrative suspension power, the Supreme Court observed that the fundamental conception of a contract of employment "is based on the acceptance of a relationship of subordination in which the employee accepts the employer's direction and control in performing the duties provided for in the contract". Following on that, the Court held that a residual power to suspend for administrative reasons is "a necessary component of the power of direction the employee has accepted if the performance of his or her work should compromise the business's interest". However, the Court placed certain limits on the employer's administrative suspension power. The Court ruled that:

"This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a ... dismissal pure and simple; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay."

The Supreme Court's ruling in *Cabiakman* that, as a matter of law, there exists under the *Civil Code of Québec* a residual power to administratively suspend an employee facing criminal charges raises some interesting prospects for the common-law provinces. At common law, there is no such implied power on the part of an employer, and absent a provision in the contract of employment authorizing same, an employer's unilateral decision to temporarily suspend an employee would generally constitute constructive dismissal. Thus, the common law governing individual contracts of employment may be said to lack the same flexibility in remedial responses that exists in collective bargaining regimes, where collective agreements commonly provide, and the arbitral jurisprudence confirms, that an employer does have a power to suspend an employee, with or without pay, as part of the full range of progressive discipline remedial options. In recent years, the notion of progressive discipline, borne out of arbitral jurisprudence interpreting collective agreements in the labour relations context, has found its way creeping into the common law governing individual employment contracts. It may be that the inclination of common law courts to recognize an implied suspension power will be fuelled by the Supreme Court's ruling that there is such a residual power in employment contracts governed by the *Québec Civil Code*. But it is unlikely that a suspension power would be implied without some limitations on the exercise of that power, akin to those laid down by the Supreme Court in the passage quoted above. As the Supreme Court explained: "The employer may always waive its right to performance of the employee's work, but it cannot avoid its obligation to pay the salary if the employee is available to perform the work but is denied the opportunity to perform it".

Excerpted from J. Paul R. Howard's article, "Employees Charged with Criminal Offences: Can the Employer Suspend Without Pay?", to be published in the Fall 2004 issue of *Education Canada*, the quarterly journal of the Canadian Education Association. Visit www.cea-ace.ca

in the courts

School board not vicariously liable for sexual abuse by teacher

The Alberta Court of Appeal recently found that a school board was not vicariously liable or negligent for the sexual assault of a 12-year old female student by her teacher and track coach. In *S.G.H. v Gorsline*, the Court of Appeal upheld the trial judge's decision finding that he had appropriately applied the law and considered all of the facts. The Court canvassed the case law regarding vicarious liability and in particular, referenced the following Supreme Court of Canada decisions: *Bazley v. Curry*, *Jacobi v. Griffiths*, *K.L.B. v. British Columbia*, and *John Doe v. Bennett*. The Court reviewed the legal test for vicarious liability set out by the Supreme Court in these decisions. Although the language among the cases varies slightly, the test generally requires the following determination by a court: (i) whether there is a significant connection between the wrongful act and the employment (i.e., whether the employment materially enhances the risk of the wrongful act); and (ii) whether it is fair to impose liability on the employer.

The Appellant did not dispute the test applied by the Court, but argued that the trial judge should have reached a different conclusion. The Appellant argued that by employing the teacher, the school board created an enhanced risk for the teacher to commit abuse on the student, due to the following factors: the influence and authority of teachers over young children, the encouragement by school boards for teachers to act as mentors and role models, and the fact that children are taught to obey teachers.

The trial judge recognized the legislative duty of school boards to provide educational services to the community and found that nothing done by the school board significantly enhanced the risk of sexual abuse in the context of the educational system. Although the employment provided an opportunity for the teacher to commit the offences given the measure of authority over the students, the teacher's duties did not require anything approaching intimate contact and, therefore, this was insufficient to impose vicarious liability. The Court of Appeal approved the trial judge's conclusions in this regard and cited support for this conclusion in Binnie J.'s statement in *Jacobi*: "I do not accept that an enterprise that seeks to provide a positive role model thereby encourages intimacy. Nor do I believe that 'mentoring', as such, puts one on the slippery slope to sexual abuse." The Court of Appeal further approved the trial judge's findings that Gorsline's authority over the student was tempered by the fact that the student was taught by several other teachers, and was influenced by the school administrators, other school staff, another coach, and her parents with whom the student lived.

When considering whether it would be fair to impose liability on the school board, the Court of Appeal endorsed the trial judge's finding that "the imposition of vicarious or strict liability on school boards could result in the introduction of rules and policies which would be regressive to the educational system and harmful to the students the system serves." The Court of Appeal upheld the trial judge's finding that the school board was not negligent in respect of the teacher's sexual abuse of the student, and found that the trial judge correctly applied the standards expected of school boards at the time of the sexual abuse (1978 to 1979). The trial judge had concluded that the standard of care required by school authorities in providing for the protection of their students was that of the careful or prudent parent. The trial judge had properly concluded that the school board was not negligent, as the evidence substantiated that the teacher was successful in hiding his sexual abuse and none of the other teachers who observed the teacher's conduct had cause for concern.

This Court of Appeal decision, being one of the few cases at the appellate level addressing vicarious liability of school boards for the unauthorized acts of teachers, will likely have significant implications on this burgeoning area of the law across Canada. We understand that leave to appeal of this decision is being sought to the Supreme Court of Canada.

protection of privacy

Picture Day and the *Municipal Freedom of Information and Protection of Privacy Act*

Picture Day is a long running and time honoured tradition in which students' pictures are taken to be sold to parents as well as to be used by the school for identification purposes and posterity. However, the taking of pictures constitutes collection of information under the *Municipal Freedom of Information and Protection of Privacy Act* (the "Act"). It is a collection not sanctioned by statute, nor is it necessary to the proper administration of education. Thus, it is essential that schools take the necessary steps to ensure compliance with privacy legislation. To that end, a school board should notify parents, legal guardians and adult students about the taking of photographs and the possible uses of such photographs, including publication in school yearbooks, video/online yearbooks, or bulletin board displays. Notification should be done well before the day on which photos are to be taken in order to give parents/guardians and adult students the opportunity to decline or provide consent. It is suggested that notice also be provided advising that the media or others may come to the school to take photos and report on students' successes throughout the school year (such as sports and academic achievements), and that these pictures may be taken of students both individually or collectively.

A school board should have a policy in place respecting the taking of photographs by non-board employees of its students on school property or at school events. The policy should apply to all images, including student portraits, digital images, any pictures to be posted on the Internet, films, video recordings and video yearbooks. Ideally, any such policy should be based on the consent of the student, or if the student is a minor, that of the parent or guardian. The Information and Privacy Commissioner recommends that a school board's contract with a third-party service provider (i.e., a photographer) should contain access and privacy protection provisions.

Finally, if students or parents are concerned about the taking or use of photographs within the school or by the media, these persons should speak to the principal. It is entirely reasonable - and in keeping with privacy legislation - for a parent/guardian or adult student to request that photographs not be taken or used without consent.

(Reference: "F.A.Q.: Access and Privacy in the School System," online at Information and Privacy Commissioner/Ontario <<http://www.ipc.on.ca>>.)

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