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2004 CanLII 16867 (ON SCDC)

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MacFARLAND, SWINTON and LINHARES de SOUSA JJ.

B E T W E E N:	)	
	)	
JAGDISH BHADAURIA	)	*Jagdish Bhadauria*, the Defendant
	)	(Appellant) *In Person*
Defendant (Appellant)	)	
	)	
- and -	)	
	)	
ONTARIO COLLEGE OF TEACHERS	)	*David E. Leonard*, for the Plaintiff
	)	(Respondent)
Plaintiff (Respondent)	)	
	)	
- and -	)	
	)	
THE ATTORNEY GENERAL OF ONTARIO	)	*Mark Crow*, for the Intervenor
	)	
Intervenor	)	
	)	
	)	
	)	**HEARD:** May 31, 2004

MacFarland J.

[1] This is an appeal brought pursuant to section 35 of the *Ontario College of Teachers Act*, 1996 from a decision of the Discipline Committee of the Ontario College of Teachers made March 5, 2003.

[2] The facts giving rise to the complaint have been the subject of extensive media coverage at the time and are well known.

[3] The appellant in 1989 wrote two letters to the then out-going director of the Toronto Board of Education and directed copies thereof to other members of the Board. The letters were offensive and unprofessional. As the result of writing those letters the Board terminated Mr.

Bhadauria's employment as a teacher. The grievance procedure initiated by the appellant went to the Supreme Court of Canada which upheld the employer's decision to terminate Mr. Bhadauria. In writing for the Court, Mr. Justice Cory, at paragraph 53 of the Judgment had this to say about the letters:

> There can be no doubt that the opinions expressed and the wording used in the letters of Mr. Bhadauria constituted very significant if not extreme misconduct. The letters did not simply express dissatisfaction with working conditions; they were threats of violence. The fact that they may have been written outside the hours of teaching duty cannot either excuse or alleviate the seriousness of the misconduct.

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[4] These comments by the Court are of assistance in dealing with Mr. Bhadauria's first ground of appeal. It is essentially that his conduct in writing the letters was purely a matter of "labour relations" and not a matter of discipline and hence the College had no jurisdiction at all to deal with the complaints because they were not matters of discipline and could not therefore constitute professional misconduct.

[5] We are all of the view that this ground of appeal is entirely without merit. The Supreme Court could not have been clearer, the two letters constituted "significant if not extreme misconduct". The issue has been finally determined by the Supreme Court, there can be no doubt but that the two letters which the Discipline Committee considered constituted professional misconduct and its decision that they did is entirely reasonable.

[6] For reasons given at the outset of the hearing, we refused to hear Mr. Bhadauria's appeal on the constitutional basis advanced and that aspect of his appeal was dismissed from the bench and counsel for the Attorney General was excused from further participation in the hearing.

[7] While the appellant raised some forty-seven issues in his factum, many of them related to the constitutional question raised.

[8] The thrust of the remaining grounds of appeal related to the jurisdiction of the Discipline Committee of the College to hear the complaint and delay.

[9] Mr. Bhadauria's argument is that because the new legislation – *The Ontario College of Teachers Act*, does not specifically authorize the College to deal with discipline matters arising out of conduct which occurred before the College came into existence, it is without jurisdiction to deal with any such matters in circumstances where the conduct in issue is known to the Board.

[10] Mr. Bhadauria, in his submissions, distinguishes between conduct which is known prior to the coming into force of the "new" legislation and conduct which may have occurred prior but was unknown until after the coming into force.

[11] It is true that the legislation does not specifically authorize the College to deal with discipline matters arising by reason of known conduct which occurred before the College came into existence.

[12] It is necessary to consider the relevant legislative provisions including those which relate to the purpose of the legislation.

[13] Section 3 of the Act provides:

> 3. (1) The College has the following objects:
>
> 1. To regulate the profession of teaching and to govern its members.
>
> …
>
> 8. To receive and investigate complaints against members of the College and to deal with discipline and fitness to practise issues.
>
> (2) In carrying out its objects, the College has a duty to serve and protect the public interest.

[14] The legislation provides that everyone who holds a certificate of qualification and registration is a member of the College, subject to any term, condition or limitation to which the certificate is subject (see section 14(1)). Further section 62(1) provides:

> Every person who, on a day to be specified in a regulation made under subsection (2), holds an Ontario Teacher's Certificate or a letter of standing issued under the *Education Act* shall be deemed to hold a certificate of qualification and registration under this Act.

[15] The new legislation changed the manner of teacher regulation in Ontario replacing a regime in which the Minister of Education had the ultimate authority to suspend or cancel certificates of authorization with a regime of self-governance through the College.

[16] That the legislature intended the College to have continuing jurisdiction – in relation to professional misconduct, incompetence or incapacity – over a person whose certificate of qualification and registration is revoked or cancelled is seen by section 14(5) which provides:

> 14. (5) A person whose certificate of qualification and registration is revoked or cancelled continues to be subject to the jurisdiction of the College for professional misconduct, incompetence or incapacity referable to any time during which the person held,
>
> (a) a certificate of qualification and registration under this Act; or
>
> (b) an Ontario Teacher's Certificate or a letter of standing as a teacher under the *Education Act*.

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[17] This provision relates to any conduct which takes place either under the "new" regime or under the former regime. Clearly the intent was, in relation to members whose certificates of qualification and registration were "revoked or cancelled", for the College to have continuing jurisdiction in relation to matters of professional misconduct *inter alia*.

[18] Similarly, where discipline matters had been commenced but not disposed of or completed before the "new" Act came into force, the Regulations provide how those discipline matters were to be treated. Regulation 276/97 deals with "Transitional Matters – Discipline" and provides detail in relation to discipline matters outstanding but not completed when the "new" legislation came into effect on May 20, 1997. Matters referred by the Minister on or after January 1, 1997 would be referred to the College for further processing. Matters referred before January 1, 1997 would be dealt with under the former regime. Even in the latter situation, however, a Minister's decision to suspend a certificate of qualification or letter of standing, is by the Regulation deemed to be a decision of the Discipline Committee of the College.

[19] When one considers that the legislation specifically provides – in the case of those whose certificates have been cancelled or revoked – for continuing jurisdiction of the College in relation to professional misconduct which occurred at <u>any time</u> the person held a certificate of qualification or letter of standing – one must of necessity ask – how could it possibly have been the intention of the legislation <u>NOT</u> to provide jurisdiction to the College to deal with its members in relation to such matters in a similar way.

[20] To suggest the College is without jurisdiction to deal with any discipline matter arising before its creation but not reported until after the College comes into existence is, we think, an absurd result. It would provide immunity to members for misconduct in circumstances where non-members would be held accountable. This cannot reasonably have been the legislative intent and if it were, would require specific legislation granting such immunity.

[21] In our view the only reasonable interpretation to be given the legislation is that the College has the necessary jurisdiction to deal with the complaint against Mr. Bhadauria.

[22] We are further fortified in our conclusion by reason of the legislative provision which requires the College in carrying out its objects to serve and protect the public interest.

[23] Section 3(2) of the Act provides:

> (2) In carrying out its objects, the College has a duty to serve and protect the public interest.

[24] The presumption against retrospective effect of legislation is rebutted in circumstances where one of the primary purposes of that legislation is the protection of the public.

[25] We agree entirely with the submissions of the respondent as set out in paragraphs 55 and 56 of its factum:

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> 55. It is submitted that *Brosseau* is analogous to the instant case. As set out above, one of the primary purposes of the *Act* is to protect the public. The disciplinary provisions under the *Act* are designed to disqualify from teaching those persons whom the Discipline Committee finds to have committed acts which call into question their suitability to teach. These measures are designed to protect the public, and are in keeping with the regulatory role of the OCT and its predecessor bodies. Applying the reasoning of the SCC in *Brosseau,* since the provisions at issue in this case are designed to protect the public, the presumption against the retrospective effect of statues [*sic*] is effectively rebutted.
>
> 56. It must also be noted that the *Act* does not reach into the past and declare the law different than what it was in that it does not change the status of the conduct engaged in by the Appellant. The previous regime similarly governed the suitability of individuals to teach through the application of criteria of professional misconduct. The difference between the current and former regimes with respect to the treatment of their conduct is primarily procedural.

[26] Lastly we turn to the issue of delay. The subject matter of the complaints being two letters sent in October and December of 1989.

[27] As indicated earlier following his termination by the Board, the appellant initiated a grievance wherein he disputed his termination. That proceeding ended when the Supreme Court of Canada in February, 1997 upheld the termination.

[28] In 1996 the appellant commenced an action in the then General Division against the Board. That action was dismissed by the Court of Appeal in February 1999 and the Supreme Court of Canada refused the appellant's request for leave to appeal.

[29] By letter dated July 8, 1999 the solicitor for the Toronto Board wrote to the Registrar of the College in relation to Mr. Bhadauria's conduct in sending the two letters in 1989 and another two letters sent later in accordance with its obligation under section 47 of the Act which provides:

> 47(3) A school board shall promptly notify the College in writing where in the opinion of the Board the conduct or actions of a member who is or has been employed by the Board should be reviewed by a committee of the College.

[30] By letter dated February 23rd, 2000 the Registrar of the College notified the appellant that she had initiated a complaint against him with the College in accordance with section 26(1) of the Act which provides:

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> 26(1) The Investigation Committee shall consider and investigate complaints regarding the conduct or actions of the College made by,
>
> …
>
> (c) the Registrar.

[31] By letter dated July 10, 2000 (and received by the College July 12, 2000), the appellant filed his detailed written response to the complaint with the College.

[32] Nothing further occurred until May 30, 2002 when a panel of the Investigation Committee met to consider the complaint against the appellant and in accordance with section 26(5)(a) of the Act directed that the matter be referred to the Discipline Committee.

[33] Mr. Bhadauria was informed of the decision of the Investigation Committee by letter dated June 4, 2002.

[34] The matter then proceeded to a four-day hearing before the Discipline Committee in February, 2003 and their decision, which is the subject of this appeal, was released March 5, 2003.

[35] The most significant delay here is on the part of the Board which waited until July, 1999 – almost ten years after the first letter was sent – to file its complaint. This in circumstances where the legislation requires “prompt” reporting.

[36] The College cannot be held responsible for that delay. However, it is a contextual factor which must be considered overall.

[37] The next delay was on the part of the Investigation Committee – for no reason that is explained in the evidence it took from February, 2000 to May 31, 2002 – in excess of two full years, to refer the matter to discipline.

[38] Section 26(9) of the Act provides:

> 26. (9) The Investigation Committee shall use its best efforts to dispose of a complaint within 120 days of it being filed with the Registrar.

[39] On the facts before us the Board’s complaint was received by the Registrar July 12, 1999. The complaint ought to have been dealt with by the Investigation Committee – absent exceptional circumstances – by the end of November 1999.

[40] On the record before us, there does not appear to have been any need for an extensive investigation on these facts. The subject of the complaints were letters which the appellant admits he wrote in 1989 and 1990.

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[41] The decision of the Investigation Committee lists at page 5 thereof all of the documents it reviewed and none are of recent origin other than the Investigation Report itself – undated but obviously created since the Registrar received the complaint, and the letters from the Registrar and the appellant in response. The only "recent" investigation relates to telephone conversations April 25 and 26 of 2002 with Ms. Green and Dr. McKeown. There is, however, no evidence to suggest that these two were not available to be interviewed at an earlier time. It appears to us, on the available record, that the Committee simply "sat" on this complaint and did not – as the legislation required it to, use its best efforts to dispose of the complaint within 120 days.

[42] This is a discipline matter where a member's livelihood is at stake. As the Court of Appeal recently noted in *Henderson v. College of Physicians and Surgeons of Ontario* (2003), Docket C38019, June 6, 2003 (Ont. C.A.) at paragraphs 26 and 27:

> There is an abundance of judicial authority and academic commentary to the effect that professional discipline legislation should be strictly complied with and strictly construed by the courts. For example, see Gardner v. Law Society of British Columbia (1991), 86 D.L.R. (4th) 334 (B.C.C.A.), C. (K) v. College of Physical Therapists (Alberta) (1999), 72 Alta. L.R. (3d) 77 (Alta. C.A.) at 88, Bechamp v. Manitoba Association of Registered Nurses (1994), 115 D.L.R. (4th) 287 (Man. C.A.) at 288 and P. St. J. Langan, Maxwell on the Interpretation of Statutes, 12 ed. (London: Sweet and Maxwell, 1969) at 245.
>
> The underlying policy of the approach of strict construction of professional discipline statutes is based on the theory that the consequences for a person who is subject to the discipline process of his or her professional body carry potentially grave consequences, including the loss of one's livelihood. The ultimate penalty of disbarment or erasure is often referred to as a professional death penalty. Given such consequences, the accused is entitled to have his or her professional regulator strictly adhere to the express provisions of its legislative mandate. Indeed, more than one case has referred to professional discipline proceedings as quasi criminal in nature. See Piller and Association of Ontario Land Surveyors, [2002] O.J. No. 2343 per Cronk J.A. (concurring) at para. 59; College of Physicians and Surgeons of Ontario v. Boodoosingh (1990), 73 O.R. (2d) 478 (H.C.J.) at 479-80 (Div. Ct.), affirm'd (1993), 12 O.R. (3d) 707, leave to appeal refused (1993), 15 O.R. (3d) xvi (S.C.C.); Re Matheson and College of Nurses of Ontario (1979), 107 D.L.R. (3d) 430 (Ont. Div. Ct.) at 432 and Re Stoangi and Law Society of Upper Canada (1978), 93 D.L.R. (3d) 204 (Ont. H.C.J.) 207.

[43] It is to be noted that the statutory language here requires that the Investigation Committee "shall use its best efforts" to dispose of a claim within 120 days not that it "shall dispose of a claim within 120 days".

[44] The appellant referred to a number of cases that dealt with delay in administrative proceedings that predated the decision of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)* (2000) S.C.C. 44.

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[45] We note that there was no application by the appellant to the Discipline Committee for a stay by reason of the delay in processing the complaint against him. Delay is raised for the first time in this Court. To succeed in setting aside the decision of the Discipline Committee on the ground of unreasonable delay alone, we are of the view that the delay must be such as to have resulted in a denial of natural justice or abuse of process.

[46] *Blencoe* was a human rights case, not a discipline case but the Court's comments in relation to delay are of some assistance. As the Court noted at page 367 of the Judgment:

> (a) Prejudice to the Fairness of the Hearing
>
> In my view, there are appropriate remedies available in the administrative law context to deal with the state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.
>
> There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied…

and at page 369:

> (b) Other Forms of Prejudice
>
> It is trite law that there is a general duty of fairness resting on all public decision-makers (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 628). The human rights processes at issue in this case must have been conducted in a manner that is entirely consistent with the principles of natural justice and procedural fairness. Perhaps the best illustration of the traditional meaning of this duty of fairness in administrative law can be discerned from the following words of Dickson J. in *Martineau*, at p. 631:

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> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

and at page 373:

> I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

[47] The cases which meet these requirements, the Court notes, will be extremely rare. The delay must be unreasonable or inordinate as the Court noted "The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings".

[48] Whether a delay has been inordinate will depend on a number of factors in each case.

[49] Here the most significant delay was that of the Board in reporting the misconduct. It was, we think, reasonable for the Board to await the Supreme Court's determination. The serious nature of the appellant's conduct in sending the letters was very much in issue in those proceedings. Once the Supreme Court's Judgment was in hand, however, there does not seem to be any basis for further delay but it was another two years before the misconduct was reported. Here, the facts are not in dispute. The letters speak for themselves and the appellant admits he sent them. The only issue for the Committee was whether the sending of those letters constituted misconduct and if so, what an appropriate penalty should be. The case did not in any way depend on the memories of witnesses which would fade over time.

[50] It is not clear on the record why the Board waited until 1999 to notify the College. The record discloses that in 1998 Mr. Bhadauria apparently applied for a permanent teaching position with the Durham District School Board under the name of "Jack Singh". In September of 1998 Mr. Bhadauria had requested the College to change his surname on College records from

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"Bhadauria" to "Singh", however, the College declined his request because he had not provided a Change of Name Certificate under the *Change of Name Act* as the bylaws of the College required. The Board took no action at that time to report Mr. Bhadauria to the College.

[51] While the delay in reporting the misconduct is that of the Board and not the College it is an important contextual factor for this Court to consider and cannot be ignored.

[52] The College's delay is two-fold. First the misconduct was reported to the Registrar on July 12, 1999 and it was not until January 4, 2000 that the Registrar makes her Request to Initiate Investigation – almost 5 months later. Mr. Bhadauria is not informed of this decision until the letter to him from the College dated February 23rd, 2000. Secondly it took from then until May 31, 2002 for the decision to refer to discipline – in total almost three years from the initial report to the College.

[53] We have considered the delay on the facts of this case in light of the standard established by the Supreme Court of Canada in *Blencoe, supra*. This was not a new allegation based on new material or evidence. The allegation of misconduct had had the benefit of the scrutiny of the Supreme Court of Canada in a very public way. There has been no change of position. The misconduct remains the content of and act of sending the letters. Mr. Bhadauria has not shown that his ability to respond to the allegations was impaired. He provided, on July 10, 2000, a very lengthy and thorough response to the complaint registered against him with the Ontario College of Teachers (see Tab 6 of the Appeal Book and Compendium of the Appellant). Mr. Bhadauria also actively participated in his defence during the four-day hearing in February of 2003 (see Volumes 1 to 3 of the Transcript of the hearing).

[54] Furthermore, there was no evidence that Mr. Bhadauria suffered any psychological or emotional harm that could be linked to the delay so as to impair his ability to respond to the allegation. We do not deny that there is a normal stress associated with disciplinary hearings. However, there was no evidence to indicate that the delay in the disciplinary hearing had any undue impact on him, particularly in view of the historical notoriety of the writing of the letters.

[55] Taking all of these factors into account, we are not satisfied that the delay on the facts of this case is of such a kind as to impair the fairness of the hearing and so impugn the disciplinary proceedings. We are not persuaded that Mr. Bhadauria has been prejudiced by the delay to the point of abuse of process. His is not one of those few cases that if proceeded with would be contrary to the interests of justice (see *J.G. v. Ontario College of Teachers*, Div. Ct., June 13, 2002).

[56] In another case it may well be different and a delay of three years could very well be such as to amount to abuse of process – but in our view on the facts of this case, it does not do so.

[57] We find it inexcusable on this record for the College to have taken as long as it did to process the complaint against Mr. Bhadauria where the legislation requires the Investigation Committee to use its best efforts to dispose of complaints in 120 days. It is not, however, such as to amount to abuse of process.

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[58] The appellant also argues that the penalty imposed by the College is unusually harsh in all the circumstances.

[59] In this respect we note and are guided by the comment of Blair J. (as he then was) in *Markson v. Ontario College of Teachers*, [2003] O.J. No. 278 (Ont. Div. Ct.) at paragraphs 9 and 10 thereof:

> The law is clear that Discipline Committees of professional peers are peculiarly well-placed to decide issues of professional misconduct and penalty, and that their decisions in that regard are entitled to considerable deference: See Patel v. College of Pharmacists (Ont.) (1999), 130 O.A.C. 291 (Div. Ct.); and McKee v. College of Psychologists (B.C.), [1994] 9 W.W.R. 374 (B.C.C.A.).
>
> The standard for our review of the Committee's decision is "reasonableness", and in our opinion the Committee's decision as to penalty was reasonable and not disproportionate in the circumstances.

[60] We adopt these comments in relation to the penalty aspect of this appeal. In our view the Discipline Committee composed of the appellant's peers is much better situated to say what the appropriate penalty is than is this Court.

[61] While the delay is not such as to constitute abuse of process on these facts, it is sufficient, in our view, to disentitle the College to its costs of this proceeding.

[62] The appeal is dismissed without costs.

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MacFarland J.

_____

Swinton J.

_____

Linhares de Sousa J.

Released: June 9, 2004

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