

**DISCIPLINE COMMITTEE
OF THE COLLEGE OF EARLY CHILDHOOD EDUCATORS**

Citation: College of Early Childhood Educators vs Shawna Lee (Ferguson) Swain,
2017 ONCECE 2
Date: 2017-02-16

IN THE MATTER OF the *Early Childhood Educators Act, 2007*, S.O. 2007, c. 7,
Sched. 8 (the “ECE Act”) and the Regulation (Ontario Regulation 223/08)
thereunder;

AND IN THE MATTER OF discipline proceedings against SHAWNA LEE (FERGUSON) SWAIN, a current member of the College of Early Childhood Educators.

Panel: Madeleine Champagne (Chair)
Eugema Ings, RECE
Kath Gradwell, RECE

BETWEEN:)
COLLEGE OF EARLY CHILDHOOD) Jordan Glick,
EDUCATORS) WeirFoulds LLP,
) for the College of Early Childhood Educators
)
- and -)
)
SHAWNA LEE (FERGUSON) SWAIN) Shawna Lee (Ferguson) Swain was not present,
REGISTRATION # 14837) nor was she represented
)
)
)
)
)
) Jennifer McKendry,
) McCarthy Tétrault LLP,
) Independent Legal Counsel
)
) Heard: October 7, 2016

REASONS FOR DECISION, DECISION AND ORDER(S)

1. This matter came on for a hearing before a panel of the Discipline Committee (the “Committee”) on October 7, 2016 at the College of Early Childhood Educators (the “College”) at Toronto.

2. A Notice of Hearing, dated May 26, 2016 (Exhibit 1, Tab 1), was served on Shawna Lee (Ferguson) Swain (the “Member”), specifying the charges and requesting her attendance before the Discipline Committee of the College on July 8, 2016 at 10:00 a.m. to set a date for a hearing. Counsel for the College submitted an Affidavit of Service sworn by Lisa Searles, Hearings Coordinator (Exhibit 1, Tab 2), and sworn September 23, 2016, confirming that the Notice of Hearing was served on the Member.
3. College counsel tendered a second Notice of Hearing, dated July 15, 2016 (Exhibit 2), that was served on the Member, specifying the charges and requesting the Member’s attendance before the Committee on October 7, 2016. Counsel for the College submitted an Affidavit of Attempted Service

THE ALLEGATIONS

IT IS ALLEGED that Shawna Lee (Ferguson) Swain, RECE (the “Member”) is guilty of professional misconduct as defined in subsection 33(2) of the ECE Act, in that:

- (a) she acted in a manner that, having regard to the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to Ontario Regulation 223/08, subsection 2(10) by virtue of the conduct set out at paragraph 3 below;
- (b) She signed or issued, in her professional capacity, a document that the Member knew or ought to have known contained a false improper or misleading statement, contrary to Ontario Regulation 223/08, subsection 2(16) by virtue of the conduct set out at paragraphs 3(i)(a) and (b) and 3(iv) below; and,
- (c) She falsified a record relating to her professional responsibilities, contrary to Ontario Regulation 223/08, subsection 2(17) by virtue of the conduct set out at paragraph 3(iv) below.

PARTICULARS OF THE ALLEGATIONS ARE AS FOLLOWS:

1. Now and at all times relevant to these allegations, the Member was registered as an early childhood educator with the College of Early Childhood Educators (the "College").
2. From in or about January of 2014 until in or about March of 2015, the Member was employed as a Manager at East York Child Care Centre (the "Centre").
3. While employed as a Manager at the Centre, the Member:
 - (a) misappropriated all or some of \$29,314.54 from the Centre as follows:
 - (i) the Member purchased up to \$16,741.72 of items that were for personal use on the Centre's business visa;
 - (ii) the Member claimed up to \$4,764.88 from the Centre's petty cash fund for items that were for personal use;
 - (iii) the Member received child care services for her daughter at the Centre which were not authorized or paid for totaling \$6,585.00; and,
 - (iv) the Member took up to \$1,222.94 of items belonging to the Centre for personal use.
 - (b) acted in an unauthorized manner that was inconsistent with the policies and procedures of the Centre, resulting in a financial loss of up to \$38,141.00 to the Centre as follows:
 - (i) the Member waived \$4,624.00 of fees as a way of resolving complaints against her relating to three clients;

- (ii) the Member permitted some clients to pay fees that were less than the Centre charged to a total loss of up to \$3,057.00;
 - (iii) the Member permitted clients to miss scheduled and continuous summer camp programming without charge to a total loss of up to \$30,460.00.
- (c) booked children's performers for a concert that was not authorized and had to be cancelled at a cost of \$2,500.00 to the Centre;
- (d) created a fictitious client account and then diverted payments from a client into that account leading to the client not receiving tax receipts for amounts paid to the Centre.

MEMBER'S PLEA

As the Member was not present, nor represented by counsel, the Committee proceeded on the basis that the Member denied the allegations as set out in the Notice of Hearing dated July 15, 2016. (Exhibit 2, Tab 3).

THE EVIDENCE

Counsel for the College called one witness: Ms. Susanne Wells, Chair of Child Studies and Community Services Department at Centennial College.

EVIDENCE OF SUSANNE WELLS

Ms Wells testified that the Member was hired as a Manager for the East York Child Care Centre with responsibilities for complete Centre management and operation, including responsibilities to children and families, staff, intake, registration, financial operations and licensing. Centennial College employed her in a full time capacity for a period of approximately 14 months from January 2014 to March 2015.

Following the Member's dismissal, an internal audit revealed a number of unauthorized expenditures. This resulted in a financial loss to the Centre of \$38,141.00 and jeopardized the reputation and financial health of the Centre.

Ms Wells also testified that the Member misappropriated monies from Centennial College while employed at the Centre. This includes unauthorized Visa charges for personal use; unauthorized charges that the Member made to the Centre petty cash fund; unpaid child care services the Member arranged for her daughter; and an inventory of missing items belonging to the Centre that the Member took for her own use. She further testified that the Member incurred other charges either to Visa or petty cash for a substantial Scholastic Book Order for a fictitious child and charges for the Member's two daughters' gymnastic club fees.

Ms Wells also testified that the Member booked an unauthorized concert as a fundraiser for the Centre. Financial accounting from an internal audit listed the cost of cancellation at \$2,500.00.

A record of emails between the Member and the company, Splash 'N Boots, document the Member's misrepresentation of herself as the supervisor of three Child Care Programs and the communication around the planning for a concert, beginning in September 2014. Ms. Wells testified that she had no discussion with the Member around this event and that she gave no approval for the expenditure.

Ms. Wells also testified that shortly before the end of her employment, the Member approached her about running a "break even" concert. Ms. Wells did not give approval for such an event.

Ms. Wells testified that she discovered that the Member had ignored her and had been planning for this event for months following the Member's employment termination. Ms. Wells became

aware of the Splash 'N Boots concert planning at this point and cancelled the concert. The cancellation of this concert resulted in a loss to the College of \$2,500.00 for the cancellation fee. (Exhibit 3, Tab 11)

While employed as a Manager at the Centre, the Member created a fictitious client (Kira Murdock) account. Actual client payments were then diverted from a client (J.C.) into "Kira Murdock's account", leading to J.C. not receiving tax receipts for amounts paid to the Centre.

Ms. Wells testified that in the course of the financial audit, she learned that the Member had directed an employee at Centennial College accounting to set up this account. It is standard practice for a Manager to direct accounting to set up accounts for families.

Ms. Wells testified that this situation came to light when the client J.C. came forward to request a tax receipt for child care fees paid. J.C. was not issued a tax receipt at the expected time and asked for clarification. She was issued the appropriate tax receipt when the diversion of funds was discovered. (Exhibit 3, Tab 10)

There was a tax receipt issued to "Kira Murdock" that was not collected.

Ms. Wells gave evidence relating to the financial audit that documented that the Member waived or reduced child care fees to three families which resulted in financial loss. These changes to child care fees were neither reported nor authorized and went against Centre policy. These differences in fees charged were reported by the City of Toronto consultant to Centennial College and verified by the families involved.

Ms. Wells further testified that during the Member's tenure as Manager, projected fees for Kindergarten Summer Camp and School Age Summer Camp were below predicted revenue, showing a total loss of up to \$30,460.00. The Member failed to follow the Centre's financial policies and requirements in collecting fees. The evidence showed that the Member revised the College's fee schedule for these camps without approval or authorization. This resulted in a loss of \$30,460.00 to the program.

Ms. Wells further testified that when confronted with the misappropriation, the Member agreed to sign a Memorandum of Agreement, dated July 5, 2015, wherein she agreed to repay her debt of \$29, 314.54 to Centennial College.

DOCUMENTARY EVIDENCE OF SUSANNE WELLS

During Ms. Wells' testimony, a number of documents were filed as Exhibits. These included documents related to the following:

The Member purchased items totalling \$16,741.72 on the Centre's Visa for her personal use.
(Exhibit 3, Tab 3)

The Member claimed \$4,764.84 from the Centre's petty cash for items that were for her personal use. (Exhibit 3, Tab 7)

The Member received child care services for her daughter that were not authorized totalling \$6,585.00 (Exhibit 3, Tab 8)

The Member took up to \$1, 222.94 of items belonging to the Centre for personal use. (Exhibit 3, Tab 9)

Evidence collected, from signed documents (Visa and Petty Cash), supports that the Member misappropriated funds from Visa and Petty Cash. (Exhibit 3, Tab 4, 5, and 11)

The Member agreed that she had misappropriated funds by signing the Memorandum of Agreement (“MOA”) with Centennial College. (Exhibit 3, Tab 6)

The MOA dated July 5, 2015, is a written agreement made between Centennial College (represented by the Dean, Rahim Karim) and the Member. The MOA states that the Member is indebted to Centennial College in the amount of \$29,214.54. Both parties agreed that the Member will repay Centennial College according to a repayment schedule. Ms. Wells testified that if the Member does not adhere to the Agreement by making payments as outlined within the Agreement, then the College is entitled to pursue legal action.

The Member did not follow the policies and procedures of the Centre and acted in an unauthorized manner which resulted in a financial loss of up to \$38,141.00 to the Centre. This includes documentation that supports that the Member waived child care fees for three families at the Centre; that the Member charged lesser fees to some clients which resulted in a financial loss to the Centre; and, that the Member did not follow Centre policies and procedures in charging fees for the summer camp programs which resulted in further financial loss to the Centre. (Exhibit 3, Tab 10).

SUBMISSION OF COLLEGE COUNSEL AS TO FINDING

Counsel for the College submitted that the Member should be found guilty of professional misconduct as alleged, citing violations of the College’s Professional Misconduct Regulation (Ontario Regulation 223/08).

VIOLATIONS OF THE PROFESSIONAL MISCONDUCT REGULATION (ONTARIO REGULATION 223/08)

Counsel for the College submitted that the Member violated Ontario Regulation 223/08, subsection 2(10) by acting in a manner that, having regard to the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

Counsel for the College also submitted that the Member violated Ontario Regulation 223/08, subsection 2(16) by signing or issuing, in her professional capacity, a document that the Member knew or ought to have known contained a false improper or misleading statement.

Counsel for the College also submitted that the Member violated Ontario Regulation 223/08, subsection 2(17) by falsifying a record related to her professional responsibilities.

DECISION

(i) Onus and Standard of Proof

The College bears the onus of proving the allegations in the Notice of Hearing dated July 15, 2016 on a balance of probabilities (more likely than not), based on clear, convincing and cogent evidence, in accordance with the Supreme Court of Canada's decision in *F.H. vs McDougall*, [2008] 3 S. C. R. 41.

(ii) Findings of Fact

The Committee finds the following as facts:

- Now and at all times relevant to these allegations, the Member was registered as an early childhood educator with the College of Early Childhood Educators (the "College").

- From about January of 2014 until about March of 2015, the Member was employed as a Manager at East York Child Care Centre (the “Centre”) at Centennial College.
- While employed as a Manager at the Centre, the Member misappropriated all or some of \$29,314.54 from the Centre as follows:
 - the Member purchased up to \$16,741.72 of items that were for personal use on the Centre’s business Visa card;
 - the Member claimed up to \$4,764.88 from the Centre’s petty cash fund for items that were for personal use;
 - the Member received child care services for her daughter at the Centre which were not authorized or paid for totaling \$6,585.00; and,
 - the Member took up to \$1,222.94 of items belonging to the Centre for personal use.

The Member acted in an unauthorized manner that was inconsistent with the policies and procedures of the Centre, resulting in a financial loss of up to \$38,141.00 to the Centre as follows:

- the Member waived \$4,624.00 of fees as a way of resolving complaints against her relating to three clients. This action was not authorized or approved;
- the Member permitted some clients to pay fees that were less than the Centre regularly charged, amounting to a total loss of up to \$3,057.00;

- the Member permitted clients to miss scheduled and continuous summer camp programming without charge, amounting to a total loss of up to \$30,460.00.
- The Member booked children's performers for a concert that was not authorized and had to be cancelled at a cost of \$2,500.00 to the Centre; and
- The Member created a fictitious client account and then diverted payments from a legitimate client into that account leading to the client not receiving tax receipts for amounts paid to the Centre.

(iii) Decision

Having considered the evidence and onus and standard of proof, and the submissions made by counsel for the College, the Committee finds that the facts support a finding of professional misconduct. In particular, the Committee finds that the Member committed acts of professional misconduct as alleged, more particularly breaches on Ontario Regulation 223/08, section 2, subsections 2(10), 2(16) and 2(17).

REASONS FOR DECISION

The Committee found the witness' testimony to be on the whole credible and consistent, demonstrating a thorough investigation supported by clear, concise, well documented and factual evidence.

The Member had an opportunity to appear before the Discipline Committee to address all evidence. She chose not to appear or be represented. The Committee reached their decision based on the evidence they were presented at the hearing. It is unfortunate that the Member failed to participate in the hearing or even provide the College with a reason for not doing so.

This demonstrates her intention not to cooperate with the professional body of which she is a member. This reflects poorly on her professionalism and as a member of the College, and deprives the Committee of the ability to assess her remorse, if any.

The Member entered into a Memorandum of Agreement admitting to this misappropriation of funds totalling \$29,314.54, reviewing a repayment plan with Centennial College and signing her agreement to repayment of this debt.

The misappropriated funds total is comprised of the following: the Member made unauthorized revisions and waived child care fees for three families, (\$4,624.00); the Member, without authorization, permitted some clients to pay lower child care fees than the Centre's rate, (\$3,057.00); the Member also revised the schedule and policies of fee payment, without authorization, for the summer camp programs operated by the Centre with a significant financial loss to the program, (\$30,460.00); the Member also made arrangements for a fundraising event without approval or knowledge of her supervisor. In her interactions with the company, the Member misrepresented herself as a supervisor of three centres when her position was as supervisor of one child care centre. The consequences of her actions caused the College to cancel the event at a cost to the College of \$2,500.00, following the termination of the Member's employment.

The Member directed an agent at Centennial College to create a financial account for a fictitious client in the program. She diverted payments from another parent (J.C.) into this account and then used the fictitious account to issue tax receipts.

The Member demonstrated a profound disrespect for the professional and ethical responsibilities assigned to her. Further, the Member has demonstrated dishonesty in her

actions. Her actions have caused a serious negative impact on the Child Care Centre's families and staff as well as jeopardizing the Centre's reputation within the community and the financial health of the Centre. These consequences were provided through sworn testimony of her immediate supervisor at Centennial College.

The Member's behaviour is unprofessional and disgraceful and demonstrates a disturbing lack of integrity, dishonesty and disrespect.

SUBMISSIONS OF COLLEGE COUNSEL AS TO PENALTY

Counsel for the College submitted that the Committee should direct the Registrar to revoke the Member's Certificate of Registration and record the results of the finding on the Register and in the College's publication, *Connexions*. Counsel for the College submitted that the Member should pay the cost of the proceedings.

College Counsel submitted that all aspects of the proposed penalty are lawful as they are consistent with the Committee's legislative authority.

College Counsel submitted that the order should be framed in a way that allows the College of Early Childhood Educators to protect the public while maintaining the high standards of the profession. The order is not designed to merely punish the Member but should focus on the Member's individual circumstances, the nature of the misconduct and the need of the College to deter future misbehaviour.

College Counsel submitted that while revocation of the Certificate of Registration is the most serious penalty that can be imposed on a Member, this decision is appropriate in similar disciplinary cases involving acts of 'moral turpitude', defined as a lack of honesty, integrity and

good morals. [*Goldman vs College of Pharmacists*, 25 O.R. (2d) 671 (Ontario)]. The fact that the Member misappropriated funds on numerous occasions over a period of time, misused her professional authority and failed to act ethically further support the revocation of her Certificate of Registration.

While not directly influencing this Committee's ultimate finding of misconduct, it was noted from submissions by College Counsel with respect to penalty that the Member had appeared before the Discipline Committee of the College of Early Childhood Educators in April 2015. The Allegations in that hearing focused on similar conduct of the Member: misappropriation of child care fees, submission of false receipts, non-payment of her daughter's child care fees, failure to deposit child care fees into the Centre's bank account, and reimbursement of monies from petty cash for personal items in her previous employment. This was an aggravating factor in the Committee's penalty considerations.

College Counsel submitted that in discharging its duty to protect the public, the most relevant principles are specific and general deterrence. The Member repeatedly engaged in acts of misconduct over an extended period of time and continued to do so even while being prosecuted by the College. The College Counsel submitted that the only way to specifically deter the Member in the future is by removing her from practice. A strong message must be sent to the College that the Member's conduct is not condoned.

College Counsel stated that a cost order is an appropriate action for the following four reasons: the Member's refusal to participate in the investigation and prosecution, causing elevated cost to the Membership; the College's need to investigate and prosecute the Member; that the Member profited financially by her actions and the fact that this is the Member's second offence.

PENALTY DECISION

1. The Registrar shall be directed to revoke the Member's Certificate of Registration, pursuant to section 33(4) of the *Act*.
2. Direct that the results of the hearing be recorded on the Register in accordance with the *Act* and the College's by-laws.
3. Direct that the Discipline Committee's Decision and Order be published in full, including the Member's name, on the College's website and in summary in the College's publication, *Connexions*.
4. Direct that the Member pay a portion of legal costs of \$16,500.00 for this proceeding to the College, pursuant to s33(5) of the *Act*. This amount represents approximately 2/3 of the cost of Tariff A: Costs of the day of Hearing - \$7,000.00 and approximately 2/3 of the balance of legal costs for the Hearing - \$9,500.00.

REASONS FOR PENALTY DECISION

The Committee has ordered a penalty consistent with the submissions made by College Counsel.

The Committee's order to revoke the Member's Certificate of Registration is appropriate and reasonable and satisfies the College's duty to protect the public. Her refusal to participate in the hearing left the panel without knowledge or evidence of any mitigating circumstances. The Committee was also left without any information which would enable them to have confidence in what manner the Member would conduct herself in the future.

The Committee determined that through the process of responding to the previous complaint and discipline process it did not deter this Member's conduct. The previous Discipline

Committee's order for a 6 month suspension of the Member's Certificate of Registration with conditions and limitations did not cause the Member to change her behaviour and demonstrate that she rehabilitated herself. The Member has repeatedly engaged in acts of misconduct over an extended period of time and continued to do so even while being prosecuted by the College. This Discipline Committee's decision is that revoking her certificate of registration is the only way to specifically deter the Member. A strong message must be sent to the Member that her conduct is not condoned and that the College will apply the most severe penalty when misconduct is found to be this serious.

The Order also meets the requirements of general deterrence as it demonstrates to Registered Early Childhood Educators that they will be aware of the type of penalty that awaits them should they commit similar acts of professional misconduct. Members will also have confidence in their College, that such acts of ongoing and serious misconduct will be addressed. They can be assured that the College is transparent in their decision making and demonstrates its willingness to respond to concerns in an appropriate fashion and to uphold the profession of Early Childhood Educators and the protection of the public.

The Committee directs that the results of the hearing be recorded on the Public Register thus ensuring that the legislative requirements are fulfilled and that the public is protected. The public can search the Registry at the College of Early Childhood Educators and immediately see that this Member's Registration is revoked.

Publication on the Public Register College website and in the newsletter *Connexions* promotes awareness of the high standards to which the College holds its members and assures both the public and other members of the profession that the College will not tolerate this kind of conduct. This publication will ensure that future employers are made aware of the Member's

misconduct. It will also communicate to the Member that the professional misconduct she committed is serious and the consequences for committing such acts are disadvantageous to her.

The Committee directs that the Member pay a portion of legal costs of \$16,500.00 for this proceeding to the College. This amount represents approximately 2/3 of the cost of Tarriff A: Costs of the day of Hearing - \$7,000.00 and approximately 2/3 of the balance of legal costs for the Hearing - \$9,500.00. If the Member had participated in the hearing as she did previously, the legal costs would have been significantly lower.

The Committee is disappointed that this is the second offence by this Member of professional misconduct. This demonstrates to the Committee that the Member has no intent to change her behaviour.

In the Member's first Discipline hearing she entered into a Joint Statement of Facts and agreed to the penalty ordered by that Discipline Committee. The Member expressed remorse for her behaviour. Her continuing fraudulent behaviour casts serious doubt on the sincerity of her remorse. She continued to personally profit financially through misappropriation of funds from the second child care Centre while in an agreement to repay the first child care centre for similar defrauding of funds.

The Member behaved in an unprofessional manner by making a choice not to participate in this hearing, which is her professional obligation. The Member is aware of the process and expectations of the College in hearings. Her decision to be a non-participant elevated the cost of this hearing.

The College of Early Childhood Educators currently bears the cost of hearings as they are funded through membership dues. The Committee agrees with Counsel's proposal that the Membership should not have to pay for an individual member's misconduct.

The Committee feels that ordering the Member to pay costs for the Hearing, while appropriate, is a new direction of the College. All members need to learn of this consequence for professional misconduct. The Membership should be made aware of their professional responsibilities.

If the Member had participated in the Hearing as she did previously, the legal costs may have been significantly lower.

The Member was fully aware of the process and expectations and by ignoring the Notice of Hearing and Hearing has shown a complete disregard for the expenses of responding to her misconduct. The Committee has a responsibility to all members of the College and has, consequently, ordered this assignment of costs.

Date: February 16, 2017

M. Champagne

Madeleine Champagne
Chair, Discipline Panel

Eugenia Ings

Eugenia Ings, RECE
Member, Discipline Panel

Kath Gradwell

Kath Gradwell, RECE
Member, Discipline Panel