SHIBLEY RIGHTON LLP
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# Education Law eBulletin

A newsletter for educators

April 2014

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## Shibley Righton Education eBulletin – Discipline Update

In the past several months, interesting decisions regarding the discipline of teachers have been raised in a variety of contexts; we are taking this edition of the eBulletin to comment on a few of these matters.

### *Ontario College of Teachers Discipline Committee v. Kowal*, 2014 LNONCTD 3

After-school supervision, always a central concern and often a topic of hot debate between teachers and administrators, was the central issue in a recent Ontario Teachers' College hearing. In this respect, stories abound regarding teachers who attempt to "beat the school buses" off the property and the end of the day. It was this type of issue that was addressed in the *Ontario College of Teachers Discipline Committee v. Kowal*, 2014 LNONCTD 3. In *Kowal*, an occasional teacher was assigned to an elementary school class. Kowal left the school at 3:05, shortly after the end of the school day and without accounting for all of the students in his class. As a result, two students from his class who were left alone and unattended in the school yard missed their respective buses. Upon learning of the incident, Kowal indicated that he was sorry, that he regretted the incident, and that he had checked the yard but did not recognize the students. He further stated that he did not have extensive experience with early primary students, and admitted that he should have taken more time with dismissal procedures. In addition to disciplinary action taken by the school board, the matter was referred to the College of Teachers for a determination as to whether the alleged actions constituted professional misconduct in the circumstances.

The College of Teachers made specific findings that leaving students unattended, failing to follow school procedures and disregarding his responsibilities as a member of a self-regulated profession constitutes professional misconduct. Significantly, after hearing testimony regarding the emotional impact on the children, including that one of the students was "…anxious about returning to school for fear that … an occasional teacher might lose him," the College held that Kowal's behaviour constituted psychological or emotional abuse of a student or students. By way of penalty, Kowal received a reprimand, had his certificate suspended for three months and was required to take, at his own expense, a course of instruction emphasizing classroom management and teacher accountability. This decision is significant and clearly places the onus on classroom teachers to supervise their students and manage the end-of-day routine in a careful and conscientious manner.

### *New Brunswick (Department of Education and Early Childhood Development) v. Canadian Union of Public Employees, Local 2745*, [2014] N.B.J. No. 20

Our next decision hails from the New Brunswick Court of Queen's Bench, and comments on the necessity that computer acceptable use policies be thorough and specific, an issue that this eBulletin

has raised in the past. This case involved an individual who had been employed in the role of a purchasing clerk for a New Brunswick school board. While working in this position, the employee made unauthorized purchases and misused her office email account by using obscenities, storing pornographic images and sending erotic messages. Initially, the school board terminated her employment for cause, which was grieved by the union. At arbitration, the arbitrator held that the appropriate disciplinary measure was a three-month unpaid suspension because, among other things, there was no evidence that the grievor had forwarded offensive photos to anyone. The board later brought an application for Judicial Review on the basis that, in fact, there was evidence that at least one offensive photo had been forwarded by the grievor from her office email account.

The Court dismissed the board's application for judicial review. The reality was that the school board's policy was broadly worded and did not clearly define the degree of privacy that employees might expect when using email for personal reasons. On this basis, the Court held that the arbitrator's findings that the misuse of email to communicate with romantic partners was a not a serious breach of the policy and that the content of her messages, even if they did include photos, did not warrant summary dismissal, were reasonable. The Court therefore upheld the arbitrator's finding that a suspension was more appropriate than summary dismissal.

As indicated in past eBulletins in which we have examined computer use, privacy and the various court decisions in *R. v. Cole*, (2012 SCC 53), school administrators; indeed, all employers must realize that employees do enjoy some privacy in their computer and electronic information. Computer use policies must be clear in their scope and application; that is, to what and to whom, they apply. Accessing electronic information, including browsing history, should be done sparingly and only when there is a genuine concern or issue. Moreover, it should be remembered that a clear computer use policy that is reiterated often is easier to enforce and keeps the policy at the front of employees' minds. Finally, it must be remembered that a practice that allows its employees any incidental use of their electronics will likely increase the employees' expectations of privacy. That said, however, it will be very difficult to create a policy in which an employee will have no expectation of privacy.

### *Ontario College of Teachers v. Floro*, 2014 LNONCTD 2

Our last comment pertains to another decision of the Ontario College of Teachers and stems from inappropriate communications and contact between a teacher and students. However, the point of this case stems from the teacher's request that his name not be published as a result of the disciplinary hearing on the basis that it could negatively impact his new career.

In short, Floro had been employed as a teacher with the Toronto District School Board between 2008 and 2010. During this time, the teacher engaged in inappropriate communications, which included making comments of a sexual nature with three students and engaging in physical contact of a sexual nature with a fourth student, which included kissing and sexual touching. At his hearing, Floro pled no contest to the allegations and admitted that the allegations constituted professional misconduct. As a result, the Discipline Committee made a finding of professional misconduct and accepted the Joint Submission on Penalty; that revocation of the teacher's certificate was the appropriate penalty for misconduct of this nature. At that time, Floro made submissions that his name need not be published to satisfy the criteria of specific and general deterrence, that his admitting to the conduct spared the students from the requirement to appear and testify and, further that publication of his name could damage his new career path. Despite the possible repercussions that publication of the teacher's name could have on his new career, the Discipline Committee held that publication of the case with Floro's name was appropriate in order to ensure transparency and to maintain the public trust.

In our view, this decision was certainly worth raising as it illustrates an increasing tendency of administrative bodies toward transparent and open hearings, and that this critical importance of an open hearing remains a pressing concern in society even as we move toward a greater privacy protections.

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