

CITATION: Fernandes v. Peel Educational, 2014 ONSC 6506

COURT FILE NO.: CV-09-03521-00

DATE: 2014-11-12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

REMY FERNANDES

Plaintiff

- and -

PEEL EDUCATIONAL & TUTORIAL
SERVICES LIMITED C.O.B. as
MISSISSAUGA PRIVATE SCHOOL
and GABRIELLE BUSH

Defendants

) Gary Bennett, for the Plaintiff

) Laszlo Pandy, for the Defendants

) **HEARD:** May 12-16, 29, 21-23 and
) June 17, 2014

2014 ONSC 6506 (CanLII)

REASONS FOR JUDGMENT

Lemon J.

INTRODUCTION

[1] Mr. Fernandes was employed by Peel Educational Tutorial Services Limited for ten years and three months. He started teaching at what is known as Mississauga Private School on January 28, 1999. Until the spring of 2008, all evidence shows that he was a good and dedicated teacher.

[2] Differences started to appear between Mr. Fernandes and his superiors towards the end of the 2007/2008 year.

[3] By April 16, 2009, it was the school's view that his:

“record-keeping and calculations are still sloppy and inconsistent, resulting in undue bonuses or penalties that impact student marks.

The calculation of missing assignments as zeros continues despite clear warnings to Mr. Fernandes not to do so. This action not only contravenes school policy but has caused serious distortions in student marks.

Distorted marks have appeared on student Report Cards, giving parents and students an inaccurate and misleading impression of a student's performance.

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

Mr. Fernandes has failed to mark or return assignments that would seriously impact student marks.

Mr. Fernandes has failed to uphold the standards and expectations of the profession, and has hurt students and the school's reputation in the process.

[4] The defendants say that Mr. Fernandes admitted to all of that and more. Accordingly, they say he was dismissed for cause on April 17, 2009.

[5] Mr. Fernandes acknowledges that his record-keeping and calculations lead to incorrect interim marks for some of his students; however he denies that he committed academic fraud or admitted to doing so. He says that he was badly treated by the school administration in 2008, unfairly investigated by the school when the marking concerns arose and, finally, he was wrongfully dismissed April 22, 2009.

OVERVIEW

[6] The story unfolds between May 2008 and April 2009. I am required to consider the teacher evaluation in May 2008 and Mr. Fernandes' behavior through the fall of 2008 although they are not determinative of the issue. The real dispute arises in March 2009 through to mid-April. In particular, during the week of April 13, 2009, members of the school administration and Mr. Fernandes had a number of meetings relating to these concerns. Mr. Fernandes says that there were only two meetings. The defendants say that there were three. After consideration of all of the evidence, the determination of this question is significant with respect to all of the other issues that are outstanding.

ISSUES

[7] The issues to be determined are:

1. What are the events that led up to the termination?
2. Were there two meetings or three?

3. Did Mr. Fernandes admit to “academic fraud”?
4. When was Mr. Fernandes dismissed?
5. Was Mr. Fernandes wrongfully dismissed?
6. If Mr. Fernandes was wrongfully dismissed, what are his damages?

FINDINGS OF CREDIBILITY

[8] Before outlining and determining the real facts in issues, I should summarize my findings of credibility.

[9] I must make my findings on a balance of probabilities based on all of the evidence that I hear. With respect to any witness, I can accept all of what they say, some of what they say, or none of what they say. These events occurred more than five years ago and predictably, few notes were taken. There were therefore difficulties with memory along with credibility.

[10] By and large, Mr. Fernandes gave his evidence in a credible fashion. He admitted the things that he should have even though many of them were not to his benefit. As set out below, he acknowledges that his record-keeping was sloppy, incorrect and late.

[11] As set out below, on two occasions, I find that he was untruthful to the court. Where there is no corroboration of his evidence, I find that I must treat his evidence with great caution.

[12] The defendants called Beatrice Chachel, Nick Zero, Paul Edwards, Drew Cleland and Gabrielle Bush with respect to the important meetings in issue.

[13] While Ms. Chachel has been a long-time employee of the school, that, standing alone, does not amount to a reason to dismiss her evidence. I cannot reject her evidence on that basis as submitted by the plaintiff. Her evidence was not shaken in cross examination and for reasons set out below I will rely on it to make at least one determination of fact upon which many others follow.

[14] Similarly, Mr. Zero, while still a teacher at the defendant school, showed no bias one way or the other to the parties involved. Where other witnesses, who had a greater interest in the outcome of the trial, differ from his evidence, I have relied on Mr. Zero and his recollections.

[15] Mr. Edwards testified with respect to his investigation of Mr. Fernandes and his recollection of meetings between Mr. Fernandes, Mr. Zero, Ms. Bush and himself. Mr. Edwards had an ill disguised dislike of Mr. Fernandes. On his own evidence, he was obviously a bully in this piece. Where his evidence differs from any other witness, I have rejected his evidence.

[16] Mr. Cleland is a partner in the corporate defendant with Ms. Bush. He was only involved in the last meeting with Mr. Fernandes. He is a witness upon whom I do not place any reliance. After Mr. Fernandes was terminated, Mr. Cleland was responsible for preparing the Record of Employment so that Mr. Fernandes could obtain employment insurance benefits. Mr. Cleland is a chartered accountant. He testified that he prepared that document in September 2009, and backdated it to April 2009. At first, he saw nothing wrong with that but then, reluctantly, agreed that it was perhaps dishonest to backdate the Record of Employment. That indicated a level of integrity upon which I cannot rely.

[17] To complete the evidence for the defendants, Ms. Bush gave clear and

candid evidence. She was not shaken in cross examination. I have no reason to reject her evidence.

1. WHAT ARE THE EVENTS THAT LED UP TO THE TERMINATION?

May, 2008

Evidence of Mr. Fernandes

[18] Mr. Fernandes taught computer studies for the junior, intermediate and senior school classes during his time at Mississauga Private School. He was also employed in the summer months carrying out information technology work for the benefit of the school. Like other teachers at Mississauga Private School, he was involved in extracurricular activities. From his evidence, it appears that he was particularly proud to be a volleyball coach and involved in the Arts and Music Night.

[19] His assessments in 2000 and 2001 indicated that he had exemplary conduct. None of his reviews fell below the word “good” and most were indicated as “excellent”. He was described as “highly respected and a valued member of the staff”. The defendant, Gabrielle Bush, carried out those assessments when she was principal of the school.

[20] Mr. Paul Edwards was vice principal of the school in 2008. He carried out Mr. Fernandes’ assessment that year. His May 2008 report indicated that he was disappointed with Mr. Fernandes’ involvement with the school video, the yearbook course, taking on new courses and appearing to be inflexible in the application of school policy. Both Mr. Edwards and Ms. Bush described that too

many students were complaining about the way that Mr. Fernandes was treating the students and that they felt “picked on” or arbitrarily disciplined. The report was otherwise positive; it noted his willingness to give of his time for extracurricular activities such as coaching a number of volleyball teams.

[21] Mr. Fernandes was very unhappy with this review. He provided a two-page response that denied and explained the various negative comments. At the end, he said:

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

I shall strive to always do my best, and always work in the best interest of the students and the school. Having said this, I shall go out of my way to make sure MPS excels and grows both as an educational institution and as a business in general.”

[22] Mr. Fernandes testified that there was a typographical error in these comments. He denied that he was in any way disappointed with his performance. Given his detailed response, I do not accept that he had made such an error. Rather, the clear message from his response in its entirety was that while he did not agree with the complaints made against him, he intended to do better in the new year. He agreed that “in the name of discipline I sometimes forget the human element’. Further, he would, “in the future note the disappointment of my superiors before sending any student to the vice-principal’s office, and I will do my best to handle the situation on my own”. This would be consistent with the dedicated and loyal teacher that he had been to that point.

[23] The defendants concede that nothing in this report generated any basis

for the termination of Mr. Fernandes. Accordingly, I need not make a determination of whether he or Mr. Edwards were correct in that assessment. I refer to it only because it is the start of the atmosphere of distrust between Mr. Fernandes and the other principal witnesses for the defendants.

[24] During the summer of 2008, the ownership of the school was transferred to Ms. Bush and Mr. Cleland through their corporation. Mr. Edwards was promoted to Principal. Mr. Fernandes sees the evaluation of May 2008 as an effort by Mr. Edwards to ruin his summer vacation. Mr. Fernandes says this was the start of a conspiracy to have him removed from the school.

[25] I do not read this review as anything inappropriate or badly timed. Concerns should be brought to the attention of an employee and there is no better time for considering improvement than a review at the end of term. Indeed, the review as a whole, shows Mr Fernandes to be an excellent teacher. Other comments include “Mr. Fernandes is passionate about the course he wishes to teach”; “approach encourages experimentation and problem-solving based on previous knowledge”. “Willing to give of his time for extracurricular activities such as coaching a number of volleyball teams”. The report itself is five pages long made up primarily of tick boxes opposite standard phrasings of expectations; Mr Fernandes is noted as meeting all of them except the few that are in dispute. Other than the matters in contention, it is a positive report.

[26] To skip ahead to the end of the story, after his termination, the defendants continued to provide Mr. Fernandes’ children’s tuition and busing to the end of term. It appears that, to the extent they could, they kept the cause for his termination quiet. I see nothing in the evidence to support a theory that the administration attempted to drive Mr. Fernandes out of the school.

[27] The defendants say that this was the start of Mr. Fernandes' gradual decline in abilities and trustworthiness that led to the events that are actually in issue. There is no doubt that there was a change in relationship between Mr. Fernandes and the school that coincided with the problems of March 2009. The evidence equally supports that Mr. Fernandes' work habits or concentration on the tasks at hand changed during that school year. However, there is insufficient evidence for me to make a determination of the reasons for that change on a balance of probabilities.

[28] I cannot and need not make a determination of what led to the events of March and April 2009. There is no explanation of why Mr. Fernandes did the things that he admittedly did. Mr. Fernandes gave no explanation to the defendants or to me at trial. My job is, therefore, to make a determination of what Mr. Fernandes did in March and April of 2009 and whether that conduct justifies his dismissal from employment at the school. I cannot determine the reasons for his actions.

September 2008

Evidence of Mr. Fernandes

[29] Prior to September 2008, Mr. Fernandes coached both the girls and boys senior team. He was the only certified volleyball coach on staff. However in the fall of 2008, another individual was named the head coach and Mr. Fernandes was to be the assistant. He spoke to Mr. Zero who said that was how it was going to be. Mr. Fernandes had been working towards a level II certificate and needed 80 hours of coaching to obtain the certificate. He would not be able to obtain those hours as an assistant. Despite that, both Mr. Zero and Mr. Edwards

told him that he could not have other coaching duties. Mr. Zero, however, told him that he would give him a fraudulent certificate for the hours.

[30] Mr. Fernandes spoke to Ms. Bush about this problem and the suggestion that fake hours could be manufactured. In response, she said that she did not want to interfere.

Evidence of Mr. Zero

[31] Mr. Zero was the athletic director of the school in 2008/2009. In 2007/2008, Mr. Fernandes coached both senior volleyball teams. However, in 2008/2009 he coached only one senior team. Mr. Zero said that the other coaches did not want to coach with Mr. Fernandes. Mr. Fernandes said that he was disappointed that he did not have both teams because he needed to complete hours to obtain his certification.

[32] Mr. Zero denied that he told Mr. Fernandes to fake his log hours. Rather, he suggested to Mr. Fernandes that he might try to obtain coaching with sports clubs outside of the school. He denied that he changed Mr. Fernandes' coaching duties to get in the way of that certification. Their relationship was always cordial and professional.

Evidence of Mr. Cox

[33] Mr. Cox started at the school in September 2007. As part of his employment, he was asked by Mr. Zero to coach volleyball. He was asked to assist Mr. Fernandes with the senior boys' volleyball team. They finished coaching together that season although Mr. Fernandes was on crutches for part of the time. Mr. Cox therefore took over as coach but Mr. Fernandes still came

out to help despite his injuries.

[34] In 2009, Mr. Cox coached the senior boys with Mr. Zero. Mr. Fernandez coached other teams which included the girls' senior team.

Evidence of Ms. Bush

[35] Ms. Bush testified that she did not hear about this coaching hours problem. In any event, she did not approve of faking coaching hours.

Findings

[36] The onus is upon Mr. Fernandes to persuade me on a balance of probabilities that he was demoted in order to thwart his wishes to be further certified. I have no reason to reject his evidence on this point but nor do I have any reason to reject the evidence of Mr. Cox and Mr. Zero. It seems unlikely on the evidence that a teacher such as Mr. Fernandes, who had been a loyal and exceptional teacher until May 2008, and who then had a mildly reproofing review at the end of that year, would somehow be intentionally targeted to take away one of the things that he enjoyed the most of his position, without reason. Although there is hearsay evidence with respect to what other teachers may have said about coaching with him, I put no reliance on those comments. In short, I can make no finding here. That is not of great concern given that the defendants do not argue that this is a ground for justifying Mr. Fernandes' termination in any event.

March 2009

[37] The significant factual issues start in March of 2009.

Evidence of Mr. Fernandes

[38] Mr. Fernandes testified that Mr. Edwards was the vice principal under the old administration but in 2008, he was introduced as the new principal. Before that change, Mr. Edwards was friendly, cordial and helpful to Mr. Fernandes. However, once Ms. Bush became head of the school, Mr. Edwards was harassing, bullying and gave him a workload that was unmanageable. Mr. Edwards made mean and nasty comments to him. He told him to chase a student out onto the field when he did not show for detention. When the student later told Mr. Edwards that he forgot about the detention, Mr. Edwards said that that was understandable.

[39] He complained to Ms. Bush about Mr. Edwards' conduct in March 2009. She said that he should speak with Mr. Edwards. Although he thought that this suggestion was putting him "in harms way", he did so. He spoke with Mr. Edwards and asked what he could do to change so that Mr. Edwards would get along with him. Mr. Edwards said that he was busy but that they could meet the next day. When they met the next day, Mr. Edwards gave him a prepared eight point memo of recommendations. He had no chance to speak with Mr. Edwards about it but rather, Mr. Edwards read the memo to him and ranted about it. Mr. Fernandes felt bullied and demoralized by this.

Evidence of Mr. Edwards

[40] In 2007/2008, Mr. Edwards said that he had concerns about Mr. Fernandes' behavior at school but he did not humiliate or denigrate Mr. Fernandes at any time or in front of anyone. He was not aware that Mr. Fernandes thought that he had.

[41] Mr. Fernandes came to Mr. Edwards and said that he understood that Mr. Edwards was not happy with him. He asked Mr. Edwards to give him guidance and direction. Mr. Edwards wanted to give some serious thought to this and so he asked Mr. Fernandes to meet with him the next day and he would prepare a list. They were to meet the following day after school.

[42] They met on March 11 and Mr. Edwards handed a copy of his document to Mr. Fernandes and walked him through it. The meeting was about a half an hour. Mr. Fernandes responded and asked for clarification and specific examples. He appeared to listen.

Ms. Bush's evidence

[43] Prior to the purchase of the school, Ms. Bush got along well with Mr. Fernandes. That did not change after the sale and did not change after the events of March and April of 2009. She did not hear Mr. Edwards abuse Mr. Fernandes. Mr. Fernandes did not complain about such abuse and no other teacher complained of it.

[44] However, Mr. Fernandes came to her and said that he thought that Mr. Edwards was not happy with him. She told him to talk to Mr. Edwards and he did so. Mr. Edwards showed the memo he prepared to her; she thought that it was great for Mr. Fernandes and instructive.

Findings

[45] I find that Mr. Fernandes is being overly sensitive on this point.

[46] He thought that he had a bad relationship with Mr. Edwards and reported

this to Ms. Bush. She told him to deal with Mr. Edwards directly. He saw this as a sign of lack of support by Ms. Bush; I see it as reasonable. Even though Mr. Edwards may have been the vice principal, such issues between coworkers should first be attempted to be resolved between them before senior management should be involved.

[47] Mr. Fernandes then spoke with Mr. Edwards. He thought that Mr. Edwards brushed him off to another day. However, the following day, Mr. Edwards was able to give him a longer meeting and a memo that he had prepared in response to Mr. Fernandes' question. I see this as reasonable and responsive to Mr. Fernandes' concern. It could not be expected that a co-worker, without notice, could deal with such an issue on a normal busy day. To defer the topic only one day to give it further thought was respectful to Mr. Fernandes' request. The memo itself is constructive and civil. Some of the issues echo the concerns of the May 2008 assessment.

[48] While it may well be that it would be disappointing for Mr. Fernandes to hear from his superior that there were concerns, it must be remembered that he asked for this input. Mr. Edwards cannot be faulted for providing it. Given the differences in how the two men testified, it does not surprise me at all that what Mr. Edwards might see as forthright, Mr. Fernandes would see as insensitive and coercive. I find that they are both correct in their own perception. The result is that Mr. Fernandes was left feeling most uncomfortable with his superior.

[49] At several points in his evidence, Mr. Fernandes said that Mr. Edwards belittled him in front of other teachers. No other witness in this proceeding heard such comments. No other witnesses were called by Mr. Fernandes to support the allegation that he was treated badly in front of other teachers or students. On a

balance of probabilities, I find that did not occur.

The Problem Surfaces - March 2009

Evidence of Ms. Bush

[50] It was school policy that marks had to be handed in on time and in hard copy. There were four report cards; early November, late January or early February, April and June. The interim report cards included spreadsheets and progress reports. Mr. Edwards would review them and tell teachers to fix errors or marking problems. All report cards were compiled by the homeroom teacher. They were then attached to a letter and a form so that parents could request interviews. The final report cards were prepared after the final exams. Those report cards had a longer comment section and a more detailed marking record.

[51] Only the final year-end marks went on the student's permanent transcript. The school did however keep the interim report cards in the student's file for a year.

[52] It was school policy that no zeros could be given on a student report except in the case of plagiarism. If the assignments were not returned, they would not be given blanks or zeros but just left "in limbo".

[53] Mr. Fernandes still used an Excel spreadsheet to provide his marks. He had been using the spreadsheet for many years. He was one of the few teachers who did. He was not using the Markbook software program that others were using and was recommended. This program was to be mandatory in September 2009.

[54] Ms. Bush testified that Mr. Fernandes' marks came in each month and there were no problems or concerns about his marks until March 2009.

[55] She was first aware of the zeros in Mr. Fernandes' report cards in March, 2009. Those blanks were having an impact on the students' marks.

[56] When the submissions came in for March 3, 2009, Mr. Zero reviewed them and prepared a report. There were concerns about five teachers when Ms. Bush, Mr. Edwards and Mr. Zero met on March 10. Mr. Fernandes was one of them. There were problems with blanks and assignments not handed in. However, Mr. Fernandes was different from the others because he had an alarming number of blanks in his reports. He also had calculations that were wrong; his math did not work out. As a result of that meeting, Mr. Edwards was to follow-up with the teachers, including Mr. Fernandes, about blanks and calculation problems.

[57] Mr. Fernandes had a new deadline to provide his marks, because he had so many problems. No other teacher had a new deadline. Mr. Edwards reported back to Ms. Bush that Mr. Fernandes had said that he would have no problem with that deadline. Ms. Bush and Mr. Edwards agreed to meet on March 13th to review what Mr. Fernandes provided.

[58] The March 13 marks were returned to Mr. Zero. Ms. Bush and Mr. Edwards reviewed them. There were still a lot of problems. Ms. Bush therefore asked Mr. Fernandes to meet with her and Mr. Edwards. Mr. Fernandes agreed that there were problems and that he would fix them over the March break. He explained that there were assignments coming in and he would mark them and fill the grades in. He would also fix the calculation formula. Ms. Bush had

concerns, but Mr. Fernandes was very reassuring.

[59] Ms. Bush had asked Mr. Fernandes to return the new reports on March 30th, the day after the end of March break, and he had no problem with that. The school was open over the March break and teachers came in to work. Ms. Bush is not sure if she came in over the March break.

[60] Ms. Bush did not get the marks on March 30th from Mr. Fernandes; however, she was not worried about that because the students still had to deliver assignments to him and the 30th was the first day back.

[61] On March 13, Ms. Bush had told Mr. Edwards to start to document all of the problems. She got that report on March 30th. She read that and used that as a basis to follow-up with Mr. Fernandes.

[62] Mr. Fernandes had still not fixed his spreadsheet formulas. With all of the blanks, it appeared the students were very far behind. Overall, this solidified Ms. Bush's concern that there was a problem with his marking. Although fraud had not occurred to her, she was concerned about his being sloppy; his math was wrong and she could not understand why he did not fix the spreadsheet.

[63] The marks did not arrive from Mr. Fernandes and so Ms. Bush and Mr. Edwards met with Mr. Fernandes on Wednesday, April the 2nd. Mr. Fernandes said that he had addressed all of their concerns but he was still marking the assignments that came in on March 30th. He asked for two more days to April 3rd and Ms. Bush allowed that. The students' progress reports were due on the third in any event.

[64] Mr. Fernandes submitted the marks and report cards on April 3rd. When

Ms. Bush looked at those marks on the 3rd with Mr. Edwards, they were "virtually perfect" and "suspicious". They had been the worst and now they were the best in the school. Everything had been done and marked. She knew that one student, who had significant educational issues and who she knew had not completed all of her work, had received five out of five. Some blanks were still counted as zeros. Those were the main issues. She did not meet with Mr. Fernandes about this, but told Mr. Edwards to investigate.

[65] Ms. Bush gave instructions to Mr. Edwards to look into the validity of the marks since March 13. He was to speak to the students, but she left it to his discretion. She also started to talk to students herself. She wanted a satisfactory explanation of why the marks were as they were. She began to investigate that weekend and started to speak to students.

[66] April was a very busy month. There was a literacy test, a university math competition and the Arts and Music Night, along with an open house later in the month.

[67] There was then an April 8 meeting with Mr. Zero and Mr. Edwards to review all of the teachers' marks, but especially those of Mr. Fernandes. Mr. Edwards had a preliminary draft marked "marks irregularities". This was as a result of his meetings with the students.

[68] Ms. Bush was very worried about what they had found. She had also met with Mr. Edwards between the meetings of April 3 and April 8. She decided that Mr. Zero and Mr. Edwards were to meet with Mr. Fernandes. They were to schedule a meeting. She did nothing else about this because of the long Easter weekend.

Evidence of Mr. Zero

[69] Mr. Zero, besides being the athletic director, was a senior coordinator. In that role he assisted Mr. Edwards. As part of his job in 2008/2009, Mr. Zero collected the reported marks from each teacher each month. It was his job to pick them up from the teachers and then to monitor those reports. He identified the students that were at risk, that is to say, those with an average below 60. He collected the marks in hard copy and then reviewed them with Mr. Edwards and Ms. Bush.

[70] On April 3, Mr. Zero collected the marks as usual but Mr. Edwards and Ms. Bush asked for Mr. Fernandes' marks on the 3rd. There had already been concerns raised with respect to Mr. Fernandes' marks in the March collection. There were missing marks that were of concern; the blanks were skewing the average since they were calculated as zeros. Mr. Zero brought this to the attention of only Mr. Edwards and Ms. Bush.

Evidence of Mr. Edwards

[71] On March 3, 2009, all teachers were to hand in their marks to date. Mr. Fernandes submitted his marks to Mr. Zero. Mr. Zero then was to review those marks and report on any concerns that he might have with respect to the students to Mr. Edwards and Ms. Bush.

[72] When he met with Mr. Zero and Ms. Bush, they reviewed Mr. Fernandes' marks. The problems were that there were too many blanks that suggested missed assignments and the columns did not total correctly. The blanks resulted in the students' marks being zero. While other teachers had assignments

missing, the zeros for blanks were only Mr. Fernandes' problem. According to school policy, if there was unsubmitted work, it should not be shown as a blank or a zero, but simply left out. Mr. Fernandes, however, had recorded unsubmitted work as zeros. The zeros would lower the student's mark and the school policy did not allow for that.

[73] Mr. Edwards brought these concerns to Mr. Fernandes. Mr. Fernandes was told to re-submit the marks on March 13, the Friday before the March break. Mr. Fernandes told him that he would mark or review the assignments in that time. It did not appear to be a big issue to Mr. Fernandes; he said that it would be resolved by the 13th. He took ownership of the mark miscalculations and apologized for those errors. He said that he would get those errors fixed.

[74] When he and Ms. Bush reviewed the March 13 marks, they were virtually the same marks as those produced on March 3. There were still blanks showing as zeros. There were still calculation errors.

[75] Again, Ms. Bush spoke to Mr. Fernandes and said, "this is very serious" meaning that the marks were not accurate and that was not right. Mr. Fernandes was told to use the two weeks of March break to submit the marks back on the first day after the break. Mr. Fernandes agreed that he would fix the marks for the first day after the break.

[76] Over the March break, Mr. Edwards also did some further investigation because Ms. Bush had asked him to compile a report of all of the concerns to date about Mr. Fernandes' teaching. He submitted that report to Ms. Bush on March 30, the first day back. He and Ms. Bush discussed it. He did not get any marks from Mr. Fernandes on the 30th. He did not speak to Mr. Fernandes on

that date.

[77] On April 1, Ms. Bush asked Mr. Edwards for Mr. Fernandes' marks. He said that he thought she had them. Neither of them had received the marks. Both then spoke to Mr. Fernandes that same day.

[78] Friday, April 3 was the next date for submitting marks. This was a more important date since report cards were due. Mr. Fernandes suggested that he would provide both sets of marks on April 3 and they agreed to that.

[79] Mr. Fernandes handed in his marks on April 3rd. Mr. Edwards and Ms. Bush reviewed them. They still had concerns about the marks. While there had been problems in the past, these were now the best report cards of the school. Only one student had a blank; the blank still showed a zero and that skewed the mark. Ms. Bush told Mr. Edwards to investigate immediately with respect to the new entries. He started on April 3 by reviewing the marks and then started interviews with the students. He did not speak to Mr. Fernandes that day.

[80] The April 3 marks would be the ones that would be on the student report cards that went out to the students. Mr. Fernandes handed the report cards in.

[81] The next regular marks meeting was April 8.

[82] After the meeting on April 8th, Ms. Bush told Mr. Edwards to continue with his investigations for another day but that would have taken him to the Thursday before the Easter long weekend. Mr. Edwards was then to meet with Mr. Fernandes right away.

Evidence of Mr. Fernandes

[83] Midterm progress report cards were issued to the administration on March 3, 2009. They were to be provided so that the administration could see how the marks were in progress. Mr. Edwards complained to Mr. Fernandes that, in some cases, blanks were provided instead of marks on the report cards. He explained to Mr. Edwards that this occurred because the reports were not completed yet. He also explained that where the reports showed zeros, that was not in fact the student's mark. Rather, when a student assignment had not been completed, his computer program showed it as a zero, rather than an incomplete.

[84] Reports were also due March 13, 2009. There were a number of students who had had overdue assignments on March 3. He received those and entered them on the March 13 report. But there were still some assignments outstanding. Mr. Edwards was still upset about the zeros given to some students. Mr. Fernandes was not concerned about them because they were only for teachers' marks, not for marks to go home with the students.

[85] He gave notice to the students who still had overdue assignments and also told their parents over the phone. The assignments were to be done over the March break. He marked the assignments that he received after the break and put those marks into his computer program. However, there were still outstanding assignments and Mr. Edwards was continuing to harass him about putting marks into the computer. He therefore had to change his marking process.

[86] With respect to the assignments that were still outstanding, he went into each student's computer to see their work and provided marks for the April 3

reports. The students didn't know that he had done that although he was entitled to access their work on the school computers.

[87] In order to evaluate students, he must consider their knowledge and understanding, their critical thinking, the application of that critical thinking and communication. He was therefore able to go into the computer and consider the first three and give them marks for that. They would not get full marks for communication because they had not handed in the assignment. He then submitted those marks on April 3.

[88] When Mr. Edwards saw those marks, he said that they were fabricated. Mr. Fernandes denied that they were fabricated.

Findings

[89] In his evidence, Mr. Fernandes provides a detailed response to all of the complaints. I will deal with those later in these reasons. To this point, however, he does admit that his marks were late and his calculations for both student and class averages were incorrect. Some marks were deleted mistakenly. He agreed that the midterm progress report marks were not ready for the reports March 3, 2009. He agreed that they were also not ready March 13, 2009. He agreed that he gave full marks to students who had not completed their assignments even though he agreed that the school policy was that one could not get a perfect score for an incomplete assignment.

[90] He agreed that in one example, he left out the February and March tests. This was an error and was to be fixed.

[91] Although he had the whole of the March break to catch up, and his first

priority was to get the blanks filled in, he also had to chase down the students for those blanks.

[92] In answer to my questions, he thought that there may have been 20 out of 30 to 35 students who had not completed their assignments. By the end of the March break there were five or six that had not been handed in. This would suggest a teacher who could not or would not get his students to comply with the requirements.

[93] The school policy was that no student can get zero for either completed or uncompleted assignments. They would get zero only for plagiarism on that assignment. While this policy seems astonishing to me, it was the rule of the school and Mr. Fernandes was aware of it. He did not follow it. Simply saying that his own computer spreadsheet would not properly complete the calculation is not a satisfactory answer to the administration's complaint, particularly when it comes from the computer science teacher.

[94] One of the significant concerns of the administration was that it appeared that students, who had not completed a presentation, had received full marks for that part of the course. Mr. Fernandes, however, said that those presentations were voluntary and therefore students that had not completed the presentation could still get full marks. And yet one of the exhibits is an email between Mr. Fernandes and one of the students dated February 19, 2009 in which he says to the student, "this will be presented in front of the class and marked on five when you next come to class". He finishes that email with, "good luck with your presentations". There is no explanation for this email other than to confirm that the presentations were to be marked. I can find here that Mr Fernandez has lied to the court on at least this one example of how the marks were created for some

of the students.

[95] Based on the above, it is clear that throughout March 2009, Mr. Fernandes, for whatever reason, had been doing an incompetent job of assessing his students, marking his students and recording those marks. While there is some dispute as to how many other examples the cross examination and the documents might disclose, Mr. Fernandes was not getting the job done.

[96] In 2009, the Easter weekend was April 10 through 13. On April 8, Ms. Bush had instructed Mr. Zero and Mr. Edwards to meet with Mr. Fernandes. While the administration was not yet aware of all that I have found, as set out above, those were the circumstances leading into the significant week of April 14 through to 17, 2009.

2. WERE THERE TWO MEETINGS OR THREE?

[97] Mr. Zero says that he met with Mr. Edwards and Mr. Fernandes on Tuesday, April 14, 2009.

[98] Mr. Edwards says that he met with Mr. Zero and Mr. Fernandes on Tuesday, April 14, 2009 and then with Ms. Bush and Mr. Fernandes on Thursday, April 16, 2009.

[99] Ms. Bush says that she met with Mr. Edwards and Mr. Fernandez on Thursday, April 16, 2009 and then with Mr. Fernandes and Mr. Cleland on Friday, April 17, 2009.

[100] Mr Cleland says that he met with Ms. Bush and Mr. Fernandes on Friday, April 17, 2009.

[101] The defendants therefore say that there were three meetings.

[102] Mr. Fernandes, however, says that he met with Mr. Edwards and Mr. Zero on Thursday, April 16, 2009 and then met with Mr. Cleland and Ms. Bush on Friday, April 17, 2009 for a total of two meetings.

[103] If two meetings occurred as Mr Fernandes says, it supports a finding that the school was in a rush to judgment against Mr. Fernandes and that he was not given a proper hearing. Alternatively, if there were three meetings, it supports the school's view that Mr. Fernandes was given plenty of opportunity to respond to their complaints, and indeed, supports the school's proposition that he admitted to wrongdoing at the Thursday meeting.

Evidence of Mr. Fernandes

[104] Mr. Fernandes testified that on Thursday, April 16, Mr. Edwards called a meeting with him and Mr. Zero. On the afternoon of April 16 at approximately 3:30 p.m., Mr. Fernandes met with them. At that meeting, Mr. Edwards handed Mr. Fernandes a four-page document showing how the marks were fraudulent. Mr. Edwards read him the document, listing his complaints and ranted about it. He said that the marks "stink" and it made him "sick". Mr. Fernandes denied fabricating the marks. Mr. Edwards told him that he would meet Mr. Cleland and Ms. Bush the next morning. Mr. Edwards said that, overnight, Mr. Fernandes should "think about his honesty" and "if I were you I would be really, really scared". Finally, he said "I'd like to see you get out of this one". This meeting was at 3:45 p.m. and lasted for about 45 minutes. Neither Mr. Edwards nor Mr. Zero wanted to hear from him about his explanations.

[105] At the end of the meeting on the 16th with Mr. Edwards and Mr. Zero, Mr.

Fernandes thanked them for their time, took the paper and went home. He showed the document to his wife on the way home. They then attempted to write a response that night but they could not complete it for the next morning.

[106] Mr. Fernandes testified that he did not meet with Mr. Edwards and Ms. Bush on April 16. There was no discussion of false or fraudulent documentation. Mr. Fernandes denied that he admitted to any fraud by him. He denied that Mr. Edwards said that he should call in the students and he denied that he broke down, confessed and cried. He denied that he said that he did not want to tell his wife.

[107] Mr. Fernandes denied that Ms. Bush and Mr. Edwards told him that there were grounds for immediate termination and that he was told to come back to meet with Mr. Cleland and Ms. Bush the next day.

[108] When Mr. Fernandes arrived on the morning of April 17, he expected to take his class as usual but there was already a teacher taking his class. The school secretary told him to attend a meeting at 9:30 a.m. This was with Mr. Cleland and Ms. Bush.

[109] Ms. Bush gave him the same document that Mr. Edwards had given him and told him that they would have to let him go. He denied that he had done anything wrong. She told him that he needed to resign. He said that he needed until Monday to give his response in writing. Mr. Cleland asked "how did this happen?" Mr. Cleland did not want it "to get messy". Finally, Ms. Bush said that he should go home and come back on Monday and they would discuss it. This meeting started at about 9:30 a.m. and ended around 10:00 or 10:10 a.m. The meeting was in Ms. Bush's office and there were just three people in attendance.

[110] He left the meeting but stayed at work. He needed to provide the homeroom reports for that date. He copied them and made them ready for distribution and then took his bag and left.

[111] No one told him to stay away from the building. He was not escorted out of the school. They did not tell him that he was fired. He did not receive a termination letter on that date. No keys were taken from him. He was not told that he could not teach for the balance of the term.

Evidence of Mr. Edwards

[112] Mr. Edwards met with Mr. Fernandes and Mr. Zero on Tuesday, April 14th. This meeting took place in his office. It was at the end of the day and they all arrived around 3:30 p.m.

[113] He gave Mr. Fernandes the document setting out his concerns about the marks and walked him through it. Mr. Fernandes responded with very general statements, such as “there is an explanation” or that he could give an explanation. Mr. Edwards said that he was just the messenger. Mr. Fernandes looked down or looked around the room. Mr. Zero only said, “how can you have assigned marks to student work that has not yet been submitted?”. Since Mr. Edwards was not getting the answers he wanted, he told Mr. Fernandes that the next thing to do was to present the report to Ms. Bush and Mr. Cleland. Mr. Fernandes nodded his head and acknowledged that it was to be passed on. Mr. Fernandes did not make a strong denial or say that it was not correct. Mr. Edwards could not recall specifics of what Mr. Fernandes said. He provided a copy of the document to both Mr. Fernandes and Mr. Zero. He is positive that the meeting took place at the end of the day on April 14th.

[114] Mr. Edwards then went to Ms. Bush. She was concerned. He also undertook other investigations after the meeting of April 14th. On April 15th, he looked in Mr. Fernandes classroom for unmarked papers at Ms. Bush's request. Both Mr. Fernandes and the students were away. He found unmarked assignments and gave them to Ms. Bush. She stored them. He then prepared another report. He gave it to Ms. Bush that evening or the next morning, the 16th. He discussed it with her. Based on that report, Ms. Bush said that they needed to meet with Mr. Fernandes.

[115] On April 16, they met in Ms. Bush's office at the end of the day. By then, some of the students had told Mr. Edwards that they had not done some of the assignments or had not even started the assignment.

[116] At this meeting, Mr. Fernandes admitted to making up the student marks. The session lasted about 30 to 40 minutes. Ms. Bush said that it would have to be reported to Mr. Cleland. She said that they needed to meet with Mr. Cleland on Friday, April 17th. Mr. Fernandes said "I understand". Mr. Fernandes then left.

[117] Mr. Edwards stayed with Ms. Bush. They found the meeting upsetting and disturbing. Throughout the meeting, Mr. Fernandes asked about his daughters. Ms. Bush said that they would take care of the girls.

Evidence of Mr. Zero

[118] Mr. Zero testified that he and Mr. Edwards and Mr. Fernandes met on Tuesday, April 14, after the Easter weekend. It was after school; after 3:30 p.m. April 14th was a busy day. Students and some of the staff were excited about the Arts and Music Night that was to occur on April 15th. Students were being pulled from classes to rehearse. The music was the priority on the 14th and the 15th.

On the 15th, there were off-site rehearsals and minimal staff at the school. Mr. Zero himself was at the Living Arts Center on April 15th.

[119] The meeting was at Mr. Edward's office and Mr. Fernandes arrived last. It was a brief meeting; perhaps eight to ten minutes. Mr. Edwards presented the document to Mr. Fernandes. It showed that Mr. Edwards had spoken with students and there were missing marks and that this is what he had found from his investigations. Mr. Fernandes did not speak. Mr. Edwards said that presentations had not been completed but marks were given. Mr. Zero asked, "why would you have marks for assignments that were not given or presentations that had not been given". Mr. Edwards told Mr. Fernandes to go home and think about his honesty. Mr. Fernandes did not respond, took the memo with him and left.

[120] Mr. Edwards read about half of the document. He read some of the examples and said that he was concerned about marks several times. He told Mr. Fernandes that the marking was sloppy but he did not berate him. He did not say that he was worthless. He did not think that Mr. Fernandes would feel humiliated. Mr. Fernandes said nothing but kept his head down and stared at the floor.

[121] Mr. Zero did not ask anything else of Mr. Fernandes. He did not ask him about his marking scheme or how he justified these marks. That was Mr. Edwards' responsibility. Mr. Zero was just there as a witness to be sure that Mr. Fernandes had the document.

Evidence of Ms. Bush

[122] Ms. Bush was aware that the meeting of April 14th was to happen and Mr

Edwards told her about it afterwards. He was worried. He had spoken to Mr. Fernandes and tried to walk him through the memorandum. He had not received satisfactory answers. She was surprised and thought that there would have been an explanation. She therefore wanted all of them to sit down, including Mr. Zero.

[123] They could not meet the next day, April 15, because the Arts and Music Night was that night. Because everyone would be out of the school, she told Mr. Edwards to get more information over the course of the 15th. He was to get whatever information he could find. Mr. Fernandes would have been at the Living Arts Center for all of the 15th. Mr. Edwards was to go into Mr. Fernandes' computer lab and find whatever he could.

[124] There was to be a meeting on the 16th at the end of the day. It was at about 3:30 p.m. in her office. She had the memo of Mr. Edwards' investigation before that meeting.

[125] Ms. Bush testified that she met with Mr. Edwards and Mr. Fernandes on April 16th in her office. She started the meeting by providing an updated document to Mr. Fernandes provided by Mr. Edwards from his investigation on the 15th. Mr. Fernandes started to look through it and she expressed how concerned or confused she was. She said that with her experience with him for many years she always found him to be a meticulous, careful, organized person and that she couldn't come up with an explanation for why the marks were so bad. She asked him to try and explain it to her.

[126] She said that he seemed shocked by the document; he said that he didn't agree with any of it. He said that he could explain everything and offered to sit down and go through it point by point. However, rather than specifics, he

answered with general comments. She said that she could not get him to deal specifically with the information in the document.

[127] When they began to speak specifically about the students who had said they had not completed the presentations, he said that the presentations had been completed and that she had nothing to worry about. At that time, Mr. Edwards suggested that he call the students in to talk it through and ask them why they would say they had not done something when they had. At that point, however, Mr. Fernandes said that he didn't need to do that, that a lot of the assignments had not been done and that he had made up the marks. At that point he started to cry. He said that he was upset and sorry, that he felt caught, backed up and behind. He said that he hadn't been able to get the students to submit all the work after the March break, he didn't know what else to do, so he simply filled in the marks. He admitted that he falsified their marks. He then very quickly went to his concern for his daughters.

[128] She said to him "this is fraud. You falsified your records". "You realize this is grounds for termination?". He said, "I know, and all I can think about is my daughters. You can't let anything happen to their education. They have to stay here and finish their year". She said that they would take care of his daughters. In response, he said that "nobody can know about this. My wife cannot know about this. I'm embarrassed, I'm humiliated, this is terrible".

[129] Her recollection is that she reiterated several times that she felt that this was grounds for termination. She said that they needed to meet again the following morning with Mr. Cleland. She said it that it was not a very long meeting after that. She told him that he need not go to class the next morning as she would find a way to cover his class but just to come to meet with Mr. Cleland.

[130] He made no mention of being unwell and made no mention of preparing a response that day that she can recall. She phoned Mr. Cleland and asked him to come in for a meeting after 9:00 a.m.

[131] She did not see Mr. Fernandes go to his class; she had told him that his class would be covered.

[132] On April 17th, he was apologetic. He did not retract his admission. He spoke about wanting to resign rather than be terminated. He said something about that he had stayed up to prepare a response and he wanted to put his thoughts on paper. He did not look ill or make any comments about being unwell or ill.

Evidence of Mr. Cleland

[133] Mr. Cleland testified that he met with Ms. Bush and Mr. Fernandes on Friday, April 17. Mr. Fernandes said that he felt very bad, he had done things he should not have done in terms of putting marks in that were not true marks. He felt very bad about that. It was indicated to Mr. Fernandez that his conduct was grounds for immediate dismissal and that they were terminating his employment effective immediately. Mr. Fernandes was concerned about his children finishing school and they agreed to meet on Monday morning to discuss those issues. Mr. Cleland said that he wanted to complete things in a way to be able to save face and not be humiliated by what happened. Both he and Ms. Bush confirmed that entering false marks and reports was immediate grounds for dismissal and he was dismissed. He did not dispute the accusation. The meeting took somewhere between 30 to 60 minutes.

Evidence of Ms. Chachel

[134] Ms. Chachel has been employed by the school since 2003. She became an administrator in 2009. Her job was to answer phone calls, answer students' needs, help out with registration and other similar tasks.

[135] She had a small office adjacent to Ms. Bush's office. There was a door between the offices that was open unless there were meetings. She could also leave her office through another door. There was a separate entrance to Ms. Bush's office that she could not see.

[136] She knew Mr. Fernandes on a "work basis". He was friendly and cordial. He was a nice person and had been an honest person to her.

[137] Mrs. Chachel remembers April 16, because it is the anniversary of her father's death. She therefore likes to leave early from school on that anniversary date to call her mother. On this date in 2009, however, she had to wait because the door to Mrs. Bush's office was closed.

[138] There was a meeting that started at approximately 3:30 p.m. or 3:45 p.m. Ms. Bush and Mr. Edwards were in the office and then Mr. Fernandes arrived. The meeting lasted about 45 minutes and she was then able to leave the school.

[139] She is certain that this was not a meeting with Mr. Edwards, Mr. Zero and Mr. Fernandes but rather Mr. Edwards, Ms. Bush and Mr. Fernandes.

[140] She would not have known of any meetings with Mr. Edwards on the 16th. Mr. Edwards' office was in a different wing and she would not know of those meetings. She is certain that Mr. Edwards was in Ms. Bush's office with Mr.

Fernandes.

Findings

[141] The evidence of Ms. Chachel is crucial to this determination. There is no reason to reject her evidence. The plaintiff submits that she should not be relied upon given that she had no notes of the event. However, given the significance of the date of this event to her, I can anchor my findings from that fact. She has testified that there was a meeting between Mr. Edwards, Ms. Bush and Mr. Fernandes on the 16th. Accordingly, the meeting with Mr. Zero, Mr. Edwards and Mr. Fernandes could not have been that day. There would not have been time for that meeting to be held on the 16th, Mr. Edwards report to Ms. Bush and another meeting to be held on the same day with Mr. Edwards, Ms. Bush and Mr. Fernandes. All agree that there were no meetings on the 15th as a result of the Arts and Music Night. I find that the meeting between Mr. Edwards, Mr. Zero and Mr. Fernandes occurred on the 14th.

[142] In support of his argument that the meeting occurred on the 14th, Mr. Fernandes refers to the document that was supposedly shown to him on that date. That document is dated April 15, 2009. I am satisfied however that as Mr Edwards obtained information, he updated an electronic document that was printed from time to time. The fact that one document is dated April 15 does not set aside the realities of Ms. Chachel's recollection and the necessity for there to be three meetings.

[143] The three participants essentially describe the meeting of the 14th the same way. The variation in description depends on the observers' sensitivities and biases. When it happened does not make much of a difference since the real

issue is how many meetings occurred with Ms. Bush.

[144] Mr. Edwards denied that he made hurtful, degrading or harassing comments. He denied that at the meeting with Mr. Zero he said that Mr. Fernandes made him sick to his stomach. He “does not recall” saying that “your marks stink”. However, he did say, “go home and think about your honesty”. He justified this comment because he thought that none of Mr. Fernandes’ answers were honest. From this I can find that, firstly, Mr. Fernandes did give answers and, secondly, Mr. Edwards did not believe the responses he got. This would explain why both Mr. Zero and Mr. Edwards recollected Mr. Fernandes saying little and looking at the ground. It would not have taken Mr. Fernandes long to realize that any response from him was futile.

[145] Mr. Zero said that he did not ask any questions of Mr. Fernandes. Rather, Mr. Zero was only there to be a witness to be sure that Mr. Fernandez received the report. Mr. Edwards read about half of the document. Mr. Zero says that the meeting lasted perhaps eight to ten minutes. That, too, would be consistent with Mr. Fernandes’ recollection that he was given no opportunity to respond to the allegations.

[146] Mr. Zero and Mr. Edwards say that Mr. Edwards said that he was just the messenger. This would explain why Mr. Fernandes would not give much of a response. There would be no sense in replying to the messenger but simply listen to the message.

[147] Mr. Edwards testified that at the meeting of the 14th, he was convinced that Mr. Fernandes had committed academic fraud. There would be no sense for Mr. Fernandes to respond in detail to an individual who was already determined

that any answers were fraudulent. This would certainly colour both Mr. Edwards' and Ms. Bush's ability to respond to any answers that may have been given on the 16th.

[148] Mr. Edwards confirms that Mr. Fernandes said that there was an explanation. It is not surprising, however, that he does not give a more detailed explanation in this short meeting to the messenger who thinks that Mr. Fernandes is a fraud. This bears out Mr. Fernandes' view of this meeting. Given Mr. Fernandes' sensitivities, I find that his version is correct.

[149] The only thing that could have occurred in that short period would be for Mr. Edwards to go briefly through the memo or partly through the memo. He would not be able to hear an explanation, Mr. Fernandes could only hang his head, and Mr. Edwards would then tell him to consider his honesty.

[150] If Mr. Edwards had decided that there was academic fraud on the 14th, his review of any documents in Mr. Fernandes' room on the 15th would be on that basis. He made assumptions without giving Mr. Fernandes an opportunity to explain. He then provided all of that information to Ms. Bush.

[151] Finally, it would make sense that there were three meetings given the flow of information. Mr. Zero and Mr. Edwards would investigate and would report to Ms. Bush. That information would require her to meet with Mr. Edwards and Mr. Fernandes. Given the results of that meeting, there would need to be a meeting with Mr. Cleland.

[152] I find therefore that there were three meetings. The first was with Mr. Zero and Mr. Edwards on Tuesday. It occurred as described by Mr. Fernandes. The second was with Mr. Edwards and Ms. Bush on Thursday. It occurred as

described by Ms. Bush. And finally, the third was with Ms. Bush and Mr. Cleland on Friday morning. It occurred as described by Ms. Bush.

3. DID MR. FERNANDES ADMIT TO WRONGDOING?

[153] Mr. Fernandes says he did not admit to any wrongdoing. Mr. Cleland, Mr. Edwards and Ms. Bush says he did. I have doubts about the evidence of both Mr. Cleland and Mr. Edwards.

[154] Mr. Edwards can remember exactly the words that Mr. Fernandes used. When Mr. Edwards asked if Mr. Fernandes wanted the children brought in to speak about their assignments, Mr. Edwards specifically remembers that Mr. Fernandes said, “don’t do that. You’re right. I admit it, I have made up all these marks.” He then remembers that Ms. Bush specifically said “you do have to understand the seriousness of what you’re telling us. You are admitting to academic fraud. You do understand that this is a basis for termination?” In response, Mr. Fernandes is said to have replied, “I know I know I’m sorry”. That is too specific and self-serving to be believable.

[155] I have no reason to reject the evidence of either Mr. Fernandes or Ms. Bush as to what occurred at each meeting.

[156] In support of Mr. Fernandes’ denial, there is the following evidence.

[157] In his examination chief, Mr. Edwards testified that Mr. Fernandes told him that he had marked the students work on their computers. He had gone on their hard drives and marked the students based on what he found on the computer. This is the same explanation he gave in his written statement.

[158] Mr. Fernandes prepared a lengthy and detailed response to all of the allegations against him. This is dated April 20, 2009. The responding memo is detailed enough and credible enough that it would be odd that he would admit to wrongdoing. He testified to all of that explanation over two days in this trial. Based on all of that, there would be no need for him to admit to wrongdoing.

[159] The following week, Ms. Bush sent a confirmation letter with respect to the termination on April 17. While the letter confirms the date and the general terms of the grounds for termination, it does not set out that he admitted anything. Rather it states, "this letter will confirm that, on Friday, April 17, 2009, we advised you in person that your employment with MPS was terminated, for cause, effective that date, as you had continually and repeatedly failed to comply with your duties and responsibilities as a teacher, and as an employee of MPS, and had breached a contract with MPS." One would think that if Mr. Fernandes had admitted to falsifying marks that would be in the confirming letter.

[160] On the other hand, he was given opportunities to explain on March 11, March 13, April 1, April 14, April 16, and April 17, but failed to do so. There is no satisfactory explanation of why he did not deliver his documented response if it was in fact completed by April 20. Although he was apparently too unwell to go to work, he could have delivered this response when Mrs. Fernandes delivered her letters. Although apparently a fulsome denial, it was not provided until well into the litigation process.

[161] I have found that Mr. Fernandes lied when he said that he could give marks before presentations were completed since the presentation was not part of the mark.

[162] Left at that, the evidence supports both an admission and a denial. However, there is more.

[163] I have found that there were three meetings. That is supported by Ms. Chachel and makes sense for the flow of information and decision-making. For there to be three meetings, there must have been an admission by Mr. Fernandes at the second meeting to generate the need to have Ms. Bush's business partner attend on Friday morning. Three meetings supports the version of events put forward by Ms. Bush. Accordingly, I find that Mr. Fernandes admitted to falsifying marks at the meetings of April 16, and 17, 2009.

4. WHEN WAS MR. FERNANDES DISMISSED?

[164] This issue is important only if I find that Mr. Fernandes was properly terminated but after he was disabled for the purposes of his long-term disability insurance. If he was disabled over the weekend of April 18 and terminated April 22, he would be eligible for insurance benefits.

[165] Based on my findings above, Mr. Fernandes was terminated Friday, April 17, 2009. This was confirmed by Ms. Bush in her confirming letter of April 20, 2009. The fact that Mr Fernandes wished to respond to each of the allegations in writing over the weekend would be consistent with his wish to defend himself. Termination on the 17th, would be consistent, as Mr. Fernandes testified, with Ms. Bush's telling him that he did not need to do that. By then, he was already terminated.

5. WAS MR. FERNANDES WRONGFULLY DISMISSED?

What to do with Robert Semone's evidence?

[166] The various complaints with respect to Mr. Fernandes' work are set out above. There is, however, one further witness to be considered when determining whether there were grounds to terminate Mr. Fernandez.

[167] Mr. Semone graduated from the school in 2010. He had been a student of Mr. Fernandes. In 2006, (three years before the events in question) Mr. Semone wrote a 75 minute final examination in one of Mr. Fernandes' classes. He was provided with a sheet of instructions to prepare the code for a blackjack game. He wrote two lines of code and handed that into Mr. Fernandes. He did about five percent of the work and thought he failed the course. He was very worried because his mother likes high marks. When he was in school, he generally received low marks except in music. When he got his marks, he found that he got 72 for his examination and 74 for the course as a whole. He had no explanation for these marks. He remembers the examination as the only one that he personally failed. That's why he remembers it.

[168] He spoke to no one about this at the time or since. In cross examination he said that he told no friends, not his best friend and not his girlfriend. However, about three weeks before trial, Ms. Bush approached him and asked him about the course that he took approximately 7 years before. He was aware that she approached another student as well. He then told her about what had occurred.

[169] In preparation to give his evidence, Ms. Bush provided him with his marks but he did not bring the records with him. He was not provided with a copy

of them. He did not remember the exact mark he received until he refreshed his memory when he reviewed the records. He does not remember seeing the examination itself. He was not shown the examination to confirm it.

[170] He thought that the exam was in one code but was reminded that it may have been a different code. He could not remember which code was being taught. He agreed that his memory is hazy after six to seven years.

[171] I am very uneasy about this evidence. It seems unbelievable that Mr. Semone, who had spoken to no one about these events, was simply picked out of a group of students, unrelated to the students who were given marks in 2009, three weeks prior to trial, and was able to give damning evidence against Mr. Fernandes. He agrees that his memory is hazy. He was provided with documents to refresh his memory but apparently was wrong on which of Mr. Fernandes' courses to which he was referring. I simply do not find this evidence to be sufficiently reliable to be of assistance to my findings.

Legal Principles

[172] The leading case dealing with dishonesty as a basis for termination is *McKinley v. BC Tel*, 2001, S.C.C. 38, [2001] 2 S.C.R. 161. There, the Court found that when considering the topic of dishonesty a contextual approach is required, rather than a hard line with respect to any amount of dishonesty. At paras. 48 to 57, the Supreme Court of Canada said:

48 In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different

ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

49 In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.

50 While ample case law supports this position, as discussed above, a second line of jurisprudence seems to run counter to it, suggesting that dishonest conduct always, irrespective of its surrounding circumstances, amounts to cause for dismissal. However, a closer inspection of these cases reveals that they actually support a contextual approach. As noted, these judgments involved dishonesty that was symptomatic of an overarching, and very serious misconduct. In most cases, the courts were faced with allegations to the effect that an employee had intentionally devised to extract some financial gain or profit to which he or she was not entitled, at his or her employer's expense. Such conduct was frequently tantamount to a serious form of fraud, and explicitly characterized by the courts as such.

51 This being the case, I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in *Lake Ontario Portland Cement Co. v. Groner*, 1961 CanLII 1 (SCC), [1961] S.C.R. 553, where this Court found that cause for dismissal on the basis of dishonesty exists where an

employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.

52 This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances.

53 Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 1002, and in *Wallace, supra*, at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".

54 Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The

importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

57 Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

Cause for Dismissal?

[173] Considering the context, the nature and the circumstances of Mr Fernandes' misconduct, I have found that he gave incorrect marks. The marks he gave were late. He allowed the students to have overdue assignments. Despite the fact that he was the computer teacher, his own computer program did not provide accurate marks.

[174] I have found that until the meeting of April 16, he lied to his employers about how the marks were calculated. He lied to the court about how the student presentations were marked. I have found that he admitted to falsifying marks on the students' records.

[175] Ms. Bush testified that because he admitted to academic fraud in falsifying marks, this could affect the reputation of the school and she could not trust him with student marks in the future.

[176] However, in considering all of the nature and circumstances of this misconduct, I also note the following.

[177] Mr. Fernandes had been employed with the school for more than 10 years and up until the spring of 2009, was a well-regarded teacher. It is clear that Mr. Edwards did not have much use for him but Ms. Bush, Mr. Cox, Mr. Zero and Ms. Chachel had no overall complaints about him. Certainly nothing that required remedial steps or termination.

[178] Some of the allegations against Mr. Fernandes arise out of Mr. Edwards' review of what he found in Mr. Fernandes' room when Mr Fernandes was away on the 15th. Mr. Edwards acknowledged that he was not qualified to assess marking on computer screens. He acknowledged that by the 14th, he was satisfied that there had been academic fraud by Mr. Fernandes. He acknowledged that he made assumptions based on what he found and his prior determination that there was academic fraud. I cannot rely on his view of what Mr. Fernandes was doing to determine if there was cause for Mr. Fernandes' termination.

[179] Over six weeks between March 1 and the middle of April, Mr. Fernandes created marks that, when the administration found out that they were wrong, were still produced by the administration to students and parents without comment on their accuracy. The fact that the school knowingly sent out the false marks confirms that these interim marks were not as serious to either the school

or the students as the defendants would submit. If this were such an egregious failing on the part of Mr Fernandes, the marks would not have been released.

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

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

[182] In balancing all of those considerations, I am satisfied that immediate termination was not the appropriate sanction for this misconduct. The defendants could have fashioned a reprimand and a warning that such conduct, if repeated, would lead to summary dismissal. (See: *Gaudio v. Banca Commercial Italiano of Canada* [1999] O.J. No. 3871, 48 C.C.E.L. (2d) 112 (S.C.J.). This rather abrupt change in Mr. Fernandes’ professional behavior should have led the employer to make more of an effort at enquiry to assist Mr. Fernandes rather than to terminate his employment without proper notice.

[183] I find that Mr Fernandes was wrongfully dismissed; the punishment outweighs the seriousness of the infraction.

6. IF MR. FERNANDES WAS WRONGFULLY DISMISSED, WHAT ARE HIS DAMAGES?

[184] Mr. Fernandes claims \$51,918 for wrongful dismissal, \$300,000 for intentional infliction of mental distress, and \$226,000 for long-term disability benefits.

Wrongful dismissal

[185] Mr. Fernandes was with the school for ten years and three months. He was 56 years of age when he was fired. When he was terminated, he was earning \$51,000 per year. Up to 2007, he also taught summer school for \$3,900, although he did not do that in 2008.

[186] He did not apply for other teaching jobs because his doctor told him that he was not fit to teach. He made no other efforts to find employment because his doctor told him not to do so.

[187] His current medical status is that he has severe depression, diarrhea, post-traumatic stress disorder, allergies, hypertension, anxiety and irritable bowel syndrome. These began when he was preparing the response to Mr. Edwards and continued as a result of the termination letter on April 21.

[188] He applied for EI benefits but was rejected because he had no Record of Employment. The school did not provide that Record of Employment until September 2009. He was able to obtain sick benefits based on his doctor's notes for 15 weeks. For those 15, weeks he received a total of \$5,895 net.

[189] He has had no other employment income since his termination. He has been living on the proceeds of sale of his home, some furniture and his investments. He is in debt. He has been living on his wife's salary.

[190] For whatever reason, it seems that Mr. Fernandes was coming to the end of his abilities as a schoolteacher. This becomes obvious by the spring of 2009. At most, he could expect employment to the end of the 2009/2010 school year. Accordingly, his request for damages for his wrongful dismissal of \$51,918

(based on what he would have earned for the entire year) is appropriate.

[191] He also seeks other lesser amounts for unpaid wages of \$3,616.90 because he was paid on a biweekly basis and there was a top up in the summer which he did not receive, \$872.52 for his benefit deductions and \$1,227.72 for his pension plan contributions. These amounts are not disputed by the defendants if liability is found.

Long-term disability

[192] Because Mr Fernandes was terminated on April 17, 2009, he was no longer eligible for his employer's long-term disability plan. Having found that he was wrongfully dismissed, I must now consider whether he would have been able to claim those benefits when he became disabled.

[193] Mr. Fernandes testified that even on April 17th he was unwell. He was not feeling well during the meeting because he was tired after a sleepless night. He was far worse by Monday after spending the weekend preparing his responding document for the meeting on the 20th. He was too sick to attend and received a doctor's note to confirm that. He was still sick on April 21st and 22nd.

[194] In his view, his medical problems started on April 17th; prior to that, his only medical difficulty was with diabetes. The comment, "have to let you go" put him under a lot of stress and Friday, April 17th was the start of his sickness. His medical problems were caused by his termination.

[195] His problems fluctuate now. Some days he is calm but he needs medication at all times. He is still not fit for work because he cannot work as a result of his hyper-anxiety; his writing or typing is slow and he has muscle

spasms. His psychiatrist thinks that closure to the case may assist but his doctor cannot tell if that would assist his physical problems.

[196] Dr. Sahheed is Mr. Fernandes' family physician. He continues to provide health care services to Mr. Fernandes. He diagnosed Mr. Fernandes with having a major depression. In his opinion, Mr. Fernandes has not improved since the events of 2009. The cause of the distress is related to what happened at his workplace – whatever happened there. He is “100 percent” certain of that it.

[197] In his opinion, Mr. Fernandes is not able to return to work as a teacher or anywhere else.

[198] Dr. Joshi is Mr. Fernandes' treating psychiatrist. He testified that the major cause of Mr. Fernandes' difficulties was his termination as a teacher. Other causes were his financial stress; he felt ashamed and guilty that he was not working. He felt useless and worthless. Another factor was that he had to sell his home.

[199] Based on what he had seen of Mr. Fernandes over the last five years, Dr. Joshi's diagnosis was “Major Depressive Disorder”, mixed with anxiety neurosis, including panic attacks and posttraumatic stress disorder.

[200] Although Mr. Fernandes was put on a low level of antidepressants, he had severe side effects including suicidal ideology, headaches, palpitations and a flushed face. He has therefore been treating him with counselling and hopes it that may help over time.

[201] He has a guarded or poor prognosis and does not believe that Mr. Fernandes will be able to work. He continues to have panic attacks and has been

unable to focus. That will make it impossible for him to retrain. He does not think that he will be able to work in the future. His view was that he has chronic long-term depression.

[202] There was no contrary evidence led by the defendants.

[203] Mr. Fernandes and his counsel requested the necessary application forms from the defendants in order to apply for long-term disability. Those forms were not provided by the defendants until into the litigation and Mr. Fernandes did not apply for long-term disability until after the requisite notice period. The insurer denied his claim because it was issued after the notice period, and after he was terminated. After reviewing the medical documentation provided, the insurer also denied the claim because it did not have documentation of his cognitive function nor his function in his activities of daily living.

[204] The defendants submit that I cannot find that Mr. Fernandes is disabled without similar evidence. I do not accept that proposition. The evidence of the two doctors is essentially unchallenged. I therefore find that he is disabled within the terms of the policy.

[205] It is admitted that the defendant, Mississauga, failed to provide the application forms to Mr. Fernandes as requested. While Mr. Fernandes could have found the forms for himself, given his condition at the time, there is no excuse for the defendant failing to respond to those requests.

[206] Pursuant to the s. 62 of the *Ontario Employment Standards Act*, Mr. Fernandes would have been eligible for these benefits for a period of time even after his termination. But for the acts of Mississauga, he would have been eligible to claim these benefits from the insurer. He would therefore have applied

in time, been employed and, as I have found, qualified for the benefits.

[207] *Egan v Alcatel Canada Inc.*, [2006] OJ No 34, stands for the proposition that:

Where an employee would otherwise have qualified for disability benefits during the reasonable notice period, but the application is denied on the basis that coverage was wrongfully discontinued by the employer, the employer must be liable for the value of the disability benefits that would otherwise have been payable.

[208] The acts of Mississauga prevented Mr. Fernandes from making that claim and, accordingly, they are liable for his losses.

[209] The plaintiff seeks the total amount of \$226,000 with respect to this claim. Little argument was presented on the calculation of that figure. While I have sufficient evidence to calculate this amount, I do not have sufficient input from counsel to be sure of those calculations.

[210] Two documents that summarize the terms of the policy were made exhibits however I do not have the terms of the insurance policy itself. From what I have, Mr. Fernandes' benefits would have continued until he reached age 65. He was born January 1, 1952 and is therefore 62 years of age. He is presently disabled and, on a balance of probabilities, I find that he will not be "gainfully employed in any job", as set out in the policy, before 65.

[211] From the various exhibits, I believe that I can calculate that his monthly benefits would be \$2000.00 per month and that this benefit would not attract tax. But, without submissions on this point, I could be wrong.

[212] I do not think that I should attempt to calculate a capitalized value without

assistance from counsel.

[213] If counsel cannot agree on the calculation of these damages, I am content to hear argument on this point or receive written submissions, whichever is agreeable to the parties. Counsel shall advise within 30 days of the release of this judgment.

Mental distress

[214] In his Statement of Claim, the plaintiff claims “general damages for intentional and negligent infliction of emotional and mental distress, mental suffering and psycho traumatic disability in the amount of \$500,000”. As a subheading to the paragraphs relating to this claim, it is referred to as “bad faith, aggravated damages, Honda and punitive damages”. He pleads that “defendant Gabrielle Bush knowingly condoned and thereby participated in the Principal’s harassment, verbal berating and public humiliation of Fernandes and therefore in addition to MPS, Bush is personally liable for causing the resulting mental distress and depression in Fernandes, all of which was reasonably foreseeable for the Defendants.”

[215] In argument, however, this was narrowed to a claim of intentional infliction of mental distress.

[216] The tort of intentional infliction of mental suffering has three elements. The plaintiff must prove:

- The defendant’s conduct was flagrant and outrageous;

- The defendant's conduct was calculated to harm the plaintiff;
- The defendant's conduct caused the plaintiff to suffer a visible and provable illness.

(See: *Boucher v. Walmart*, 2014 ONCA 419, 120 O.R. (3d) 481; *Prinzo v. Baycrest Centre for Geriatric Care*, 60 O.R. (3d) 474 (C.A.), 2002 CanLII 45005.

[217] The defendants' conduct here was not "flagrant and outrageous". There is no evidence that this was "plainly calculated". While Mr. Edwards' investigation was incompetent and he was, at times, insensitive to Mr. Fernandes, what Mr. Edwards found, indeed what Mr. Fernandes admitted to, required action by the administration. Having found that Mr. Fernandes admitted to wrongdoing, the steps taken by the administration cannot be seen as flagrant and outrageous.

[218] While I have found that the school did not have cause to terminate Mr. Fernandes, one can certainly understand the defendants' dismay at his conduct. There is no evidence that their conduct was calculated to do Mr. Fernandes any harm. Despite their beliefs, the grounds for Mr. Fernandes' termination were kept as quiet as possible. They maintained his daughters' education in place for the balance of the term. I am satisfied that there was nothing in the defendants' conduct deserving of damages as a result of such a separate actionable wrong.

[219] The claim for intentional infliction of mental distress is dismissed.

LIABILITY AGAINST MS. BUSH?

[220] Finally, the plaintiff claims against Ms. Bush personally. No separate claim was made against her but rather all claims were made "against the defendants jointly and severally". In reviewing the statement of claim, the plaintiff

seems to allege that Mr Edwards inflicted harassment and abuse upon Mr. Fernandes under the direction of Ms. Bush. While the evidence supports that Mr. Edwards acted under the instructions of Ms. Bush, I have found nothing wrong with those instructions. Mr. Edwards may have been a bully in the way he went about his instructions, but there is no evidence that he was instructed to do his duties in that fashion. Indeed, based on the information that she had, Ms. Bush would have been negligent if she failed to act as she did. All of her steps were taken in her role as a director and officer of the corporate defendant and as such there is no liability that attaches to her personally. The claim against her is dismissed.

RESULT

[221] The plaintiff shall have judgment against Peel Educational and Tutorial Services Limited as follows:

- a. damages for wrongful dismissal in the amount of \$51,918;
- b. miscellaneous income loss claims totaling \$5717.14;
- c. damages for the loss of long-term disability benefits to be calculated on consent or after further submissions.

[222] The claim against Gabrielle Bush is dismissed.

[223] If the parties cannot agree on costs, written submissions may be made to me after the determination or resolution of the benefit claim. Those submissions shall be no more than three pages (not including any offers to settle or bills of costs).

Lemon, J.

Released: November 12, 2014

CITATION: Fernandes v. Peel Educational, 2014 ONSC 6506
COURT FILE NO.: CV-09-03521-00
DATE: 2014-11-10

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

REMY FERNANDES

Gary Bennett, for the Plaintiff

and –

PEEL EDUCATIONAL & TUTORIAL
SERVICES LIMITED C.O.B. as
MISSISSAUGA PRIVATE SCHOOL and
GABRIELLE BUSH

Laszlo Pandy, for the Defendants

REASONS FOR JUDGMENT

Lemon, J.

Released: November 12, 2014