

COURT OF APPEAL FOR ONTARIO

CITATION: Fernandes v. Peel Educational & Tutorial Services Limited
(Mississauga Private School), 2016 ONCA 468
DATE: 20160614
DOCKET: C59734

Gillese, Hourigan and Pardu JJ.A.

BETWEEN

Remy Fernandes

Plaintiff (Respondent)

and

Peel Educational & Tutorial Services Limited c.o.b. as Mississauga Private
School and Gabrielle Bush

Defendants (Appellant)

Tim Gleason and Adrienne Lei, for the appellant

Gary Bennett, for the respondent

Heard: February 24, 2016

On appeal from the judgments of Justice Gordon D. Lemon of the Superior Court of Justice, dated November 12, 2014, June 18, 2015, and August 13, 2015, with reasons reported at 2014 ONSC 6506, 2015 ONSC 3753 and 2015 ONSC 5112.

Gillese J.A.:

OVERVIEW

[1] Peel Educational & Tutorial Services Limited carrying on business as Mississauga Private School (the “School”) is an accredited private school, offering classes from pre-kindergarten to grade 12.

[2] The School employed Remy Fernandes (“Mr. Fernandes” or the “respondent”) as a teacher from January 1999 until April 2009, when his employment was terminated, without notice.

[3] Mr. Fernandes sued the School and Gabrielle Bush, a co-owner of the School, alleging that he had been wrongfully dismissed. The School defended on the basis that there was just cause for dismissal.

[4] The trial judge found that Mr. Fernandes had committed acts of misconduct, including the creation of false marks and inaccurate grades and then lying to cover up the improprieties. Nonetheless, he found that the School had wrongfully dismissed Mr. Fernandes. He also found that Mr. Fernandes became disabled during the reasonable notice period. He dismissed the claim as against Ms. Bush.

[5] By judgment dated November 12, 2014, (“Judgment #1”) the School was ordered to pay Mr. Fernandes damages for wrongful dismissal amounting to one year’s salary, a small miscellaneous income loss claim, and loss of long-term disability benefits. A second judgment, dated June 18, 2015 (“Judgment #2”), quantified the value of the long-term disability benefits. A third judgment, dated August 13, 2015 (“Judgment #3”), required the School to pay Mr. Fernandes costs of \$130,000, inclusive of HST and disbursements. No costs were ordered for or against Ms. Bush.

[6] The School appeals.

[7] I would allow the appeal and dismiss the action. In my view, Mr. Fernandes' misconduct cannot be reconciled with his obligations as a teacher. It was fundamentally and directly inconsistent with Mr. Fernandes' obligations to the School and to his students. Considered in context, that misconduct was sufficiently serious that it justified dismissal without notice. Accordingly, the trial judge erred in finding that Mr. Fernandes had been wrongfully dismissed.

BACKGROUND

The School's Grading Policy

[8] The School is accredited by the Ministry of Education to grant credits towards obtaining an Ontario Secondary School Diploma. In order to maintain its private school accreditation, the School must follow the Ministry's policies, including those concerning the assessment and evaluation of student progress and achievement.

[9] The School established guidelines for the assessment and evaluation of student achievement, based on the provincial curriculum expectations and the achievement levels set by the Ministry. One of the School's policies stipulated that no zeroes or blanks could appear on a report card, except in the case of plagiarism. The School required teachers to hand in their grades in "hard copy" and on time, so that they could be used to prepare student report cards.

[10] Each school year, the School issued four report cards: in November, late January or early February, April and June. The first three report cards were interim; the fourth was the final report card.

[11] All report cards were compiled by the homeroom teacher. The interim report cards included spreadsheets and progress reports. They were then attached to a letter along with a form so that parents could request interviews.

[12] The fourth and final report cards were prepared after final exams. The final report cards had a longer comment section and a more detailed marking record. Only the final grades from the June report cards appeared on a student's official Ontario Student Record.

January 1999

[13] Mr. Fernandes began teaching for the School in January 1999. He taught computer studies for the junior, intermediate and senior school classes. He also worked for the School in the summer months, doing information technology work. Like other teachers at the School, Mr. Fernandes was involved in extracurricular activities, including as a volleyball coach and being involved in the Arts and Music Night.

[14] Until 2008, Mr. Fernandes received positive assessments for his teaching.

The 2008 Assessment

[15] Paul Edwards was the School's vice-principal in 2008. He completed Mr. Fernandes' annual assessment for the 2007/08 school year (the "2008 assessment"). The 2008 assessment was on the standardized, comprehensive four-page assessment form that covered curriculum (planning, preparation and instruction), classroom management and appearance, communication, and professionalism.

[16] In the 2008 assessment, the School expressed disappointment with Mr. Fernandes' performance in a number of areas.

[17] In the curriculum category, there were three critical comments. The first related to the video retrospective shown at the School Gala. The comment was that although the video seemed to involve considerable class time and student involvement, it was very disappointing and not representative of the School's history or of the imaginative potential of the students. Another comment was that the grade 12 yearbook course was "very problematic, with deadlines being missed badly and the administration not being informed of issues until it was almost too late". A third comment relating to curriculum was that while Mr. Fernandes was passionate about the courses he wished to teach, he took on new courses only with "real reluctance".

[18] In terms of classroom management and appearance, the 2008 assessment noted that:

- Mr. Fernandes was inflexible in his application of school policy;
- He was sometimes perceived as being inconsistent or unfair to the extent that students lost their respect for him;
- Too many students had expressed frustration and resentment about their treatment by Mr. Fernandes, saying that they did not feel they had been treated fairly but, rather, “picked on” and arbitrarily disciplined; and
- Too often, relatively minor infractions had been the basis for sending students to the vice-principal’s office when they should have been resolved by the teacher.

[19] The 2008 assessment was otherwise positive.

[20] Mr. Fernandes was not happy with his 2008 assessment and provided a two-page response to it. In his response, Mr. Fernandes explained why he disagreed with the comments noted above and concluded with the following:

I have every reason to be disappointed with my professionalism and performance, as I see the administration is not pleased, and have concerns that are not becoming of a good teacher.

I shall strive to always do my best, and always work in the best interest of the students and the [S]chool.

Having said this, I shall go out of my way to make sure [the School] excels and grows both as an educational institution and as a business in general.

Summer 2008

[21] Ms. Bush, who had previously been the school principal, and Drew Cleland became co-owners of the School through a corporation. Mr. Edwards was promoted to the position of principal of the School.

September 2008

[22] In September 2008, instead of again being named as head coach of the volleyball team, Mr. Fernandes was made the assistant coach. Consequently, Mr. Fernandes was no longer able to get the hours he needed to obtain a coaching certificate that he had been working towards.

[23] Mr. Fernandes felt that his “demotion” to assistant coach had been done to thwart his wish to become further certified. The trial judge found no evidence to support this contention.

March 2009 – A meeting between Mssrs. Fernandes and Edwards

[24] In early March 2009, Mr. Fernandes complained to Ms. Bush about Mr. Edwards. Mr. Fernandes believed that since Mr. Edwards’ promotion to principal, Mr. Edwards had begun bullying Mr. Fernandes and had given Mr. Fernandes an unmanageable workload. Ms. Bush suggested that he speak directly with Mr. Edwards.

[25] On March 10, Mr. Fernandes spoke to Mr. Edwards and asked what he could do to improve their relationship. Mr. Edwards suggested that they meet the following day to discuss the matter.

[26] When the two men met on March 11, Mr. Edwards gave Mr. Fernandes a memo which responded to his request for suggestions on how he might improve. The trial judge found that the memo was “constructive and civil”. Among other things, the memo echoed some of the same concerns that had been expressed in the May 2008 assessment.

March 2009 – Problems with grades

[27] In order for the April 2009 interim report cards to be prepared, teachers were required to submit their grades to the School’s Senior Coordinator, Nick Zero, by March 3, 2009. Mr. Fernandes submitted his grades, but there were numerous blanks and calculation errors in his reports.

[28] Mr. Fernandes was one of the few teachers to use an Excel spreadsheet when providing his marks. He had been using the spreadsheet for many years. He was not using the Markbook software program that other teachers were using and that was recommended. Usage of the Markbook program was to be mandatory beginning in September 2009.

[29] On March 10, Mr. Edwards, Ms. Bush and Mr. Zero met to discuss the grades that had been submitted by five teachers, one of whom was Mr.

Fernandes. In respect of Mr. Fernandes' grades, they were concerned about the alarming number of blanks that were recorded. If a student failed to complete an assignment or test and a blank was registered to reflect that, the computer would transform the blank into a grade of zero. Because of the large numbers of blanks in the grades that Mr. Fernandes had submitted, the grades for his classes were exceptionally low. There were also calculation errors in the grades that he had submitted.

[30] Mr. Edwards met with Mr. Fernandes to discuss the problems with his grades. Mr. Fernandes promised that he would resubmit the grades by March 13, 2009.

[31] Mr. Fernandes did resubmit the grades on March 13 but the problems had not been fixed. There were still many missing marks, the spreadsheets still calculated the blanks as zeroes, and there were still many calculation errors. After reviewing the resubmitted grades, Mr. Edwards and Ms. Bush decided to meet again with Mr. Fernandes to discuss the ongoing problems with his grades. A meeting was arranged for later that day, at which Mr. Edwards, Ms. Bush and Mr. Fernandes were in attendance.

[32] During the meeting, Mr. Fernandes agreed that there were problems with his grades but reassured the other two, saying that over the March break, once assignments had been handed in, he would fix the problems. He promised to

resubmit the grades on March 30, 2009. After the meeting, Ms. Bush asked Mr. Edwards to document the problems with Mr. Fernandes' grades.

[33] March 30 was the first day of school following March break. Mr. Edwards gave Ms. Bush the document that he had prepared, at her request, about the problems with Mr. Fernandes' grades (the "March 30 Report"). The March 30 Report referred to Mr. Fernandes' initial March 3rd grades and those that he resubmitted on March 13th and set out a number of problems that both sets of grades displayed. In both sets of grades there were two types of problems: zeroes had been left for individual students who had not completed assignments and/or presentations, contrary to the School's grading policy; and, there were inconsistencies/inaccuracies in how the grades had been calculated.

[34] The March 30 Report did nothing to allay Ms. Bush's concerns about the tardy and sloppy approach that Mr. Fernandes had taken to the preparation of student grades.

[35] Mr. Fernandes did not resubmit his grades on March 30, as he had promised.

Early April 2009

[36] On April 1 or 2, Ms. Bush and Mr. Edwards spoke again with Mr. Fernandes because he had still not resubmitted his grades. Mr. Fernandes told them that he had addressed all of their concerns but was still marking

assignments that had come in on March 30. He asked for a further extension to April 3.

[37] On April 3, Mr. Fernandes submitted his grades for the third time. Mr. Edwards and Ms. Bush reviewed them and were astonished to see that the grades were virtually perfect. This made them suspicious, particularly as the marks for the respondent's students had gone from being the worst of all of those of the staff at the School to the best. The grades indicated that all student assignments and presentations had been completed and marked. Ms. Bush was struck by the grades of one student with significant educational issues whom she had been monitoring. That student had been given a perfect score (5/5), despite having not completed all of her work in the course.

[38] At that point, Ms. Bush became concerned that the problem was bigger than the validity of the grades that Mr. Fernandes had submitted for purposes of the interim report cards. She worried that the marks upon which the grades were based might also be invalid. She asked Mr. Edwards to investigate the validity of the marks that Mr. Fernandes had given to his students for their assignments and presentations and indicated that she, too, would begin to speak to the students about their progress in Mr. Fernandes' courses.

[39] On April 8, Ms. Bush, Mr. Edwards and Mr. Zero met to review all of the teachers' grades, including those of Mr. Fernandes. At the meeting, Mr. Edwards

produced a draft report dealing with irregularities in marks given by Mr. Fernandes for the work of his students (the “April 8 Report”). This report itemized the results of the meetings that he and Ms. Bush had each had with students in Mr. Fernandes’ classes. Ms. Bush was seriously concerned about the irregularities which showed that students had been given marks for assignments that not been marked and presentations that had not yet taken place. She directed Messrs. Edwards and Zero to follow up with Mr. Fernandes after the Easter long weekend, which fell on April 10 - 13.

April 13 to 17

[40] The testimony of the parties diverged on the meetings that took place in the week of April 13, 2009, leading up to the termination of the respondent’s employment with the School.

[41] The School’s witnesses testified that there were three meetings that week: (1) on April 14, between the respondent and Messrs. Edwards and Zero; (2) on April 16, between the respondent, Mr. Edwards and Ms. Bush; and (3) on April 17, between the respondent, Ms. Bush and Mr. Cleland.

[42] Mr. Zero testified that when he and Mr. Edwards met with Mr. Fernandes on April 14, Mr. Fernandes was given an updated version of the April 8 Report.¹

¹ The version of this report that was entered as an exhibit at trial is dated April 15, but the witnesses agreed that it was the same document provided to Mr. Fernandes at the meeting between him, Mr. Zero and Mr. Edwards.

Mr. Edwards then read a significant portion of the document to Mr. Fernandes. Mr. Fernandes offered no response when asked why he had awarded marks for assignments that had not been marked and presentations that had not yet occurred. Mr. Zero said that Mr. Edwards did not berate Mr. Fernandes but told him that the marking was sloppy. Mr. Zero thought the meeting lasted perhaps 8-10 minutes.

[43] April 15 was Arts and Music night at the School. That evening, Mr. Edwards looked in Mr. Fernandes' classroom for unmarked papers, which he found. He finalized his report and gave it to Ms. Bush that evening or the following morning.

[44] Ms. Bush and Mr. Edwards testified that they met with Mr. Fernandes on April 16, at which time they gave him Mr. Edwards' final report, which included the following conclusion:

Mr. Fernandes appears to have fabricated marks on a number of occasions. He has entered marks in his records before students have done the work or even submitted the assignments. Mr. Fernandes has entered marks for assignments that he has not marked. This appears to be a case of academic fraud.

[45] Ms. Bush testified that Mr. Fernandes initially said he did not agree with the report and claimed that his marks were accurate. However, after Mr. Edwards suggested that the students be called in to talk about the report, Mr. Fernandes started to cry, admitted he had falsified his marks, and said he was sorry. Ms.

Bush said that she told Mr. Fernandes that the matter was extremely serious, it was fraud to falsify his records, and his conduct was grounds for termination. Mr. Fernandes expressed concern about his daughters' tuition-free status at the School. He agreed to meet with Ms. Bush and Mr. Cleland the following morning to discuss how the situation would be handled.

[46] On the morning of April 17, Ms. Bush and Mr. Cleland met with Mr. Fernandes. Ms. Bush testified that she advised Mr. Fernandes that his employment was terminated for cause effective immediately because he had falsified student records, which was academic fraud, and that Mr. Fernandes agreed and accepted the termination. Ms. Bush said that Mr. Fernandes was apologetic, did not retract anything that had been said, denied that anything was going on in his life that was troubling or distracting him, and repeated the same admissions he had made the previous day. He spoke about wanting to resign, rather than have his employment terminated.

[47] At Mr. Fernandes' request, Ms. Bush agreed to meet again with him on Monday, April 20, 2009, to "talk about what we were going to tell people, how he could save face and to really firm up some sort of an arrangement with his daughters."

[48] At trial, Mr. Fernandes testified that there were only two meetings: (1) on April 16, when he met with Messrs. Zero and Edwards; and (2) on April 17, when

he met with Ms. Bush and Mr. Cleland. He denied that he met with Ms. Bush on April 16, denied that there was any discussion of academic fraud at the April 16 meeting, denied that he had confessed to falsifying marks at the April 16 meeting, and denied that he had been terminated for cause on April 17. He testified that at the April 17 meeting, Ms. Bush told him that he needed to resign and he told her that he would respond in writing on Monday, April 20.

[49] Suffice to say at this point that the trial judge rejected Mr. Fernandes' version of what had transpired that week and accepted the evidence of Ms. Bush and Mr. Zero. He found as fact that Mr. Fernandes was terminated on April 17, 2009.

After April 17

[50] Mr. Fernandes did not attend the April 20 meeting that he had requested because he felt ill. He went to the doctor that day. The doctor gave him a note which read "Due to work related stress, Mr. Fernandes will be off work until further notice." His wife faxed the note to the School.

[51] That same day, Ms. Bush wrote a letter² to Mr. Fernandes, saying "on Friday, April 17, 2009, we advised you in person that your employment with [the School] was terminated, for cause, effective that day, as you had continually and

² The trial judge refers to the "April 20 letter" but it appears from the record that the letter is dated April 21.

repeatedly failed to comply with your duties and responsibilities as a teacher, and as an employee of [the School]”.

[52] The interim report cards were sent out on April 17, the same day that Mr. Fernandes was terminated. They included the student grades that Mr. Fernandes had submitted. Ms. Bush testified that although those grades were not a true reflection of the students’ progress at that time, there was insufficient time to rectify them. Mr. Edwards and Ms. Bush knew that the School had a big task ahead of it in terms of re-evaluating and re-assessing all of the work of all of the students in all of Mr. Fernandes’ classes. While Ms. Bush was confident that the work could be done in time for the final report cards in June, it could not be done in time for the April interim report cards.

[53] The School continued to provide bus service and free tuition for Mr. Fernandes’ two daughters for the balance of the academic year.

[54] With the help of the new teacher hired to replace Mr. Fernandes, the School re-assessed and re-evaluated all of the marks that the respondent had assigned to each student to ensure their validity. The final marks contained in the June report cards (and which appear on a student’s Ontario Student Record) were correct.

The Trial

Witnesses for the Plaintiff

[55] Mr. Fernandes testified. So, too, did his two treating physicians: Dr. Sahheed and Dr. Joshi. Dr. Sahheed was Mr. Fernandes' family physician. Dr. Joshi was his treating psychiatrist.

[56] Dr. Sahheed testified that Mr. Fernandes had major depression arising from his loss of employment. In his opinion, Mr. Fernandes was not able to return to work as a teacher or anywhere else.

[57] Dr. Joshi testified that Mr. Fernandes had major depressive disorder, mixed with anxiety, panic attacks and posttraumatic stress disorder. In his view, the major cause of Mr. Fernandes' medical difficulties was the termination of his employment as a teacher. Other causes were his financial stress, the fact that he had to sell his home, and his feelings of shame, guilt and worthlessness because he was not working.

[58] Mr. Fernandes also called Matthew Williamson, the regional manager of the Hamilton Disability Management Service Office of Great-West Life Insurance Co., the School's insurer. At the time of testifying, Mr. Williamson had been employed by Great-West Life for 13 years.

[59] Mr. Williamson testified that he reviewed Mr. Fernandes' application for disability benefits and denied the claim by letter on April 21, 2014. He determined

that Mr. Fernandes was ineligible for benefits because Mr. Fernandes was not employed on the date of disability. However, he testified that he had also reviewed the medical information submitted by Mr. Fernandes' physicians and concluded Mr. Fernandes did not qualify for disability benefits, even if he were employed.

[60] As Mr. Williamson's letter explained, "disability is assessed on the basis of the duties a person regularly performed for the employer before the disability started." A person is considered disabled under the policy "if, because of disease or injury, there is no combination of duties [the person] can perform that regularly took at least 60% of [his or her] time at work to complete." According to the letter, the medical information provided to the insurer by counsel for Mr. Fernandes was insufficient to support the level of functional impairment that he was claiming.

Witnesses for the Defendants

[61] Six witnesses from the School testified at trial: Beatrice Chachel (a long-time administrative employee), Nick Zero, Travis Cox (who coached volleyball at the School), Paul Edwards, Drew Cleland, and Gabrielle Bush.

[62] The School also led the evidence of Robert Semone, an alumnus. Mr. Semone had been a student of Mr. Fernandes several years before his dismissal and testified that, even though he believed he had failed an examination in Mr. Fernandes' class by submitting only two lines of code for the whole examination,

he received a 72 on the examination and a 74 in the course. Mr. Semone had never spoken to anyone about this incident until shortly before the trial, when Ms. Bush approached him. He agreed that his memory was hazy and he was unsure about certain details.

[63] The trial judge found Mr. Semone's evidence to be insufficiently reliable to be of assistance in reaching his findings.

THE DECISION BELOW

Credibility Findings

[64] After introducing the parties and issues that divided them, the trial judge made credibility findings. He stated that Mr. Fernandes gave his evidence in a credible fashion, admitted things even though many were not to his benefit, and acknowledged that his record-keeping was sloppy, incorrect and late.

[65] The trial judge found that Mr. Fernandes lied to the court on at least two occasions. First, Mr. Fernandes lied to the court when he said that he could give marks before student presentations were completed since the presentations did not form part of the students' marks. Second, he lied about the events of the week of April 13.

[66] The trial judge concluded that where there was no corroboration of Mr. Fernandes' evidence, he had to treat it "with great caution".

[67] Of the six School witnesses, the trial judge accepted the evidence of Ms. Chachel, Mr. Zero and Ms. Bush and rejected that of Mssrs. Cleland and Edwards. He did not assess Mr. Cox's credibility.

[68] In respect of Ms. Chachel, he found no reason to reject her evidence.

[69] The trial judge found that Mr. Zero, although still a teacher at the School, showed no bias in relation to the parties involved in this dispute. He stated that where Mr. Zero's evidence differed from that of other witnesses who had "a greater interest in the outcome of the trial", he "relied on Mr. Zero and his recollections".

[70] He found Ms. Bush to have given clear and candid evidence that was not shaken in cross examination. He stated that he had no reason to reject her evidence.

[71] Mr. Cleland's involvement with this matter was limited to attending the last meeting with Mr. Fernandes on April 17 and preparation of the record of employment for Mr. Fernandes. Mr. Cleland prepared that document in September 2009 but dated it April 2009. The trial judge stated that he did not place any reliance on Mr. Cleland's evidence.

[72] The trial judge found that Mr. Edwards had an "ill-disguised dislike of Mr. Fernandes" and was "a bully in this piece". He stated that where Mr. Edwards'

evidence differed from that of any other witness, he rejected Mr. Edwards' evidence.

Findings on Mr. Fernandes' Marks and Grades

[73] The trial judge noted that Mr. Fernandes admitted the following:

- his marks were late;
- his calculations for both student and class averages were incorrect;
- some marks were deleted in error;
- midterm progress report marks were not ready on March 3 or on March 13;
- he gave full marks to students who had not completed their assignments even though he knew that it was School policy that one could not get a perfect score for an incomplete assignment; and,
- in one case, he left out the February and March test results.

[74] The trial judge noted that the number of students who failed to hand in assignments (20 out of 30-35 students prior to March break) suggested a teacher who could not or would not get his students to comply with course requirements.

[75] He also noted that Mr. Fernandes was aware of the School grading policy that a zero grade could only be given for assignments in cases of plagiarism but did not follow it. The trial judge added:

Simply saying that his own computer spreadsheet would not properly complete the calculation is not a satisfactory answer to the administration's complaint, particularly when it comes from the computer science teacher.

[76] He found that Mr. Fernandes lied to the court when he testified that because certain presentations were voluntary, students who had not completed the presentation could nonetheless be given full marks for that part of the course. The fact that students who had not completed a presentation were given full marks for that assignment was a significant concern of the School, and Mr. Fernandes' email to a student about the presentation confirmed that the presentations were to be marked as part of the course.

[77] The trial judge found that throughout March 2009, Mr. Fernandes did an incompetent job of assessing and marking his students and recording those marks. He concluded that "Mr. Fernandes was not getting the job done."

Findings on the Meetings between April 13 and 17, 2009

[78] The trial judge found, as the School's witnesses had testified, that three meetings took place in the week of April 13, 2009. He also found that in the meetings of April 16 and 17, 2009, Mr. Fernandes admitted to wrongdoing, including falsifying student marks.

Date of Dismissal

[79] The trial judge found that the School terminated Mr. Fernandes' employment on Friday, April 17, 2009. In making this finding, the trial judge pointed to the facts as found above in relation to the meetings of that week and Mr. Fernandes' admissions in two of those meetings; Ms. Bush's letter of April 20, 2009, which confirmed April 17 as the date of dismissal; and when Mr. Fernandes said he would prepare a written response to the allegations over the weekend of April 18-20, Ms. Bush responded that there was no need to do that. The trial judge viewed her response as consistent with the fact that by that time, Mr. Fernandes' employment with the School had already been terminated.

No Just Cause

[80] The trial judge quoted extensively from paras. 48-57 of *McKinley v. B.C.Tel.*, 2001 SCC 38, [2001] 2 S.C.R. 161, the leading Canadian case on dishonesty as a basis for termination of the employment contract.

[81] In determining whether there was just cause, the trial judge considered that Mr. Fernandes:

1. gave incorrect marks that were delivered late;
2. allowed students to have overdue assignments;
3. used a computer program that did not provide accurate marks despite the fact that he was the computer teacher;

4. lied to his employer about how the marks were calculated until the meeting on April 16;
5. lied to the court about how the student presentations were marked; and
6. falsified marks on students' records.

[82] He then noted that Mr. Fernandes had been employed with the School for more than 10 years and said that up until the spring of 2009, Mr. Fernandes was a well-regarded teacher with no deficiencies that required remedial steps or termination.

[83] The trial judge stated that although the School found out in April 2009 that Mr. Fernandes had created incorrect marks, those marks were still produced to the students and parents without comment on their accuracy. He said that because the School knowingly sent out the false marks, those marks “were not as serious to either the [S]chool or the students as the defendants would submit. If this were such an egregious failing on the part of Mr. Fernandes, the marks would not have been released.”

[84] The trial judge stated that after balancing the various considerations, termination was not the appropriate sanction for the misconduct. In his view, the School could have fashioned a reprimand and given a warning that such conduct, if repeated, would lead to summary dismissal. He said that the “rather abrupt change” in Mr. Fernandes’ professional behaviour should have led the

School to make more of an effort at enquiry to assist Mr. Fernandes rather than terminate his employment without proper notice.

[85] He concluded that Mr. Fernandes had been wrongfully dismissed because “the punishment outweighs the seriousness of the infraction.”

[86] Later in his reasons, when determining the length of the reasonable notice period, he observed that, “for whatever reason”, by the spring of 2009, it was obvious that Mr. Fernandes was coming to the end of his abilities as a schoolteacher.

Long-term Disability Benefits

[87] The trial judge found that Mr. Fernandes became disabled after his employment was terminated on April 17, 2009. This finding was based on Mr. Fernandes’ testimony that his medical problems started on April 17 and that prior to that time his only medical difficulty was with diabetes.

[88] Based on the testimony of Dr. Sahheed and Dr. Joshi, the trial judge also found that Mr. Fernandes would not be gainfully employed, within the meaning of the insurance policy, before the age of 65.

[89] The trial judge referred to the fact that the insurer denied Mr. Fernandes’ claim not only because it was made after termination but also because it did not include medical documentation on his cognitive functioning or his functions in his activities of daily living. He rejected the School’s submission that without that

type of evidence, he could not find Mr. Fernandes disabled within the meaning of the insurance policy.

[90] The trial judge was critical of the School for failing to provide Mr. Fernandes with the application forms for long-term disability benefits, when he requested them. Those forms were not provided until sometime during the litigation.

[91] The trial judge said that but for the acts of the School, Mr. Fernandes would have been employed, applied for the benefits in time, and qualified for the benefits. Having found that the School prevented Mr. Fernandes from making the claim, he concluded that the School was liable for Mr. Fernandes' lost disability benefits.

Claim for Mental Distress

[92] In his statement of claim, the respondent sought, among other things, damages for intentional and negligent infliction of emotional and mental distress, aggravated damages and punitive damages. The trial judge stated that these claims had been narrowed in argument to a claim for intentional infliction of mental distress. He dismissed that claim, however, saying:

- based on Mr. Edwards' findings and Mr. Fernandes' admitted wrongdoing, the steps taken by the School's administration cannot be seen as flagrant and outrageous;

- the School administration's dismay at Mr. Fernandes' conduct was understandable and there was no evidence it was calculated to do him harm;
- despite the School's beliefs as to what had transpired, it kept the grounds for Mr. Fernandes' termination as quiet as possible; and
- the School maintained Mr. Fernandes' daughters' education in place for the balance of the school year.

Claim against Ms. Bush

[93] The trial judge dismissed the action as against Ms. Bush personally, saying that based on the information which she had at the time of termination, it would have been negligence on her part had she failed to act as she did.

Costs

[94] The trial judge ordered the School to pay Mr. Fernandes costs of \$130,000, all inclusive. Included in this figure were the costs associated with the School's abandoned counterclaim.

[95] The School had counterclaimed for damages for: the cost of rectifying problems with the School computers allegedly resulting from Mr. Fernandes' negligent maintenance of them; the costs of tuition and busing for his two daughters after termination of his employment; and, harm to the School's reputation as a result of Mr. Fernandes' acts. The School withdrew its

counterclaim at the outset of trial, without notice. Ms. Bush testified that the School withdrew the counterclaim in order to avoid having to bring students and parents in to testify about the damage to the School's reputation, and to avoid prolonging the trial and Ms. Bush's absence from the School any longer than was absolutely necessary.

[96] At para. 27 of his costs endorsement, dated August 13, 2015, the trial judge stated that the costs associated with the withdrawal of the counterclaim "should fall solely on the party causing [the withdrawal]".

THE ISSUES

[97] The appellant alleges that the trial judge:

1. made findings of fact and credibility that were irreconcilable with the evidence before him and/or other of his findings;
2. misapprehended the evidence, failed to consider relevant evidence and considered irrelevant evidence;
3. erred in his application of the law relating to dishonesty as a basis for termination of employment; and
4. erred in ordering costs in favour of the respondent that included substantial indemnity costs for the defence to the School's withdrawn counterclaim.

ANALYSIS

ISSUES #1 and #2 Did the trial judge make erroneous findings and/or misapprehend the evidence?

[98] In issues #1 and #2, the School takes exception to a number of the trial judge's findings. It says that certain of those findings are incompatible with his determination that Mr. Fernandes' evidence had to be treated with great caution and/or his rejection of Mr. Fernandes' allegation that beginning in September 2008 the Administration was engaged in a malicious conspiracy to have him removed from the school. (In respect of the latter, the trial judge said that there was nothing in the evidence that could support such a theory.)

[99] The School also points to the trial judge's statement that he would prefer Mr. Zero's evidence over that of interested witnesses. It says the trial judge then preferred Mr. Fernandes' evidence over that of Mr. Zero on certain events without explanation.

[100] Other complaints relate to the trial judge's finding that Mr. Fernandes was disabled within the meaning of the School's insurance policy. The School says that the trial judge failed to consider Mr. Williamson's evidence on this matter and also failed to consider the meaning of "disability" within the insurance policy. While the School acknowledges that the policy was not before the court, it says that the trial judge should have referred to the definition of "disability" in the policy

which was contained in Mr. Williamson's letter to the respondent. It also takes exception to the way in which the trial judge treated the evidence of Dr. Sahheed and Dr. Joshi.

[101] As I explain in my analysis of Issue #3, the trial judge erred in his application of the relevant legal principles when determining whether Mr. Fernandes' conduct was just cause for dismissal. A correct application leads to the conclusion that the School had just cause to dismiss Mr. Fernandes. Accordingly, it is unnecessary to deal with the many alleged factual errors raised in the first two grounds of appeal.

ISSUE #3 Did the trial judge err in his application of the law?

[102] In my view, the trial judge erred in finding that Mr. Fernandes had been wrongfully dismissed. His errors lay in his application of the legal principles set out in *McKinley* for determining whether an employee's misconduct³ gives rise to just cause for summary dismissal.

The Governing Legal Principles

[103] The governing legal principles can be found at paras. 48-49 of *McKinley*. Justice Iacobucci, writing for the court, states that whether an employer is justified in dismissing an employee on the grounds of misconduct is a question

³ In *McKinley*, the words "dishonesty" and "misconduct" are used interchangeably. See, for example, the first sentence of para. 48.

that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's misconduct gave rise to a breakdown in the employment relationship. He notes that the test can be expressed in different ways: just cause for dismissal exists where the misconduct violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

[104] The principle of proportionality underlies this approach: an effective balance must be struck between the severity of an employee's misconduct and the sanction imposed: *McKinley*, at para. 53.

[105] In *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65, at paras. 49-50, this court, following *McKinley*, concluded that the core question is whether the employee's misconduct was sufficiently serious that it struck at the heart of the employment relationship. To answer that question, the court must:

1. determine the nature and extent of the misconduct;
2. consider the surrounding circumstances; and
3. decide whether dismissal was warranted.

Application of the Legal Principles

1. Nature and Extent of the Misconduct

[106] In this step, the court must determine the nature and extent of the misconduct and assess its seriousness: *McKinley*, at para. 49. In the present case, the trial judge made the requisite findings in respect of Mr. Fernandes' misconduct but failed to assess its seriousness.

[107] The trial judge found that Mr. Fernandes' misconduct in March and April of 2009 consisted of:

- assigning both incorrect and false marks for individual students' assignments and presentations;
- submitting grades to the administration that he knew were inaccurate, with the knowledge that the grades would be used in producing the April interim report cards;
- despite repeated opportunities to rectify the inaccuracies in his grades, resubmitting the grades two additional times, knowing that they were false and/or inaccurate;
- repeatedly lying to his employer about the grades, in an attempt to cover up their improprieties; and

- admitting to the inaccuracies and falsity of the marks and grades only when Ms. Bush and Mr. Edwards said they would call in the students to get to the bottom of the irregularities.

[108] These findings were fully available to the trial judge. Indeed, on the record, they are inescapable.

[109] However, the trial judge failed to then go on and assess the seriousness of the misconduct. His only discussion of seriousness related to the incorrect grades that Mr. Fernandes had provided. The trial judge said that because the School sent out the April interim report cards, knowing of the irregularities of Mr. Fernandes' grades and without comment as to their accuracy, Mr. Fernandes' conduct in providing inaccurate and false marks was not as serious as the School contended.

[110] With respect, this single comment on only one aspect of Mr. Fernandes' misconduct, fails to address the seriousness of that misconduct in any meaningful way and constitutes legal error.

[111] Teachers occupy a special position of trust. In *Ross v. New Brunswick District No. 15*, [1996] 1 S.C.R. 825, at para. 43, the Supreme Court described that special position of trust in the following way:

Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a

teacher bears directly upon the community's perception of the ability of the teacher to fulfil such a position of trust and influence, and upon the community's confidence in the public school system as a whole.

[112] One of a teacher's most important professional obligations is to fairly and properly evaluate and assess student progress and achievement. The School trusted Mr. Fernandes to fulfill his professional duties as a teacher, including those relating to the assessment of his students. So, too, did his students and their families.

[113] Mr. Fernandes' misconduct went far beyond mere negligence or incompetence. Failing to properly assign marks and evaluate student progress; falsifying students' grades; repeatedly lying to his employer – these intentional acts constitute serious misconduct.

2. The Surrounding Circumstances

[114] In this step, the court must consider the particular circumstances of both the employee and the employer. In relation to the employee, the court should consider such factors as his or her age, employment history, seniority, role and responsibilities. In relation to the employer, the court should consider such things as the type of business or activity in which the employer is engaged, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee: *Dowling*, at para. 52.

i. The Employee's Circumstances

[115] In relation to Mr. Fernandes' circumstances, the trial judge considered his age and employment history. He noted that Mr. Fernandes had been employed with the School for more than 10 years and that until the spring of 2009, Mr. Fernandes was a well-regarded teacher.⁴ At other places in his reasons, the trial judge observed that until at least the spring of 2008, Mr. Fernandes had been a dedicated and loyal teacher and was committed to extracurricular activities in addition to his teaching responsibilities.

[116] However, the trial judge failed to consider one significant matter: Mr. Fernandes offered no explanation for his misconduct. In the meetings during the week of April 13-17, Mr. Fernandes said there was nothing going on in his life that was troubling him or distracting him from fulfilling his teaching responsibilities.

[117] The absence of any explanation for the misconduct is underscored by two of the trial judge's other findings. First, Mr. Fernandes became ill only after his employment was terminated. This finding was based on Mr. Fernandes' testimony that his medical problems started on April 17, 2009, and that prior to that time, his only medical difficulty was with diabetes. Second, the trial judge found that "for whatever reason", by the spring of 2009, it was obvious that Mr. Fernandes was nearing the end of his abilities as a school teacher. From this, I

⁴ This ignores the criticisms contained in Mr. Fernandes' 2008 teaching assessment.

understand that there was no reason discernible to the trial judge to help explain or understand the misconduct.

ii. The Employer's Circumstances

[118] While the trial judge considered the employee's circumstances, he failed to consider those of the employer. This, too, constitutes legal error.

[119] The School was a private school whose accreditation from the Ministry depended upon it meeting its obligations in respect of granting credits towards earning an Ontario Secondary School Diploma. If the School did not comply with the requisite assessment and evaluation standards, it could have lost its right to grant such credit. Had that taken place, it is self-evident that the School would have suffered serious harm. The respondent's misconduct exposed the School to that potential harm, harm of which the respondent acknowledged he was aware.

[120] The fact that the School did not actually suffer that harm is not the point. It is the severity of the potential harm that must be considered when assessing the seriousness of the misconduct: *Lepire v. National Bank of Canada*, 2004 FC 155, 267 F.T.R. 138.

[121] Further, the terms of his contract of employment required Mr. Fernandes to "carry out his duties in a professional manner that is compatible with the philosophy of the school." Mr. Fernandes' misconduct in terms of his failure to

fairly assess and evaluate his students in accordance with the School's policies amounted to a breach of that term.

[122] Finally, as has already been mentioned, the School reposed a large degree of trust in Mr. Fernandes to fairly and correctly assign marks and grades to his students.

3. Was Dismissal Warranted?

[123] In this step of the analysis, the court must consider the nature, extent and seriousness of the misconduct (step one) in the context of the surrounding circumstances (step two) to decide whether there was just cause for dismissal.

[124] For the reasons already given, a consideration of the full range of misconduct leads to the conclusion that it was very serious. That misconduct – particularly, the intentional disregard for the fair and accurate grading of his students – was incompatible with Mr. Fernandes' professional obligations as a teacher and with the essential conditions of his employment obligations. No explanation was offered for the misconduct. None is evident on an examination of the record.

[125] The misconduct put into jeopardy the School's continued operation as an accredited private school and destroyed the trust that the School reposed in Mr. Fernandes.

[126] As *McKinley* stresses, the misconduct must be considered in context. It consisted of acts over a period of approximately 2 months, by an employee who had served the School for just over ten years. The duration of the misconduct was short, when compared to the overall period of employment. Nonetheless, in my view, it struck at the very heart of the employment relationship, thereby giving rise to its breakdown. Consequently, there was just cause for Mr. Fernandes' dismissal.

[127] I would conclude simply by noting that, on the findings of the trial judge, Mr. Fernandes' employment was terminated for cause before he became disabled. Therefore, he is not eligible for long-term disability payments.

ISSUE #4 Did the trial judge err in his costs award?

[128] The School seeks leave to appeal the costs award contained in Judgment #3. It argues that the trial judge erred because he included costs on a substantial indemnity basis for the School's abandoned counterclaim and substantial indemnity costs should be reserved for rare cases of reprehensible conduct. The School maintains that its counterclaim was legitimately conceived and that it was withdrawn for practical reasons. Therefore, the School says, its actions did not amount to reprehensible conduct and substantial indemnity costs were not properly ordered in respect of the defence to the counterclaim.

[129] As I would allow the appeal, the costs order below falls away. Accordingly, I find it unnecessary to determine whether to grant leave to appeal the costs award.

DISPOSITION

[130] For these reasons, I would allow the appeal, dismiss the action and set aside all of Judgments 1, 2 and 3.⁵

[131] I would order costs of the appeal to the School, fixed in the amount of \$30,000, all inclusive. I would order costs of the trial to the School, fixed at \$75,000, all inclusive. In setting the quantum of the trial costs, I reduced the amount by \$10,000, to allow for the costs associated with the School's withdrawn counterclaim.

“E.E. Gillese J.A.”

“I agree. C.W. Hourigan J.A.”

⁵ I recognize that para. 5 of Judgment #1 remains valid, as it orders the dismissal of the action against Ms. Bush and no appeal was taken against that. However, as I would dismiss the action, the effect is to dismiss it against both the School and Ms. Bush.

Pardu J.A. (Dissenting):

[132] With respect to my colleagues who view the matter differently, I would dismiss the appeal.

[133] I agree that the core issue before the trial judge was whether Mr. Fernandes' misconduct was sufficiently serious that it struck at the heart of the employment relationship. This was a ten-day trial. The trial judge had the advantage of hearing evidence from the persons involved. He was in a better position than an appellate court to assess the misconduct in the context of a ten-year, mostly satisfactory employment relationship.

[134] I am not persuaded that the trial judge failed to consider the seriousness of the misconduct or the extent to which it impacted the employment relationship. He cited the appropriate governing authority, *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161. He also explicitly considered the seriousness of the misconduct, at paras. 179-81 of his reasons:

Over six weeks between March 1 and the middle of April, Mr. Fernandes created marks that, when the administration found out that they were wrong, were still produced by the administration to students and parents without comment on their accuracy. The fact that the school knowingly sent out the false marks confirms that these interim marks were not as serious to either the school or the students as the defendants would submit. If this were such an egregious failing on the part of Mr Fernandes, the marks would not have been released.

Although the defendants referred to this as “academic fraud”, that is a very dramatic way of describing a few students who were marked on presentations that they had not yet given. That presentation was only one part of one course and the presentation made up only one part of the overall mark.

And finally, although belatedly, Mr Fernandes admitted his conduct to the administration.

[135] The trial judge determined that immediate termination was not the appropriate sanction for Mr. Fernandes’ misconduct and that the appellant could have made more of an effort to inquire into the reason for the change in Mr. Fernandes’ professional behaviour and to assist him. The appellant also could have fashioned a reprimand short of dismissing him without notice. In the trial judge’s words, “the punishment outweigh[ed] the seriousness of the infraction.”

[136] I agree with the analysis of Turnbull J.A., dissenting in *Henry v. Foxco Ltd.*, 2004 NBCA 22, 269 N.B.R. (2d) 63, at paras. 17-22, 27-33, that the assessment of whether misconduct is sufficiently serious as to merit termination without notice is a question of fact, to which an appellate court owes deference. He cited *McKinley*, in which Iacobucci J. noted, at para. 49, “assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.”

[137] Turnbull J.A. concluded, at para. 22:

Thus, absent a palpable and overriding error, there is no basis for appellate interference with the trial judge's factual conclusions. Moreover, an appellate court must not substitute its opinion for that of the trial judge, unless the latter's opinion is unreasonable, that is, "nothing [in the trial record] could have justified the judge's conclusion." See *Gallant v. Thibodeau* (1998), 206 N.B.R. (2d) 336 (C.A.) at paras. 12-16.

[138] I would reject the appellant's submissions challenging the trial judge's findings of fact and credibility. They are, in substance, an invitation to this court to retry the case. The factual findings made by the trial judge were reasonably open to him on the evidence. They were detailed and carefully made. I see no palpable and overriding error in his factual findings or conclusions.

[139] I turn next to a consideration of the relief granted.

[140] The appellant does not challenge the trial judge's assessment of the 12-month notice period. Instead, it submits that the trial judge erred in awarding the respondent the disability benefits to which he would have been entitled but for the termination without notice.

[141] The evidence of the respondent's medical problems was, according to the trial judge, "essentially unchallenged": para. 204. Mr. Fernandes' family physician, Dr. Sahheed, testified that Mr. Fernandes had major depression, that he had not improved since the events of 2009, and that he was not able to return to work as a teacher or to work anywhere else. Dr. Sahheed's opinion was that

the cause of Mr. Fernandes' medical difficulties was the workplace environment and what had occurred there.

[142] Mr. Fernandes' treating psychiatrist, Dr. Joshi, also testified. In his opinion, Mr. Fernandes had major depressive disorder, along with anxiety neurosis, panic attacks, and posttraumatic stress disorder. Dr. Joshi was also of the view that the major cause of Mr. Fernandes' difficulties was the termination of his employment, and that he would not be able to return to work in the future.

[143] The appellant did not lead any contrary medical evidence. Instead, it argued that the trial judge could not find Mr. Fernandes disabled within the meaning of the insurance policy without further medical evidence.

[144] Mr. Williamson, a regional manager working for the appellant's insurer, testified that the primary reason he denied Mr. Fernandes' application for disability benefits was because the respondent applied after he was already terminated and outside the notice period. He also testified that he denied the application because after reviewing the medical information submitted by Mr. Fernandes' physicians, he concluded there was not enough medical evidence of the respondent's functional impairment for him to qualify for disability benefits. Mr. Williamson summarized the terms of the insurance policy in the letter he wrote to Mr. Fernandes' counsel, dated April 21, 2014, in which he denied the respondent's claim for benefits:

Definition of Disability

During the initial assessment period shown in the Table of Benefits, disability is assessed on the basis of the duties of a person regularly performed for the employer before disability started. He is considered disabled if, because of disease or injury, there is no combination of duties you can perform that regularly took at least 60% of your time at work to complete.

If disease or injury prevents a person from performing a duty, it will also be considered to prevent him from performing

- 1) Others that are performed only in order to complete that duty, and
- 2) Others that can only be performed after that duty is complete.

[145] However, given the uncontradicted evidence that the respondent was entirely incapable of work, there is no palpable and overriding error tainting the trial judge's conclusion that the respondent was, in fact, disabled within the meaning of the policy. In response to questions from the trial judge, Mr. Williamson agreed that, leaving aside any issues related to the timing of Mr. Fernandes' application for disability benefits, if there was adequate medical evidence demonstrating, on a balance of probabilities, that Mr. Fernandes was unable to work, the benefits could be approved.

[146] In addition, the trial judge found that but for the appellant's wrongful termination without notice, Mr. Fernandes would have been eligible to claim disability benefits for a period of time even after his termination and that he would have applied in time. Again, I see no error in this conclusion.

[147] Finally, I would not interfere with the trial judge's award of substantial indemnity costs on the counterclaim. The appellant maintained the counterclaim for five years, only withdrawing it without notice at the commencement of trial. The trial judge observed that the counterclaim did not appear to have much validity, and that the appellant had not defended it to any great extent in its cost submissions. The trial judge therefore concluded that the appellant should bear the costs of its conduct.

[148] There being no palpable and overriding error identified, in my view, the appeal must be dismissed.

Released: June 14, 2016 ("E.E.G.")

"G. Pardu J.A."