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Capsle

Canadian Association for the Practical Study of Law in Education

COMMENTS

TEACHER SEXUAL MISCONDUCT: AN EPIDEMIC OR JUST ANOTHER CONCERN?

I teach 2 courses in Education/School Law in the Faculty of Education at Memorial University of Newfoundland: *Education 4641 – Legal Issues in Today's Schools and Education 6335 – Legal Foundations of Educational Administration*. One of the many topics we discuss in both courses is teacher sexual misconduct. In recent years, it seems to me that this is an issue that refuses to go away. In fact, I perceive that the incidents of sexual misconduct across Canada may be increasing.

In 2012, I did a study wherein I examined all the disciplinary cases that had occurred between 2007 and 2012 in the Provinces of Ontario and British Columbia. These 2 Provinces were chosen because they were the only 2 provinces in Canada which made this information available to the public via 2 magazines, *Professionally Speaking* published by the Ontario College of Teachers (OCT) and *TC Magazine* published by the British Columbia College of Teachers (BCCT). Eventually, the British Columbia Government decommissioned the BCCT and its duties were assumed by the Teacher Regulation Branch of the British Columbia Ministry of Education.

Teacher sexual misconduct is best described by referring to a definition of sexual abuse by teachers proffered by Jaffe et al. (2013) in an article titled "Emerging Trends in Teacher Sexual Misconduct in Ontario 2007-2012" published in the *Education and Law Journal* (Volume 23, Issue 1):

> Sexual abuse may involve a wide range of behaviors that are often grouped into the broader category of sexual misconduct. Experts in this area who refer to sexual misconduct include such behaviors as physical contact (kissing, touching, fondling, and oral, anal and vaginal penetration), verbal communication (sexually-related conversations, jokes, questions, personal information, and harassment), visual communication (webcam communication, sharing pictures of a sexual nature), and possession or creation of child pornography. (p. 20)

According to my calculations, the percentage of teacher sexual misconduct cases acted upon by the OCT from 2007-2012 was 33.3 percent of all the misconduct cases adjudicated by the OCT during that time period. The actual number of cases was 79, numerically not a large number. However, one sexual assault case in schools is one too many. In British Columbia for the same time period, the percentage of sexual misconduct cases was 40.0%. Again, the number (72) was not exorbitant but again, one case of sexual misconduct in whatever province or territory is one too many. I plan on doing a similar review in late 2017 to see if the numbers have changed.

From time-to-time, I review the cases published in OCT's *Professionally Speaking* and in *LEARN* which is published by BC's Teacher Regulation Branch and I am left with a sickening feeling that teacher sexual misconduct cases are not decreasing but perhaps increasing.

Specifically, I'll refer to the 2 latest issues of these publications: *Professionally Speaking*, June 2016 and *LEARN*, Summer/Fall 2016. In this issue of *Professionally Speaking*, a total of 32 discipline cases were cited. 17 of those cases (53%) had to do with teacher sexual misconduct. In the *LEARN* publication, a total of 14 discipline cases were discussed, and 5 or 36% of which involved misconduct of a sexual nature towards students.

I do realize that this information is only involving 2 provinces out of a total of 10 provinces and 3 territories. Information from the other jurisdictions, as CBC's *Marketplace* found in their recent investigation, is extremely difficult to obtain. I'm left wondering if there is a similar rate of teacher sexual misconduct in these other locales. Rightly or wrongly, my gut reaction is that other jurisdictions within Canada likely show a similar incident of sexual abuse.

A recent search of the following topic, "Teacher Sexual Misconduct in Canada" on Google revealed a number of interesting media articles in several provinces.

For example, in the Province of Alberta, an article by Matt McClure of the *Calgary Herald* titled "Dozens of Sexual Allegations Filed Against Alberta Teachers Over The Past Five Years" made for some interesting but shocking reading.

Specifically, this review revealed that over a five-year period teachers were involved in 22 cases of sex-related inappropriate relationships and 10 cases of pornography. Disciplinary actions stemming from those cases ranged from 13 lifetime suspensions from the teaching profession to 6 suspensions of varying durations including a number of fines and formal reprimands.

In the Province of Saskatchewan, the several articles emanating from the Google search centered around 2 female teachers charged with having sexual relations with 16-year old male and 15-year old male students.

The Quebec search revealed details of a female Physical Education teacher being given an 18 month sentence for 2 counts of sexual exploitation and a 20 month sentence for 1 count of sexual assault involving a high school student. This sentence was imposed in 2014.

In Nova Scotia, CBC journalist, Blair Rhodes wrote in a recent online article:

> The Nova Scotia government has acted against 62 teachers in the past 15 years over allegations of inappropriate conduct, CBC News has learned. Figures obtained through a CBC News investigation shows [sic] most of those allegations were sexual in nature; 26 involved sexual misconduct, which includes sexual assault, sexual exploitation, sexual impropriety and sexual misconduct.
>
> Of those cases, 24 resulted in teachers losing their certificates, while two people got indefinite suspensions.
>
> Another 12 cases involved inappropriate relationships, touching or communications. There were six pornography cases, which all resulted in the cancellation of teaching certificates. (*CBC Investigates,* April 15, 2015)

In the Territory of Nunavut, a Google search listed an April 16, 2013 article by Dave Dean which revealed that 3 teachers had recently been charged with sexual assault. A follow-up Google search to determine the results of these cases was unsuccessful.

Other Google searches for the Provinces of Manitoba, Newfoundland and Labrador, Prince Edward Island, New Brunswick, and the Yukon and Northwest Territories revealed nothing of significance with respect to this topic. We should not take much comfort from this result, for as CBC's *Marketplace* (2016) investigative report revealed:

> "We know that there are more incidents going on than are publicly reported, and we have very good evidence that many of these cases are buried," says Paul Bennett, a former teacher and principal who now researches teacher discipline at Saint Mary's University in Halifax.

Marketplace went on to state that "Compared to other professions involving public trust, there is little information made available about teachers who have been disciplined".

In concluding, I believe that it is reasonable to state that teacher sexual misconduct in our Canadian schools is indeed a significant issue, one that needs further study and research in our Bachelor of Education and Master of Education (Leadership Studies) university programs. Ministries of Education and teacher associations across the country need to rethink how teacher sexual misconduct cases are handled in this country. Particularly, I think we must review these issues in respect to the public's right to know about the particulars and statistics concerning these incidents. Whether or not teacher sexual misconduct

in Canada is occurring in epidemic proportions or just another issue of concern in our schools is a question worthy of our attention. You decide.

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PRESIDENT'S MESSAGE

I expect by the time all of you read this message, it will be September and school, university and work will be in full swing. As the Board of Directors embarks on a critical time for the CAPSLE organization, I thought it would be a good idea to reflect on CAPSLE and its mission and values. As a bit of refresher, let's go back to basics:

· CAPSLE (the Canadian Association for the Practical Study of Law and Education) is a national organization which strives to provide an open forum for the practical study of legal issues in education.

· CAPSLE was established in 1989. We are made up of individuals from all parts of the education spectrum, including lawyers, school trustees, teachers, school-based employees, school board administrators, academics, teacher federations, government officials and students. We represent all the regions of the country and all aspects of the legal and education community. We welcome all who have an interest in the legal issues that affect education.

Focus of CAPSLE

During my tenure with CAPSLE, we have focused on:

1. Providing a high quality conference annually.
2. Increasing the scope of CAPSLE and its membership numbers.
3. Attempting to use the website to its fullest potential.
4. Providing access to information about legal issues in education through the CAPSLE newsletter and publications.
5. Attempting to do a much better job in providing all members with an index or guide to where and how to find current law on emerging education issues.

As I have said before, the focus of the current Board is on the following:

1. Membership engagement and annual conference.
2. Publications.
3. Succession planning (secretary position and in general).

Mission and Values of the Organization

As a reminder, I restate the following:

CAPSLE Mission: We are a national organization whose aim is to provide an open forum for the practical study of legal issues in education.

CAPSLE Values: Our principal values are:

- To maintain and promote CAPSLE's collegial, non-threatening environment for the discussion of legal issues in education.
- To pursue increased diversity of CAPSLE's membership.
- To maintain and improve the affordability of participation in CAPSLE.

These missions and values remain as true today as they were when CAPSLE was founded. As President, I will continue to focus on our mission and on the 3 main values/objectives listed above.

Membership engagement, the annual conference and publications are our foci. Our review of how to best serve our central values led to the survey and the additional "Tuff Questions" that we posed at the Toronto Conference. To this end, the Board will continue with its review of these issues in the Fall, with the following discussions. We will hold:

- a full Board conference call in September;
- committee meetings in October; and then
- a face-to-face meeting in Toronto in late November;

as we continue to tackle and create a plan to ensure the long term viability of CAPSLE.

I encourage all of you to mark off the dates for the Saskatoon Conference in your calendar and encourage friends, colleagues and others to attend this Conference.

I wish all of you the best in the upcoming school year and look forward to continuing our dialogue.

Ian Pickard
CAPSLE President

TEACHER COLLECTIVE BARGAINING IN ALBERTA - A BRAVE NEW WORLD

Long a cornerstone of teacher collective bargaining in Alberta, a model of bargaining whereby the Alberta Teachers' Association negotiated through its local bargaining units with individual school boards is no more. While the legislation to formally change the bargaining model was introduced and passed in late 2015, the roots of the end of this model go back decades.

In the 1990s in the midst of the Ralph Klein revolution in Alberta, school boards were stripped of their ability to impose local taxation. Instead, funding for education became based on a per-pupil model whereby the provincial treasury allocated funds to school districts for their operation. In the intervening years, there was often money allocated for earmarked purposes (including some money actually designated specifically for teacher salaries). Additionally the funding model did not apply equally across the Province. Rather, funding was established on a per-pupil base rate, and then jurisdictions would receive additional funding based on a certain set of parameters which included (but weren't always limited to) sparsity and distance, FNMI population, and unique cost of living factors.

This model posed a challenge for teachers and employing boards alike. Employing boards were handtied with respect to funding. They had no ability to address truly unique local circumstances, nor did they have the ability to take creative initiatives on their own. The budget was what the budget was. A progressive board in a progressive community had no ability to appeal to the electorate in order to address a specific need. Likewise teachers who were severely impacted by the across-the-board salary rollbacks that occurred in the early years of the Klein government had limited ability to pursue other matters with their employer due to the argument that the employer's hands were tied by the allocation from the government.

The funding model established by the Klein government in the 90s sowed the seeds for a fundamental change in teacher collective bargaining. It just took a while to get there. Needless to say, there were some interesting bumps along the way.

In 2002, with the economic difficulties of the early to mid-90s long in the rear view mirror, and the Alberta Government awash in cash due to another oil boom, and more critically, a huge boom in natural gas, teachers sought to recover from the salary rollback years earlier. To do so, many local bargaining units engaged in strike action in the winter of 2002. Ultimately the Government legislated the teachers back to work, and binding arbitration was established in those jurisdictions. The awards served teachers well and helped teachers to re-establish their purchasing power that had been lost to them years earlier. Nevertheless, another seed in the end of local bargaining was sowed.

The outcome of the strikes and the subsequent financial restitution for teachers was a definite win for the Alberta Teachers' Association and its members, there was a large matter that was still unresolved: a festering and growing unfunded liability (UFL) in the teachers' pension plan. The growing UFL was already in the billions of dollars and would threaten to cripple the government's finances and the pension plan. In the fall of 2007 the Association and the Government would conclude an agreement that would see the Government pay the UFL and establish a salary escalator over the next five years. Local bargaining would resolve other matters. The first two-tiered bargaining action sowed another seed.

Following the expiry of what became known as the pension deal, the Government and the ATA engaged in another round of multi-lateral talks, this time including school boards in the discussions. The resulting deal in 2012-13 produced another two-tiered agreement.

While the two agreements produced some wins for both teachers and employing boards, the local bargaining model remained in place. As the second long-term agreement was expiring, the daunting task of having to bargain locally in all 61 jurisdictions began to rise on the horizon. Again, teachers and boards were faced with uncertainty. Would there be local bargaining? Would there be Government intervention and some sort of central model, and what would that look like?

Subsequently a change in government brought about a change in the bargaining model. Introduced in late 2015, the Public Education Collective Bargaining Act (PECBA) established a new model for a two-tiered central and local bargaining mechanism. Gone were the days of exclusive local bargaining. Also gone were the days of a changing bargaining game (often changing during the round of bargaining) with great uncertainty with regard to process.

In place is a model whereby teachers will negotiate central matters with a joint government and employer board. Following successful ratification of that agreement, teachers and boards will negotiate a separate list of matters on local issues. The conclusion of bargaining in each of the 61 jurisdictions will yield a collective agreement in each bargaining unit.

The process in ongoing. To date, negotiations have successfully produced central and local bargaining lists. Negotiations are ongoing on central matters.

Under the umbrella of a devastated oil economy, we are living (and negotiating) interesting times.

***Public Education Collective Bargaining Act*: A Primer**

The Alberta Teachers' Association

· Approximately 40000 members (All teachers employed by Public, Separate and Francophone school boards)
· 61 Local Bargaining Units

Teacher Employer Bargaining Association

· One representative (elected trustee) from each of 61 school boards
· Executive Committee
  - o 14 members (8 from Government of Alberta, 6 from group of 61 board representatives)
  - · Negotiating Committee
  - o 5 members (2 from Government of Alberta, 2 from group of 61 board representatives, lead negotiator)

List Bargaining – Concluded

Central Table Bargaining – Ongoing

Local Bargaining – To begin following ratification of Central Table memorandum

Cory Schoffer
Alberta Teachers' Association
Edmonton, Alberta

SCHOOL BOARDS MOVING TO REVIEW HEAD LICE POLICIES

The Toronto District School Board ("TDSB") has begun the process of reconsidering its strict policy on requiring children with head lice to remain home from school.[1] TDSB spokesperson Ryan Bird described the reconsideration process as geared towards nclusion in the classroom: "I think that many people believe that as long as it's being treated, that shouldn't be a barrier to come to school for days at a time."

Commonly known as a "no nit" policies, the strict exclusion of children with head lice from classes has been adopted by numerous schools throughout Canada, Australia and the United States. Such policies maintain strict caution against the spread of lice – requiring children found with traces of live head lice or lice eggs in their hair to remain at home until their scalps are completely lice-free.[2] In many cases, children are sent home regardless of whether they are found with one louse or many, and regardless of whether the lice are viable or not. Even a single "nit" amounting to an empty egg casing with no live louse and presenting no possibility of transmission may result in a child being sent home from school. Depending on the course of treatment, the resulting exclusion from school usually ranges between 2 and 14 days.[3] Up until 2006, health authorities in both Canada and the United States recommended such policies as a best practice among school boards.[4]

However, these recommendations have recently changed and this change has brought about a disparity in school boards' policies towards addressing lice infections – with some school boards continuing to maintain a strict "no nits" approach and others adopting more relaxed approaches.

A similar debate is taking place in the United States

As of 2004, approximately 60 percent of schools in the United States reported having adopted strict "no nit" policies.[5]

Research on the costs of maintaining such "no nit" policies in the United States has nevertheless challenged their value. One group of researchers estimated that parents missed an average of five working days when a child was sent home to be treated for lice. This resulted in lost wages of up to $2,720 per family per active infestation,[6] and a total annual loss of approximately $6 billion in earnings across the United States.[7] At the same time, children in the United States lost an estimated 12 to 24 million school days and,[8] as a result, schools lost $280 to $325 million in funding due to absences attributable to head lice.[9]

For many Americans, however, these costs are unquestionably worthwhile – particularly when considered against the costs that would result from lice transmission becoming a more common in classrooms. Parents who have endured the distress and effort involved in meticulously removing lice from children's hair and fabrics have attested to the importance of taking all possible measures to ensure that such experiences are avoided.[10]

Critics of "no nits" policies have nevertheless countered that simple treatment by insecticide shampoos and acid vinegar for the weeks after contamination is sufficient to remove lice from most children with minimal distress.[11] However, Deborah Z. Altschuler, president of the United States National Pediculosis Association, states that policies allowing children with lice to attend classes give rise to a lack of vigilance on the part of parents and an overreliance on treatment by pesticides that may, in themselves, place children in further jeopardy.[12] The Canadian Paediatric Society confirms that although commonly-used insecticides "have favourable safety profiles," stronger second-line insecticides such as Lindane have potential for neurotoxicity and bone marrow suppression.[13]

Changed recommendations from the medical community in Canada

Following updates to international guidelines for the control of head lice infections in 2007,[14] the Canadian Paediatric Society (CPS) adopted a revised position statement that favoured the inclusion of students with head lice in classrooms.[15] The most recent version of the CPS position statement sets out the basics of head lice infestations and transmission as follows:

> The infestation
> An infestation with lice is called pediculosis, and usually involves less than 10 live lice. Itching occurs if the individual becomes sensitized to antigenic components of louse saliva that is injected as the louse feeds. On the first infestation, sensitization commonly takes four to six weeks. However, some individuals remain asymptomatic and never itch. In cases with heavy infestations, secondary bacterial infection of the excoriated scalp may occur. Unlike body lice, head lice are not vectors for other diseases.
>
> Transmission of head lice
> Head lice are spread mainly through direct head-to-head (hair-to-hair) contact. Lice do not hop or fly, but can crawl at a rapid rate (23 cm/min under natural conditions). There continues to be controversy about the role fomites play in transmission. Two studies from Australia suggest that in the home, pillowcases present only a small risk, and in the classroom, the carpets pose no risk. Pets are not vectors for human head lice.

Based on its assessment of the limited potential for head lice to spread between children in classrooms or to cause serious adverse side effects, the CPS adopts the view that schools' "no nit" policies do not have a basis in medicine:

> Exclusion from school and daycare due to the detection of the presence of 'nits' does not have sound medical rationale. Even the detection of active head lice should not lead to the exclusion of the affected child. Treatment should be recommended and close head-to-head contact should be discouraged pending treatment. The American Academy of Pediatrics and the Public Health Medicine Environmental Group in the United Kingdom also discourage 'no nit' school policies.
>
> Families of children in the classroom where a case of active head lice has been detected should be alerted that an active infestation has been noted, and informed about the diagnosis, misdiagnosis and management of head lice, and the lack of risk for serious disease. [emphasis added]

Similar positions have been adopted by the United States' Centre for Disease Control, and National Association of School Nurses.[16]

Responses from community stakeholders

Like their American counterparts, Canadians who support strict "no nit" policies have cited concerns over the potential for lice to spread in the classroom, and the resulting stress and lost work time for parents who are then required to treat their children and prevent the further spread of lice in their homes.

The Hastings and Prince Edward District School Board's recent revision of its formerly strict "not nit" received a "furious" response from some of the parents in its community.[17] A Facebook page launched to protest the change of policy received the support of nearly 400 individuals who signed up as members over the course of a single weekend. In an interview with by the Globe and Mail, the parent who launched the page stated, "now our children who don't have head lice are now prone to it on a daily basis…it's like our kids' rights have been taken away

from them."[18] As the Globe and Mail highlighted, however, not all parents who joined the online Facebook discussion shared a common point of view on the necessity of strict "not nits" policies. The disagreement is evident in the following two postings:

> "This is ridiculous! Send them to school so they can give it to all the other students!"

> "I am outraged!!! I have been through this x 5 and wasted an entire summer picking nits and had to cut all my girls hair off short...nuisance my ass!"

Faced with such competing views, school boards have been left to determine the appropriate policy measures to balance medical recommendations against many parents' voiced concerns and lived experiences.

The differing approaches of school boards across Canada

Across Canada, a single, consistent policy approach for addressing head lice remains elusive, as different school boards continue to adopt different approaches to striking the balance between the views of medical professionals and their community stakeholders. While most school boards continue to maintain some form of a "no nits" policy, the strictness of enforcement varies. On the strict end of the spectrum, the Simcoe County District School Board requires children with head lice to be removed from school and, before the child may return, parents must to sign a form confirming that recommended head lice treatments have been completed.[19] Toward the opposite end of the spectrum, Vancouver public school boards notify parents when lice or nits are spotted in the classroom but do not otherwise require students to be kept out of school.[20] Closer to the center of the spectrum, schools boards in Calgary and Halifax encourage parents to remove their children from classes but do not expressly require them to do so.[21]

The possibility that Canada's largest school board may relax its own "no nits" policy may serve to significantly shift the balance in this spectrum of approaches.

Considerations for striking an appropriate balance

In developing any balanced approach to policies addressing head lice in the classroom, the minimization of harm is key. The challenge for school boards is to strike a balance that assigns appropriate weight to sorts of harms that concern the medical community as against the sorts of harms that concern their community stakeholders.

An entry point in this respect may be both communities' shared concern over ensuring against (i) unnecessary harm to the health of children; and (ii) unnecessary time away from school.

These shared concerns may be best reflected in head lice policies designed to avoid misdiagnosis and overdiagnosis of head lice infections. As stated by Sciscione:[22]

> Misdiagnosis of head lice infestation occurs frequently and causes inappropriate exclusion from school and unnecessary treatment with pediculicides [ie., insecticides].

Indeed, research cited by Kosta Mumcuoglu estimates that, in the United States, 4.2 to 8.3 million children are unnecessarily sent home each year to be treated for lice infections that they do not have. Such uninfected children are just as likely as infected children to be treated with strong insecticides.[23] In Canada, the CPS policy statement similarly cites concerns over research finding that head lice is frequently overdiagnosed and misdiagnosed when the strict application of "no nits" policies are not matched with investment in necessary resources for ensuring that lice infections are accurately diagnosed.[24]

One solution to these concerns is to provide training that enables school staff to take proper care in determining whether a child is truly infected with live lice that may be passed on to others. The United States' National Pediculosis Association, while supporting policies to send children with lice home from school, also

supports prevention efforts to ensure that such outcomes are as rare as possible. Included among these prevention efforts is a "comprehensive" policy of continuous community education to ensure that parents and others play a role in detecting lice and minimizing the risk of infections in the first place.[25] As described by Deborah Altschuler, such education ensures against the sort of complacency that may adversely impact on children who experience its consequences:

> The mentality that head lice are only a nuisance keeps children unnecessarily vulnerable and chronically infested.

While medical professionals and community stakeholders have differed in the weight they attach to different harms arising from the application of "no nits" policies, all sides agree that the safety and well-being of children must be paramount in any policy addressing head lice in the classroom.

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1 Alison Auld (Jan 13, 2016) "Toronto school board's plan to review head lice policy sparks debate" The Globe and Mail [Globe and Mail].
2 Kosta Y Mumcuoglu, Terri A Meinking, Craig N Burkhart and Craig G Burkhart, "Head Louse Infections: the "no nit" policy and its consequences" (2006) 45 International J Dermatology 891 [Mumcuoglu].
3 JH Price JH, CN Burkhart CN, CG Burkhart CG, et al. "School nurses' perceptions of and experiences with head lice." (1999) 69 J Sch Health 153.
4 *Ibid.*
5 Patricia Sciscione, "No-Nit Policies in Schools: Time for Change" (2007) 23 J Sch Nursing 13 at 16 [Sciscione].
6 S Gordon "Shared vulnerability: A theory of caring for children with persistent head lice" (2007) 23 J Sch Nursing 283 [Gordon].
7 Mumcuoglu, *supra* at 893.
8 Sciscione, *supra* at 13.
9 Gordon, *supra*.
10 For example, see Tamara Flannagan, "Send Students With Lice Home Before it Gets out of Control" (October 15, 2015) New York Times.
11 Mumcuoglu, *supra* at 894.
12 Deborah Z. Altschuler, "No Nits or Lice, No Chemicals, No Excuses" (October 15, 2015) New York Times [Altschuler].
13 CPS Policy Statement, *supra*.
14 "Pediculosis Management in the School Setting," National Association of School Nurses Position Statement (Revised 2011) online at:
<http://www.nasn.org/PolicyAdvocacy/PositionPapersandReports/NASNPositionStatementsFullView/tabid/462/ArticleId/40/Pediculosis-Management-in-the-School-Setting-Revised-2011>.
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<http://www.nasn.org/PolicyAdvocacy/PositionPapersandReports/NASNPositionStatementsFullView/tabid/462/ArticleId/40/Pediculosis-Management-in-the-School-Setting-Revised-2011>
17 Luke Hendry (January 12, 2016) "Parents furious over head lice decision" The intelligencer, online at <http://www.intelligencer.ca/2016/01/11/parents-furious-over-head-lice-decision>.
18 Globe and Mail, *supra*.
19 Cheryl Browne, "Debate brewing is students suffering from head lice should be nit-free when they return to class," (January 14, 2016) Barrie Examiner
20 Hannah Hoag (April 11, 2015) "The new lice wars" Macleans; See also Globe and Mail, *supra*.
21 Globe and Mail, *supra*.
22 Sciscione, *supra* at 16
23 Mumcuoglu, *supra* at 893.
24 CPS Policy Statement, *supra*.
25 Altschuler, *supra*.

FROM THE CAPSLE ARCHIVES (2015, Kelowna, BC)
I Want My Union Representative at the Meeting!
(Hugh H.M. Connelly)

4. Investigation Meetings & Union Representation

The initial stages of an employer investigation may be for the purposes of simply determining what actually happened. The employer at this point may not have any reason to suspect employee misconduct, negligence or non performance. However, in the course of determining what happened, the focus and purpose of the investigation may change from determining the facts to determining if employee discipline is warranted. Once this point in the investigation has been reached, employer meetings with the employee will trigger the employee's right to union representation.

…

5. Employee Discipline & Union Representation

The following extract from the (2007) arbitration decision, Limestone District School Board, recognized that employer communications with an employee for the purpose of discipline are treated and viewed differently from other employer employee communications.

> … arbitrators first recognize that disciplinary communications have a unique character and status in the world of labour relations. This status translates into the need for a high degree of vigilance on the shop floor or in the school hallways. Administrators must know and respect the fact that disciplinary communications are never private or personal, never casual and never below the radar of the protection of the collective agreement. They are always the subject of business between the parties to the contract - the employer and the union. They always attract the special care that ensures that the right parties are in the room - and that includes the union's representative. (Limestone District School Board, para. 89)

Employee discipline includes the following management actions:
· verbal and written reprimands;
· suspensions with and without pay; and
· termination of employment.

As was set out in the prior section of this chapter, if there is any possibility that employee discipline will eventually resulting from an employer meeting with an employee, the employee has the right to union representation in accordance with the union representation clause in the applicable collective agreement.

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Where can I get the rest of this Paper?

The above two extracts are part of a 13 page paper presented at the 2015 (Kelowna, BC) CAPSLE Conference. This paper and other are available to CAPSLE Members on the CAPSLE Members Only Web Page. There is also a Master Index of all the Paper and PPT's from the 2011-15 CAPSLE Conferences.

Access to CAPSLE Members Only Web Page

1. Go to Capsle.ca
2. Click LOG IN (Top Right Menu).
3. Type in your user name (Last Name.First Name) and Password.
4. Click MEMBER RESOURCE in Top Left Menu (only shows after you have logged in).

COURT DISMISSES TRACK STUDENT'S NEGLIGENCE LAWSUIT AGAINST SCHOOL BOARD, TRACK COACH AND PRINCIPAL

On August 2, 2016, the Ontario Superior Court of Justice issued a decision dismissing a lawsuit against Peel District School Board, a principal and track coach. In *Peters v. Peel District School Board et al.*[1], former high school student and track team member Tiffany Peters sued the Board, the principal, two vice-principals and the track coach for negligence after she was injured during a long-jump practice in 2005. The litigation was dismissed as against the two vice-principals in earlier proceedings.

Ms. Peters was injured during a track practice after school on April 19, 2005. The parties agreed on some of the basic facts, including that Ms. Peters reported having hurt her left knee during the practice and had an operation eight months later to repair a tear in the lateral meniscus on her left knee. She alleged that after the injury and surgery, her condition deteriorated and although she entered university, she ultimately did not succeed in her dream of being a singer, dancer or actor.

In her lawsuit, she alleged that the Board and its employees were negligent and caused permanent disability, leaving her unable to pursue her career goals. The Court dismissed her case and rejected her claim for damages.

School Board met Standard of Care

The Court in Peters applied the landmark Supreme Court of Canada decision from 1981 on the standard of care in claims of school board negligence, *Myers v. Peel County Board of Education*.[2] A school board and its employees owe a duty of care to students known as the standard of a careful and prudent parent. The Supreme Court explained how to apply the standard in individual cases in the following excerpt from *Myers*:

> [I]t remains the appropriate standard for such cases. It is not, however, a standard which can be applied in the same manner and to the same extent in every case. Its application will vary from case to case and will depend upon the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and the degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, competency and capacity of the students involved, and a host of other matters which may be widely varied but which, in a given, case, may affect the application of the prudent parent standard to the conduct of the school authority in the circumstances.[3]

At the trial in Peters, the Board did not concede that Ms. Peters tore her left meniscus on April 19, 2005 and submitted to the Court that it could have occurred any time prior to an MRI conducted on September 16, 2005. However, the Court concluded on a balance of probabilities that Ms. Peters tore her lateral meniscus in her left knee on April 19, 2005 during the track practice. The questions for the Court then became:

(1) whether the Board was negligent prior to, at the time of, or after the accident;
(2) what was Ms. Peters' current physical condition and prognosis, and
(3) whether her current physical condition was causally related to the April 19, 2005 accident.

It is worth noting that the trial judge found significant inconsistencies in Ms. Peters' evidence and decided it was not reliable. In many instances her testimony was contradicted by other evidence, including her own prior statements given at examinations for discovery. On the other hand, the Board's witnesses and testimony given by the Track Coach and Principal was deemed credible and reliable.

The Court concluded that the Board was not negligent prior to the accident nor at the time of the accident. This conclusion was based largely on the testimony of the Track Coach and another track student and the following key facts:

1. The Track Coach was on the field when Ms. Peters' injury occurred. The Track Coach was complying with the Ophea guidelines for supervision.
2. The Track Coach properly instructed Ms. Peters on long jump, and instructed her only to perform "run-throughs", i.e. omitting the final part of the jump where the student takes off from the track and lands in the pit.
3. The Track Coach properly inspected the long jump pit.

The Court also reviewed what occurred after Ms. Peters' injury and found the Board met the standard of care of a prudent parent. Evidence was given by the Track Coach, the Principal, Ms. Peters and her family members who cared for Ms. Peters after the injury.

The trial judge concluded that the Track Coach assessed Ms. Peters' injury and determined the best treatment was "RICE" – Rest, Ice, Compress, Elevate, which she communicated to Ms. Peters. She accompanied Ms. Peters and another student into the school and confirmed that arrangements had been made for a ride home for Ms. Peters. At that point, she returned to the field to put equipment away. In the circumstances, her actions met the standard of a prudent parent.

One of Ms. Peters' allegations was that she was left alone at the school after the injury. However, the facts did not support her allegations. The Principal gave testimony about his practice of leaving his door open to the foyer so he could actively supervise students and intervene when necessary. On the evening of the injury, the Principal spoke with Ms. Peters and heard that she was waiting for a ride. She did not appear to be in distress. The Court found that the Principal's interaction with Ms. Peters met the standard of care of a prudent parent.

The Court was satisfied that the Track Coach and Principal did not breach the standard of care of a prudent parent in their dealings with Ms. Peters prior to the injury, at the time of the injury or following the accident when Ms. Peters was picked up and taken home. The claim was therefore dismissed.

Damage Assessment

As is standard practice, the trial judge in *Peters* assessed the damages even though the claim was dismissed. The trial judge reviewed extensive medical evidence and concluded that Ms. Peters' post-accident condition was not causally related to the injury on April 19, 2005, but was more likely related to her excessive weight gain. The other difficulty with her claim was that Ms. Peters self-reported pain that could not be objectively quantified or verified.

Ms. Peters claimed that the injury had diminished her employment prospects and her aspiration to become an actor, dancer and singer. However, the evidence showed that she undertook little preparation to achieve her dreams. For example, she did not, at any point, enroll in competitive programs for singing, dancing or acting.

Lessons for Educators

This case confirms that the courts will continue to apply *Myers* and the standard of care of a careful and prudent parent in cases of school board negligence. The application of that standard depends on the nature of the activity and students. In this case, it was highly relevant that the Track Coach was consistent in the training and supervision of her long-jump students and that she followed the Ophea guidelines applicable to track and field. Both the Principal and the Track Coach provided an appropriate level of care and attention to Ms. Peters after her injury.

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1 2016 ONSC 4788
2 [1981] 2 S.C.R.
3 [1981] 2 S.C.R. at para 31

LABOUR RELATIONS QUESTIONS & QUICK ANSWERS
EMPLOYEE OBLIGATION TO EXPLAIN MISCONDUCT

Questions

Does an employee have an obligation to explain his or her off duty misconduct to an employer particularly when the misconduct may result or has resulted in criminal charges? What, if any, are the consequences of a failure to provide an adequate explanation?

Quick Answers

A recent arbitration decision addresses this issue.[1]

General Rule

… Subject to an extraordinary circumstances exception, [an employee does not have an obligation to respond to an employer's questions or requests for information]. … such situations represent an opportunity for an employee to respond, as distinct from being legally obliged to do so, or as an independent ground for discipline.[2]

However, this decision also details that an employee's failure to respond may lead to disciplinary repercussions for him or her:

Potential Consequences of Employee Silence

… there very well may be employment or evidentiary consequences for an employee who chooses not to respond to an employer's questions or requests for information. These consequences may include an employer inferring that the employee has engaged in the alleged culpable misconduct.[3]

Another decision has noted that the failure of an employee to be forthcoming in response to employer inquiries, may not – on its own – be the basis for disciplinary consequences.

While the consequences of remaining silent may ultimately lead to dismissal, the failure to explain, standing alone, does not constitute just and reasonable cause for discipline.

This second decision, however, has also noted that there are situations in which employee silence or misinformation may be the basis for discipline.[4]

Exceptions

1. Where an employee deliberately attempts to deceive his employer by a false or misleading explanation, the employee's conduct is clearly blameworthy and threatens the basis of the employment relationship.
2. The employee's behaviour is equally blameworthy where he knowingly allows his silence to damage the legitimate business interests of the employer.

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1 *Huron-Superior Catholic District School Board,* 2013 OLAA 374 (Levinson) ("Huron-Superior"
2 Huron-Superior, para. 35.
3 *Ibid*
4 *Tober Enterprises Ltd*., 1990 BCLRBD 51 (Bruce) ("Tober Enterprises"), p.9.

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SEXUAL VIOLENCE AND HARASSMENT ACT IN FORCE IN ONTARIO

The Ontario Government introduced the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment, 2016* (Bill 132 for short) on October 27, 2015. On March 8, 2016, Bill 132 received royal assent in Ontario. Bill 132 amends a number of existing statutes, including the *Limitations Act, 2012*, the *Ministry of Training, Colleges and Universities Act* and the *Occupational Health and Safety Act* (the "*OHSA*").

Bill 132 takes a comprehensive approach to sexual violence and harassment in Ontario society. It builds on the harassment and bullying reforms introduced in 2009 under the *OHSA*. It seeks to address sexual violence and harassment in college, university and private college settings, requiring these institutions to implement sexual violence policies. It eliminates the statutory limitation period for civil sexual assault claims. The preamble to Bill 132 announces:

> The Government will not tolerate sexual violence, sexual harassment or domestic violence. Protecting all Ontarians from their devastating impact is a top Government priority and is essential for the achievement of a fair and equitable society.
> All Ontarians would benefit from living without the threat and experience of sexual violence, sexual harassment, domestic violence and other forms of abuse, and all Ontarians have a role to play in stopping them.

To achieve this laudable intention, the Government requires employers, such as school boards and independent schools, to do their part in the workplace. For employers, the most significant amendments are those to the OHSA. The significant changes include:

- The existing definition of workplace harassment, established under Bill 168, is expanded to include the new workplace sexual harassment definition.
- The new workplace sexual harassment definition is:
  (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
  (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome
- Employers will have an obligation to advise employees who allege workplace harassment by a supervisor of the measures and procedures that they can follow.
- Procedures will have to be put in place to maintain the confidentiality of information obtained about an incident or complaint of workplace harassment, unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law.
- Policies will need to be updated to set out how an employee who has allegedly experienced workplace harassment and the alleged harasser, if he or she is an employee, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation.
- The general obligation to protect employees from workplace harassment has been strengthened. In addition to the above, employers must ensure that an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances.
- Finally, Ministry of Labour inspectors are given new and interesting powers. An inspector may order an employer to cause an investigation into workplace harassment to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.

These changes came into force on September 8, 2016. As of September 8, 2016, employers, such as school boards and independent schools, were required to amend their existing workplace violence and bullying policies and procedures to reflect the above changes. Those policies and procedures must now be reviewed on an annual basis after September 8, 2016.

The *OHSA* is also amended to provide employers with a quasi-defence to claims of workplace harassment. The *OHSA* expressly provides that a reasonable action taken by an employer or supervisor relating to the management and direction of employees or the workplace is not workplace harassment. Consequently, claims that a manager is harassing an employee because of a negative performance review, for example, will not constitute workplace harassment, although employers presumably will have to investigate those complaints to make this determination. A claim that a negative performance review amounts to workplace harassment will just have to continue to be dealt with in the traditional manner: with water-cooler grumbling and extended stress leaves.

In 2015, the Human Rights Tribunal of Ontario ordered the employer of two women who had been abused, harassed and sexually assaulted by the owner and principal of the employer to pay them $150,000 and $100,000 respectively for injuries to their dignity, feelings and self-respect.[1] The women, temporary foreign workers from Mexico with little or no command of English or their legal rights, were forced to engage in numerous unwanted sexual acts, all the while being threatened with deportation if they did not comply. The case shows that sexual harassment and sexual violence continues to occur in workplaces in Ontario. Bill 132 should go some distance to stopping this type of conduct once and for all.

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1. O.P.T. v. Presteve Foods Ltd.2015 HRTO 675 (CanLII)

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