Charges Pending
Can the Employer Suspend Without Pay?

J. PAUL R. HOWARD

School boards, like all employers, are often faced with very difficult decisions should one of their employees happen to be charged with a criminal offence. What is to be done with the employee pending trial and the court's ultimate decision on the charges? Is the subject matter of the charges work-related conduct or "off duty" conduct that may nevertheless affect the work-place or the employer's interests? How does the employer balance the employee's right to be presumed innocent with the employer's interests in protecting its legitimate business concerns, including the need to protect the public, its staff, and in the case of a school board, its students? Where preventive action is necessary to protect the employer's interests or fulfill the employer's duties, but there is no alternative position to which the employee may be temporarily re-assigned, can the employer suspend the employee pending disposition of the charges? Can the suspension be without pay, or will the employer be held liable for the employee's back-wages if the employee should ultimately be acquitted by the criminal courts?

Questions similar to these confronted the Supreme Court of Canada, albeit in a non-education context, in its recent decision in *Cabiakman v. Industrial Alliance Life Insurance Co.*,[1] where the Court held that in certain situations an employer may suspend "for administrative reasons" an employee against whom criminal charges are pending. The Court ruled, however, that unless there are exceptional circumstances, the suspension cannot be without pay.

The case came to the Supreme Court on appeal from the Québec Court of Appeal, and it should be noted at the outset that the law governing the individual employment contract in issue was the *Civil Code of Québec*, a system of civil law that is quite distinct from the English-born common law system that governs the other Canadian provinces. That said, many of the fundamental legal concepts examined by the Supreme Court are common to both legal systems, and thus the Court's decision is not without relevance to the common-law jurisdictions, particularly to the extent that it may provide insight into how the Supreme Court might treat similar issues should they arise from one of the common-law provinces.

In *Cabiakman*, the employee was hired as a sales manager of one of the branch offices of the employer, an insurance company. In that capacity, he exercised supervisory powers over branch sales staff, including the power to hire and fire; his duties included selling insurance plans, retirement fund, pension funds and other investment products; and he was responsible for the transfer of moneys between institutions. As such, his was a position wherein his personal integrity was of fundamental importance to his dealings with both the employer's customers and the sales team members he supervised.

In November 1995, three months after he was hired, Cabiakman was arrested for attempted extortion; he was charged with conspiracy to extort money from his securities broker. During the week following his arrest, a newspaper article appeared in a weekly tabloid having a wide circulation in the Montreal area; it identified the employee by name and recounted the circumstances of the charges against him.

Upon learning of the article, the insurance company suspended Cabiakman without pay pending resolution of the criminal charges by the court. The employer conducted no independent investigation of the allegations, nor did it give the employee an opportunity to explain himself. It suspended him because of the nexus between the nature of the charges and the duties of the employee's position. It administered this "administrative" suspension in order to protect the reputation of its business and the integrity or image of the services provided to its customers.

The criminal charges came to trial some two years later, and in October 1997 the employee was acquitted by the court without even having to testify. He was reinstated in his position once the employer learned of the acquittal, and has worked there ever since. The employee commenced legal proceedings against his employer, arguing that his suspension for an indefinite period that ended up lasting two years was tantamount to dismissal. He claimed damages for loss of income during the period of his suspension because he was unable to find another job; the parties agreed that the amount of the damages was $200,000, if liability were found.

Cabiakman was not subject to a collective agreement, and there was nothing in his individual contract of employment that spoke of the employer's power to suspend. The Supreme Court approached the question on the basis of whether the employer had some implied or residual power under the *Civil Code of Québec* to unilaterally suspend the effects of an individual contract of employment, apart from the employer's power to impose a suspension as a form of disciplinary penalty. In the latter regard, the Court made clear that the employer's power to suspend an employee as a disciplinary response, in the sense of punishment for culpable conduct, was not in issue in the appeal. The evidence in this case was clear that the suspension was not imposed as a disciplinary measure. The insurance company made its decision based on the possible impact on its business of the charges laid against the employee, and thus the question was whether the employer had the unilateral power to suspend the employee for purely administrative reasons connected with the interests of the business.

Although the *Civil Code of Québec* contained no provisions expressly recognizing an employer's administrative suspension power, the Supreme Court observed that the

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fundamental conception of a contract of employment "is based on the acceptance of a relationship of subordination in which the employee accepts the employer's direction and control in performing the duties provided for in the contract". Following on that, the Court held that a residual power to suspend for administrative reasons is "a necessary component of the power of direction the employee has accepted if the performance of his or her work should compromise the business's interest."[2]

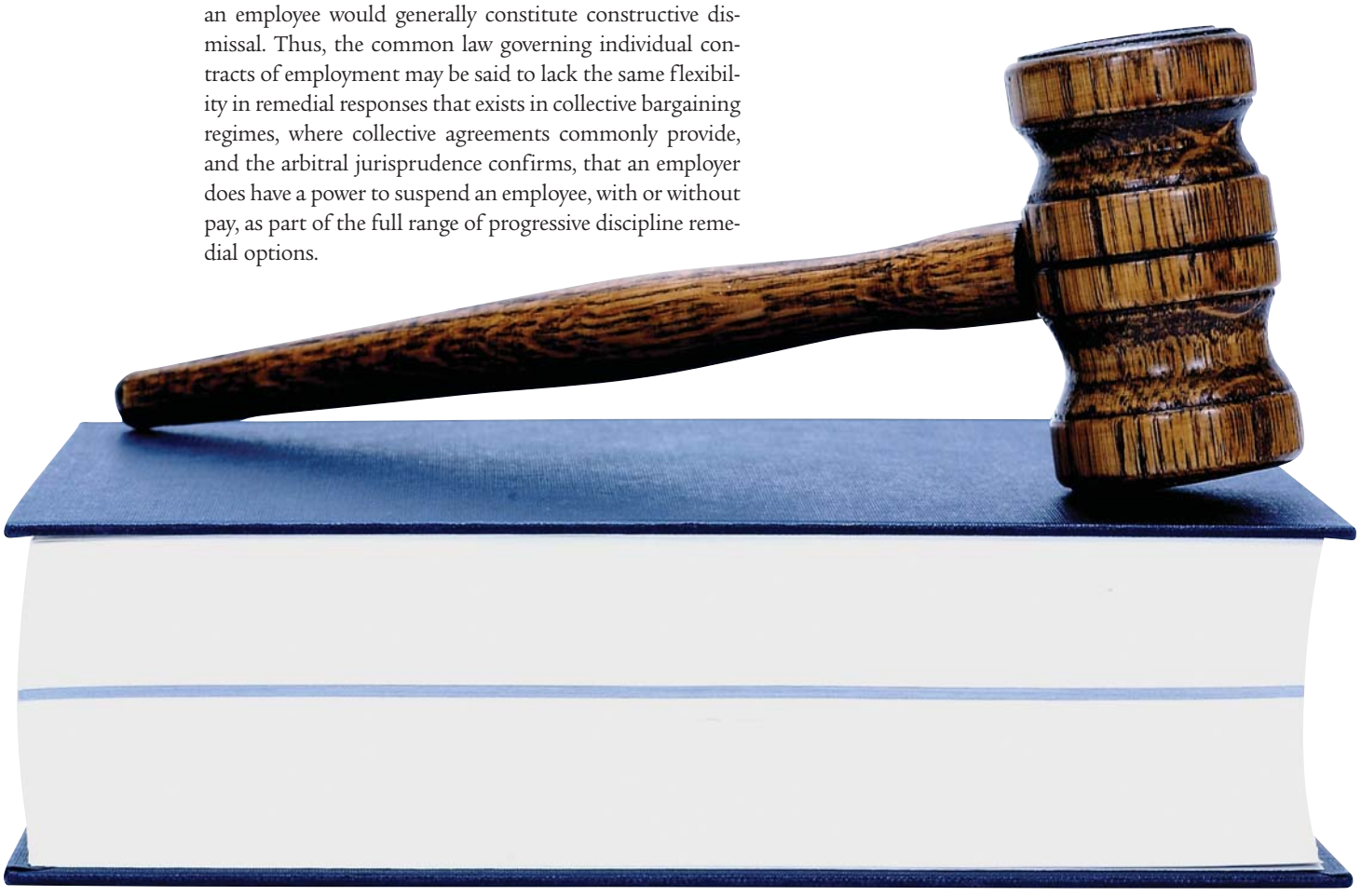
However, the Court placed certain limits on the employer's administrative suspension power. The Court ruled that:

> This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a ... dismissal pure and simple; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay.[3]

The Supreme Court's ruling in Cabiakman that, as a matter of law, there exists under the *Civil Code of Québec* a residual power to administratively suspend an employee facing criminal charges raises some interesting prospects for the common-law provinces. At common law, there is no such implied power on the part of an employer, and absent a provision in the contract of employment authorizing same, an employer's unilateral decision to temporarily suspend an employee would generally constitute constructive dismissal. Thus, the common law governing individual contracts of employment may be said to lack the same flexibility in remedial responses that exists in collective bargaining regimes, where collective agreements commonly provide, and the arbitral jurisprudence confirms, that an employer does have a power to suspend an employee, with or without pay, as part of the full range of progressive discipline remedial options.

In recent years, the notion of progressive discipline, borne out of arbitral jurisprudence interpreting collective agreements in the labour relations context, has found its way creeping into the common law governing individual employment contracts – and along with it, it may be that an implied power of suspension will ultimately follow. At least one Ontario court has found that an employer has an implied power to suspend an employee for conduct affecting work performance pending trial of charges (there, a 90-day suspension of a truck driver who temporarily lost his driving licence on account of drinking-and-driving charges).[4] However, in that case the court implied the suspension power into the contract of employment based on the parties' intentions, i.e, it was not implied as a matter of law or general rule applicable in every case but, rather, was justified in that particular case because the specific evidence before the court indicated that the parties had agreed to it, which of course contracting parties are free to do. It may be that the inclination of common law courts to recognize an implied suspension power will be fuelled by the Supreme Court's ruling that there is such a residual power in employment contracts governed by the *Québec Civil Code*.

But it is unlikely that a suspension power would be implied without some limitations on the exercise of that power, akin to those laid down by the Supreme Court in the passage quoted above. Interestingly, the four limitations "read in" by the Supreme Court in *Cabiakman* are – with one exception – roughly analogous to similar limitations established by arbitral jurisprudence governing the use of such suspension powers in collective bargaining regimes. The notable exception is the last limitation articulated by the Court: that, absent exceptional circumstances,



any administrative suspension of an employee pending trial of criminal charges must be with pay. As the Supreme Court explained: "The employer may always waive its right to performance of the employee's work, but it cannot avoid its obligation to pay the salary if the employee is available to perform the work but is denied the opportunity to perform it".

True, there are already many school boards whose practice, when faced with an employee who has been charged with some offence bearing relevance for the work-place, is to suspend the employee with pay; or others, wanting to avoid any connotation of discipline or the taint of prejudgment of a presumed innocent employee, will require the employee to stay home with pay or impose some form of administrative leave with pay. However, the practice is not universal, and in one of the leading cases on point, *Re Perth County Board of Education and O.P.S.T.F.*, a board of arbitration upheld the school board's indefinite suspension without pay of a vice-principal charged with sexual assault of a student in a case where the criminal process dragged on for several months and no reasonable alternative temporary assignment was available.[5] While parties are of course generally free to negotiate their own contractual language, and may thus choose themselves how to deal with an employee pending disposition of criminal charges (assuming they turn their minds to it), if the Supreme Court's ruling in the Québec case comes to be regarded as a legal norm, it may call into question the current practice of some Canadian school boards, irrespective of civil law or common law jurisdictional borders. ★

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Notes

1 *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55, released 29 July 2004.

2 *Ibid.*, at paras. 54-58.

3 *Ibid.*, at para. 62.

4 *Reininger v. Unique Personnel Canada Inc.*, [2002] O.J. No. 2826 (S.C.J.). In *Haldane v. Shelbar Enterprises Ltd.* (1999), 46 O.R. (3d) 206, the Ontario Court of Appeal specifically left open the possibility of implying a term into an employment contract to permit "reasonable discipline, including suspension without pay", and said that the question of whether such a term may be implied into a contract as a matter of law was best left for another case, where the issue could be fully argued.

5 *Re Perth County Board of Education and O.P.S.T.F.*, 29 June 1994 (Arb. Brent), Ontario Education Relations Commission decision no. 560. But where the federation agrees not to seek back-pay pending the teacher's appeal from criminal conviction in consideration for the school board's deferral of termination and imposition of a suspension without pay pending appeal, the federation is estopped from subsequently claiming the back-pay even though the appeal was ultimately successful: see *Re Board of Education for the City of Windsor and O.P.S.T.F.*, 11 July 1996 (Arb. Springate), O.E.R.C. decision no. 657.