SHIBLEY RIGHTON LLP
Barristers and Solicitors

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A newsletter for educators

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For Whom the Bell Tolls – Divisional Court Quashes Arbitrator's Decision

The start of the workday can be a contentious issue for employers, whether or not employees are required to 'punch a clock.' This very issue was at the heart of a recent decision by the Ontario Divisional Court; in *Ottawa Carleton District School Board v. Ottawa Carleton v. Elementary Teachers' Federation*, [2012] O.J. No. 5224, the court reviewed an arbitrator's decision regarding the impact of the morning bell.

The issue in dispute was very narrow. Both the Board and the Federation agreed that the instructional day was limited to a maximum of 300 instruction minutes, commencing with the published start time for the school and excluding recess and lunch breaks. There was also no dispute between the parties that the published start time varied from school to school and that the published start time must coincide with the time students are required to enter the school. At issue in this case was the effect of ringing a bell at some time different from the published start time.

In this respect, 12 of the Board's 115 elementary school rang a bell at a time different from "the published start time" for the school. Whereas the Board stated that the ringing of the bell *permitted* the students to enter the school, the Federation took the position that this bell *required* the students to enter the school from between three to ten minutes before the published start time and, therefore, the time between the ringing of the bell and the published start time should be included in the instructional day.

At the initial arbitration hearing, the Arbitrator had erroneously concluded that the Board had, in fact, calculated the instructional day starting from the ringing of the bell instead of the published start time and upheld that Federation's grievance. Relying on the mistaken fact that the Board began to calculate the 300 minute instructional day as of the morning bell, the Arbitrator characterized the time between the morning bell and the published start time as "broadly instructional" and concluded that it was compensable. The Arbitrator likened the issue to that in a previous decision rendered by Arbitrator Beck in *Durham* in which the school board had not included the five minutes of opening exercises in the calculation of instructional minutes.

In reviewing the Arbitrator's decision, the Divisional Court held that the Arbitrator had misapprehended salient facts and had not made any finding that students were *required* to enter schools when the initial bell rang. The Divisional Court also held that it was plain that:

> "(i) the affected teachers at these twelve schools did not have to work a minute longer than their colleagues at other schools; (ii) the label or categorization of the minutes has absolutely no practical consequence; (iii) the affected teachers had no different duties, or additional duties, than their colleagues at other schools"

The Divisional Court further stated that the issues raised in this case could not be compared to the issue in *Durham* and that it was "unreasonable, if not irrational" to conclude that teachers were entitled to additional compensation due to differential treatment given evidence that, following an "early bell," some affected teachers continued drinking coffee in the staff room or locked themselves in their classroom while students lined up in the hall. The Divisional Court therefore quashed the Arbitrator's decision and remitted the grievance to a different arbitrator for reconsideration.

Given the Divisional Court's comments, it is entirely likely that this case will never be re-litigated. That said, this case serves as a point of discussion that school administrators should be mindful of timings and of any additional requirements placed on teachers in the morning or after school that could be interpreted as extending the instructional day.

Court Quashes Expulsion after College Fails to Follow Policies

In its November 2012 decision in *Setia v. Appleby College*, [2012] O.J. No. 5270, the Ontario Divisional Court quashed a private school's decision to expel a student who was caught using illicit substances on school premises. This decision seems to sidestep the recent trend that courts will pay some deference to school administrators regarding disciplinary issues.

Prior to admission to Appleby College, an independent day and boarding school for students between grades 7-12, students' parents are required to execute a form acknowledging that attendance at the College is dependent upon compliance with the Code of Conduct. The Code of Conduct includes a Substance Abuse Policy, breaches of which may be sanctioned by "possible suspension or expulsion." The Code of Conduct also includes a Lighting of Substances Policy which states that lighting of substances is a "significant safety concern," and that expulsion is mandatory for "students found smoking and/or using matches, candles or lighters."

On June 14, 2010, the second last day of school, 18-year-old Gautam Setia met up with two friends to celebrate the end of high school. After a residence director discovered a bong containing smoke in a residence room, Setia and a friend admitted to smoking marijuana in the room. The Head of School wrote an email to Setia's parents advising that the student was "in breach of the substance abuse policy," would be required to withdraw from school, and would not receive his Appleby diploma. The student did, however, complete all of his exams and received his Ontario Secondary School Diploma. The Head of School refused to meet with the student or parents in person regarding the expulsion and stated that he had no discretion in the matter. The parents and the student brought an application for judicial review of the student's explusion. At issue was whether the court had jurisdiction to review the decision and if so, whether the expulsion should be quashed.

The Divisional Court held that it had jurisdiction to review the College's decision to expel Setia on the basis that Appleby College was created by a Special Act of the Ontario Legislature, "*An Act to Incorporate Abbleby School*." Through the legislation, the school administration had the powers of administration and discipline. Therefore, decisions concerning administration and discipline constituted an exercise of a statutory power and were subject to judicial review under the *Judicial Review Procedure Act*.

In reviewing the expulsion, the majority of the Divisional Court held that the student and his parents were aware of the particulars of the incident, the Code of Conduct, and the likelihood that the student would be expelled. The Court held that the student and his parents therefore had adequate notice of the allegation and potential consequences. However, the majority held that because the Head of School had only cited the school's substance abuse policy, and not the lighting of substances policy, expulsion was not, in fact, mandatory in the circumstances. Thus, by failing to provide the parents with an opportunity to make submissions regarding the appropriate penalty, the majority of the Court held that the College failed to follow its own process and procedure and quashed the expulsion decision accordingly.

Of interest in this decision is Justice Chapnik's dissent. Justice Chapnik disagreed with the majority that there was a failure of procedural fairnes or natural justice, finding that the evidence, including the boys' admissions, sufficiently proved that the students had smoked marijuana in the residence room. Justice Chapnik further held that neither the school's policies nor the principles of natural justice required an oral hearing with Setia's parents in the circumstances and that the College's policy expressly provided that the school's polices do not remove the College's discretion to apply any sanction it deems appropriate in the circumstances of an offence, including expulsion. In his view, the College did conduct a proper investigation and satisfied the need for a hearing by reading and responding to Setia's parents' emails. In his conclusion, Justice Chapnik would have afforded the College's adminsitration some degree of deference given that Setia was still able to complete his exams and obtain his Ontario Secondary School Diploma; the only penalty was that he did not receive his diploma from Appleby College.

In our view, both the majority and the dissenting opinions have merit. In this case, we agree with Justice Chapnik's conclusions that the College should have been afforded some deference in this matter given the student's admissions and the circumstances surrounding the incident. However, had the College cited the lighting of substances policy in addition to Setia's violations of the drug abuse policy, the majority of the Court may have had more difficulty in quashing the decision. In light of this decision, school administrators are reminded to choose their words carefully when making decisions that consider policies and procedures given that not all courts may provide the same measure of deference to disciplinary decisions.