



Education Law eBulletin

A newsletter for educators

June 2013

SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
2510 University Avenue
Suite 700
Toronto, ON M5H 3E5
Tel.: (416) 214-5200
Toll free: 1-877-214-5200

Windsor Office:
2510 Ouellette Avenue
Suite 301
Windsor, ON N8X 1L4
Tel.: (519) 969-9844
Toll free: 1-866-422-7988

Education and Public Law Group

John P. Bell
john.bell@shibleyrighton.com

Brian P. Nolan
brian.nolan@shibleyrighton.com

Sheila M. MacKinnon
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard
paul.howard@shibleyrighton.com

Thomas McRae
thomas.mcrae@shibleyrighton.com

Gaynor J. Roger
gaynor.roger@shibleyrighton.com

John De Vellis
john.devellis@shibleyrighton.com

Bryce Chandler
bryce.chander@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

Arbitrator: Suspension Without Pay following Charges of Sexual Assault Unwarranted

Employers occasionally need to address employees facing criminal charges based on off-duty conduct. Obviously, employers cannot simply ignore these matters when they arise. However, prior to taking any type of disciplinary action, employers are generally required to determine whether the employee's presence in the workplace would present a reasonably serious and immediate risk to the legitimate concerns of the employer, including any reputational concerns the employer may have. This requirement holds true even in situations where a school board employee is charged with sexual misconduct, despite the logical desire to immediately suspend and/or terminate the employee. A recent arbitral decision issued by Owen Gray titled *Toronto District School Board v. CUPE, Local 4400*, 2013 CanLII 34759 (ON LA) illustrates that charges of sexual misconduct will not, in and of themselves, justify an unpaid suspension without demonstrating that there is a reasonably serious and immediate risk to the employer.

In May 2010, a caretaker for the Toronto District School Board (the "Board") was arrested and charged with three counts of sexual interference and sexual assault committed between 2007 and 2008 when the alleged female victim was under 14 years of age. The alleged sexual assaults occurred away from the caretaker's workplace. One of the terms of his release pending trial was that he not be in the presence of any person under the age of 16. Upon learning of the charges, the Board suspended the caretaker with pay.

Two weeks after receiving certified copies of the Information filed by the charging officer, which set out the formal charges, the Board changed the caretaker's status to suspended, *without* pay. Ultimately, the charges against the caretaker were dropped due to inconsistencies between the alleged victim's testimony at the preliminary hearing and a video statement she had made previously. The alleged victim later refused to participate in the Board's enquiry into the matter bringing the Board's investigation to an end.

CUPE initiated several grievances on behalf of the caretaker; the issue at this arbitration was the Board's decision to change the caretaker's status from suspended with pay to an unpaid suspension. At the hearing, the Board argued that given its special duty to students, the age of the student involved, the nature of the charges, and the alleged involvement of drugs, there was a legitimate concern as to what the community would think about the Board's continued employment of the accused. For this reason, the Board submitted that it was justified in suspending the caretaker without pay. CUPE responded, stating that the information obtained by the Board only confirmed that which it already knew and did not justify changing the caretaker's status to an unpaid suspension. CUPE also argued that the charges, preliminary hearing and peace bond had not become the subject of any publicity. Finally, CUPE argued that the Board could have assigned the caretaker with duties that did not bring him into contact with students, and that the Board failed to consider this possibility.

In his decision, the arbitrator held that criminal charges, without more, are insufficient to impact upon the Board's reputational interest. Although the arbitrator recognized that proof of public knowledge of the issue is not required, the Board was still required to demonstrate that continued

employment would damage the Board's reputation based on the assessment of a fair-minded and well-informed member of the public.

In this case, the arbitrator found that any revulsion engendered by the formal charges must be tempered by the recognition that they might not be true. The arbitrator held that any conclusions based solely on the charges, without consideration of the nature of the work being performed by the caretaker, including work that would not bring him in contact with students, could not be considered to be either well-informed or fair-minded. Because the Board failed to provide evidence that a fair-minded and/or well-informed member of the public would lose confidence in the Board's ability to discharge its responsibilities for the care and safety of children, the arbitrator held that the Board did not have cause to suspend the caretaker without pay. The Board was therefore ordered to compensate the caretaker for loss of wages or benefits resulting from his suspension.

Although Arbitrator Gray's decision does not alter the law as it previously existed, his decision emphasizes the need for school board administrators to review any situations in which employees have been criminally charged on a case-by-case basis in order to determine whether a suspension with pay, or more severe reaction, is reasonable in the circumstances. We recommend that school board administrators consult legal counsel anytime they are contemplating any type of unpaid suspension or more severe discipline against an employee.

Class Picture Retaken after Student with a Disability Separated from his Classmates

Class pictures are a service provided by most, if not all, school boards to parents across Canada. Class photographs often become treasured mementos of our childhood and allow us to reminisce about childhood friends and memories. Recently however, a picture taken of a second grade class at Herbert Spencer Elementary School by a Lifetouch Canada Inc. photographer did not have the desired effect.

Myles Ambridge is in Grade 2 at Herbert Spencer Elementary School in British Columbia. Myles has spinal muscular atrophy, and is confined to a wheelchair as a result of his condition. When the time came for the group photo to be taken, Myles' classmates and teacher were centered on benches, shoulder-to-shoulder, in three tiered rows, with approximately one to two feet of empty bench on either side of the group. Myles, sitting in his wheelchair, was positioned at one end of the benches. The result was an obvious gap separating Myles from his classmates. In an effort to be included, Myles can be seen shifting in his chair in an effort to be closer to the rest of his classmates.

When Myles' parents saw the class picture – repeatedly described as 'heartbreaking' by Myles' parents and innumerable online comments – they immediately contacted the school board and Lifetouch Canada Inc. As reported by the Toronto Star on June 14, 2013, and other online media websites including gawker.com, Myles' parents posted a copy of the picture to the photography company's website; the class picture went viral shortly thereafter. In this case, it was reported that Myles' parents did not fault the teacher, school or school board for the picture as they had not seen the class picture before it was sent home to parents. Lifetouch only reluctantly agreed to retake the photo, this time with Myles sitting on a bench beside his classmates with a caregiver giving him off-camera support. Despite the retake, gawker.com reported that Herbert Spencer Elementary School has indicated that it will no longer be using Lifetouch following the incident.

Perhaps the most distressing issue raised by this photograph is how easily it could have been avoided. Although Myles was seated on the bench in the re-take, the question remains as to why the students could not have been arranged in a more inclusive fashion – with Myles in the middle of the photograph, or with the students seated at one end of the benches, in order to avoid the exclusionary result.

Class pictures are a service provided by the school board to parents. In this case, the photo itself appears to provide evidence of separation and differential treatment; it is entirely possible that the circumstances of this picture could have resulted in an human rights complaint against the school board. In our opinion, the Grade 2 Herbert Spencer Elementary class picture serves as a salient reminder that all service providers, including photographers, should be aware of, and sensitive to, school board policies and the needs of students with disabilities.