In the Court of Appeal of Alberta

Citation: Edwards v Pembina Hills School Division, 2026 ABCA 37

Date: 20260210
Docket: 2303-0255AC
Registry: Edmonton

Between:

Teri Edwards

Appellant

- and -

Pembina Hills School Division

Respondent

The Court:

The Honourable Justice Jolaine Antonio
The Honourable Justice Tamara Friesen
The Honourable Justice Karan M. Shaner

Memorandum of Judgment

Appeal from the Order by
the Board of Reference
Dated the 31st day of October, 2023
Filed on the 6th day of November, 2023

Memorandum of Judgment

The Court:

Introduction

[1] The respondent employer terminated the appellant's teaching contract after determining she engaged in gross misconduct in interacting with a student. The appellant appealed to a Board of Reference pursuant to s 231(2)(a) of the *Education Act*, SA 2012, c E-0.3. Among the remedies she sought was reinstatement. The Board found the respondent had just cause to terminate the appellant's contract and dismissed the appeal.

[2] The appellant appeals the Board's decision to this Court pursuant to s 242 of the *Education Act*. She argues: the Board erred in how it characterized the appellant's conduct, which, she says, expanded the grounds for termination; relatedly, she was deprived of an opportunity to answer to the alleged new ground for termination and thus denied procedural fairness; the Board erred in finding the respondent was not required to consider less serious forms of discipline and to explain why termination was the only option; and the Board erred in interpreting and applying s 237 of the *Education Act.*

[3] The appeal is dismissed for the reasons below.

Background

[4] The appellant was a teacher for 16 years. At the relevant time, she was employed by the respondent and led a program serving students with behavioural and mental health challenges. Among the students in the program was a teenaged student, identified as "S" in these reasons. S had an individual program plan, prepared by the appellant, that included an instruction under the heading "Regulation and Sensory Integration" to "Keep your distance when talking to him as he feels threatened if you are too close".

[5] On the afternoon of November 12, 2019, S was sitting beside a program assistant in a classroom. No one else was present. A video camera in the classroom recorded a physical interaction between the appellant and S. In its reasons, the Board described the 44-second interaction as follows:

> [267] The Board finds that [S] was not being disruptive and was working well with [the program assistant] when the Appellant marched in without saying anything (her lips were not moving); she put her right hand on his arm to push his body away from the table; she then put her left arm on his right shoulder and moved her right arm over to his knees; pulled his knees out from the table so she could

> straddle both his legs; lifted her right leg over both his legs so she could straddle his legs; sat on his lap very close to his body; turned her face to him and talked to him; bounced up and down on his butt and ground her buttocks around on his lap twice. The first "grinding" lasted approximately four seconds.

[6] The video was included in the record before this Court. Having reviewed the video, the Board's description is accurate.

[7] The program assistant reported what happened to the principal two days later. It was subsequently reported to the superintendent, who reviewed the video and determined it was necessary to suspend the appellant pending an investigation. He advised the appellant of this by letter dated November 14, 2019, in which he stated, "it is alleged that you gyrated your bottom on a student's lap".

[8] The events were also reported to the police, and the video was provided to them. The appellant was subsequently charged with three offences under the *Criminal Code*, RSC 1985, c C-46, including sexual assault. A trial proceeded in November 2020; however, the Crown withdrew the charges at the close of its case and the appellant was acquitted.

[9] At the request of the superintendent, the associate superintendent conducted an investigation on behalf of the respondent in late November or early December 2019. He interviewed S and the program assistant who reported the events, among others. During his investigation, it came to light that the appellant had used profanity in the classroom and with individual students. The appellant admitted to this, both during the investigation and at the hearing before the Board. She said she repeated back profanity to students as a teaching management strategy. She also admitted she had twice used vulgar language directly to a student.

[10] Following the investigation, the associate superintendent advised the appellant he was recommending that her teaching contract be terminated. This was set out in a letter dated December 13, 2019, which was copied to the superintendent:

> **Recommendation**
>
> It is clear from our investigation that you have engaged in highly inappropriate and unprofessional conduct which does not meet the standard of behaviour expected of a teacher. You have abused your position of trust and authority in initiating unwanted physical contact of an intimate nature with a minor male student in your classroom. Further, your use of what you characterize as "classroom management strategies", including yelling at students and using profane language, do not foster a welcoming, caring or safe environment for students but rather, puts their well-being at risk. It is clear that the necessary relationship of trust between you and the Division has been irreparably harmed by your conduct. As a result, I must proceed

> with forwarding my recommendation for our Superintendent to consider the termination of your employment for just cause on the basis of the foregoing in accordance with Policy 11, Board Delegation of Authority.

[11] The matter proceeded to a termination hearing on February 4, 2020. The superintendent presided. Following the hearing, the superintendent decided to terminate the appellant's contract, effective March 11, 2020. The appellant was advised of the decision, and the reasons for it, in a letter from the superintendent dated February 10, 2020. The letter explained the appellant's teaching contract was terminated for gross misconduct, a serious breach of her employment contract, and a serious transgression of the normal student/teacher boundaries. The letter identified specific provisions of applicable codes and policies, as well as provisions of the appellant's employment contract, which her conduct violated. The letter explained that continued employment was untenable, the appellant having "breached the position of trust and authority that teachers hold and ... engaged in behaviour which would undermine public confidence in the education system". The superintendent's letter did not refer to the appellant's interactions with S as sexual assault, sexual harassment, or in ways that would suggest there was a sexual component.

[12] The appellant appealed her termination to the Board, seeking reinstatement. Sections 230 to 242 of the *Education Act* govern appeals to the Board. Section 237 sets out the Board's powers, as well as considerations relevant to how those powers are exercised. The relevant portions are reproduced below:

> 237(1) In deciding the matter being appealed, the Board of Reference may make an order doing one or more of the following:
>
> (a) confirming the termination, suspension or refusal to give an approval;
>
> ...
>
> (c) directing the board
>
> (i) to reinstate the contract of employment or the designation of a teacher,
>
> ...
>
> 237(2) In making an order under subsection (1)(c)(i) [to reinstate] … the Board of Reference may take into consideration any matter that the Board of Reference considers relevant, but in making that order the Board of Reference must consider at least the following:
>
> (a) whether the teacher is guilty of gross misconduct;

> (b) whether the teacher refused to obey a lawful order of the board without justification;
>
> (c) the risk to the safety of students, co-workers and the teacher;
>
> (d) the ability of the teacher to perform teaching duties effectively;
>
> (e) the effect of reinstatement on the future relationship between the board and the teacher;
>
> (f) the possibility of recidivism;
>
> (g) whether the reinstatement would have the effect of undermining the confidence of Albertans in general in the public education system;
>
> (h) fairness to the teacher.
>
> (3) Notwithstanding subsection (1), the Board of Reference shall not make an order under subsection (1)(c)(i) or (d) if the Board of Reference determines that
>
> (a) the teacher should not be engaged in teaching for a board, or
>
> (b) there is just cause for terminating the contract of employment or designation.

[13] The hearing lasted 11 days, during which the Board heard from numerous witnesses, including the appellant, the program assistant, and S.

[14] The respondent did not, at first, expressly use the terms "sexual assault" or "sexual harassment" to describe the appellant's conduct. In his opening statement, the respondent's counsel described the appellant's interaction with S in the following terms (Transcript, p 7, ll 6-11):

> [S] was in the process of working quietly with [the] program assistant ... and then for whatever reason, the teacher walked in, placed her hand on the shoulder of the young lad, sat on his lap, and gyrated, grinded, wiggled - - use the term you want ... .

[15] The first time the word "sexual" was used during the hearing to describe the appellant's conduct was by the Board, during an exchange with the appellant's counsel regarding the qualification of a proposed expert witness. The exchange occurred at the beginning of the hearing, approximately two weeks before the appellant gave her evidence. The appellant's counsel pointed out that a proposed expert had referred to the "sexual nature" of the appellant's conduct in a report.

See Transcript, p 87, ll 12-15. She argued the possibility of the conduct being sexual in nature and the criminal charges were irrelevant, not having been cited by the superintendent in his letter dismissing the appellant.

[16] The Board made a number of comments that suggested that appellant's physical interaction with S could be considered sexual contact. The Board stated it did not at that point have all the evidence but noted "[y]ou can have a sexual contact without having criminal charges laid for sexual contact. There could be levels and degree[s], shall we say". Transcript at 89, ll 10-17. Further, the Board pointed out that in his opening statement, the respondent's counsel had "referred to grinding and moving and - - which has sexual connotations in it if someone is sitting on someone else". Transcript at 89, l 27 to 90, ll 1-3.

[17] The day after this exchange, the program assistant, who was present in the room and sitting beside S when the impugned conduct occurred, gave evidence. When asked what she saw, she said the appellant sat down on S's lap and "my first thought was he just had a lap dance in class" and that the appellant "was bouncing from side to side initially and saying, Isn't my butt bony, and -- she did a few circular motions and got up and left". Transcript, p 131, ll 15-21.

[18] S gave his evidence after the education assistant. After watching the video, he was asked to describe what happened (Transcript, p 353, ll 10-15):

> Q. Tell me what is going on here right now.
>
> A. Well, as shown, she moved me aside to sit on my lap.
>
> Q. Okay. Then what happened?
>
> A. She -- she was trying to use her body to get me to do my work. And she started wiggling her ass, and I -- it was extremely uncomfortable.

[19] When asked how the appellant's actions made him feel, S repeated he felt "[e]xtremely uncomfortable". Transcript, p 354, ll 1-2.

[20] In her evidence, the appellant testified she believed S was upset with her because she had separated him from another student and taken his phone away that day. She said her intention in sitting on S was to try to "change the trajectory of the -- of the mood, of his -- of the atmosphere". Transcript, p 771, ll 2-4. She said she knew humour worked on S. She admitted she made a "bad choice" in deciding to be "funny, be stupid, and I went and sat on [S's] lap". She also said she did not realize in that moment that she had "crossed a boundary" and that she read the situation poorly. Transcript p 771, ll 9-22. Whether the appellant's actions could be characterized as sexual did not come out in her direct evidence, nor did the respondent cross examine her on it.

[21] Following the evidentiary portion of the hearing, the Board requested supplemental written arguments from the parties on the applicability of ***Calgary (City) v Canadian Union of Public Employees Local 37***, 2019 ABCA 388 [***Calgary v CUPE Local 37***] to its overall assessment of whether there was just cause for discipline and, if so, whether terminating the appellant's employment was excessive. This latter question is assessed within the analytical framework set out in ***William Scott & Co v CFAW, Local P-162***, 1976 CarswellBC 518 at para 13, [1976] BCLRBD No 98 [***William Scott***].

[22] ***William Scott*** sets out a legal framework commonly applied in assessing termination grievances. It has three components: whether there is just cause for discipline; if so, whether the discipline imposed was excessive in response to all the circumstances of the case; and if the discipline was excessive, what alternative measure should be substituted. ***William Scott*** at para 13. Before the Board, the appellant conceded that both her use of profanity and her physical interaction with S provided just cause for some form of discipline, so the Board's focus was on the second component of the ***William Scott*** framework. It requires a contextual analysis of the misconduct, the grievor's individual characteristics, and the surrounding circumstances, mitigating, aggravating, or neutral. Key among the contextual factors to be considered is the seriousness of the misconduct.

[23] ***Calgary v CUPE Local 37*** was an appeal from a grievance arbitration arising under the employer's sexual harassment policy. The grievor had squeezed another employee's breast without the other employee's consent. The employer dismissed the grievor and the case went to arbitration. The arbitrator applied the ***William Scott*** framework and found the grievor had in fact engaged in the conduct as alleged, giving rise to just cause for discipline. In assessing the nature of the grievor's conduct under the second branch of the framework, however, the arbitrator found it fell at the "lower end" of the sexual harassment spectrum, attracting a less serious form of discipline. The arbitrator substituted a lengthy suspension for the dismissal. A majority of this Court overturned the arbitrator's decision, finding her conclusion on the seriousness of the conduct was unreasonable and that the conduct constituted sexual assault. In making this finding, the majority noted the arbitrator used vague and "ambiguous" terms such as "incident", "contact" and "personal assault", which it considered "ambiguous and vague" language. ***Calgary v CUPE No 37*** at para 33.

[24] This Court's conclusion in ***Calgary v CUPE No 37*** was premised on the following definition of workplace sexual harassment [citations omitted]:

> [27] A current academic authority provides an updated definition which incorporates gender-based harassment and acknowledges the evolving legal landscape. Where sexual harassment was once primarily an issue of discrimination, its harms are now better understood and related areas of the law have evolved to ensure all employees are provided with safe and respectful workplaces:

> [T]he harassing comments or conduct is unwanted, often coercive, humiliating or offensive sexual or gender-based behaviour, whether physical or verbal, directed by one or more person (the perpetrator(s)) towards a targeted person(s), that is in violation of the targeted person(s)' human rights, occupational health and safety protections, common law entitlements and/or other applicable statutory rights.

[25] The majority went on to agree that "sexual assault is sexual harassment *in its most serious form*". ***Calgary v CUPE No 37*** at para 32 [emphasis in original].

[26] In its written submissions to the Board, the respondent urged it to consider the "potentially sexual nature" of the appellant's conduct in assessing overall context and seriousness, stating her actions could be described as a "lap dance" and were "sexually provocative" in nature. The respondent submitted the appellant's conduct constituted "sexual harassment" or alternatively, "an indefensible lack of judgment and gross misconduct". The respondent also referred to the appellant's conduct as "sexualized contact".

[27] In response, the appellant denied there was a sexual element to her actions. She argued the respondent's position was unfair and came as a surprise. She submitted the respondent did not lead evidence that her conduct towards S was sexual - other than S's evidence, which the appellant characterized as her having "perhaps gyrated, perhaps grinded" on him – and the possibility that her conduct constituted sexual assault or harassment had not been put to her in cross examination. Further, the appellant pointed out that in advising her that her contract was terminated, the respondent did not rely on conduct of a sexual nature. She submitted that she "sat on" S as a means of refocusing him on schoolwork and that although it was inappropriate, her actions were based on her experience and knowledge from previous interactions with S.

[28] The Board dismissed the appeal and confirmed the termination.

[29] The Board addressed whether, in suggesting the appellant's conduct was sexual in nature, the respondent had expanded the grounds for terminating her contract. It dismissed this argument, finding the nature of the allegations remained unchanged; what the appellant was challenging was the respondent's *characterization* of the same set of facts and the same physical actions. Further, it held the respondent's choice of terminology in characterizing the conduct could not limit the scope of the Board's analysis [emphasis in original]:

> [437] The Board accepts - under the authority of the Court of Appeal's pronouncements in *Calgary (City) v. CUPE Local 37* –it is not only *entitled* to consider the nature of a particular form of misconduct and assess its seriousness *for itself* – including whether it constitutes sexual harassment or sexual assault – but it is *required* to do so, to appropriately apply the second question of the *Wm. Scott*

> *Test.* An adjudicator cannot abrogate its assessment of the seriousness of the misconduct by limiting itself to the employer's use of terminology to describe what occurred. An adjudicator has the responsibility to make findings of fact regarding the seriousness of what misconduct has occurred.

[30] The Board also rejected the appellant's argument that she was "caught by surprise" and deprived of procedural fairness by the respondent's characterization of her conduct:

> [453] … That the Division believed the conduct had a sexual component was not "news" to the Appellant for the first time before this Tribunal, as was argued. The Division reported her misconduct to the R.C.M.P. and she was charged with sexual assault. There was a standstill agreement regarding this proceeding until that criminal proceeding was finished … .
>
> [...]
>
> [455] There is no unfairness to her in this Board's consideration of that misconduct. The Appellant was able to bring the evidence she felt appropriate to defend her conduct before this Board and did. She had legal representation in doing so. She was given a full opportunity to prepare all of her explanations and was able to give to the Board the background of her classroom and why she did what she did. The Appellant had the opportunity to question the witnesses, and her counsel questioned the Superintendent on the Division's policy on harassment and discrimination. She outlined her explanations of trying to use humour to change [S's] behaviour. She made her case - both through her evidence and in the written arguments made by her learned and experienced counsel on her behalf. Further, this Board specifically asked counsel to address *Calgary (City) v. CUPE, Local 37,* which is a case involving a finding of sexual assault in the workplace.

[31] The Board applied ***Calgary v CUPE, Local 37*** in assessing the nature and seriousness of the appellant's conduct. It cited the majority's observation, noted above, that "harassment with a physical component constitutes a form of sexual assault and is among the most serious forms of workplace misconduct". ***Calgary v CUPE, Local 37*** at para 31. The Board found that minor students in a school are entitled to the same protection from sexual assault and harassment as employees in a workplace and that principles in ***Calgary v CUPE, Local 31*** apply to the conduct of teachers.

[32] The Board concluded the appellant had sexually assaulted S, stating:

> [448] The Appellant sat as close to [S's] body as she could and ground around on his lap, without his consent. That constitutes sexual assault. It does not accept the Appellant's argument that there was no direct contact with [S's] genitals: the

> Appellant got as close to [S's] genitals as was possible during this encounter. The Board concludes that the conduct of the Appellant was gender-specific to the fact this student was a male and the Appellant was a female; and that "grinding" on a lap as between genders has a sexual component. It accepts – on a civil standard of a balance of probabilities - that this "grinding" on the lap of a male teenager was harassment of a sexual nature, with a physical component and so constituted sexual assault.

[33] The Board rejected the appellant's denial of sexual intention, stating "it is difficult for this Board to accept that a female teacher sitting and grinding on the lap of a 15-year-old minor male student has no sexual intention". Further, the Board found that even if there was no sexual intention, it would have characterized the conduct as serious sexual harassment.

[34] As directed in ***William Scott***, the Board considered other factors - mitigating, aggravating, and neutral - beyond the appellant's conduct, in determining whether her dismissal was warranted. It found the appellant's actions were not part of a pattern of conduct. The appellant had been employed with the respondent for a "short" tenure of 3.5 years and accordingly, the Board determined her length of service was not mitigating. While the appellant taught challenging students, she knew this when she agreed to establish and run the program. The Board considered whether the appellant had been provoked by the circumstances in the classroom that day and found she was not. The appellant had "blatantly and flagrantly" disregarded S's personalized education plan, which required teachers to keep their distance because S felt threatened by close contact. The appellant had no prior disciplinary record, which was mitigating.

[35] The appellant argued the respondent was required to consider less serious forms of progressive discipline before terminating her employment and that termination was not warranted. The Board rejected this, finding there is no requirement that all disciplinary steps proceed in a linear order, nor must the appropriateness of all lesser forms of discipline be considered in cases of serious and significant misconduct. The Board also concluded that consideration of less serious forms of discipline would not have changed the result and that termination was a proportionate disciplinary response in the circumstances.

[36] Additionally, the Board considered the factors set out in s 237(2) of the *Education Act* and found they militated against the appellant being reinstated. The Board was satisfied the appellant's conduct qualified as "gross misconduct" under s 237(2)(a), which is conduct that is "a very marked departure from the standards by which responsible and competent teachers habitually conduct themselves". ***Edmonton School District No 7 v Malati***, [1970] 74 WWR 434 at 440, 1970 CanLII 1121 (AB KB); AR at 118. With respect to the other factors set out in s 237(2), the Board found reinstating the appellant would risk student safety, allow for the possibility of recidivism, and undermine Albertans' confidence in the public education system. As well, the Board found "the trust relationship between the Appellant and the school board has been fractured beyond repair". AR at 118-19, making reinstatement inappropriate.

[37] Ultimately, the Board found the appellant's dismissal was "a just and reasonable response for this egregious conduct" and confirmed the respondent's decision.

Grounds of Appeal

[38] There are four grounds of appeal. First, the appellant says the Board erred and did not properly apply the law of sexual assault, leading it to incorrectly characterize the nature of the appellant's actions. This gave rise to the second ground of appeal, breach of procedural fairness, because the appellant did not know the case she had to meet. The third ground of appeal is that the Board misinterpreted s 237 of the *Education Act*, leading it to apply the factors enumerated in s 237(2) incorrectly. Further, in applying s 237, the Board treated reinstatement as the only option and did not consider payment in lieu of reinstatement as contemplated in s 237(1)(f) of the *Education Act.* Finally, the appellant alleges the Board erred in stating it was unnecessary for the employer to consider less severe forms of discipline.

Standard of Review

[39] Where the legislature has provided for a statutory appeal mechanism, but has not expressed the applicable standard of review, as in this case, the appellate court should apply appellate standards of review to the administrative decision. ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 37 [***Vavilov***]. The standard of review is correctness for questions of law, and palpable and overriding error for questions of mixed fact and law. ***Housen v Nikolaisen***, 2002 SCC 33 at paras 10-37.

[40] The first ground of appeal alleges legal error, namely, the misapplication of the law of sexual assault and attracts a standard of correctness. It also raises an error of mixed fact and law with respect to the Board's application of its factual findings to the law. The latter is reviewable for palpable and overriding error.

[41] The second and fourth grounds of appeal allege breaches of procedural fairness. The inquiry on appeal is whether, having regard to the context, the appropriate level of fairness as required by statute or common law was granted. ***Zuk v Alberta Dental Association and College***, 2020 ABCA 162 at para 13, leave to appeal to SCC refused, 39237 (26 November 2020) citing ***Vavilov*** at para 77; ***1765662 Alberta Ltd (Windermere Registry) v Edmonton (City)***, 2020 ABCA 137 at para 14; ***Springfield Capital Inc v Grande Prairie (Subdivision and Development Appeal Board)***, 2016 ABCA 136 at para 11.

[42] The third ground of appeal is a question of statutory interpretation. This is a question of law to be reviewed on a standard of correctness.

Discussion

a. The Board did not err in characterizing the appellant's conduct as sexual assault

[43] The appellant argues the Board applied an incorrect definition of sexual assault, leading to a mischaracterization of her actions. In support of this, the appellant points to the criminal description of sexual assault and its constituent elements set out in ***R v Chase***, [1987] 2 SCR 293 at para 11, 1987 CanLII 23 (SCC) [***Chase***]. Specifically, ***Chase*** defined "sexual assault" as an assault committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. It requires criminal courts to consider all the relevant circumstances in drawing a conclusion, including: the part of the body touched, the nature of the contact, the circumstances under which it occurred, accompanying words and gestures, and the perpetrator's motive.

[44] The appellant argues her circumstances do not fit within this framework because she had no sexual intent and her actions could be construed as something other than sexual. A grinding motion may have sexual connotations, but that does not necessarily make it sexual in nature. Similarly, the appellant argues a gender difference between the parties does not automatically transform the actions into sexual ones and further, the fact that the interaction occurred between a "female teacher" and a "teenage boy" raises the question of whether the conduct would have been viewed the same way if it occurred between same-gender individuals.

[45] The fundamental problem with this argument is that it assumes the Board imposed a *criminal* definition of sexual assault to a non-criminal matter. That is not what occurred. The Board was dealing with an employment issue, and it properly relied on the description of sexual assault as a manifestation of workplace sexual harassment, which was adopted by this Court in ***Calgary v CUPE No 37.*** It did not apply, nor was it required to apply, a criminal definition of sexual assault.

[46] The Board did not err in concluding the appellant's conduct fell within the definition of sexual assault described in ***Calgary v CUPE No 37***. The evidence was clear: the appellant sat on S's lap, bounced up and down, and ground her buttocks into his groin area. The appellant's concern that the conclusion might have been different had the contact occurred between same-gendered individuals is unfounded. The fact that it occurred between a female teacher and a male student is a relevant factor, but not determinative. The contact was unwanted and coercive. It made the student extremely uncomfortable. It was imposed by a person in a position of trust and authority upon a person under her control. Despite the appellant's denial of any sexual intention, it was clearly open to the Board to find the contact was sexual in nature.

[47] We see no reason to disturb the Board's finding that the appellant's actions amounted to sexual assault as the most serious form of sexual harassment, nor its finding that the conduct amount to gross misconduct.

b. The process was fair to the appellant

[48] The appellant submits the respondent characterized her conduct as sexual for the first time in its arguments before the Board. This, she argues, not only expanded the grounds for dismissal but also deprived her of the opportunity to fully respond. Given all the circumstances, we reject this argument. The appellant had a reasonable opportunity to fully answer the allegations, and she was afforded an appropriate level of procedural fairness. The nature of the allegations never changed. What changed was that the conduct was labelled as sexual and as noted, the availability of that label was obvious.

[49] It would be naïve to conclude the appellant did not know the case she had to meet or that she was surprised by the characterization of her conduct as sexual in nature. Further, this position is contradicted by the record. Within days of the events, the associate superintendent gave a copy of the video to the police. The police laid charges relating to sexual offences. The appellant was arrested and went to trial. Neither the Crown's decision to withdraw the charges, nor the acquittal, would eliminate the possibility that even in the non-criminal sphere the conduct could reasonably be characterized as sexual.

[50] Indeed, in the letter informing the appellant of her suspension, the superintendent advised her of an allegation that she had "gyrated [her] bottom on a student's lap". A month later, when recommending the appellant's dismissal, the associate superintendent described the appellant's misconduct in part as "initiating unwanted physical contact of an intimate nature with a minor male student in your classroom". Though these letters did not use the word "sexual", their meaning was clear.

[51] Additionally, and as noted, there was an exchange between the Board and the appellant's counsel early in the hearing during which the Board observed it was possible for sexual contact to occur without criminal charges and that the respondent's counsel had, in his opening argument, referred to the appellant's movements as "grinding ... which has sexual connotations". Transcript at 89, ll 10-27 to 90, ll 1-3. In these circumstances, it should have been obvious to the appellant that there was a possibility her conduct could be construed as sexual.

[52] The appellant suggests she would have tendered different evidence, cross-examined witnesses differently, and engaged in a different legal strategy had she known the respondent planned to allege her conduct amounted to sexual assault or that the Board would characterize her conduct as sexual assault. The appellant has not provided any detail about how she would have changed the evidence she adduced, the questions she asked, or strategy she employed if the respondent had expressly stated her employment was terminated for sexual assault.

[53] The process was fair. The appellant ought to have understood from the beginning that the respondent viewed her conduct as sexual in nature. The Board drew its conclusions only after the appellant had a fair opportunity to put her case forward, to the test the evidence, and to counter the

respondent's written arguments on the applicability of ***Calgary v CUPE No 37*** to the Board's ***William Scott*** analysis. The appellant knew the case she had to meet.

c. The Board did not err in considering the factors in s 237(2) of the Education Act

[54] The appellant argues the Board misinterpreted and misapplied s 237 of the *Education Act* by applying the factors enumerated in s 237(2) to its consideration as to whether there was just cause fore dismissal. This argument is premised on the wording of s 237(2) [emphasis added]:

> *In making an order under subsection (1)(c)(i)* [for reinstatement] ... the Board of Reference may take into consideration any matter that the Board of Reference considers relevant, but *in making that order* the Board of Reference must consider at least [the factors listed in s 237(2)(a) to (h)].

[55] The appellant says this means the Board may consider the factors in s 237(2)(a) to (h) *only* if it intends to order reinstatement or to remove a suspension. The factors inform whether reinstatement is viable, presumably after the Board has decided the impugned conduct warranted some lesser form of discipline. The appellant says the respondent erroneously applied the factors in s 237(2) to justify the appellant's dismissal. The effect of that error was to extend the analysis beyond the appropriate parameters of the ***William Scott*** analysis and bolster a finding of just cause. As well, the Board treated reinstatement as the only option, foreclosing on the availability of other forms of discipline, including termination with payment in lieu of notice.

[56] While we agree that the factors set out in s 237(2) are aimed at assessing viability of reinstatement, the narrow interpretation urged by the appellant as to when those factors should be applied is untenable. Taken to is logical extreme, it would force the Board to decide to order reinstatement *before* assessing viability. That would defeat the purpose of the exercise. Read in context, it is clear the Legislature intended the Board would consider the factors set out in s 237(2) to inform whether it should order reinstatement.

[57] The Board did not expressly state its purpose in considering the factors in s 237(2); however, it can be inferred the Board considered these factors because the appellant sought a lesser penalty and reinstatement. We note the appellant's position before the Board was that a three-to-five-day suspension would be an appropriate disciplinary response. Additionally, the Board acknowledged the appellant's argument that the respondent was required to consider the factors in s 237(2) in determining whether there was just cause for dismissal. In this context, considering the factors in s 237(2) formed a legitimate and important part of the Board's overall analysis. The Board's application of s 237(2) did not augment the *grounds* for discipline, as suggested by the appellant. Rather, it served to illustrate why the appellant's conduct made anything less than termination an untenable disciplinary response.

[58] We would dismiss this ground of appeal in any event, based on the curative *proviso* in r 14.75(2)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010. The Board's application of the s 237(2) factors did not affect the result. It had already found there was just cause for dismissal, which foreclosed on the possibility of reinstatement, pursuant to s 237(3)(b).

d. The Board did not conclude it was unnecessary to consider progressive discipline and the appellant was provided with an explanation for the termination

[59] In her factum, the appellant argues that the Board determined that lesser forms of discipline did not have to be considered by an employer when misconduct has occurred. This is not what the Board decided.

[60] The Board ruled neither of the cases the appellant cited, ie ***Rast v Calgary Board of Education***, 2021 CarswellAlta 2004, nor ***William Scott***, stand for the proposition that all lesser forms of discipline be considered, or that progressive discipline must be applied in a linear fashion, in cases of serious and significant misconduct. Citing ***McKinley v BC Tel***, 2001 SCC 38 [***McKinley***], the Board went on to state that a single serious incident of misconduct may justify dismissal. This is correct in law. ***Bird v White Bear First Nation***, 2017 FC 477 at para 44, aff'd 2021 FCA 50; ***McKinley*** at para 57; ***Leach v Canadian Blood Services***, 2001 ABQB 54 at para 117. The Board emphasized the finding in ***Calgary v CUPE No 37*** that sexual assault is sexual harassment in its most serious form, which appropriately attracts the most serious form of discipline, and it found the appellant's dismissal was a proportional response in the circumstances.

[61] The appellant argues the respondent was required to explain why her conduct could not be addressed through the progressive discipline process, short of termination. In our view, the respondent did so. In a five-page letter, the respondent described the misconduct ("you sat, bounced and grinded on the lap of a student for approximately 40 seconds"); it acknowledged the appellant's explanation for the misconduct (using humour to get the student "back on track"); it set out the superintendent's conclusion that the appellant's actions constituted gross misconduct, a serious breach of her employment contract, and a serious transgression of normal teacher/student boundaries; and it cited the polices and standards, and the provisions of her contract that the appellant violated and how. The letter also explained why the appellant's continued employment was untenable. Specifically, she breached the position of trust and authority that teachers hold, and engaged in behaviour that would undermine public confidence in the education system. Clearly, the respondent considered the appellant's conduct so egregious that her continued employment was untenable, necessarily implying the respondent considered less serious forms of discipline inappropriate.

[62] Finally, the Board's own analysis of the factors in s 237(2) and its conclusions on the seriousness of the appellant's misconduct, provide a robust explanation as to why anything short of dismissal would not have been a proportional response.

Disposition

[63] The appeal is dismissed.

Appeal heard on March 5, 2025

Memorandum filed at Edmonton, Alberta
this 10th day of February, 2026

Antonio J.A.

Friesen J.A.

Shaner J.A.

Appearances:

J.M. Michaud
M.E. Musbah
for the Appellant

Y.V. Prefontaine
J. Butler
for the Respondent