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CITATION:Setia v. Appleby College, 2012 ONSC 5369

DIVISIONAL COURT FILE NO.: 122/11

DATE:20121108

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Chapnik, Aston, Lax JJ.

BETWEEN:

Setia, Devinder Singh Setia and
Navpreet Setia

Applicants

– and –

Appleby College

Respondent

)
)
) *Ronald D. Manes/Marco Falco*, for the
) Applicants
)
)
)
) *Martin Scisizzi/Margot Finley*, for the
) Respondent

)
)
) **HEARD:** September 19, 2012

REASONS FOR JUDGMENT

ASTON AND LAX, JJ.

Overview

[1] This is an application by a student and his parents for judicial review of a decision to expel the student after he admitted to smoking marijuana in a friend’s dormitory room the night before the final day of his sixth and final year at Appleby College (“Appleby”). Appleby is a private co-educational school created by a Special Act of the Ontario Legislature in 1911.

[2] There are no material facts in dispute. The issues are: (i) whether the court has jurisdiction to judicially review the decision to expel the student and deny him his Appleby Diploma; and, if so, (ii) whether the expulsion decision should be quashed and what other relief, if any, should be granted.

Factual Background

[3] On June 14, 2010, eighteen year old Gautam Setia (“Gautam”) met up with two friends to celebrate the end of high school. The boys admitted to smoking a small amount of marijuana off campus. Gautam and a friend (“M”) returned to M’s room at their residence. M lit the last pinch

of marijuana and using a bong both boys took one last “drag” of smoke. At approximately 11:30 p.m., the Director of the residence, Mr. Massi, discovered the boys with the bong. M told Mr. Massi that “it’s all me, Gautam had nothing to do with this” but Gautam confessed to Massi that he too “was a part of this”.

[4] Mr. Massi then completed a “Serious Incident Report” which he forwarded to Dr. Pierce, who was then Appleby’s Head of School.

[5] The applicants concede that Gautam and his parents all were well aware of and familiar with Appleby’s Code of Conduct. The parents had signed a form acknowledging that Gautam’s attendance at Appleby was dependent upon compliance with that Code of Conduct.

[6] The Code of Conduct provides [*emphasis added*]:

Failure to Comply with the Code of Conduct

The College’s Discretion – All Appleby community members are responsible for observing both the letter and the spirit of the school’s policies and procedures. As a general principle, **Appleby College reserves its right to apply a full range of sanctions, including expulsion, to any offence committed by a student. Although the specific policies described in this Code of Conduct outline steps that Appleby College normally will take** in the event that a student contravenes, or attempts to contravene, the requirements of a policy, **they do not take away from the ultimate discretion of Appleby College to apply any sanction that is appropriate in the particular circumstances of an offence, including the expulsion of a student.**

...

Process and Procedure

In determining whether an offence has been committed and what sanction should be applied, Appleby College will employ procedures that:

- reflect the severity of the offence alleged;
- ensure that a student, and his/her parents, are aware of the complaint against the student;
- **ensure that a student, and his/her parents, have the opportunity to present fully and fairly their version of events and explanation and to have these taken into account by the decision-maker;** and
- ensure that the decisions will be made in a fair and impartial way.

The general procedure Appleby College **will observe** to investigate and deal with any reports of breaches of the Code of Conduct is as follows:

...

- as part of the investigation, the School Director will provide the student with an opportunity to explain the student's conduct, respond to the allegation and be heard regarding the student's position with respect to the incident in question;
- after these initial interviews, the School Director will inform the parents as required;
- in serious cases, where there is potential for lengthy suspension or expulsion, the School Director will obtain from the student and his/her parents a written acknowledgement of the allegations;
- communication with the student and parents will clearly indicate Appleby College's policies and the consequences for infractions;
- if a student denies an allegation and a matter of credibility arises, the student and his/her parents should be given an opportunity to meet with the person who will make the discipline determination (the Head of School or designate) so that he/she can:
 - i. present his/her side of the story, including mitigating circumstances;
 - ii. test or challenge the evidence against the student, and/or;
 - iii. make submissions as to possible sanctions;
- **if the offence is one that might result in a serious sanction (e.g. suspension for more than one or two weeks, or expulsion), the student and his/her parents should be given an opportunity to meet with the person who will make the discipline determination (the Head of School or designate) so that he/she can:**
 - i. **present his/her side of the story, including mitigating circumstances;**
 - ii. test or challenge the evidence against the student, and/or;
 - iii. **make submissions as to possible sanctions;**

[7] The *Drug and Alcohol Protocol*, which is part of the Substance Abuse Policy provides:

Students will not use, possess, procure or provide drugs, alcohol or paraphernalia ... [a] student who breaches this rule is subject to disciplinary action, including **possible suspension or expulsion**, at the Head of School's discretion... [*emphasis added. The full policy can be found at Tab 2(B), pp. 57-61 of the Application Record*].

[8] The Lighting of Substances Policy provides:

The lighting of substances is a significant safety concern... Students found smoking and/or using matches, candles, lighters, etc. inside, on or within 10 metres of any school building... will result in expulsion...

The Policy on the Lighting of Substances applies to all substance abuse protocols. It will be applied at the first offence in all cases of the lighting of substances and will result in expulsion. [emphasis added]

[9] Mr. Massi contacted Gautam's mother, Navpreet Setia, the next morning, June 15, 2010. He told her that her son "had been caught smoking dope" and would likely be expelled. She immediately phoned Dr. Pierce to discuss the situation but was told he was too busy to meet with her. Dr. Pierce did instruct Ms. Blake, Appleby's Head of Seniors, to meet with the boys to hear their side of the story. By this time, Gautam was writing his final exam but as soon as he had finished, Ms. Blake met with him. During that meeting, Gautam admitted to smoking in the residence room and admitted knowing that the consequence of smoking in the residence was expulsion. However, he also asked Ms. Blake if there was anything he could do, or anybody to whom he could tell his side of the story. Gautam did then meet with Dr. Pierce but was told that whatever he had to say would not affect Dr. Pierce's decision. Gautam's parents arrived at the school and tried to speak to Dr. Pierce. They were informed that he was not available to meet with them. However, Dr. Pierce did step out of a meeting briefly to tell them that their son was not allowed to attend the graduation ceremonies and that Dr. Pierce would provide them with his formal decision later on.

[10] In the early afternoon, Navpreet Setia sent Dr. Pierce an email requesting a meeting with him before he made a decision. The response was an email from Dr. Pierce at 3:45 p.m. which reads in part as follows:

I am writing in response to an incident which took place last night, June 14th, 2010 where Gautam was caught in breach of the school's substance abuse policy. I have read the Serious Incident Report and have heard the evidence. Regretfully, I have no doubt that Gautam was smoking a banned substance in his residence room. This is an offence which warrants expulsion from the school, but in light that this has taken place so close to the conclusion of the school year, I will simply require that Gautam withdraw from the school immediately. The exam he wrote while under investigation will be allowed to count so that he will be eligible for his Ontario Secondary School Diploma. Unfortunately, he will not be awarded his Appleby College Diploma as he has not successfully completed his school year. Gautam will not be permitted to attend the closing ceremonies and will not be allowed to return to campus after June 30th. Gautam's marks will be submitted as normal to the Ontario Universities Application Centre, so it is fortunate that this will not impact his university admission.

[11] This June 15, 2010 email from Dr. Pierce (the first of two he sent to Ms. Setia that day) is the decision that is the subject of this judicial review application. Although the decision allows Gautam to withdraw rather than be formally expelled, both sides have treated the decision as an

expulsion. They say it is analogous to the situation of an employee being allowed to resign rather than having his or her employment terminated by the employer.

The Court's Jurisdiction

[12] Is a decision to expel a student from a private school an exercise of a statutory power that is subject to judicial review, or is it an issue which is to be determined as a matter of private contract? *C.D. (Litigation Guardian of) v. Ridley College* [1996] O.J. No. 3800 (Gen. Div.) and *W.W. v. Lakefield College School* [2012] O.J. No. 375 (S.C.J.) reach opposite conclusions on this question. Counsel for Appleby submits that the *Ridley College* case was wrongly decided. We do not agree.

[13] The two decisions can be reconciled on the basis that s. 17 of the *Ridley College Act*, S.O. 1924, c. 145, a Special Act of the Ontario Legislature incorporating that school, specifically authorized the principal of the school to “make regulations ... for the discipline ... of the pupils ... and for the conduct and management of the College”.

[14] There is no similar provision for Lakefield College School. Lakefield was not created by a Special Act of the Ontario Legislature. Rather, it is one of hundreds of private schools in Ontario incorporated under the *Ontario Corporations Act*.

[15] Justice Lauwers was well aware of the difference when he stated at paragraph 46 in *Lakefield*:

“I distinguish *Ridley College* on the basis that the power to expel a student was inferred by its incorporating statute. By contrast, the power of Head of School to expel from Lakefield College is not conferred by, or situated in, any statute.”

[16] In this case, Appleby is an institution within the same category as Ridley College. Appleby was also created by a Special Act of the Ontario Legislature, *An Act to Incorporate Appleby School*, 1 Geo. V. c.140. Moreover, s. 11 of that legislation specifically gives its Board of Directors the power to “confer upon [its] officers ... such powers of administration and discipline as it may think necessary”.

[17] Counsel for the Respondent points out the Applicants have acknowledged that Appleby's *Code of Conduct* provides that “attendance at Appleby College is a privilege not a right”. However, under s. 1 of the *Judicial Review Procedure Act* a “statutory power of decision” includes a decision respecting “privileges” and “eligibility ... to receive ... a benefit”. It is therefore no answer on the jurisdictional issue to characterize the benefits of receiving the Appleby College Diploma as a “privilege” rather than a “right”.

[18] Decisions by Appleby's officers concerning “administration and discipline” constitute an exercise of a statutory power. They are subject to judicial review under s. 2(1) of the *Judicial Review Procedure Act*.

Standard of Review

[19] The applicants bring this application for relief based upon a breach of procedural fairness and denial of natural justice. A standard of review analysis is not necessary when considering procedural fairness issues. The proper approach is to ask whether the requirements of procedural fairness and natural justice have been met in the particular circumstances. See *Forestall v. Toronto Services Board*, 2007 CanLII 31785 (ON SCDC), (2007) 228 O.A.C. 202 (Div. Ct.) at paragraph 38.

Positions of the Parties

[20] The applicants raise two aspects of the decision for the Court to review; first, the process by which the decision was reached and second, the decision itself. They submit that if the process breaches principles of natural justice, the decision must be set aside however reasonable it may appear to be. Alternatively, they submit that even if the process of the decision making does not rise to the level where it constitutes a breach of natural justice principles, the outcome is so unreasonable that it amounts to an injustice.

[21] Appleby submits that it afforded the applicants imperfect but adequate procedural fairness and that the consequence of expulsion was not only reasonable, it was mandatory.

[22] The parties agree that the basic requirements of natural justice are:

- (i) notice;
- (ii) the opportunity to be heard; and
- (iii) an unbiased decision maker.

Analysis and Conclusion

[23] In view of the conclusion we have reached on the process by which the decision was reached, it is not necessary to address the alternative submission of the Applicants that the decision itself is so unreasonable that it amounts to an injustice.

[24] The Applicants submit that Dr. Pierce's conduct gives rise to a reasonable apprehension of bias and that he rushed to judgment. It is true there was no obvious need to make a decision within less than twenty-four hours. However, it is plain from his two emails of June 15, 2010 that Dr. Pierce made a genuine attempt to be fair to Gautam and his parents. We reject the submission that he was not impartial or that a reasonably informed bystander would perceive bias on his part.

[25] When considering the other two procedural requirements, adequacy of notice and opportunity to be heard, the decision's consequential seriousness is a factor to consider. Though expulsion has been fairly characterized as the most severe punishment a school can mete out, the only consequences of the decision in this case are that Gautam did not receive an Appleby Diploma or have the right to attend the graduation ceremonies. The decision here is also

considerably important to Appleby, with the potential to impact on its reputation for instilling certain values in its students while affording fairness in disciplinary decisions.

[26] The Applicants submit that Appleby failed to give them adequate notice because they were not told which particular provisions of the Code of Conduct were at issue. It is clear that both Gautam and his parents were familiar with the Code of Conduct and with the specific allegation that he had smoked marijuana in the dormitory room of his friend M. They were well aware of the particulars of the incident and the school's likeliness to expel Gautam. In our view they had adequate notice of the particular allegation and the possible consequences.

[27] The main dispute here focuses on the opportunity to be heard. The applicants submit that before Dr. Pierce imposed the severe sanction of expulsion, he was obliged to afford them a right to be heard. They submit that they were entitled to a meeting with Dr. Pierce to question exactly how Gautam breached the Code of Conduct and to make representations regarding the appropriate sanction. When Mr. Massi found the bong it still contained smoke, but it was not lit. It was not a fire safety hazard at that moment. The different underlying purposes of the Drug Abuse Policy and Lighting of Substances Policy are not irrelevant. The applicants submit there is a genuine issue about whether the Lighting of Substances Policy was the appropriate policy to apply, and that they were denied an opportunity to make that submission to Dr. Pierce.

[28] Counsel for Appleby submits that Gautam's admission that he smoked in the residence room obviated the need for any further hearing or opportunity to be heard because there is no discretion with respect to penalty for an admitted contravention of the Lighting of Substances Policy. There was no mitigating circumstance or explanation that could have resulted in any lesser penalty. This argument would be more persuasive if Dr. Pierce made his decision based on the Lighting of Substances Policy but it is not clear that he did so.

[29] In the Serious Incident Report that begins the process, Mr. Massi checked off "Drugs", not "Fire Setting", as the identified Code of Conduct violation. The email decision explicitly refers to a breach of the "substance abuse policy" but does not mention the Lighting of Substances Policy. It would appear that Dr. Pierce conflated the two policies. It is apparent from a reading of his two emails of June 15th to Mrs. Setia that he was sympathetic, but felt his hands were tied.

[30] We agree with the respondent that procedural fairness does not always require a formal oral hearing with the decision maker. In this case, there was no issue of credibility because Gautam admitted that he smoked marijuana in the residence. However, we reject Appleby's submission that expulsion was mandatory and that Dr. Pierce had no discretion regarding what penalty to apply.

[31] Appleby's submission is contradicted by the decision itself. Given the mandatory sanction of expulsion for breaching the Lighting of Substances Policy, Dr. Pierce must be taken to have been acting under the Drug Abuse Policy in meting out a lesser penalty. Once a lesser penalty is a possibility, Dr. Pierce had an obligation to consider what penalty to impose within the range of options. For example, he might have decided that simply barring Gautam from attending the graduation ceremonies was adequate in the circumstances of the case, once he took into account other facts. Gautam was not the person who lit the bong. The marijuana and the bong both belonged to M. Gautam not only had a clean record during all his years at Appleby but he owned

up to responsibility, even when there was no direct evidence against him and the only witness, M, had stated that Gautam was not involved. Dr. Pierce does not appear to have distinguished between M's actions and Gautam's on the night in question. For example, he states in his decision that the boys were smoking in Gautam's residence room, when clearly the incident took place in M's room. In his second June 15th email he states that both Gautam and M admitted to having a lit substance in the residence. However, there was no evidence that Gautam actually lit the bong or anything else on the night in question, only that he smoked from it.

[32] Appleby failed to follow its own process and procedure in a significant way when Gautam's parents were denied an opportunity to make representations to Dr. Pierce with respect to the appropriate sanction for offending the Drug Abuse Policy. It is not a zero tolerance offence. Furthermore, because there is no evidence that Gautam lit any flame, and therefore did not cause any fire safety concern, it might well have been more appropriate to deal with his transgression as a matter falling under the Drug Abuse Policy rather than the Lighting of Substances Policy.

[33] Based upon the denial of an adequate opportunity to be heard, the June 15, 2010 decision of Dr. Pierce is quashed. We also declare Navpreet Setia's consequential withdrawal of Gautam from Appleby College on June 17, 2010 to be of no force or effect.

[34] We decline to go further and order Appleby to confer the Appleby Diploma. It is not appropriate to do so without first affording the new Head of School an opportunity to reconsider the matter and exercise his discretionary statutory power of decision consistent with these reasons.

[35] Private schools are alternative schools. In this case, the parents chose Appleby, in part, because they were impressed by the Code of Conduct and by what Appleby offers beyond mere delivery of a curriculum. With the guidance of these reasons, the Head of School is in the best position to interpret and apply that Code of Conduct, balancing the seriousness of the offence and the interests of the offender with the school's broader interest and perspective, including its responsibility to other students and other parents.

[36] Though we decline to order Appleby to confer the Appleby Diploma, the Applicants have been successful on the jurisdictional issue and in having the original decision quashed. They are entitled to a contribution towards their costs which we fix at \$15,000 all inclusive.

Aston J.

Lax J.

CHAPNIK J. (Dissenting):

[37] I have read the Reasons for Judgment of the majority in this case and, with respect, I cannot agree with either the reasoning or the decision reached by my colleagues.

[38] It is common ground that Gautam and his friend M were smoking marijuana on school property and that they knew the consequence for doing so was expulsion. Save and except for these admissions, there are serious material facts in dispute touching on the issues before the court and which underlie the school's handling of the incident and the decision made. Accordingly, the first matter I will discuss is the factual matrix underlying the school's decision.

[39] The second matter in which I differ from the majority is their framing of the central issue as being "the opportunity to be heard" as a matter of entitlement. In my view, that is the wrong question. The broader issue is whether under the law as it stands, there has been a denial of procedural fairness to Gautam and/or his parents.

[40] Prior to discussing those issues, I will say I do agree with the finding that the school's decision was made pursuant to a "statutory power of decision" and that this court has jurisdiction to hear and determine this matter pursuant to the *Judicial Review Procedure Act, R.S.O. 1990, c. J.1*. I also support the majority's decision to exercise the court's discretion to accept jurisdiction in this case.

THE FACTUAL MATRIX

[41] It is important to understand the full context under which Dr. Michael Peirce, the Head of School, made the decision he did. The summary of facts by the majority is found in paras. 9, 10 and 11 of their decision. For the most part, it reiterates what the applicants say occurred on the day in question, much of which is disputed by the respondents. For example, para. 9 states that when Mr. Eugene Massi, the House Director, contacted Gautam's mother the next morning, he told her that "her son had been caught smoking dope" and would likely be expelled. This conflicts with the evidence of Mr. Massi, who denied in his affidavit sworn June 8, 2011, that he ever used or would use these words. According to him, he did not use the words "smoking dope". He did say the boys' behavior would likely lead to expulsion but added that such was not his decision to make.

[42] Moreover, it was Mr. Massi's evidence that when he went to check M's room at curfew, the entrance was blocked, M's speech was slurred and confused, Gautam's eyes were "glassed over", a fan pointed out the window, and on the desk, he observed a glass bong with smoke still in it. He confiscated the glass bong, a baggie with marijuana remnants and a BBQ lighter.

[43] At first, the boys said they were "just studying" but shortly after this, they admitted they had been smoking in the room. That evening, Mr. Massi completed a Serious Incident Report, as he was required to do which was then forwarded to Dr. Peirce and to Theresa Blake, the Senior School Director.

[44] After reading the report the next morning, Dr. Peirce asked Ms. Blake to meet with each of the boys "to hear their side of the story". Ms. Blake did meet with Gautam in her office after his exam that day and when asked to explain what had occurred the previous night, Gautam

responded that they had “smoked drugs in the room” as they wanted to “have fun”. When asked if he was familiar with the school’s Code of Conduct and the consequences for smoking on school property, he answered “yes, expulsion”. This conflicts with Gautam’s account that Ms. Blake advised him he was expelled and when he asked if there was anything he could do or anybody to whom he could tell his side of the story, she responded that Dr. Peirce had made the decision that he would not receive an Appleby diploma but rather an Ontario Secondary School diploma. According to Ms. Blake, M told her that Mr. Massi came into his room and “caught us smoking marijuana”.

[45] Ms. Blake reported the results of her interviews to Dr. Peirce who then met with both boys together in his office. When they stated that they had only smoked marijuana off-campus, Dr. Peirce told them he would speak to Mr. Massi and Ms. Blake and advise them of his decision later. He then contacted Mr. Massi who confirmed what he had observed and delivered to him the confiscated items.

[46] When Gautam’s mother arrived at the school that morning, Dr. Peirce explained that he was busy with the graduation ceremonies, but he was reviewing the incident and would advise her of his decision later that afternoon. It is noted that his evidence conflicts with that of Gautam and Ms. Setia in several respects. In summary, according to the applicants, Dr. Peirce told them he was busy preparing for year-end ceremonies and “whatever they had to say would not affect his decision”.

[47] In his affidavit sworn June 8, 2011, Dr. Peirce states (at para. 16):

Following my investigation into the incident, I was satisfied that both Gautam and M had been smoking a banned substance in M’s room, in violation of Appleby’s Code of Conduct, the Drug and Alcohol Protocol, and the Lighting of Substances Policy. In the circumstances, and in accordance with the Code of Conduct, I considered the seriousness of the offence, Gautam’s and M’s intentional violation of the policy, and the impact of the offence on the standards of behavior and integrity that Appleby tries to cultivate in its students. Based on these considerations, I determined that an expulsion was warranted. However, as the incident had occurred just prior to M and Gautam’s final examination, I decided to permit M and Gautam to withdraw from Appleby.

[48] That afternoon, Dr. Peirce reviewed the matter with the principal of the school. They decided that, although expulsion was the appropriate sanction, they would permit the students to withdraw. In addition, the students would have to leave the school and would not be allowed to attend the graduation ceremonies. Dr. Peirce then prepared a letter to the boys’ parents, explaining his findings and decision.

[49] With respect to the emails from Ms. Setia requesting to meet with him and setting out the factors she believed favoured a lesser sanction, it was, he says, clear that Gautam had not been completely honest with her regarding the incident. Her understanding, for example, was that there was “no smoke in the room, no lighter, as well as no drugs in the boys’ possession...” Dr. Peirce responded to her in writing, explaining the facts that led him to believe the boys were indeed smoking drugs in the room, including their admissions to both Mr. Massi and Ms. Blake.

Subsequently, he received an email from Ms. Setia advising of her decision to withdraw Gautam from the school.

[50] In my view, the applicants' recitation of the day's occurrences is not credible. The evidence of the school officials is more credible. Their evidence is supported by written notes taken contemporaneously with the events involving Gautam as well as written and oral reports that are consistent with those notes. Moreover, the applicants' recitation of the day's occurrences is problematic. For example, Ms. Setia contends that she sent Dr. Peirce an email during the afternoon requesting a meeting "before he made a decision". At the same time, she asserts that she was led to believe that Dr. Peirce had already reached his decision that morning. Furthermore, Gautam suggests that Ms. Blake told him that Dr. Peirce had made a decision to expel him and he couldn't "tell his side of the story". However, the records of the school officials indicate that Ms. Blake went to speak to Gautam to investigate his side of the story and report back to Dr. Peirce. In this regard, the evidence of the school officials, whose reports are consistent and accord with their written notes is more plausible.

[51] The above evidence serves to give a more fullsome understanding and context to the reasoning underlying the school's decision and the rules and procedures that were followed in this case.

NATURAL JUSTICE

[52] It is well-established, as noted by the majority, that the basic requirements of natural justice are notice, an opportunity to be heard and an unbiased Tribunal. It is also a well-known principle of administrative law that a hearing does not need to be a formal oral hearing.

[53] In *Gianfrancesco v. Junior Academy Inc.*, [2001] O.J. No. 2730 at para. 44 the court, citing *Hundal v. Superintendent of Motor Vehicles* 1985 CanLII 772 (BC CA), (1985), 20 D.L.R. (4th) 592 at p. 597 (B.C.C.A.), noted that:

The key will always be whether the decision-maker had acted fairly in dealing with the citizens' rights...at a minimum, **however, the principles will always require some kind of hearing, even if it only involves the most rudimentary ability to respond to and have notice of the case against you.** [Emphasis added.]

[54] There is no issue as to the matter of notice. Indeed, the applicants concede that, as part of the admission process, all parents were asked to sign a registration form acknowledging that the students' attendance at Appleby was dependent on compliance with its *Code of Conduct* which stipulates standards of behavior expected of Appleby students. I also agree with the majority that Dr. Peirce's conduct does not give rise to a reasonable apprehension of bias. There was no "rush to judgment" and a reasonably informed bystander would not perceive bias on the part of Dr. Peirce.

[55] However, I do not agree there was a failure of procedural fairness or natural justice afforded to either Gautam or his parents.

[56] The majority decision analyzes the various rules and protocols encompassed within the school's *Code of Conduct* and *Substance Abuse* policies. They conclude that there was no "lit substance" in the room and, therefore, the zero-tolerance stipulation in the *Lighting of Substances Policy* would not apply. Moreover, by allowing a lighter penalty than immediate expulsion, the school did not follow its own procedures and would have to provide Gautam's parents with a hearing pursuant to the school's *Code of Conduct*. In particular, the applicants submit that a hearing was required by the *Code of Conduct* to determine, as a matter of fact, whether Gautam breached the policies and allow him to present his side of the story, challenge evidence and make submissions regarding potential sanctions.

[57] Both boys admitted to Mr. Massi and Ms. Blake that they had been smoking marijuana in the room. In M's words, they "caught us" in the act. This was reported to Dr. Peirce and Mr. Massi provided him with the items he had taken from M's dormitory room.

[58] Although Dr. Peirce did not meet face-to-face with Gautam's parents before making his decision, it is evident that he read Ms. Setia's emails and responded to them while conducting a full investigation. In my view, the investigation conducted was fair and the school did not contravene its own process.

[59] Moreover, in the words of Dr. Peirce "given the seriousness of Gautam's offence, a face-to-face meeting with Gautam's parents would not have changed" the school's decision. After all, there was a clear, unambiguous admission of culpability and Gautham's parents were not witnesses to the incident. In any event, the *Code of Conduct* expressly reserves the school's ultimate discretion to apply any sanction that is appropriate, including expulsion.

[60] The *Code of Conduct* stipulates the following:

...although the specific policies described in this *Code of Conduct* outlines steps that Appleby College normally will take in the event that a student contravenes, or attempts to contravene, the requirements of the policy, **they do not take away from the ultimate discretion of Appleby College to apply any sanction that is appropriate in the particular circumstances of an offence, including the expulsion of a student.** [Emphasis added.]

[61] In my view, neither the school's policies nor the principles of natural justice required an oral hearing with Gautam's parents in the circumstances. The school acted fairly in dealing with Gautam. There was no violation of procedural fairness or natural justice in this case.

WAS THE DECISION UNREASONABLE?

[62] According to the applicants, the school's decision was incorrect, harsh and unreasonable given the timing of the incident, Gautam's unblemished record, his family's significant contributions to the school and the public embarrassment surrounding the incident and Gautam's exclusion from the graduation ceremonies. Moreover, other students had been issued lesser

penalties for similar conduct. Regarding the latter allegation, according to the school authorities, none of the other students Gautam named were found to have been smoking on school property.

[63] The *Code of Conduct*, well-known to students and parents, sets standards for all students, including promoting a willingness to accept responsibility for one's own actions. Gautam committed a zero-tolerance offence which he knew was not permitted. The penalty imposed did not keep Gautam from completing his exams, obtaining his Ontario Secondary School diploma (the school provided his marks for that purpose) or attending university. The only result at this juncture is that he has not received the diploma from Appleby.

[64] In my view, the ultimate penalty was correct, proportionate to the offence, just and fit in the circumstances of this case. Moreover, some degree of deference should be afforded the Head of School who had dealt with similar matters over a four year period.

[65] I would dismiss the application with costs.

Chapnik J.

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B E T W E E N:

GAUTAM SETIA, DEVINDER SINGH SETIA
and NAVPREET SETIA

Applicants

- and -

APPLEBY COLLEGE

Respondent

REASONS FOR JUDGMENT

Aston and Lax JJ (majority)

Chapnik J. (dissent)

Released: 20121108