



2022 TAHP 01

Decision issued: March 22, 2022

Citation issued: May 13, 2020

File N° [REDACTED]

IN THE MATTER OF THE *TEACHERS ACT*, SBC 2011, c. 19

AND

A HEARING CONCERNING

**Danion Shemar Barker**

(A Formerly Authorized Person under the *Teachers Act*)

**REASONS FOR DECISION ON CONSEQUENCES AND COSTS**

Date(s) and location(s): by written submissions, (virtual)

Panel: Sarah Levine, Chair, Carolyn Broady, Alice Kedves

Counsel for the Commissioner: Maureen Boyd, Ministry of Attorney General

Counsel for the Respondent: Carolyn Janusz and Steven Rogers, Victory Square Law Office

## INTRODUCTION

- [1] On June 24, 2021, the panel in this matter issued its decision finding the Respondent to have engaged in professional misconduct under section 63(1)(b) of the *Teachers Act* (the "Act")(the "Conduct Decision"). The parties agreed to conduct the penalty phase of the hearing by way of written submissions.

[2] The Commissioner's written submissions on penalty were filed on August 17, 2021. The Respondent's submissions were filed October 1, 2021. The Commissioner filed Reply submissions on October 7, 2021.

## CONSEQUENCES AND COSTS

Consequences

## APPLICABLE LAW

[3] Section 64 of the *Teachers Act* sets out the consequences after a hearing as follows:

Section 64. If a panel makes a finding under section 63(1)(b), (c), or (d), the panel may make an order setting out one or more of the following:

- (a) a reprimand of the authorized person;
- (b) a requirement for the director of certification to suspend the certificate of qualification, independent school teaching certificate or letter or permission of the authorized person for a fixed period;
- (c) a requirement for the director of certification to suspend the certificate of qualification, independent school teaching certificate or letter or permission of the authorized person until the authorized person has fulfilled conditions imposed by the panel;
- (d) a requirement for the director of certification to suspend the certificate of qualification, independent school teaching certificate or letter of permission of the authorized person until the authorized person satisfies the director of certification that the authorized person is able to carry out the professional duties and responsibilities of an authorized person;
- (e) a requirement for the director of certification to cancel the certificate of qualification, independent school teaching certificate or letter of permission of the authorized person;
- (f) a requirement for the director of certification to suspend or cancel the certificate of qualification, independent school teaching certificate or a letter of permission unless the authorized person has fulfilled conditions by a fixed date imposed by the panel;
- (g) a requirement for the director of certification to not to issue a certificate of qualification, independent school teaching certificate or letter of permission for a fixed or indeterminate period;
- (h) a requirement for the director of certification to place limitations and conditions on the certificate of qualification, independent school teaching certificate or letter of permission of the authorized person.

- [4] The parties agree on the applicable law regarding the determination of the consequences that flow from the Respondent's misconduct. The relevant factors were set out in *In the Matter of the Teachers Act – and – McGeough*, (January 17, 2013) ("*McGeough*"), as follows:
- a. The nature and gravity of the allegations;
  - b. The impact of the conduct on the student;
  - c. The presence or absence of prior misconduct;
  - d. The extent to which the teacher has already suffered consequences;
  - e. The role of the teacher in acknowledging the gravity of the conduct;
  - f. The need to promote specific and general deterrence; and
  - g. The need to maintain public confidence in the teaching profession as a whole.
- [5] These factors were further summarized in *In the Matter of the Teachers Act – and – Obert*, 2020 TAHP 02 ("*Obert*"), as follows:
- ... the nature and gravity of the conduct, the principles of specific and general deterrence of the Respondent and other members of the teaching profession from engaging in similar conduct, proportionality, denunciation, rehabilitation (where appropriate) and the importance of fostering and maintaining public confidence in the ability of the Commissioner to properly supervise and regulate the conduct of teachers.
- [6] In determining appropriate consequences from the factors above, the Panel must also consider whether and to what degree each factor is mitigating or aggravating in the circumstances of the case.
- [7] Where a factor is **aggravating**, it will demonstrate a need for more severe consequences. Aggravating factors include:
- a. Repetitive conduct or conduct which continued over a long period of time
  - b. Risk of harm to a student or students, or actual harm
  - c. Lack of insight or remorse on part of the teacher
  - d. Conduct intended to hide the teacher's misconduct
  - e. A disciplinary record, particular with misconduct of the same or a similar nature
- [8] Where a factor is **mitigating**, it may reduce the consequences under section 64. Mitigating factors include:
- a. The absence of any prior misconduct
  - b. The fact that a teacher has already suffered significant consequences,

- c. An acknowledgement by the teacher of the misconduct (such as admissions of misconduct, timely apology to the person who may have been harmed by the misconduct); and
  - d. Steps taken voluntarily by the teacher to address his or her misconduct or shortcomings.
- [9] The consideration of aggravating and mitigating factors is case specific and contextual.
- [10] In submissions on consequences and costs, the Commissioner submits that the following factors are central to the Panel’s assessment of consequences for the Respondent:
- a. The effect of the Respondent’s status as a former certificate holder and the brief period of time that he was a teacher in British Columbia.
  - b. The nature and gravity of his conduct, and
  - c. The importance of public denunciation of the conduct and general deterrence.
- [11] The Commissioner states that the range of penalties open to the Panel to impose on the Respondent consists only of a reprimand under subsection 64(a) of the Act, or a requirement not to re-issue any authorization to teach under subsection 64(g). The additional provisions of section 64 of the Act refer to suspensions of a teacher’s certificate, which, the commissioner submits, is not relevant in this case, because the Respondent does not hold a valid certificate at this time.
- [12] The Respondent does not agree with this submission. The Respondent agrees that this Panel can impose a reprimand or a requirement not to issue a certificate to the Respondent, but also submits that it is open to the Panel to issue a suspension, as per subsections 64(b) to (f) of the Act. The Respondent’s submission seems to contemplate that a suspension would operate by commencing the duration of the suspension at the time that the Respondent renewed his certificate.

### **Background and Application of Factors to the Respondent**

- [13] The Respondent taught in BC for approximately one school year. He was issued a Conditional Certificate of Qualification on June 3, 2019. His certificate required him to complete some additional coursework in order to obtain a full teaching certificate in BC, as he previously had taught in Jamaica. He taught for several months in British Columbia before obtaining the teaching position that he held at the time of the incident underlying the Citation in this matter (the “incident”).

- [14] As a result of the incident, the Respondent was fired from his position as temporary teacher on call (“TTOC”) at [REDACTED] school in June, 2019. The Respondent was not able to get another teaching position before the end of the 2018/2019 school year.
- [15] The Respondent then obtained teaching work in Dawson’s Creek, BC, commencing in the fall of 2019. However, in October, 2019, the Commissioner suspended the Respondent’s teaching certificate pursuant to section 50 of the Act. Section 50 provides that:
- (1) At any time between the commissioner’s receipt of a report or complaint or the initiation of an investigation under section 47(1)(b) and the resolution under this Part of the report, complaint, or investigation, the commissioner may order the director of certification
    - (a) To suspend the certificate of qualification or independent school teaching certificate of the certificate holder who is the subject of the report, complaint, or investigation until the report, complaint or investigation is resolved under this Part, or
    - (b) To suspend the letter of permission of a person who is the subject of the report, complaint or investigation until the report, complaint or investigation is resolved under this Partif the commissioner considers there is a risk of
    - (c) Physical harm to a student,
    - (d) Sexual abuse or sexual exploitation of a student, or
    - (e) Significant emotional harm to a student.
- [16] As a result of the suspension of the Respondent’s teaching certificate pursuant to section 50, the Respondent was fired from the job that he had obtained in Dawson’s Creek. He was unable to obtain another teaching job, as he did not hold a certificate. The Respondent gave evidence that he picked up casual non-teaching work but at a much reduced income, which was further reduced as the COVID-19 pandemic ensued.
- [17] Neither party indicated whether the Respondent was aware of the date of the hearing of this matter by November, 2020, which was approximately 13 months after his teaching certificate had been suspended, and he had been effectively denied the opportunity to teach for approximately 17 months at that time. He did not pay the fee to renew his (suspended) certificate and it was cancelled.
- [18] It is clear that the Respondent was dismissed from two different jobs and denied the ability to teach for approximately 17 months as a result of the course of the misconduct and resulting process and investigation. Neither party referred to any prior decisions that

considered the effect of a suspension of a teacher's certificate pursuant section 50 a subsequent determination of the consequences of misconduct for a teacher.

The fact that the Respondent is a former certificate-holder

- [19] A preliminary issue raised by the Commissioner is whether consequences for the Respondent are limited to either a reprimand or a requirement that the Commissioner not issue the Respondent a certificate for a period of time, and do not include the possibility of a suspension. The Commissioner argues that as a former certificate holder, the Panel cannot order a suspension of the Respondent's certificate. The Respondent argues that the appropriate penalty is a reprimand, but if the Panel decides that a reprimand is not sufficient, that a suspension is an available penalty to the Panel.
- [20] This issue only arises and only needs to be considered by the Panel if it determines that a suspension would be an appropriate penalty but for the Respondent's status as a former certificate holder. For the reasons set out, it does not, and therefore it did not consider the issue of whether a suspension of the Respondent's certificate was available to a former certificate holder in the position of the Respondent.

#### Mitigating and Aggravating Factors

- [21] The Panel noted in its decision that the Respondent admitted that having a knife in the classroom and touching a child's skin with the knife was misconduct and a breach of Standard #1. The Panel noted that the conduct created a risk of harm to students in the classroom, and in fact a child did suffer harm, though the harm was of a very minor physical nature, and of frightening the student.
- [22] The Panel also found the following:
- "The Respondent's actions... fall into the category of a serious but brief lapse of judgement that created a risk of real harm. They do not fall into the category of intimidating, threatening, demeaning or insulting students. This difference is important. Where an action that creates a threat of harm also creates an atmosphere that is intimidating, threatening, demeaning or insulting to students, the nature of the misconduct is more serious than where it does not. In this case, it did not."
- [23] The Panel noted that in other decided cases and in other reported investigations that led to consent resolutions that were cited by the Commissioner, the misconduct was more severe than in this case.

[24] This is the starting point for determining consequences. While all of the mitigating and aggravating factors are important to consider, the most important factor to consider is the nature of the misconduct and how serious it is. The misconduct in this case was less serious than in most cases considered, and far less serious than the most egregious cases that have come before this Tribunal in the past. The consequences will reflect that, and as a result, the consequence that will be imposed will be less severe, obviously, than it would be for more serious misconduct.

#### *Mitigating and Aggravating Factors*

[25] In his response, the Respondent argues that there are no aggravating factors, and that mitigating factors that justify a lesser penalty than that sought by the Commissioner include the following.

##### *No Prior Disciplinary matters*

[26] The Respondent had no prior disciplinary matters. The Commissioner submits that because he had only taught in British Columbia for less than a month prior to the incident, this factor should not bear much weight.

[27] While it is true that the Respondent taught for less than a month at [REDACTED], he taught for several months prior to this position at his previous teaching position, so while his teaching record in British Columbia was brief, it was not less than a month.

[28] Regardless, the Commissioner is correct that the brevity of his teaching record in British Columbia is relevant in ascribing importance to this factor, in the sense that a teaching record of a long duration with no prior disciplinary matters is a stronger mitigating factor than a very short teaching history with no prior disciplinary matters. However, a teaching record free of prior discipline is a mitigating factor even if the duration of the record is short.

##### *Consequences already suffered*

[29] It is appropriate to consider “the fact that a teacher has already suffered significant consequences”.

[30] The Respondent did not pay his fees for his teaching certificate in 2020. The Respondent had been unable to be employed as a teaching for the entire previous year because of the

suspension. The Commissioner submits that the Respondent agreed on cross-examination that it is more expensive to pay for another application for a certificate than to pay the annual fee, and that “by allowing his certificate to be cancelled, the Respondent has effectively limited the impact on him of the consequences this Panel may impose”.

- [31] It may be that the Respondent’s action in allowing his certificate to be cancelled does limit the scope of consequences that are available to the Panel. However, it is logical to infer that it was the Commissioner’s cancellation of the Respondent’s certificate that caused the Respondent not to pay his renewal fees. While it may be less expensive for the Respondent to pay the renewal fee than to pay for a new certificate, the evidence was that the Respondent had little or no source of income at the time that his certificate renewal was due; he had no accommodation of his own and was sheltered by staying with acquaintances in Montreal. No evidence was led that the Commissioner gave the Respondent any indication of a date by which the Respondent could apply to or have his certificate reinstated. As a result, the suspension of the Respondent’s certificate *prior to* the non-payment of fees by the Respondent had the same effect on the Respondent as would a one-year suspension of his certificate. During this period, the Respondent was prevented from practising his profession. He lost a second position as a result of the suspension of his licence, after having been fired from another job in relation to the same incident. The uncontradicted evidence given at the hearing was that the Respondent’s immigration status in Canada was dependent on his employment; when he was unable to secure additional regular employment, and fell into poverty and had to relocate in order to survive partially with the assistance of charitable contributions from members of the Jamaican community outside BC.
- [32] The Commissioner cautioned the Panel about accepting the evidence of the Respondent’s employment and financial status after the suspension of his certificate by the Commissioner. However, it is reasonable to assume that when a professional is prevented from practising their profession that their economic circumstances will suffer. The Respondent gave oral evidence that his economic circumstances had declined significantly upon the suspension of his certificate. The Panel found no reason not to accept that evidence. The Panel considers the significant decline in the Respondent’s economic situation to be part of the consequences that the Respondent suffered prior to the hearing in this matter.



- [33] In this case, the Panel considers the mitigating factor of “other consequences already suffered” to be at the extreme end. The Commissioner submits that “if the Respondent still held his certificate, it would be seeking a suspension of at least one month”. In this case, the Respondent had his certificate suspended by the Commissioner prior to the hearing for more than a year. This is in addition to having been fired from his teaching position and losing a subsequent position.

*Impact on Student*

- [34] The Commissioner submits that the Panel found that the Respondent’s conduct in holding a knife to the student’s skin was experienced as threatening and caused emotional harm to the student. This harm was compounded when the Student was bullied in class by other students, and outside class for “being the Student who got the teacher fired”. The Respondent submits that the fact that the Student was the victim of bullying by his peers and the incident in the Respondent’s classroom was part of what he was teased about is not part of the Respondent’s misconduct. The Panel agrees. To the extent that the Respondent was aware of any bullying activity among the student’s peers, the evidence indicates that the Respondent attempted to mitigate it.
- [35] The Panel considers the creation of the risk of harm and actual harm to the Student to be the very nature of the misconduct. The Panel considers this factor to be neither mitigating nor aggravating.

*Role of the Teacher in acknowledging gravity of the conduct*

- [36] The Respondent submits that this should be a mitigating factor, as he acknowledged his conduct and that it was wrong in the hours and days immediately following the incident. These acknowledgements were made to the student, the student’s mother, the Principal, and the school district.
- [37] The Commissioner acknowledges that the Respondent acknowledged his conduct and that it was wrong immediately following the incident, but that this factor is not entirely mitigating because of the Respondent’s conduct after that time and up to and during the hearing. The Commissioner argues that the Respondent’s positions at the hearing undermined this acknowledgement of wrongdoing and taking of responsibility. The Commissioner points to the Respondent’s unwillingness to acknowledge that his conduct with the knife likely caused the scratch on the student’s hand, his position that the student should have been called to testify at the hearing, and his position that an adverse

inference should be drawn by the fact that the Student (who was 12 at the time of the hearing) did not testify.

- [38] The Panel agrees that this factor is mitigating as it relates to the Respondent's conduct immediately after the event. The positions taken by the Respondent are somewhat contrary to his acknowledgment of the seriousness of the incident and his initial approach of taking responsibility for the incident and detract somewhat from this as a mitigating factor. On balance, this factor is neither mitigating nor aggravating.

*Factors related to the profession and the public interest:*

*1. The need to promote specific and general deterrence*

- [39] The Commissioner submits that the nature of the incident was inherently intimidating and it is important to unambiguously denounce such conduct.

- [40] The Respondent notes the Panel's comments regarding its finding that the Respondent's conduct was not a violation of Standard #2. The Panel found that:

The Respondent's actions fall into the category of a serious but brief lapse of judgment that created a risk of real harm. They do not fall into the category of intimidating, threatening, demeaning or insulting students.

- [41] In so stating, the Panel noted that other disciplinary decisions have dealt with incidents where teachers have used dangerous objects with students that have also involved intimidation, threatening or insulting students, and in some cases, repeated conduct. In noting that the Respondent's conduct did not involve any of these factors, the Panel was noting that the Respondent's conduct was of a less serious nature than the conduct considered by other panels relating to other teachers.

- [42] The fact that the Respondent's conduct was not repeated, and was not intimidating, threatening, demeaning or insulting to students is a mitigating factor.

*Need to maintain public confidence in the teaching profession*

- [43] The Commissioner submits that a prohibition of the teacher's right to apply for a reinstatement of his certificate for nine to 12 months is required to maintain the public confidence in the teaching profession.

- [44] The Commissioner refers to the emotional harm suffered by the student in particular.

- [45] The Respondent submits that a prohibition of that length would be out of proportion to the consequences imposed by Panels and in consent agreements by the Commissioner for more egregious conduct. He also submits that the consequences incurred by the Respondent to date are sufficient to maintain public confidence.
- [46] The prior cases cited by the Commissioner had more serious misconduct, and lesser penalties than what are sought by the Commissioner.
- [47] The Respondent submits that the most analogous case is *Nyhan*, where a teacher lifted up a gym mat that a student had refused to get off of, causing her to roll off and hit her head and experience pain. The panel in that case found that the teacher's action was a momentary lapse of judgment, which was followed by an apology. This case is analogous to the present case.
- [48] In that case, the penalty was a reprimand only. The teacher in that case did not suffer additional consequences. The Panel finds that this case is the most analogous to the present case.
- [49] The Panel agrees with the Respondent's submissions. Consequences must have consistency across cases; deterrence and protection of the public work best when there is consistency and predictability in consequences for misconduct. There is very little to be gained in deterrence or protection of the public by having consequences that vary significantly from case to case without logical reason for doing so; a lack of consistency creates a feeling of arbitrariness which is the opposite of the predictability required for effective deterrence and protection of the public.
- [50] In each of the cases cited by both Commissioner and Respondent, the misconduct of the teacher was more serious than the conduct by this Respondent, and the consequences for the teacher were far less serious than the consequences already experienced by this Respondent. This weighs heavily on the Panel's consideration of appropriate consequences in this case.
- [51] In *Teng, Lepine, Ryan, Ouellette, and Rojas* the teachers were found to have engaged in more serious misconduct, and the penalties imposed range from a reprimand only to a reprimand and a one-day suspension. In those cases, teachers engaged in repeated acts of aggression against students, which included conduct that was intentional, demeaning, repeated and created risks of harm that were more serious than the risk created in this case.

- [52] The Respondent also submits that he should not have consequences visited upon him for emotional harm inflicted by other students in response to the events that took place, particularly given that the responses of other students largely happened after the Respondent was fired from his teaching position.
- [53] The Panel emphasizes its finding that the Respondent's misconduct consists of a momentary but serious lapse in judgment that created a risk of physical harm to a student, and which resulted in a degree of emotional harm and a physical injury of a minor nature. This is consistent with the Respondent's submission that to the extent that the Student suffered emotionally from bullying by other students, that does not flow from the Respondent's conduct and should not be a factor in deciding what the appropriate consequences are.
- [54] As a result, the Panel finds that the Respondent has already experienced severe consequences from the misconduct in question. He was fired from his teaching position. His teaching certificate was suspended, which resulted in his immediate dismissal from a subsequent teaching position. The suspension of his certificate was not time-limited when it occurred; it had been suspended for approximately one year when it came up for renewal, and the Respondent did not pay to renew it. There was no evidence placed before the Panel that the suspension of the Respondent's certificate would have come to an end prior to its cancellation. However, even if the suspension had been "only" one year (the time prior to its cancellation for non-payment), a one-year suspension is a more severe consequence than the Panel would have imposed as a result of the misconduct at issue here (in the event that the Respondent had not suffered any additional consequences).
- [55] For all of these reasons, the Panel concludes that the imposition of any additional consequences by the Panel would result in a punishment that is too severe for the nature of the misconduct herein. The Panel declines to impose any additional consequences.

#### Costs

- [56] The Commissioner seeks an order under section 65 of the *Teachers Act* requiring the Respondent to pay costs of \$3,000.
- [57] Section 65(1) of the Act authorizes a panel to:

make an order requiring the authorized person to pay all or part of the costs of a hearing if the panel considers the conduct of the authorized person to have been improper, vexatious, frivolous or abusive during the hearing.

- [58] This is the first hearing in which the Commissioner has sought an order of costs pursuant to section 65. As a result, there are no previous panel decisions considering the application of section 65(1) of the Act. The submissions of both parties have referred to the principles relating to cost awards in other jurisdictions and the Panel has referred to those principles in coming to its decision.
- [59] The wording of section 65(1) is similar to the wording of section 47(1) of the *Administrative Tribunals Act* and is likely based on that provision.
- [60] The payment of costs by a party is generally a policy tool used to encourage or deter certain behaviours in the hearing process. However, unlike civil litigation, there is no usual rule that the unsuccessful parties in litigation pay a costs award to the successful party.
- [61] The use of costs as a policy tool beyond indemnification of a successful party has been recognized. Additional uses of costs award relate to encouraging negotiation of settlement offers, and discouraging the conduct referred to in section 65.
- [62] The Commissioner made submissions on appropriate factors for the Panel to consider in applying section 65. These are
- a. Cost awards should not be so large that they are likely to deter a respondent from raising a legitimate defence.
  - b. There is a need to find an appropriate balance by considering the impact of a costs award on the respondent.
  - c. The impact of other sanctions [on the Respondent] should be considered.
  - d. The extent to which a respondent's conduct resulted in the accumulation of costs should be considered.
- [63] The Commissioner refers to cases from other B.C. Administrative tribunals and from Tribunals relating to teacher discipline from other provinces for guidance. These include *Stoppes v. Just Ladies Fitness (Metrotown) Inc.*, 2007 BCHRT 125 and *Ontario College of Teachers v. Hall*, 2019 LNONCTD 20. These cases stand for the propositions that costs



orders in their respective administrative proceedings are punitive, but that the improper conduct that is at issue in a costs order does not need to be intentional in order to be improper and attracting a costs order. While these principles seem consistent with the language of section 65, it is not clear that they provide additional guidance to its interpretation.

- [64] The Respondent agrees with the Commissioner's submission that the purpose of a costs award pursuant to section 65 is punitive, rather than compensatory. The Respondent submits that the Panel should be cautious in adopting interpretive principles that apply to other administrative law contexts where costs orders can be made for compensatory, rather than punitive purposes. The Panel agrees that it must distinguish between statutory provisions that provide for cost awards for compensatory purposes from those that reserve cost awards only for punitive purposes. Only the latter will be applicable to section 65 of the *Teachers Act*.
- [65] The jurisprudence establishes that the conduct need not be intentional to be found to be improper (*Wells v. University of British Columbia*, 2010 BCHRT 100).
- [66] The Respondent cites *Ma v. Dr. Ianin G. M. Cleator and another*, 2014 BCHRT 180 (CanLii) for its discussion of whether the competence of counsel representing a party should be considered in assessing costs. The tribunal cautions against a tribunal using costs to set a particular standard for counsel competence – in that particular case, relating to the conduct of cross-examination. The tribunal noted that the regulation of the legal profession is not the job of the decision-maker, but rather of the Law Society of British Columbia.
- [67] As a corollary, however, counsel are assumed to act pursuant to the instructions from their client. It is not the tribunal's task to attempt to distinguish conduct of a party's counsel from that party's conduct. Where it is the conduct of a party's counsel that has contributed to the malfeasance that triggers a cost award, the party's remedy is against that counsel, rather than by attempting to create a distinction between himself and his own lawyer. The Respondent cites authority for this proposition in *Kubiny v. Nationwide Laminate Warehouse*, 2014 BCHRT 100, a decision of the BC Human Rights Tribunal, which noted that

[T]he [BC Human Rights] Tribunal does not have the jurisdiction to address allegations of unethical or unprofessional conduct against a party's counsel. The discretion to award costs is against a party.

- [68] The Commissioner has not made allegations against the Respondent's counsel; the application is for costs against the Respondent himself. The Respondent's counsel is acting on his behalf and on his instructions. His counsel was making choices and taking steps in the Respondent's name, on his behalf and with his instructions, and if his counsel's conduct is vexatious, improper, abusive or frivolous, costs may be awarded against him.
- [69] The Respondent cites passages from a number of cases in which costs were not awarded by the BC Human Rights Tribunal, despite conduct that was noted to have prolonged the length of the hearing, or accusations that were ultimately determined to be unfounded. For example, in *Ma v. Dr. Ianin G.M. Cleator and another*, 2014 BCHRT 180 (Canlii), the BC Human Rights tribunal made an order of costs against the complainant, but for some parts of the alleged abuse of process and not others. The tribunal declined to order costs because the time of the hearing was extended by the complainant's conduct; the tribunal found that the 5-day hearing required 10 days partly because of complainant's counsel's underestimate of the amount of time the hearing would take and partly through the complainant's inordinately slow responses to questions. However, the tribunal did order costs against the party because she fabricated her complaint and provided false evidence to the Tribunal.
- [70] In *Francis*, the BC Human Rights Tribunal declined to make a cost order despite the party's conduct extending the duration of the proceeding for 8 years.
- [71] These cases are somewhat helpful, in that they affirm the proposition put forth by both the Commissioner and the Respondent that there is a high threshold of conduct that is permitted by a party in bringing or defending the case before it will reach the definition of the language set out in section 65 that can result in a costs award. However, these cases also demonstrate how context-specific the determination is of whether a party's conduct has reached the level of "improper", "vexatious", "frivolous" or "abusive". These cases underscore the importance of considering the totality of a party's conduct, rather than trying to take one particular element of conduct from another case and assuming that the determination will be the same.
- [72] The task for the Panel, then, is to determine what constitutes conduct of a litigant (through counsel or through his own conduct) "improper", "vexatious", "frivolous" or "abusive" conduct, taking into account the totality of the circumstances.

- [73] The Commissioner submits that the following aspects of the Respondent's conduct during the litigation justify a costs award against him. In summary:
- a. The hearsay objection made on December 1, 2020 during the evidence in chief of the Principal, which resulted in lengthy submissions and which was withdrawn the next day, and which was contrary to the established principles of the application of the hearsay rule in administrative proceedings;
  - b. The Respondent's failure to reasonably clarify the scope of the Respondent's admissions and thus the issues in dispute, and in particular, the delay in doing so on the afternoon of Thursday, December 3, 2020;
  - c. The focus on cross-examination of the Commissioner's witnesses on topics that were irrelevant to the only issue in dispute (which was whether or not the Respondent's misconduct had caused the scratch on the Student's finger) including an attempt to elicit from the Student's mother the names of adults to whom the Student had expressed apprehension of whether it was safe to go with them;
  - d. The Respondent's submission that the fact that the 12-year-old student did not testify was "unexplained" and an adverse inference should be drawn;
  - e. The Respondent's "extensive submissions" on the legal tests relating to the admissibility of evidence on the issue of whether the Student got a mark or scratch from the knife, in the context that the Respondent had previously acknowledged that it was from the knife; and
  - f. The Respondent's failure to provide any response to the Panel's request for submissions at paragraphs 82 and 83 of the Decision.
- [74] The Respondent opposes the application for costs. The Respondent submits that the conduct of counsel was not "improper", "vexatious", "frivolous" or "abusive".
- [75] While the ultimate determination of the costs award will consider the context of the conduct of counsel as a whole, it is necessary to consider the Commissioner's points individually to determine which, if any, contribute to conduct that justifies a cost award pursuant to section 65.



### ***The Hearsay Objection***

- [76] The Commissioner notes that the Respondent made an objection to the admissibility of testimony of any evidence by the Principal regarding what was said to him by the Student. The Respondent's objection was that in a disciplinary hearing with "serious and crucial consequences" to him, hearsay could not be admitted at all. The Respondent's submissions on admissibility of the testimony at issue were approximately 2.5 hours (half of a hearing day). At the conclusion of counsel's submissions, she sought a break to obtain instructions about the objection. At the conclusion of the break, counsel for the Respondent withdrew the objection to the admissibility of the testimony.
- [77] The Commissioner submits that the objection was contrary to the preponderance of authority on the admissibility of hearsay in administrative hearings. The Respondent objects strongly to the idea that the likely outcome of the objection should be a factor in the panel's consideration of whether the objection was improper, frivolous, or vexatious.
- [78] In the abstract, the Respondent's submissions that fact that a position taken is likely to fail does not make it improper, frivolous or vexatious is correct. Parties and counsel are given wide latitude in deciding how to make their case, even if their decisions result in taking extra time in a hearing. However, there are a number of contextual factors here that could bring this hearsay objection within the realm of improper, frivolous or vexatious.
- [79] Prior to the setting down of dates for any hearing, parties must give an estimate of the time that the hearing will take. This involves counsel using their judgment about what motions will be made and how long submissions will take on those motions. While counsel does not need to be correct, counsel does have an obligation to try to predict roughly how they will bring their case.
- [80] When a party makes any motion, or objection, or chooses to call a particular witness, that should have some purpose that relates to the case they are trying to put before the decision-maker. This is the reason that objections may be successfully made during hearings excluding evidence that is irrelevant or has no connection to the matter before the Tribunal.
- [81] A motion that takes a half day of hearing time is substantial. This hearing was scheduled to take four days in total. A party should consider whether a motion has any purpose to

be advanced, and whether it is likely to succeed, before advancing a motion that is likely to take a significant amount of hearing time.

- [82] The Commissioner states that this motion was vexatious because an objection against the admissibility of hearing is unlikely to succeed, and because the Respondent withdrew the objection approximately 15 minutes after the more than half-day of submissions was concluded.
- [83] In the Panel's view, the merits of the objection are not the crucial factor. However, the Commissioner's point about the law being well set out on the admissibility of hearsay in administrative tribunals does support the proposition that the objection was not canvassing an obscure point of law which would have been difficult for the Respondent's counsel to assess in advance. The Commissioner's response to the hearsay objection, while thorough, relied on often-cited case law, and did not bring forward any novel legal principles that could have been surprising to the Respondent.
- [84] The Respondent did not offer any explanation, either during the hearing or in his response submissions in this application, of what came up during the submissions that were a surprise, or that changed the Respondent's view of the advisability of the objection. There was no reason offered why the instructions sought immediately after lengthy objection could not have been made as easily before.

### ***The Failure to Clarify the Issues in Dispute***

- [85] The second basis upon which the Commissioner seeks costs is that the "Respondent mounted an extensive defence about a factual issue that he had previously assumed and acknowledged had occurred".
- [86] The citations of misconduct included the Respondent's conduct in bringing a knife into a classroom multiple times, and holding the knife next to a Student's finger for a short period of time. At the outset of the hearing, the Respondent admitted this conduct and that it was misconduct, but he did not admit it in a way that was binding upon him.
- [87] The citation also stated that the Respondent's holding of the knife against the Student's finger had caused a mark or scratch. The Respondent stated at the outset of the hearing that he did not admit this to be true. During the hearing, evidence indicated that the Respondent had previously indicated that at the time immediately following the incident,

he had believed and had stated that his conduct in holding the knife against the Student's finger had caused the cut or scratch.

- [88] Both the conduct that was cited and admitted, and the conduct that was not admitted, were key to any determination of relevance during the hearing.
- [89] This issue arose when the Respondent applied to recall the Principal to cross-examine him on some of his evidence that would only have been relevant had the Respondent's admissions not been binding. This application was made immediately after the Respondent withdrew his objection to the admission of the hearsay evidence of the Student. The Panel ruled that the testimony sought was not relevant, and the Commissioner sought clarity on the Respondent's admissions. The Respondent's counsel asked for a break to seek instructions, after which the Respondent made a written admission that covered the same matters that had been admitted orally at the outset of the hearing. This matter also took approximately one half-day of hearing.
- [90] The Commissioner submits that it was improper and vexatious for the Respondent to take this amount of hearing time to provide clear and unambiguous written admissions of the same nature that had been previously made.
- [91] The unwillingness or unpreparedness of the Respondent to make clear and unambiguous written admissions that covered the same subject-matter that had previously been admitted orally unnecessarily prolonged the hearing.
- [92] It is not unusual for a party to make admissions during the course of a legal proceeding, as the evidence becomes clearer, or for other reasons. It is not inappropriate to do so, and in fact, making additional admissions can contribute to a more expeditious and focussed proceeding and is to be encouraged. However, the admissions at issue in this application are admissions that the Respondent *had made* orally at the outset of the hearing, but had declined to put in writing in a way that would be binding upon him. The making of admissions while declining to be bound by the admissions is the conduct that is alleged to be vexatious and improper.

***The focus in cross-examination on issues irrelevant to the only issue in dispute***

- [93] The Respondent's counsel spent several hours cross-examining the Principal and the Student's mother on matters that did not relate to the question of whether the Respondent's conduct had caused the scratch or mark on the Student's hand.

- [94] The Respondent's counsel devoted additional hearing time to extensive submissions on the admissibility of the testimony of the Principal and the Student's mother on the matter of whether or not they believed that the cut or scratch on the Student's hand had been caused by his actions, when he had previously believe that it had and had given statements to that effect.
- [95] The Respondent argued that an adverse inference should be drawn because the Student did not testify, which did not take into account the negative effect that giving evidence on a matter that had caused trauma would have on a 12-year-old child.

***The failure to respond to the Panel's request for submissions on Consequences and on publication***

- [96] The Commissioner submits that the Respondent's failure to respond to the Panel's request for submissions on the manner of the consequences hearing and on publication without any explanation is improper and vexatious and impacts the integrity of the Panel's process.

***Analysis***

- [97] Although the Commissioner set out the conduct alleged to be vexatious and improper in separate headings, in this case, it makes sense to consider the Respondent's conduct taken together as a whole, in deciding whether it was improper, vexatious, frivolous or abusive, and if it was, whether it justifies an order of costs against the Respondent.
- [98] In this context, the word "abusive" could have multiple definitions. In some contexts, it could refer to behaviour that was demeaning or aggressive to another person involved in the process. In this case, the complaint is the conduct in relation to the Tribunal's process. The Panel does not understand the Commissioner to be alleging that the conduct was abusive of another party; there is no allegation that any of the conduct raised herein was abusive in that sense. "Abusive" can also refer to "abusive of the process". For the purpose of this discussion, any conduct that might be considered "abusive of the process" would also be covered by one of the other three terms in section 65, namely "improper", "vexatious", or "frivolous". Therefore, the Panel will refer to those three terms and not to the term "abusive" in this discussion.
- [99] As was stated above, the application of section 65 is to be made considering the context of the hearing and the conduct of the Respondent *as a whole*. This makes sense when

considering each of the allegations separately and then together: the Commissioner makes multiple allegations that the Respondent took unnecessary, irrelevant steps during the hearing that wasted the Panel's time and prolonged the hearing. Procedural decisions that result in some hearing time wasted will not be found to be improper or vexatious; but repeated steps that result in long time extensions due to lack of preparatory steps may be found to be so.

- [100] In response to the allegations set out by the Commissioner, the Respondent makes extensive arguments, citing examples in other contexts about the propriety of each individual allegation. For example, the Respondent cites multiple authorities confirming the rights of litigants to make evidentiary objections to the admissibility of hearsay, and to the broad scope of the right of cross-examination.
- [101] With respect, these submissions miss the point by not taking into account the overall context.
- [102] The main point of the hearsay objection was not that it is improper to object to the admission of hearsay in an administrative hearing *per se*, but that the objection related to evidence that established the same facts that had been admitted by the Respondent. Moreover, the Respondent spent one half of a day of hearing time, and then when the objection was responded to by the Commissioner, arguing well-established and predictable legal principles of hearsay evidence, the Respondent's counsel immediately sought instructions and withdrew the objection.
- [103] The problem with the failure to provide timely admissions was not that the Respondent was *required* to make any admissions, but that he was clearly prepared to do so both at the outset of the hearing and approximately three days into the hearing, yet he conducted a time-consuming defence as if all of the matters that were admitted were in issue.
- [104] The remaining issues were the failure to acknowledge reasons why a 12-year-old would not testify other than for reasons relating to the nature of the evidence he would have given; on extensive submissions against admitting and accepting evidence supporting conclusions that had been essentially admitted by the Respondent's own previous admissions, and failure to respond to the panel's request for submissions on simple procedural matters necessary to complete the hearing process.
- [105] Standing alone, each of these issues indicate that the Respondent could have been more organized and made the hearing more efficient by a small amount of additional

preparation before the hearing. If the Respondent had been responsive at the hearing to the evidence as it arose, or the Panel's requests for information or rulings, he could have made small changes that would have resulted in far less wasted time and a more expeditious hearing. However, standing alone, none of these choices for putting forth the Respondent's case would have amounted to improper, vexatious, or frivolous conduct.

[106] However, it is when taken together as a whole, that the Respondent's conduct was frivolous and ultimately vexatious. His unwillingness to make basic decisions in a timely manner, to bring lengthy motions only to drop them, and to fail to respond to the Tribunal's requests for simple responses resulted in significant time spent on matters that bore no relevance to the outcome; the Respondent and his counsel did not seem to be able to communicate on simple instructions that repeatedly drew out matters by hours that then became irrelevant. While none of the incidents mentioned would be improper or vexatious on their own, the totality of the unusual conduct reached the level of frivolous and vexatious.

**Was the conduct sufficiently vexatious and improper to result in an award of costs against the Respondent?**

[107] Section 65 authorizes the Panel to make an order of costs if it finds that the conduct of the Respondent was improper or vexatious, which it has determined the Respondent's conduct was. However, the statutory provision is permissive; in other words, if the panel finds that there was improper or vexatious conduct, it *may* rather than *must* make an order for costs.

[108] Like the determination of whether conduct is improper, the determination of whether an award of costs should be made requires a consideration of the circumstances as whole. The Respondent in this case was found to have committed misconduct that consisted of a single, brief lapse in judgment; it did not have any malicious intent, either inadvertent or intentional demeaning, mocking or insulting of a student. The Respondent acknowledged his wrongdoing and took moral responsibility for it and apologized for it repeatedly and sincerely immediately after the incident. When these factors are compared to cases involving misconduct of a similar nature by other teachers, decisions of other panels and consent orders have resulted in consequences that have a far less serious effect on the member for misconduct of a more serious nature. Instead, as noted above, the Respondent was fired from his job, and his teaching certificate was suspended

prior to the hearing of the matter. As a result of the suspension, he lost a second job, and faced an effective ban from teaching for an indeterminate period of time. Any professional who loses two jobs and loses their right to participate in their profession for an indeterminate period of time is likely to suffer severe financial, and possibly personal, consequences. The evidence showed that the Respondent did.

- [109] These effective consequences suffered by the Respondent all occurred before the hearing. The Respondent's conduct at the hearing was a different matter. The Respondent's counsel at the hearing stated that "it was like she had two clients" because she had to, at times, seek instructions from the British Columbia Teachers' Federation. Some of the vexatious behaviour at the hearing may have been motivated by the Respondent's counsel's legal strategy. It is possible that decision-making was affected by both the Respondent's instructions and counsel's own decision-making, including instructions from others.
- [110] In the circumstances, the Respondent has already faced consequences that are severe relating to the misconduct found. It would not serve the interests of justice or fairness to make a costs award. At the time of the hearing, the Respondent was without a teaching certificate and there was evidence that he had suffered severally financially as a result. In those circumstances, the impact of a costs award would be particularly harsh. As a result, a costs award will not be made despite the findings of frivolous and vexatious conduct at the hearing.
- [111] Finally, despite comments from the Respondent's counsel regarding the involvement of the British Columbia Teachers' Federation in the Respondent's representation, there was no evidence that established that it would be the BCTF, rather than the Respondent, who would pay a costs order. The Panel's jurisdiction is to make an order against an "authorized person" and in this case, that would be the Respondent. The Panel has not taken the role of the BCTF into consideration in declining to make an order for costs against the Respondent.

## **SUMMARY AND CONCLUSION**

- [112] In light of the previous consequences that the Respondent faced as a result of the misconduct in this case, no further consequences are ordered.

[113] The Panel finds that the Respondent's conduct in the hearing was frivolous and vexatious. However, due to the severity of the consequences that he already suffered prior to the hearing, the Panel did not exercise the discretion available to it pursuant to section 65 of the *Teachers Act* to make an order for the Respondent to pay the costs or partial costs of the hearing.

## PUBLICATION

[114] In accordance to section 66 of the Act the Panel directs publication of these reasons.

For the Panel

Date: March 22, 2022



Sarah Levine, Panel Chair



Carolyn Broady, Panel Member



Alice Kedves, Panel Member