HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

JKB as represented by her Litigation Guardian JB

Applicant

-and-

Regional Municipality of Peel Police Services Board

Respondent

DECISION

Adjudicator:	Brenda Bowlby
Date:	February 24, 2020
File Number:	2017-29780-I
Citation:	2020 HRTO 172
Indexed as:	**JKB v. Peel (Police Services Board)**

APPEARANCES

JKB as represented by her Litigation Guardian JB, Applicant	)	Roger Love, Counsel
Regional Municipality of Peel Police Services Board, Respondent	)	Paula M. Rusak, Counsel

INTRODUCTION

[1] This Application was filed on September 27, 2017 under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). The applicant submits that the respondent discriminated against her in the provision of services. The respondent denies any discriminatory treatment of the applicant.

[2] Specifically, the applicant alleges that she was subjected to differential treatment on September 30, 2016, because of her race, when two police officers treated her in a manner that was lacking in the care and compassion with which a White child would have been treated by handcuffing and shackling her at her school. The applicant asserts that the circumstances in which this occurred are such that an inference of implicit racial bias on the part of the officers can be drawn.

[3] Further, the applicant asserts that the respondent called the Children's Aid Society ("CAS") to make a report without reasonable grounds and did so because of the applicant's race.

[4] Applicant's counsel advised during the hearing that the ground of age, which had been included in the Application, would not be pursued.

[5] The respondent denies that the applicant was treated in a discriminatory fashion. The respondent submits that its officers did their best to keep the applicant and others safe in a situation in which the applicant's behaviours were creating a safety risk for herself and others, including the officers. The respondent denies that the officers were influenced by the applicant's race in the actions they took. The respondent denies the applicant's allegations regarding a report to the CAS.

[6] The hearing took place over the course of seven days, all in 2019: May 29 and 30, October 1 and 2, and November 13, 15 and 20.

[7] The applicant called the following witnesses: JB (the Litigation Guardian and JKB's mother), Laura Ginou, Jennifer Chambers, David Patrick, and Dr. Kerry Kawakami.

[8] The respondent called police officers, Constable Nicholas Eckley and Constable Slav Kosarev.

[9] The parties agreed to bifurcate the issue of remedy pending a determination of the merits of the Application.

DECISION

[10] I find that race was a factor in the treatment of the applicant by the respondent's officers on September 30, 2016 and, consequently, that her right to equal treatment under s. 1 of the *Code* was breached.

PROCEDURAL AND PRELIMINARY ISSUES

[11] By Interim Decision, 2019 HRTO 119, dated January 24, 2019, the applicant's request to amend the Application to add disability as a ground was denied.

[12] The respondent requested that the Tribunal dismiss the Application on the basis either that it had no reasonable prospect of success or that the applicant had commenced a civil proceeding simultaneously in the Ontario Superior Court of Justice on the same factual circumstances. The respondent requested, alternatively, that the Application be deferred pending the outcome of the civil proceeding. Both requests were denied in Interim Decision, 2019 HRTO 483, dated March 19, 2019.

[13] The respondent objected to the admissibility of the evidence of two witnesses whom the applicant proposed to call as expert witnesses. In Interim Decision, 2019 HRTO 878, dated May 27, 2019, I found Dr. Kerry Kawakami to be qualified to give expert opinion evidence on the role of implicit racial bias in dynamic situations. I deferred my decision on the admissibility of Jennifer Chambers' evidence until the hearing to afford an

opportunity for examination and cross-examination on her qualifications and experience. Subsequently, after hearing Ms. Chamber's evidence about her qualifications and experience, I found her to be qualified to give expert opinion evidence on unconscious bias in policing in respect of mental health and its intersection with race.

[14] A partial publication ban was granted by Interim Decision, 2019 HRTO 1274, dated September 17, 2019, relating to the disclosure of identifying information pertaining to the applicant.

[15] During the hearing on the merits of the Application, an issue arose regarding the use of information from an investigation by the Office of the Independent Police Review Director ("OIPRD") into a complaint against the respondent, filed by the applicant's mother. The issue first arose when the respondent sought to place before one of the Applicant's witnesses a copy of the transcript of this witness's interview by the respondent. This transcript had been created, at least in part, for the purposes of the OIPRD complaint and process and had been submitted to the OIPRD by the respondent. Respondent's counsel stated that the respondent was not asking that this transcript be entered as an exhibit but rather that the witness simply review this transcript to "refresh his memory." Applicant's counsel argued that since section 83(8) of the *Police Services Act*, R.S.O. 1990, c. P.15, as amended, provides that documents prepared as the result of a complaint made to the OIPRD are inadmissible in any civil proceedings, other than a hearing relating to the complaint, then "the product" of an OIPRD investigation may not be used in another proceeding. I accepted the applicant's argument on the basis that if the document is subject to a statutory privilege, then its contents are also privileged and cannot be used in another civil proceeding.

[16] Later in the hearing, I upheld a similar objection of respondent's counsel when applicant's counsel attempted to cross-examine one of the respondent's witnesses on the outcome of the OIPRD investigation in order to introduce this information into evidence. I found that since this information only could arise out of an investigative report or other document prepared as a result of a complaint to the OIPRD then, just as the statutory

privilege attaches to information in the interview transcript, the privilege also attaches to the information in the investigative report.

[17] The parties filed with the Tribunal briefs of documents which they intended to rely on in the hearing, including witness 'will say' statements. These briefs were treated as exhibit books, subject to further identification and challenges by either party of documents in the other party's briefs, and with the understanding that any document successfully challenged would be removed. No challenges were received regarding any of the documents in the parties' briefs, although the transcripts of interviews of the two paramedics were removed from the respondent's brief at the request of the respondent following the first ruling on documents generated in the OIPRD investigation.

[18] The respondent's exhibits briefs included the notes of police officers who had been identified by the respondent as possible witnesses prior to the hearing, including several who were not called by the respondent when it came time to present the respondent's case. Also included was an email from the school principal who was not called as a witness by either party. These notes and the email were not referred to by either party at any point in the course of the hearing, including in final argument. Although the applicant did not request their removal, I have not considered them for the purposes of making this decision. Nor did I consider 'will say' statements included in the respondent's brief of witness statements, which also became an exhibit, other than those of the two officers who testified. These two statements were confirmed and adopted by the officers as part of their evidence in the hearing. Again, there was no reference by either party to the statements of officers who did not testify during the hearing or in final argument.

[19] I did, however, consider the two dispatch records (Event Number P160338571 and Event Number P160347440) and the Occurrence Details records relating to the attendance of police at the school on September 8 and September 15, 2016. These documents were not objected to by the applicant at the hearing.

BACKGROUND

[20] The focus of the hearing was on the interaction between two police officers employed by the respondent ("the officers") and the applicant over the period starting at 10:44 a.m. on September 30, 2016, when the first officer arrived at the school and continuing until 12:11 p.m. on that day when that officer left the school ("the incident"). However, events and circumstances underlying the incident that forms the basis of the Application provide necessary context.

[21] At the time of the incident, the applicant was six years old and was enrolled in Grade One at a public school ("the school") in the Peel District School Board ("the school board"). She was a typically sized child for her age: between three and four feet tall, slim and about 48 pounds. She is Black.

[22] The applicant resides with her mother and older siblings. Prior to September 2016, the applicant had been subject to several traumatic events in her short life. This included the murder of her father when she was quite young and that, for a period of about a year prior to the incident, she had been dealing with the fact that her mother was undergoing treatments for cancer. Further, on the first day of school in September 2016, the applicant witnessed her mother's finger get caught in the door of the cab that was dropping her off at school, requiring seven stitches. According to the applicant's mother, the applicant believed that she was responsible for this injury. The applicant apparently did not like to be apart from her mother.

[23] Starting in 2014, when the applicant was in Junior Kindergarten, the school began calling the applicant's mother, asking her to pick up the applicant up because she had been refusing to stay in class, running around the school or fighting with other children. When the applicant's mother arrived at the school, the applicant would appear to be fine. The applicant's mother would take her home and return her to school the next day. This was a relatively frequent occurrence that continued through the next school year and into September of 2016. The applicant's mother said that these behaviours were not evident at home or when the applicant attended the Boys and Girls Club.

[24] In the previous school year, the school had put in place for the applicant a Safety Plan outlining the behaviours causing concern together with strategies for dealing with those behaviours. The behaviours outlined in the Safety Plan included: fight and flight, punching, hitting staff and students, throwing objects at students and staff, running from the room, unsafe behaviour in the stairwell (sliding on bannister), refusing to return, kicking when upset and screaming loudly, throwing herself onto the ground, banging into people, spitting and swearing.

[25] The applicant's mother said that she did everything in her power to try and find out the underlying reasons for the applicant's struggles at school. This included engaging in a parenting program, counselling sessions, using a book provided by the school social worker to help to explain to her children her experience with cancer and consenting to the school social worker providing services to the applicant. The applicant's mother also consented to the school obtaining a psycho-educational assessment of the applicant. This assessment, which was made an exhibit, set out a diagnosis of Oppositional Defiance Disorder. The school had put an Individualized Education Plan in place for the applicant before September 2016.

[26] Prior to the incident on September 30, 2016, the school called 911 to request the assistance of police officers on September 8 and 15 and 26 because of the applicant's behavioural issues. Police attended on September 8 and 15, but on September 26, before police arrived, the school advised that there was no longer a need to attend. The police officers who attended on the previous occasions were not the same officers who attended on September 30.

[27] The 911 record and Occurrence details for September 8 reflect that police were called to the school after the applicant exited the school through the gymnasium, climbed a fence and began throwing rocks and objects at vehicles. There is no indication that the police went into the school on this occasion – rather, the officer who responded was able to escort the applicant, who was calm at that point, back to the school.

[28] The 911 record and Occurrence details for September 15 reflect that police were called when, shortly after arriving at school, the applicant made a mess of the washroom by throwing toilet paper around; then threw various objects around the hallway; kicked, punched and spit at staff when they approached her; and then returned to her classroom where she threw various objects around, leaving the classroom in a state of disorder. The Occurrence details note that the school called the police due to safety concerns and for help in de-escalating the applicant after an hour and a half of attempting to calm the applicant. The police officers found the applicant sitting calmly under a table when they arrived. There is no indication that she escalated after arrival of the police. The Occurrence details note that this was part of a continued pattern of behaviour by the applicant and that this was the second time police had been called into the school.

[29] David Patrick ("DP") is employed by the school board as a behavioural teaching assistant and he worked at the school with the applicant in September 2016. When required, he provided help to the applicant's teacher in de-escalating the applicant. He said that there were occasions when classrooms had to be evacuated because of the applicant's behaviour.

[30] DP has received training in managing aggressive behaviour both in his current job as a behavioural teaching assistant and in his prior job assisting autistic clients with behavioural issues. He testified that there were times when he had to restrain the applicant by holding her. The hold used by DP was a child lock hold or child safety lock. In this hold, the child's arms are crossed in front of them and the child's hands are held under and behind the child's armpits by the person applying the restraint (somewhat like a straightjacket); this person is standing or sitting behind the child and balancing the child on their leg - so that the child is slightly off balance - as the child's hands (and therefore arms) are pulled back. DP learned this hold as part of the Crisis Prevention Intervention ("CPI") training which he received from the school board.

[31] When restraint was necessary, DP would hold the applicant in the restraint he described. He explained that it is not advisable to keep a student in a restraint for long because the person doing the restraint gets fatigued, that it is best to have another person

there to take over after 5 to 7 minutes. If the child becomes calm, the restraining need not continue. The idea is to apply the restraint hold until child becomes more rational and it is possible to communicate with them. If the child escalates, the restraint is applied again. The process can fluctuate up and down.

[32] DP described the various stages of agitation including the most heightened level where negotiating or reasoning with the agitated person does not work because they are not going to listen to any type of instruction. At this point, the person needs to calm down to a rational state to be able to listen. DP said that on September 30, the applicant was in the most heightened state and, as a result, not much communication was registering with her.

[33] DP carries a walkie-talkie radio ("radio") at school and was called in to assist in de-escalating the applicant on several occasions in September 2016, including on September 30. On that day, he was called to a classroom where he found a teacher, the principal, the applicant and a student who was crying. He was told that the applicant had hit the child and when he asked the applicant why she had done so, she smiled and left the room. As the applicant headed down the hallway towards another child, DP ran out and was able to get ahead of her as the applicant was swinging at the other child, with the result that the applicant hit DP instead. DP told the applicant that he would not let her hit other students. She then started running down the hall trying to open doors and made her way up to the stage area – an elevated part of the gym that was at the time closed off from the gym by curtains. DP followed the applicant onto the stage and radioed the principal who entered the stage area from another door. DP and the principal cornered the applicant on the stage.

[34] On the stage, the applicant began throwing objects at the principal and DP tried to get her to stop. At one point the applicant picked up a chair leg and tried to hit the principal, but DP was able to stop her. Both the principal and DP attempted to de-escalate the applicant, asking her what they could do to help her. However, she continued to throw objects, including books, at the principal. At one point she threw a book backwards and it hit DP on the lip, resulting in him getting a 'fat lip'. DP's description of this suggests that

it was more by accident that he got hit by the book than that the applicant aimed the book at him.

[35] When the applicant continued to attack the principal, DP restrained the applicant using the child lock hold for a while as the principal tried to negotiate with her. DP would hold the applicant and let go when they felt like the applicant was calming down, but then the applicant would escalate, and DP would have to hold her again. This went on for 20-30 minutes before DP and the principal finally took the applicant to the office.

[36] After they got to the office, they locked the door. The applicant began to run around the office, again hitting the principal and throwing objects at her, so DP restrained her again using the child lock hold. He would restrain her and let go and then restrain her again using this same method. The applicant was screaming and was being restrained by DP when the police were called because DP and the principal were not able to de-escalate her. By the time the police arrived, the applicant had finally calmed down and was sitting in the office.

[37] The school called 911 twice on September 30, first at 10:05 a.m. and then again about 20 minutes later when police officers had not yet arrived. The transcript of the first 911 call discloses that the school told the dispatcher during the call: "We have a grade one student, I've called several times about her before. She's running around the school, she's outside...they're not able to control her. She's hitting everybody. She's throwing things...She's been assaulting many students and she threw a hard-covered book and hit Mr. Patrick in the face..."

[38] The transcript of the second call discloses that the school was calling to ask how long before the police arrived and noted that a child could be heard screaming in the background. The transcript reflects that the caller, when asked if the school had an emergency, said, "Yes, we're restraining a student." When the dispatcher asked her age, the response was, "She's six. You can hear her?" In response to the dispatcher's question whether there had been problems before with this child, the caller responded "Yes." In

response to the dispatcher's question, "So you're physically having to hold her down?", the caller responded, "Yes."

[39] DP said that he was relieved when the police arrived. He explained how applying child hold restraints was fatiguing and that he was sweating.

EXPERT OPINION EVIDENCE REGARDING IMPLICIT BIAS

Jennifer Chambers

[40] The applicant proposed to call Jennifer Chambers ("JC") as an expert witness to give opinion evidence on unconscious bias in policing and its intersection with race. JC is the Executive Director of Empowerment Council and in that capacity works with the Centre for Addiction and Mental Health ("CAMH"). She has completed the course work for a Masters degree in clinical psychology, but has not done a thesis. Her work with Empowerment Council involves dealing with client rights, policy development and educational initiatives such as Prevention and Management of Aggressive Behaviour and Mental Health training for Correctional Officers. She has worked with the Toronto Police Service ("TPS"), including reviewing Toronto Police College course materials and scenarios used to educate TPS officers on unbiased policing and interacting with people in crisis or/and with mental health issues. For three and a half years, she was a member of the Police and Community Engagement Review ("PACER") Committee, a community engagement committee focused primarily on anti-black racism and composed primarily of members of the black community; JC was the one mental health-related voice on this committee. PACER had a focus on "carding" and ultimately developed principles and guidelines for the TPS on street checks. PACER has been replaced by an anti-racism advisory panel, of which JC is co-chair, which provides advice and recommendations to the TPS Board. JC has testified at 8 coroner's inquests that involved the deaths of persons with mental health issues in encounters with police or in restraints in hospital settings. In four of these inquests, the person who died was Black and in two of these, the inquest specifically addressed the intersection of mental health and race. As part of her work, JC has done extensive reading of research literature. When asked whether she

considered herself an expert on unconscious bias concerning race, she responded, "Relatively, no", but that she does consider herself an expert on the intersection of race, mental health and policing.

[41] Based on the combination of her work experience with CAMH, her work with the TPS, her work in coroner's inquests involving deaths of Black persons during interactions with police and her work with PACER and its replacement anti-racism panel, I found JC to be qualified as an expert witness to give opinion evidence on unconscious bias (referred to as "implicit bias" by experts) in policing in respect of mental health and its intersection with race.

[42] I note that JC acknowledged that she has no expertise regarding children in the education system. Ms. Chambers agreed that her expertise really lay in the area of mental health and de-escalation, though with an intersection in race where police dealt with Black persons in crisis as a result of mental health issues

[43] Ms. Chambers provided the following evidence:

- Statistically, there is an increased likelihood that police will use more severe force on people whom they perceive to have mental health problems.
- There has been very little demographic analysis on the use of restraints. Unpublished statistics compiled by CAMH found that the rate at which people who are Black are restrained at CAMH considerably exceeds the percentage of the Black population in Toronto.
- There is evidence that bias based on race is not restricted to police but is universal.
- There is no evidence that the police are more biased than other members of society – that is, the evidence is that police are as biased as other members of society. This can affect decisions to use force.
- Research indicates that there is a general tendency for the perception of people with mental health issues to be one of exaggerated dangerousness and, in particular, bias in the case of people who are Black can involve a perception of

superhuman strength. This can lead to more coercive measures being used than are called for in a given situation.

- People who appear to be in crises and people who are Black are both subject to attributions of superhuman strength.
- Research has found that Black children are perceived as less innocent than non-Black children and less in need of protection, prematurely seen as more similar to adults.
- One can extrapolate from the research data that a Black child perceived to be in crisis has an elevated risk of greater use of force by police.
- There is evidence that the typical approach of police when dealing with someone in crisis is to be authoritarian in appearance and communication style. Police tend to seek compliance, to come on strong and try to resolve things quickly. When someone in crisis seems to be ignoring instructions because they are not taking them in, this is seen as defiance, which can lead to more coercive tactics, which can then escalate the person. So, being calming can be more helpful than being commanding.
- If an officer does not know the diagnosis of a person in crisis or have background information, officers should try to relate to the person, find out what is happening in the minute, present themselves as allies trying to help them, remain calm and non-judgmental. Being an ally includes making statements like, "I am here to help – how can I help?" Also, explaining clearly what is going on can be helpful, and containing the person until they burn off some energy and can be safely contained.
- Recommendations made in two of the inquests involving deaths following physical restraints, included recommendations that the use of physical restraint be a last resort.

Dr. Kerry Kawakami

[44] The applicant called Dr. Kerry Kawakami (Dr. K.) as an expert witness to give expert opinion evidence on the role of implicit racial bias in dynamic encounters. Dr. K. is a professor in the Department of Psychology at York University.

[45] The respondent did not dispute that Dr. K. has the qualifications necessary to testify about how individuals perceive people from different social groups, how people react to intergroup bias, and implicit bias in dynamic encounters. Rather, the respondent's objection to qualifying Dr. K., in part, related to the necessity of such evidence on the basis that the general dynamics of bias, prejudice and stereotyping in society falls within the expertise of the Tribunal. I rejected this argument and admitted this evidence. See Interim Decision, 2019 HRTO 878.

[46] Dr. K. gave evidence regarding how implicit racial bias operates:

- While explicit (also referred to as "conscious") bias is deliberate and conscious expressions of bias, implicit bias acts on an unconscious or automatic level.
- An important distinction that researchers have found in recent years is that how people respond on a very conscious, deliberative measure is very different from how they respond on a more automatic spontaneous, non-conscious level.
- An example of an explicit measure would be in answering questions on a survey where, if the person wanted to look unprejudiced, answers given would be very deliberate so that the person appeared in a certain way – e.g. not biased towards a particular group.
- An example of a more implicit measure would be brain activation, so that when a person sees faces of Blacks or Whites, a brain scanner would show that in a certain part of the person's brain related to emotional responses, strong emotional responses might be activated. That type of response is much more difficult to control since it is hard to manipulate which parts of one's brain become activated.
- Research has shown that the explicit and implicit responses of people can often differ because explicit responses can be manipulated while implicit responses cannot.
- Social psychologists conceptualize that people are brought up in a particular culture to attend to certain social categories and to associate things with certain categories. It is assumed, therefore, that those brought up in a particular culture would have the same biases.
- People growing up in North America are brought up in a culture in which certain categories are important like race,

age, gender. In the case of race, people identify themselves as Black or White or Asian, etc. Further, people learn to associate characteristics with those categories or groups, both positive and negative.

- Canada is influenced a lot by the culture of the United States because Canadians watch American television and movies and know a lot about American culture. In American culture, typically, negativity is associated with Blacks. Some of the characteristics associated with Blacks are poor, criminality, aggression, and athleticism. There is research that shows that within a millisecond, race is identified and then the things associated with that category/group also become activated including negative associations we might have with that category/group.
- In a dynamic or unfolding process, in the first instance, you perceive that someone is from a different category or the same category as yourself probably within the first 10 seconds. Neuroscience research has shown that within a fifth of a second, we know what racial category they belong to. Even if that is not our intention, even if we are only looking to see whether it is a man or a woman, or it is a male or female, race becomes activated. And then often within the next third of a second, associations we have with that category also become activated including the negative associations we might have with the category, the characteristics we might associate with that category, whether we identify that category as part of our own group, that person as part of our own group or a different group, those also appear very quickly. And then once we know those characteristics, or once those characteristics are activated in our head, they influence how we perceive the person and how we treat them. Further, how we treat a person can in turn influence how they behave. If our expectations are that a person is going to be aggressive and we treat them in a certain way, then our behaviour might drive their behaviour – they might not have acted that way if we hadn't initially acted in a certain way.
- Dr. K's research suggests that Whites may not be aware of how they will respond to discrimination and may be apathetic to the negative treatment of Blacks.
- White perceivers often interpret certain actions and context more negatively when Blacks are involved, and they typically associate more negative concepts with Blacks. They also respond to racism less negatively than they assume.

- There is research that shows that implicit prejudice stereotyping and identification processes can influence a person's ability to recognize emotions, to identify others, to care when others are treated unfairly or are in pain – for example, White perceivers are worse at recognizing emotions on Black faces than on White faces, and in particular tend to perceive Black faces as angrier than White faces with comparable expressions.
- There is research that shows that when adversity is suffered by a group to which an individual does not belong, the individual doesn't care as much what happens to the other group. So, if the individual heard a racial slur being used against a child from another social group, the individual would react with less empathy than if child was from the individual's own social group.
- There is classic research from the 1970s and 1980s that shows that where White and Black children engaged in exactly the same behaviour, Black children were perceived more negatively. Black children were perceived to be older, more muscular, more aggressive than they actually were and so it was perceived that there was a need for more force to control a Black child than a White. This research is Canadian. There is also research from the U.S., that links the use of force by police officers to the idea that Black children are seen as more threatening.
- Research has demonstrated implicit biases associating threat with Blacks for Black children as young as 5 years old, and the size of these associations did not differ with biases found for Black adults.
- The majority of the research on perceived threats of aggressiveness and hostility has been done on Black men and Black boys. Recent research has been done on whether the stereotypes linking Black men and Black boys with violence and aggression can be generalized to Black women and Black girls. Findings suggest that seeing faces of Black people regardless of age or gender were associated more with threat than seeing faces of White people, although the magnitude of this implicit racial bias was smaller for Black females versus Black males.
- Since police officers grow up in the same culture as others in North America, they have the same kinds of associations regarding Black people as do other citizens, such as perceiving Black children as larger and more of a threat.

[47] In cross examination, Dr. K. agreed that:

- While the majority of non-Black people hold implicit racial biases, not all non-Black people hold implicit racial biases.
- Not every arrest of a Black person is motivated by implicit racial bias.
- The fact that a Black child has been handcuffed by a White police officer is not an automatic sign of racism.
- If someone did not grow up in North America, they may not have learned the associations which give rise to the implicit racial bias described by Dr. K.
- Dr. K. stated that, based on research studies, social psychologists can say, in general, what they assume will happen in various situations but they cannot say that specific individuals will act with implicit bias or that they are implicitly biased.
- She also said that they do not know yet what life experiences impact implicit bias.

[48] Dr. K. was asked to comment on two scenarios provided by the applicant's counsel. She said that she was given the two scenarios and asked to "speculate" on how implicit biases might influence those scenarios. Her comments on the scenarios were framed in a speculative way – she consistently used the word "may" and posited assumptions of how the child may have felt at various points in the scenarios and what the police officers might have done. The two scenarios did not accurately reflect the facts of this case because of a significant lack of detail in the scenarios and because certain facts in the scenarios differed from the facts of this case. Moreover, Dr. K. made assumptions regarding the appropriateness of the force described as being used in the scenarios that was beyond her expertise which does not include policing. Consequently, I gave no weight to her comments regarding the actions of the police officers in the scenarios.

FINDINGS OF FACT REGARDING THE INCIDENT

Credibility and Reliability of Evidence

[49] In making the findings of fact which follow, I have had to make determinations based on conflicting evidence that are central to my findings in this case. In doing so, I have had regard to the principles succinctly set out in *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220 ("*Maynard*"), starting at para. 155

> To the extent that this case requires me to assess the credibility of the witnesses who testified before me, I have been guided by the principles established in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (BCCA) and particularly the following comments at pp. 356-357:
>
> > (...) Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
> >
> > The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (...) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.
>
> I am also guided by factors considered by the Tribunal in assessing credibility in the case of *Cugliari v. Clubine and Brunet*, 2006 HRTO 7 at para. 26: the motives of the witnesses, the relationship of the witnesses to the parties, the internal consistency of their evidence, inconsistencies and contradictions in relation to other witnesses' evidence, and observations as to the manner in which the witnesses gave their evidence.
>
> A finding of lack of credibility or reliability with respect to one aspect of a witness's testimony does not automatically render the entirety of the witness's evidence incredible or unreliable. See *McDougall and Shah v.*

George Brown College, 2009 HRTO 920 . As such, a tribunal is entitled to accept or reject some, all or none of a witness's evidence.

[50] The two officers who attended at the school on September 30 were Constable Nick Eckley ("NE") and Constable Slav Kosaver ("SK"). The incident began with the arrival of NE on September 30 in response to the second 911 call and ended with his departure at about noon.

[51] There was symmetry in the overall narrative provided by the applicant's witness, DP, who was present throughout most of the incident, and the two officers involved. There is no dispute amongst these three witnesses that, upon the arrival of SK, the applicant ran out of the office where she had been sitting quietly to the stage area of the gymnasium, that the officers followed and once there, with DP's assistance, managed to "catch" the applicant, that the officers carried the applicant back to the office where they held her initially in the front part of the office before moving her to the back part of the office where they remained until the arrival of the ambulance called in by SK. All agree that at some point after returning to the office, the officers placed handcuffs on the applicant's wrists and ankles. All agree that the officers, throughout, tried verbally to de-escalate the applicant.

[52] However, there is a significant difference between them as to when and how the handcuffs were placed on the applicant. Most importantly, there is a difference between DP and the officers on whether the officers placed the applicant on her stomach at one point and then placed handcuffs on her wrists behind her back. DP says they did. The officers say they did not place the applicant on her stomach or put handcuffs on her wrists behind her back. This difference is critical because placing a six year old child on her stomach with her wrists handcuffed behind her, her ankles handcuffed, and holding her in that position for almost half an hour represents an entirely different type and level of control than leaving her in a sitting position with her hands cuffed in front of her, as the officers say they did. Placing her on her stomach as described by DP would not only further restrict her freedom but would represent a greater impact on her dignity.

[53] The incident occurred more than three years prior to the hearing. Such a long delay could well affect memories. Moreover, the incident unfolded in circumstances which, especially in the front and back offices, were dynamic, chaotic and fluid. This might have impacted the perception of witnesses, especially the officers who were at the centre of the incident.

[54] DP's memory about the specifics respecting the placement of the handcuffs on the applicant, was much clearer than either of the officers' memories. It was evident that certain points stood out for him. DP made notes about the incident – he believes within 24 hours of the incident -- to help refresh his memory. These notes were more detailed and coherent than the notes made by either officer. He was not challenged about the accuracy of his notes.

[55] NE's notes appear to have been hastily made immediately upon his leaving the school, are bereft of detail and, according to NE, contain a significant error. SK's notes are best described as scant. He did write up Occurrence details about the incident several days later, but it contains errors and is lacking in detail or descriptors that provide a clear picture or narrative of the incident.

[56] DP was present throughout most of the incident. As he said, he stood back and for the most part observed. As an employee of the school board, he was a third party to the events. Because he was an observer, I find he was in a better position to perceive how the incident was unfolding. He candidly admitted that his memory was foggy about events earlier in September and that he did not remember all of the specifics of what happened on the stage -- which unfolded very quickly -- before the applicant was carried back to the office by the officers. However, he acknowledged no such impediment regarding what occurred after the officers returned the applicant to the office and he was firm on his evidence about that part of the incident which unfolded in the office. He said that one officer, who was SK based on DP's description of the event, placed his handcuffs on the applicant's ankles in the front office and the other officer, who was NE based on DP's description of the event, placed his handcuffs on the applicant's wrists behind her

back, after she has been placed on her stomach on a bench in the back office by the officers.

[57] Respondent's counsel did not challenge DP's credibility in final argument, although in cross examination she did challenge his recollection of the officers placing the applicant on her stomach and placing the handcuffs on her wrists behind her back. However, DP remained firm about his recollection on these points and refused to change the evidence he had given.

[58] DP gave his evidence in a straightforward manner, without exaggeration or embellishment. As a disinterested party, he had no reason to mislead. I find that he was honest and that the evidence he gave about what happened in the office was reliable. Clearly this incident made an impression on him as it unfolded in the office. Since it is not every day that police attend at a school and handcuff a six-year-old child, this is not surprising.

[59] Both SK and NE were also firm that they did not place the applicant on her stomach or handcuff her wrists behind her. However, both SK and NE acknowledged that their memories were not clear on a number of points, some of which were significant. There were also inconsistencies in their evidence.

[60] SK's memory regarding what occurred when the officers returned the applicant to the front office from the stage was, to say the least, very poor. He was not asked to provide a detailed account of how the incident unfolded in the office in examination in chief – in fact, during examination-in-chief he gave very little detail about what occurred in the front or back offices prior to the arrival of the paramedics beyond speaking to the reasons why he decided to handcuff the applicant. However, in cross examination, he was led through the part of the incident that occurred in the office. He said that he "vaguely" recalled being in the front office upon the return from the stage, and when asked if he recalled sitting in a chair on one side of the applicant while NE sat on the other side, his response was, "I think so." When asked if he was holding the applicant at this point,

he said, "Yes, I must have been. I can't recall specifically, but I must have been." He also said that he could not recall specifically if NE was also holding the applicant.

[61] SK and NE were interviewed by an independent third party approximately a year after the incident ("interview"), as part of an administrative review for the respondent. The transcripts of these interviews were placed into evidence. In his interview by the independent third party, SK 's description of the incident included no specific reference to them being in the front office.

[62] In the interview, SK said that he was tending the applicant's ankles while NE was tending her wrists. At the hearing, just over three years after the incident, SK did not remember whether he placed his handcuffs on the applicant's wrists or ankles since he could not remember whether he had her legs or her arms. Further, SK could not remember whether he and NE placed their handcuffs on the applicant at the same time or not. During the interview, he stated that he removed the handcuffs from the applicant on one occasion when she calmed down – though did not say whether this was from her ankles or wrists. At the hearing he said he removed handcuffs one or two times, and again did not say whether this was from the applicant's wrists or ankles.

[63] In his evidence at the hearing, NE did not remember certain aspects of what happened on the stage and had little recollection of being in the front office after he and SK carried the applicant to the office from the stage. In contradiction to SK's statement in his interview, NE said that he was tending the applicant's ankles while SK was tending her arms. He did speak in some detail about the handcuffs being placed on the applicant. He said that he placed his handcuffs on the applicant's ankles while SK placed his on the applicant's wrists, in front of her. He said that the handcuffs remained on the applicant until the paramedics arrived.

[64] It cannot be ignored that both NE and SK are interested parties in this case. NE stated at one point that the optics of this case are not good – this is true for both of the officers. Consequently, there is reason for them to be less than candid in providing their evidence, and to present themselves in the best possible light. NE in particular on

occasion embellished his evidence – for example, when attempting to explain what he claimed was an error in his notes, he said that he used a wrong term because he was still slightly stressed from the incident when he made his notes, that his heart rate was still up from holding the applicant while she struggled. However, the applicant's behaviours stopped – and NE stopped holding the applicant -- upon the arrival of the paramedics at 11:45 a.m. and NE made his notes just after he left the school at 12:11 p.m. and returned to his car. This was almost half an hour after he had ceased holding the applicant. Twenty-six minutes would have been an extraordinarily long time for his heart rate to still be "up". Similarly, when NE was asked how easy it would have been to place the applicant, a small child, on her stomach, he responded in a somewhat evasive manner by describing in detail how much "significant force" was required to turn an adult who is fighting back on his stomach and hand cuff them from behind.

[65] I have considered the evidence of NE and SK against the totality of the evidence to determine, particularly in respect of the conflicting evidence, what is the most probable conclusion. As is more fully explained below in the findings of fact, I have accepted the evidence of DP as being more probable than that of SK and NE on the question of when the handcuffs were placed on the applicant's ankles, whether the applicant was placed on her stomach and whether her wrists were handcuffed behind her back. Suffice to say that I found DP to be far more credible than either NE or SK. and I have rejected their evidence where it conflicts with DP's evidence.

Arrival of the officers

[66] NE has been a police officer since 2010. In September 2016, he worked in a uniform capacity as a Uniform Patrol Officer and answered calls in the community. He did not often get calls from schools at that time. NE is White.

[67] SK was born in the Ukraine and did not move to Canada until he was 15 years old. He grew up speaking Russian at home. He has been a police officer for over 9 years. In September 2016, he worked in a uniform capacity in the Neighourhood Policing Unit (NPU) as an NPU Officer. He was a school resource for two schools, including the school

attended by the applicant. It was the practice of NPU Officers to respond to calls for police assistance involving schools. However, most of his experience was in dealing with high school students. SK is White.

[68] While both officers have received training on dealing with people in crises, neither officer has had training on dealing with children in behavioural crisis or training in restraints specific to children including CPI training or child safety locks.

[69] As noted above, DP is a behavioural teaching assistant, who has training in CPI and restraints to be used on children in crisis. He worked with the applicant when her teacher needed assistance.

[70] When NE accepted a dispatcher's call to attend at the school at 10:33 a.m., he was provided with information from dispatch that teachers were trying to restrain a six-year-old child, that she had behavioural problems and could be heard screaming in the background, and that her family had been called. He understood that the police were being called to the school because they had a child who was out of control, who they had been restraining, and who they could not manage.

[71] NE arrived at the school at 10:44 a.m. He went to the front desk and spoke with the school administration staff to get further information. He was aware at that point that SK was on his way to the school.

[72] School staff gave NE a summary of what had happened that day and what had happened in the past. He was told that there had been issues of behaviour and violence towards students and staff and running away. He was also told that that the school was trying to get the applicant's family on the phone. He said that his immediate thought was that there might be a behavioural or medical problem.

[73] After NE arrived, DP left the office and went to a school assembly which was taking place in the gym (where the stage was also located, curtained off from the gymnasium).

[74] The applicant was calm when NE arrived. She was sitting in the front reception area of the school office, quietly in a chair. NE explained that the reason why he did not leave when he found the applicant to be calm was because the call was a two-officer call and he was waiting for the arrival of the other officer (SK), who was the school liaison officer. NE explained that school liaison officers attend all school calls and that since he (NE) was not SK's supervisor, he was not going to tell SK not to attend at the school in response to the call. However, NE did radio back to the police office that everything was fine at 10:50 a.m.

[75] NE sat down in a chair one over from the applicant so that there was an empty chair between them. He said did so because he did not want her to feel intimidated by him or to invade her space. He leaned forward with his hands crossed, arms resting on his thighs, with his head turned towards the applicant. He began to converse with her, using tactical communications strategies to attempt to start building some rapport with the applicant and to find out what had gone on. He testified that he spoke in the same tone and pitch he was using to give his evidence, which was a calm, normal speaking tone. He said he used the applicant's name. He tried to make some connection with her, tried to make eye contact, but she was looking at the counter. He used open ended questions with her to try to get some sort of response, such as: How are you today? What happened today? Is anything wrong? Do you know why the police were called? And he told her: You've done nothing wrong. However, NE got no response from the applicant.

[76] NE sat with the applicant for approximately 12 minutes until SK's arrival at 10:57 a.m. As SK walked into the office, the applicant got up and ran out of the office and down the hallway towards the stage.

[77] When SK received the call from dispatch on September 30, 2016, he was given the same information as NE had received. He had the same understanding as NE for the reason police were called to the school. When SK arrived at the school at 10:57 a.m., he went to the office, but the applicant was no longer there. He spoke with NE and the principal and was told that the applicant had been kicking, tripping students running away

and had thrown a book at DP and hit him. SK also received a summary of the applicant's behavioural history, prior to the events that day.

On the stage and removal from the stage

[78] After the applicant left the office, she ran to the stage where she had been earlier that morning. The principal contacted DP by radio to advise him that applicant was back on the stage and the police needed help. When DP got to the stage, he saw the applicant "horsing around", running around, peeking through the curtains into the gym where the assembly was taking place. He saw students glaring at the applicant through a gap in the curtains. NE and SK arrived on the stage at about the same time as DP.

[79] The stage area was darkened. The applicant ran behind a large piece of furniture very near the front of the stage along the ledge. There was concern that she might fall off or tip something over. SK tried to make verbal contact; he said something like, "Hi I am Slav. How are you sweetie? Will you come out and we will go to the office?" He reached his hand behind the piece of furniture, but the applicant was giggling and slapping his hand, like playing tag. DP was able to reach the applicant and he brought her out from behind the piece of furniture, but she was pulling away from DP. SK took her hand and she continued to pull away from him. SK was concerned that if he let go, she might run away. He had been told that she had been out of control earlier.

[80] SK went down on one knee continued to hold the applicant by the arms as she was pulling away and spoke to the applicant, asking her things like, "What is wrong? You're not in trouble. Can you please come with us?"

[81] The applicant then fell to the floor and began to kick and scream. SK thought they might be dealing with a medical situation.

[82] None of the witnesses was able to say exactly how long they were on the stage, but it appears that it was only a matter of moments.

[83] After the applicant fell to the floor, SK and NE decided to pick up her up and carry her back to the office. Each took an arm and carried her down the hallway. She struggled, screamed, kicked, headbutted and tried to bite, attempting to get free.

[84] SK said that based on the applicant's behavior and signs she was exhibiting, and the fact the assembly was going on, they decided that if they had to deal with a situation, they preferred not to deal with the applicant in a dark environment with other kids around.

The front office

[85] The officers took the applicant to the front office and placed her on a chair with one officer on either side, each holding one of her hands. Meanwhile she was wriggling, flailing and kicking her feet and trying to break their grip. DP testified that the officers had had to be "hands on" with the applicant because she was "kind of all over the place." The officers tried to de-escalate the applicant. NE said that they used "professional tactical communications" to try to calm the applicant down and figure out what was going on but had no luck. DP agreed that the officers had no greater success than he had had in de-escalating the applicant.

[86] It was DP's evidence that the first set of handcuffs were placed on the applicant in the front office in the following circumstances. The applicant was spitting, head butting and trying to break free. She began kicking the officers, swinging her legs out sideways and coming backwards, like a heel kick. The officers spoke with each other and agreed to handcuff the applicant's ankles. DP recalled that one officer told the applicant a few times that if she did not stop kicking, spitting and head butting they would have to put cuffs on. When the applicant continued to kick, one of the officers held both of her hands and the other officer handcuffed her ankles and then stood up to make a phone call. It appeared to DP that the officers were trying to figure out what to do. This happened 5 - 10 minutes after they arrived in the office.

[87] It was NE's evidence that SK placed his handcuffs on the applicant's wrists while he (NE) placed his handcuffs on the applicant's ankles but that both did so in a back office where the applicant was moved subsequent to their arrival at the front office. His recollection about being in the front office was very vague and was that they were there fleetingly.

[88] SK's recollection also was that both sets of handcuffs were placed on the applicant in the back office – he had no recollection of the handcuffs being placed on the applicant in the front office. As noted above, while in his evidence at the hearing, he was unable to recall whether he placed his handcuffs on the applicant's ankles or wrists, in his interview with the independent third party, approximately a year after the incident, he said he was tending the applicant's ankles while NE was tending the applicant's wrists. Both NE and SK agree that SK called his Sergeant to ask for advice. His Sergeant offered to send additional officers, but SK declined. The Sergeant also told SK to call an ambulance if he felt that was necessary.

[89] I find DP's evidence to be more reliable on the point of when and how the first set of handcuffs were put on the applicant. His narrative about how the applicant's ankles came to be handcuffed is plausible; his recollection about the events is far better than the officers'; unlike the officers he was not in the middle of what was a chaotic event and his notes, made contemporaneously, indicate that the applicant's ankles were cuffed in the front office. I find, therefore, that handcuffs were placed on the applicant's ankles by SK in the circumstances described by DP – that is, that the officer who made the call in the front office was the officer who handcuffed the applicant's ankles. I also find that SK, before handcuffing the applicant's ankles, warned her that if she did not stop, that handcuffs would be placed on her.

[90] Based on the evidence of all three witnesses, I conclude that after the applicant's ankles were handcuffed, she continued to spit and bite, attempt to flail and struggle to break free.

The back office

[91] Shortly after the handcuffs were placed on the applicant's ankles, DP saw a parent walking by through the glass walls of the outer office where the officers were sitting with the applicant. DP realized that the assembly was letting out and he suggested that they move to the back office in order not to be seen.

[92] NE and SK carried the applicant to the back office the same way they had brought her to the office as she continued to kick, try to bite and flail.

[93] Once in the back office, the situation continued to be chaotic with the applicant getting up, sitting down, struggling to break free, screaming, flailing her arms, trying to bite and scratch the officers. NE described the situation as quite fluid, dynamic and on-going. While the applicant would calm down momentarily, she would then continue to flail.

[94] Throughout, the officers continued to try to de-escalate the applicant by continuing to speak to her calmly, asking her what was wrong, telling her that they were trying to get hold of her mother, telling her she had done nothing wrong. DP said that in addition, the principal pleaded with the applicant to stop. The officers warned the applicant that if she did not calm down, if she did not "behave", they would have to handcuff her. They also asked whether the applicant's parent had been called.

[95] At 11:17 a.m., SK radioed for an ambulance, a fact which is verified in police records regarding radio usage. These same records show that the ambulance arrived at 11:45 a.m.

[96] NE, SK and DP all agree that handcuffs were placed on the applicant's wrists in the back room. All three witnesses agree that the applicant was continuing to flail and to try to bite and scratch the officers. However, they disagree on the circumstances in which the handcuffs were placed on the applicant's wrists.

[97] It was DP's evidence that the officers placed the applicant on her stomach, face down, just before the call at 11.17 a.m., after she had continued to flail, and try to bite and spit at the offices. He said, "I heard the officer say, 'Oh she scratched me' or something like that." The officers then placed the applicant on her stomach and the officer who made this statement, continued to hold the applicant while the other officer made a call. DP said that it was the officer who was holding the applicant who placed handcuffs on the applicant's wrists behind her back while the other officer was still on the phone.

[98] Both officers denied that the applicant was either placed on her stomach or that her wrists were handcuffed behind her back.

[99] SK said that the situation was dynamic and that, with the applicant struggling, any part of her body could have touched the bench at any point in time. SK said that he had placed cuffs to the rear on individuals in medical crises, but it depended upon the circumstances and he did not do so in this case. As noted above, he could not recall at the hearing whether he placed his handcuffs on the applicant's ankles or wrists. As noted above, SK did say in his interview with the independent third party, just under a year after the incident, that he was holding the applicant's ankles while NE was holding her arms. SK says that he repeatedly told the applicant that if she did not stop this behaviour they were going to have to put on handcuffs and that this would not be a pleasant experience. However, the behaviour continued and so they put the handcuffs on her. SK said that subsequently he removed handcuffs from the applicant when she calmed down but returned them when she re-escalated. In his interview he said that this occurred once; at the hearing he said it occurred at least once and up to two times. However, he could not say whether the handcuffs he removed were from her wrists or ankles or both.

[100] NE said that the applicant's wrists were handcuffed after the call for the ambulance. His evidence was that he was tending the applicant's ankles and SK was tending her arms. He said that SK put his handcuffs on the applicant's wrists. In response to being told that DP's evidence was that the applicant had been placed on her stomach in cross examination, NE said, "I would never put a child on a point where she could possibly asphyxiate herself on a couch, or a soft bench. I would not have done that, no."

[101] In disagreeing with the suggestion that he placed the applicant on her stomach, NE also suggested that it would take "significant force" to place someone who is flailing onto their stomach and put handcuffs on their wrists behind their back. He elaborated as follows:

> For a situation like this, where somebody is having an episode, flailing their arms, trying to hit, trying to bite, typically, like, if you are dealing with an adult, and you are trying to get that person, you know, into custody, for instance, it takes force. Not gentle force, like holding onto an ankle, but actually grabbing a wrist and an elbow and doing turns and manoeuvres to get somebody in the handcuffs. So, if we had to pick her up, almost throw her onto her stomach, put her arms behind her back while she is fighting, it certainly could have caused injury to her. And then putting the handcuffs on with somebody who is, you know, resisting, you push the handcuffs onto the bone, and then it opens itself.

[102] However, NE subsequently conceded that it would not have been hard in the case of the applicant, who he elsewhere in his evidence said he saw as a "little girl, a little child", to turn her over onto her stomach, that it would have required a little bit of force with someone who was not co-operating with them. I note that both officers are around six feet tall and 190-200 pounds while the applicant was a small child around 48 pounds and between three and four feet tall.

[103] Significantly, NE's handwritten notes support DP's evidence. In his notes, NE said, "rear cuffs removed as she was calming down." At the hearing, NE said that he was mistaken in using this phrase in his notes. He said that "rear cuffs" is the phrase he generally uses in his notes because people being arrested are usually handcuffed 'to the rear'. He said that this is the phrase he most often uses when noting the removal of handcuffs. He said that he was still slightly stressed when he made his notes immediately upon his return to his car when he left the school, that his heart rate was still up and that he used the phrase out of force of habit. He said that it would have been better for him to take a breath and do the notes later.

[104] I do not accept NE's evidence that he erred in using the term "rear cuffs" in his notes because he was stressed or because his heart rate was still up. At least 26 minutes

had elapsed from the point NE stopped holding the applicant and left the school and he did not strike me as someone who is out of shape. Nor do I accept that he used the phase simply because of force of habit. It is very difficult to attribute the fact that this note coincides with DP's evidence that the handcuffs were applied to the rear merely to coincidence.

[105] I also note NE's evidence that at one point the applicant bit him. This is reflected in his notes. DP testified that it was the officer who continued to hold the applicant who made the statement, "'Oh, she scratched me', or something like that" just before placing the applicant onto her stomach. The officer who made the phone call was SK, which means that it was NE who continued to hold the applicant and put the handcuffs on her wrists. I accept NE's evidence that at some point the applicant bit him. It is entirely possible that instead of 'Oh, she scratched me', that what NE said was 'Oh, she bit me.'

[106] I accept DP's evidence that just before 11:17 a.m., when the call for the ambulance was made, as the applicant continued to flail, kick and attempt to bite, she was placed on her stomach on the bench and was held there by NE. She then continued to struggle and to try to scratch the officer who was holding her arms. I also accept DP's evidence that handcuffs were placed on the applicant wrists behind her by the officer who held her, namely NE. DP was not at the center of what was a very chaotic event. His memory about what occurred was much better than either officer's. He had no reason to mislead on this point. He had contemporaneous notes available to refresh his memory which were much more detailed and coherent than the notes which either officer made for himself and those notes reflect his recollection. Although challenged in cross examination on this point, DP remained firm about his recollection.

[107] On a balance of probabilities, the evidence I received supports the conclusion that NE placed his handcuffs on the applicant's wrists behind her after she had been placed on her stomach.

[108] As noted, SK said that he recollected that he removed the handcuffs from the applicant once and possibly a second time at the hearing. In his interview, he said this

occurred once. He could not recall if he removed the handcuffs on the applicant's wrists or on her ankles and he could not recollect whether NE also removed handcuffs at the same time. NE stated that from the time the handcuffs were placed on the applicant, they were not removed until the paramedics arrived. The gist of his evidence was that the applicant calmed down only for fleeting moments; he also stated that after the handcuffs were placed on the applicant, her behaviours intensified, that she bit him and began to spit on him. This does not coincide with SK's suggestion that she calmed down long enough for the handcuffs to be removed. DP said that the handcuffs did not come off the applicant's wrists until the paramedics arrived and that the applicant remained on her stomach until then.

[109] I am compelled to accept DP's evidence on this point over that of SK. NE's evidence does not support SK's on this point. DP, as the third-party observer who was not at the center of the chaos, was in a better position to observe what happened in the back office. I have found his evidence to be more reliable than either SK's or NE's for the reasons outlined above.

[110] I find that the handcuffs remained on the applicant's wrists as she lay on her stomach until the paramedics arrived. She continued to attempt to bite, scratch, and struggle to break free until that point, with brief moments of calm. The officers continued to try to de-escalate her during this period.

[111] Both officers made the point that when they placed the handcuffs on the applicant, they made sure that the cuffs were double locked, which meant that they would not tighten. Further, they also ensured that the cuffs were not tight around the applicant's wrist or ankles. They continued to hold the applicant to stabilize her legs and arms to keep them from moving in order to try to prevent any injury to the applicant from the metal cuffs as she was trying to it as fact.

[112] There is no evidence that the applicant at any point did anything to suggest that she was in pain or that the officers were hurting her.

[113] The officers continued to hold the applicant while trying to de-escalate her until the paramedics arrived. NE said that they tried to be as gentle as possible in holding the applicant and that minimal force was used. He was not challenged on this evidence and I accept it as fact.

[114] DP agreed that, throughout the time he observed the officers, their voices were never aggressive or angry and that their demeanor was polite. There was no evidence supporting a finding that the officers at any point acted towards the applicant in a manner that was overtly "authoritative". DP's evidence was that the officers at all times acted professionally.

Arrival of the paramedics

[115] When the paramedics arrived, the applicant seemed intrigued by their instruments and just stopped. At this point, the officers removed the hand cuffs from the applicant's wrists and ankles. The paramedics took her blood pressure and one of the paramedics tried to persuade the applicant to allow her to prick the applicant's finger so that she could draw some blood to test but the applicant refused.

[116] It is clear that upon the arrival of the paramedics, the officers stood back and did not engage further with the applicant except to remove the cuffs.

[117] After the paramedics arrived, the applicant's mother phoned the school. NE spoke to the applicant's mother and told her that the police had been called in after the school had tried to restrain the applicant, that her teacher had been assaulted and that the police had restrained the applicant and had put her into handcuffs.

[118] When the applicant's mother arrived at the school, she refused the paramedic's request to take a blood sample to test and declined to take the applicant to the hospital to have her assessed there.

Explanations given by the officers for handcuffing the applicant

[119] The explanations that NE provided about his decision to place handcuffs on the applicant were as follows:

- In his interview, NE stated that the handcuffs were applied "...solely for the purpose of controlling her, reducing the risk of injury to myself and my partner and other staff, we saw no other option that was fit at the time."

- His explanation at the hearing as to why they did not just continue to hold the applicant was that it was "stressful and exhausting", that tactical communications had not worked, that he had done everything he possibly could but it felt like they were wrestling with the applicant and he did not want her to get hurt. He was aware that the trained professionals at the school had been unsuccessful in restraining the applicant so the best solution at the time was to put handcuffs on the applicant to control the range of motion of her limbs while continuing to hold her. He said that the handcuffs helped control the applicant's limbs to prevent injury to the officers, to anyone else and "of course" the applicant.

- NE was asked if he ever saw the applicant as threatening. He said, "Never. I saw her as a little child." He was also asked whether, throughout his entire interaction with the applicant, he ever asserted his authority as a police officer. He answered that he had not. He said that visibly he is a police officer because he is in uniform, but he was not there doing a criminal investigation and a big part of his work is almost like social work, dealing with people in crisis. He said that in this case he knew immediately that this was some kind of behavioural issue or crisis. He explained that with tactical communication, different approaches are used in different situations and in this case, he took a soft, gentle approach, not invading personal space while initially in the office and using pitch, tone and volume which was the same as that he was using in giving his evidence.

[120] SK gave the following evidence about his decision to place handcuffs on the applicant:

- SK said that the applicant's struggling persisted, he guessed, for about 10 minutes and he was starting to tire, that his palms were getting sweaty, that there was no option of letting the applicant escape and potentially run away and harm herself or somebody else. So, it was determined that rather than apply pressure to the applicant to hold her there and possibly causing injury to the applicant, the only option was to put handcuffs on her and ensure that they were loose and double locked.
- SK was asked in cross examination a number of questions about why he did not let the applicant go, whether he had asked that the doors to the back room be closed or whether there was any discussion about blocking the applicant from leaving the room. SK said that he was concerned that if they stopped controlling the applicant, and they did not react in time, he was concerned for the safety of other kids in the school because he had been told that she had kicked and tripped other students. He pointed out that the school called the police because the applicant had run away from adults and they could not catch her. He said that he was not concerned that he could not outrun the applicant but that the driveway was right outside and she might get out and be hit, which was a risk he did not want to take. He said that he could not say what the applicant would do if she were freed, but that the potential was there that she could hurt herself or someone else. As to whether he had thought about closing the door to keep her in the back room, he said that he was pre-occupied with tending to the applicant. He said that controlling the applicant was preventing her from leaving and that he did not give consideration to asking others in the room to block her from leaving.

[121] When asked if he perceived some sort of threat from the applicant, SK said that he would not call it a threat, but that there was potential for the applicant to cause harm to herself or others and that they were not in a position to take that risk. In response to questions about whether he had any concerns of the applicant hitting other adults, SK said that he couldn't say that he was thinking that she would start hitting teachers and that his main concern was that she would run away, that she could have hit herself or tripped, fallen and hit her head.

FINDINGS OF FACT REGARDING REPORTS TO THE Children's Aid Society (CAS)

[122] While the applicant's mother testified that she received two calls from the CAS in the fall of 2016, the focus of the parties' argument was on the second call. Neither party addressed the first report during argument.

[123] The first call followed the occurrence on September 15, 2016. In this call, the CAS advised the applicant's mother that they had received a call from the respondent and offered to provide services for the applicant if the applicant's mother needed them. The applicant's mother declined this offer because she was already looking for resources for her daughter on her own and did not need their assistance.

[124] The applicant's mother testified that she received a second call from the CAS following the September 30 incident, again offering help to find services. However, she did not say that the CAS said anything during this call about the respondent making a report concerning the incident.

[125] A letter from the Peel CAS to the applicant's former legal counsel was put into evidence by the respondent and was spoken to by the applicant's mother during her testimony. This letter set out a history of the CAS's contacts with the applicant's mother. In the letter, the CAS said that on September 15 they had received a call from one of the respondent's police officers reporting that the applicant had vandalized school property, had sworn and assaulted support staff and teachers. The CAS said that in response to this report it had reached out to the applicant's mother to offer supportive services.

[126] The information provided in the CAS's letter is reflective of what is set out in the September 15 Occurrence report and also coincides with DP's evidence and the photographs he took of the classroom on that day.

[127] The CAS stated in the letter that a report following the September 30 incident was received from Peel Paramedics relating to concerns about the applicant's mental health and need for medical care. However, no suggestion is made by the CAS in this

letter that the respondent made a report in connection with the incident. In fact, the CAS's letter does not disclose any other contact from the respondent apart from the September 15 report.

[128] There is no evidence that NE made a report to the CAS but, as noted above, SK did indicate in the Occurrence details he prepared relating to the incident that the CAS was contacted. On the last page of the Occurrence details regarding the September 30 incident is a notation that the Special Victims Unit sent a copy of the report to the CAS.

[129] SK says that he did not contact the CAS but that he was aware that the paramedics had contacted the CAS, which is what he meant in his notation. SK says that he was not aware until much later, when he read the Occurrence details after this process started, of the statement at the end of the Occurrence details that a copy had been sent to the CAS by the Special Victims Unit.

[130] No evidence was presented by the respondent about the circumstances in which the Occurrence details were sent to the CAS by the Special Victims Unit. Nor is it clear when the report was sent. Since this information is within the knowledge of the respondent and could have been provided, I draw an inference that the Occurrence details relating to the September 30 incident were sent to the CAS and that this constitutes a report to the CAS.

ANALYSIS AND DECISION

Applicable Law and Issues

[131] The Applicant framed her allegations of discrimination on the following basis: this case is about the decision of the officers to handcuff and shackle a six-year-old child, and to make a report to the CAS without a reasonable basis. The applicant says that these actions resulted in a denial to her of equal treatment with respect to services without discrimination because of race, contrary to s. 1 of the *Code*. She asserts that she was not

accorded the same treatment as a White child would have been accorded in the same circumstances.

[132] The legal principles to be applied in this case are well established. The onus is on the applicant to establish discrimination, on a balance of probabilities, by showing:

> 1. they have a characteristic protected by the *Code* ground – in this case race;
>
> 2. they experienced adverse treatment or impact in a social area under the *Code*; and
>
> 3. the protected characteristic was a factor in the adverse treatment.

See *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 ("*Moore*"); *Shaw v. Phipps*, 2010 ONSC 3884 at paras. 11-15, aff'd *Shaw v. Phipps*, 2012 ONCA 155 at para. 42 ("*Shaw*") at para 42; *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 52, 62 and 111 - 125 ("*Pieters*").

[133] The protected characteristic need not be the only factor or even the main factor in the discrimination. It is sufficient that a connection between the adverse treatment and the protected characteristic be shown. (*Pieters,* above, at para. 59).

[134] Further, the applicant need not show overt evidence or even a subjective intention to discriminate by the respondent. The Court of Appeal, in *Pieters,* above, at para. 72 explained as follows:

> ... The question whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondents' state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.

[135] Where there is no direct evidence of discrimination, the question to be asked is whether an inference of racial discrimination is more probable than the respondent's

explanation (if any) for the officer's conduct. In answering the question, the Tribunal must take into account the nature of racial discrimination and the fact that it can be the product of learned attitudes and biases, which often operate on an unconscious level. See *Nassiah*; *R. v. S. (R.D.)* 1998 CanLII 324 (SCC) at para. 46; *Abbott v. Toronto Police Services Board,* 2009 HRTO 1909 ("*Abbott*"); *Jean v. Ottawa Police Services Board,* 2015 HRTO 1488 ("*Jean*").

[136] If the respondent does call evidence providing an explanation for the adverse treatment, the burden of proof remains on the applicant to establish that the inference of discrimination is more probable than the explanation offered by the respondent. See *Riad v. Waterloo Regional Police Services Board,* 2017 HRTO 51 at para 23. The Ontario Court of Appeal in *Pieters,* above, explained why the burden remains on the applicant, at para. 83 as follows:

> In a case where the respondent calls evidence in response to the application, the *prima facie* case framework no longer serves that function. After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a *prima facie* case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.

[137] In summary, the principles to be considered in a policing case involving allegations of racial discrimination are as follows:

- The grounds alleged by the applicant do not need to be the sole or the major factor in the actions taken by the respondent; it is sufficient for her to prove that one or more of the prohibited grounds was a factor;
- There is no need to prove intention - the focus is on the effect of the respondent's actions on the applicant;
- The evidence supporting the explanation must be credible on all the evidence;
- Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices;

- When assessing the respondent's explanation, the ultimate question is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent;
- Discrimination will more often be proven by circumstantial evidence inference rather than direct evidence;

See *Phipps v. Toronto Police Services Board*, 2009 HRTO 877.

[138] In the absence of evidence of actual differential treatment by a police officer, the exercise of determining whether an inference of discrimination nevertheless should be drawn was explained in *Smith v. Schuyler Farms Limited*, 2019 HRTO 262 at paras. 15 -16:

> As was observed by the Nova Scotia Board of Inquiry in *Johnson v. Halifax Regional Police Service*, (2003) 48 C.H.R.R. D/307 at para. 51:
>
> > . . . in order to consider if differential treatment occurred, the board must necessarily hypothesize about how events would have unfolded if the driver . . . of the vehicle had been white rather than black.
>
> This is necessarily a hypothetical exercise because in these kinds of cases, there rarely if ever is an incident involving precisely the same circumstances with the sole exception that the member of the public involved is White as opposed to Black. But it is nonetheless important to engage in this exercise in order to try to tease out what aspects of an interaction between a police officer and a member of the public can be attributed merely to the power imbalance that flows from the officer's statutory authority, as opposed to any inappropriate racial dynamic that may be overlaid: see *Abbott v. Toronto Police Services Board*, 2009 HRTO 1909 at para. 43.

See also, *Jean,* above, at para 118.

[139] If the applicant establishes on a balance of probabilities that discrimination has occurred, the burden shifts to the respondent "to justify the conduct or practice within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur." See *Moore,* above, at para. 33.

[140] The Tribunal has made clear in dealing with cases involving allegations of racial discrimination in policing that it is not the Tribunal's role to decide or comment on the appropriateness of policing techniques or the correctness of the exercise of police discretion except to the extent that the use of those techniques or the exercise of that discretion violates the *Code*. See *Anderson v. London Police Services Board,* 2012 HRTO 1227 at para. 17, *Ritlop v. Toronto Police Services Board,* 2009 HRTO 307 at para. 17 *and Briggs v. Durham Regional Police Services,* 2015 HRTO 1712 at para. 181.

[141] I have read and considered the policies of the Ontario Human Rights Commission submitted by the applicant, namely the Commission's Policy and Guidelines on Racism and Racial Discrimination 2005 and Policy on Eliminating Racial Profiling in Law Enforcement.

[142] In this case, there is no dispute that the interaction of the officers with the applicant on September 30, 2016 falls within the category of "services." Nor is there any dispute between the parties that in the circumstances of this case, a report by one of the respondent's police officers to the CAS would fall within the scope of providing services.

[143] There was no dispute between the parties on the issue of whether the applicant was subject to adverse treatment.

[144] The handcuffing of an individual by police epitomizes a use of force that is a potent symbol of the authority of the state. Quite simply, the use of handcuffs by police restricts the individual's freedom and therefore amounts to adverse treatment.

[145] With respect to the report to the CAS, there was no dispute between the parties that a report made maliciously or without reasonable grounds would result in adverse treatment. The applicant's submission that a stigma attaches to being involved in a report to the CAS was not disputed by the respondent.

[146] There no dispute that the respondent is liable for the actions of the officers pursuant to s. 46.3(1) of the *Code*.

[147] The respondent has put forward no argument that the conduct in question falls within an exemption under the *Code*.

[148] Since there is no direct evidence of discrimination in this case, the issues remaining to be determined are:

> a. In connection with the treatment of the applicant by the officers during the incident, is an inference of racial discrimination more probable from the evidence than the explanations for the officers' actions provided by the respondent?
>
> b. In connection with the report to the CAS, was the report made maliciously and/or without reasonable grounds, and if so, was race a factor in the decision to report?

a) Is an inference of racial discrimination more probable from the evidence than the explanations for the officers' actions provided by the respondent?

[149] The question I must answer is whether the circumstances surrounding the incident give rise to an inference, on a balance of probabilities, that the officers were motivated, even in part, by the applicant's race in their treatment of her on September 30, 2016. In doing so, I must consider whether the evidence establishes that an inference of racial discrimination is more probable than the explanations provided by the officers for their treatment of the applicant.

[150] This was not a situation in which police initiated a confrontation with a racialized person because of the stereotypical thinking which underlies racial profiling, as occurred in some of the cases cited by counsel. Nor is it a situation in which police acted in an overtly authoritative manner as a result of unconscious bias, inflaming a calm situation into an altercation between police and the racialized person, as in other cases submitted by the parties.

[151] In this case, police officers with no training in dealing with children in crises were called into a school to deal with a situation involving the applicant which the school staff had been unable to manage. The applicant's behaviours, before the arrival of the officers

on the morning of September 30, 2016, included hitting another child, running away, throwing objects at her principal and behavioural teaching assistant – and hitting him on the lip – and hitting out at both adults. We do not know what prompted such behaviours in this six-year-old girl. The officers were told about the applicant's behavioural history upon arrival and understood that they had been called in to "control" the applicant – which they proceeded to try to do. Although the applicant was sitting calmly in the office when NE arrived, there is no evidence that either SK or NE did anything to prompt the applicant's abrupt departure from the office – rather, this was a continuation of her behaviours from earlier that morning. The applicant's resistant behaviours began as SK initially held her on the stage and attempted to encourage her to return to the office with them. Her behaviours continued until the paramedics arrived. The evidence is undisputed that the officers conducted themselves throughout the incident in a professional and polite manner and that they did make efforts to verbally de-escalate the applicant while she continued to struggle, kick, head butt and try to scratch and bite them. It is also clear that the focus of the officers from the point SK began to hold the applicant by the arms when she emerged from behind the piece of furniture on the stage was on attempting to "control" the applicant through physical means.

[152] The officers provided very similar explanations at the hearing for their decisions to use handcuffs on the applicant after returning to the office. First, they both wanted to prevent harm to others and themselves, and to the applicant. NE said in his interview that the sole reason for using handcuffs was to reduce the risk of injury to himself, his partner and staff. SK said that he was concerned that the applicant might run out of the room and that there was a potential she could hurt herself, including running out to the driveway in front of the school, or hurt others including other students. SK said that there was "definitely a potential that she could cause harm to herself or others." Second, both officers said that they were tiring from holding the applicant. SK said that this meant they would have to apply more pressure in holding the applicant as she continued to struggle.

[153] Because they denied doing so, the officers provided no explanation for placing the applicant on her stomach with her ankles handcuffed and her wrists handcuffed

behind her, then maintained her in that position for 28 minutes. It is clear that this level of control was significantly more than what the officers acknowledged exercising, that it represented greater restriction of the applicant's freedom, with greater impact on her dignity, and at least has the appearance of being punitive.

[154] The credibility of the explanations provided by the officers must be considered within the context of the facts of this case. In considering these explanations, it cannot be assumed that because the applicant was engaging in challenging - or even aggressive – behaviours, that race played no role in the means or degree of control chosen by the officers to deal with those behaviours. The Tribunal made this point in *Sinclair v. City of London*, 2008 HRTO 48 at para. 53, a case in which the respondent called in security as a result of the conduct of the applicant, a Black man:

> It is important not to simply assume that because Mr. Sinclair was behaving inappropriately, race played no part in the decision to call security. Racial discrimination is often subtle, and can manifest itself through overreaction or a differential response when a racialized person is involved in situations that pose challenges for those in authority.

[155] While the officers had a legitimate duty to maintain the safety of the applicant, others and themselves in circumstances where the applicant's behaviours were challenging and might have created a safety risk, this did not give them licence to treat the applicant in a way that they would not have treated a White six-year-old child in the same circumstances.

[156] The primary explanation provided by the officers for their treatment of the applicant was that it was necessary to reduce the risk of injury to themselves, others or the applicant. There is no question that control of some nature was necessary to ensure the safety of all concerned, including the applicant. However, I have concluded that the officers' actions in placing the applicant on her stomach, handcuffing her wrists behind her wrists and maintaining her in this position, with her ankles also handcuffed, for 28 minutes were disproportionate to what was necessary to provide adequate control and amounts to a clear overreaction in the circumstances.

[157] In September 2016, the applicant was a small girl, 48 pounds, just six years old. The officers were both about six feet tall and 190-200 pounds. There were at least two other adults -- the principal and DP – present while the incident unfolded in the back office. Although the applicant was kicking, flailing, headbutting and trying to "break free" while being held by the officers, it is difficult to see why it would have been necessary to place her on her stomach with her wrists handcuffed behind her and her ankles handcuffed and then hold her in that position for 28 minutes in order to keep everyone safe.

[158] Had the applicant not been handcuffed, it seems highly unlikely with four adults in the room that she would have been able to escape from the room, run out the front door of the school onto the front driveway or out to the hallway to kick and trip other students, especially if the two office doors had been closed. Nor does it seem probable that the four adults in the room would have been unable to fend off any efforts by the applicant to hit them or throw things at them. DP's evidence was that while he was hit by a book thrown by the applicant, this was more by accident than intent, since the applicant threw the book backwards. There was no evidence that either DP (apart from his 'fat lip') or the principal was injured by the applicant before the police arrived, despite the applicant's behaviours. However, SK said that he did not think about shutting the two doors leading out of the room to prevent the applicant from running out of the room because he was pre-occupied tending to her and that "controlling" the applicant, as they were doing, was preventing her from running out of the room.

[159] The expert evidence of JC was that use of coercive tactics can escalate a person who is already in crisis. NE said that the applicant's behaviour intensified after the handcuffs were placed on her. It is highly probable that the applicant's struggles to "break free" (as DP described it) were escalated by the handcuffs being placed on her ankles and wrists and being placed on her stomach. It is also reasonable to conclude that this did not occur to the officers because their focus was on controlling the applicant by physically restraining her. It is clear that the only means of control which they considered, ultimately, was handcuffs and placing her on her stomach.

[160] In denying that they placed the applicant on her stomach and handcuffed her wrists behind her back, the officers' position was that they handcuffed her wrists in front of her while she remained in a seated position. As noted, placing the applicant on her stomach and handcuffing her wrists from behind would result in far greater control over the applicant than holding her in a seated position with her hands cuffed in front of her. The officer's assertion that they maintained the applicant in a seated position, with her hands cuffed in front of her, at the very least, amounts to a concession by the officers that it was not necessary to elevate the degree of control over the applicant by placing her on her stomach with her wrists cuffed to the rear in order to achieve their goal.

[161] In concluding that the officers' actions were an overreaction, I have considered NE's unequivocal statement, when asked to respond to DP's evidence that the officers placed the applicant on her stomach, that, "I would never put a child on a point where she could possibly asphyxiate herself on a couch, or a soft bench. I would not have done that, no." While there is no evidence that the applicant was ever at risk of asphyxiation, no doubt because the officers were continuing to hold her, the obvious question is why, if NE said he would never place a child on her stomach, the officers did so to the applicant?

[162] Since the officers' explanation for their treatment of the applicant -- to ensure the safety of themselves, others and the applicant -- does not justify the degree of control to which they subjected her, and since the officers placed the applicant on her stomach despite NE's statement that he would never do this to a child, then is an inference of racial discrimination warranted in this case? I believe that it is.

[163] The expert opinion evidence provided by JC and Dr. K. explained how, in a dynamic situation, such as the one in this case, implicit bias can kick in and be a factor in decisions made by police. Dr. K. said that once it registers that someone belongs to a different group – for example in the case of a White person, that the other person is Black -- the negative characteristics and stereotypes associated with that other group are activated in our brains. Those characteristics and stereotypes influence how that other person is perceived and how they are treated. Dr. K. also testified that research on implicit bias has demonstrated that in the case of Black children, because of the stereotypes and

negative characteristics triggered, Black children may be perceived to be older, bigger, stronger, faster or more of a threat than they really are simply because they are Black. Canadian research has shown that Black children engaging in exactly the same behaviour as White children are perceived to be older, more muscular, more aggressive than they actually are with the result that it is perceived that more force is needed to control a Black child than a White child.

[164] The Tribunal has recognized that "race plays a very subtle role in our society. It can influence many social interactions without the knowledge or the intention of those involved." See *Adams v. Knoll North America,* 2009 HRTO 1381; judicial review dismissed, 2010 ONSC 3005 (Div. Ct.) at para 45. This was clearly the case here.

[165] NE said that he would never place a child on her stomach because it would put her at risk of asphyxiation. However, NE and SK did just that. The clear difference between the applicant and a typical child, from the perspective of two White police officers, is her race – as a Black person, the applicant is a member of a 'different group'. While I do not believe that it was the intention of these officers to discriminate against the applicant based on her race, it is clear that their focus throughout was on controlling her. Their overreaction can only be explained by the inference that because of implicit stereotypical associations that arose because of the applicant's race, they saw her, as a Black child, being more of a threat, being bigger, stronger and older than she was and, consequently, of being more in need of control than they would have seen a White child in the same circumstances

[166] I have considered that SK spent his first 15 years in Ukraine and that Dr. K.'s evidence was that growing up in North American culture generates implicit bias. However, there was no evidence that a person raised until their mid-teens in another culture before moving to North America is immune from developing implicit racial bias – or conscious/explicit bias -- either while in that other culture or after moving to North America. In any event, the question is whether the evidence supports an inference that an individual acted on racial bias or stereotypical considerations, whatever the cause of that bias.

[167] In the absence of any explanation for their overreaction in placing the applicant stomach down with her wrists cuffed behind her, ankles cuffed and maintaining her in this position for 28 minutes, the evidence supports the conclusion that the most probable reason for this action is that the officers were influenced by implicit bias in respect of the applicant's race. I find, therefore, that race was a factor in the officers' treatment of the applicant on September 30, 2016 and, as a result, the respondent has violated the applicant's rights to equal treatment in the provision of services under s. 1 of the *Code*.

b) Was the report to the CAS made maliciously and/or without reasonable grounds, and if so, was race a factor in the decision to report?

[168] As a consequence of s. 72(7) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11, as amended, ("*CFSA*"), the Tribunal is limited in reviewing a decision to make a report to a CAS. The *CFSA*, which was in effect when the applicant was filed, has now been replaced by *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1("*CYFSA*"). Language similar to that found in s. 72 of the *CFSA* is now found in s. 125 of *CYFSA*.

[169] Sections 72(1), (5) and (7), in effect when the Application was filed, provide as follows:

> Duty to report child in need of protection
>
> 72. (1) Despite the provisions of any other Act, if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall forthwith report the suspicion and the information on which it is based to a society:
>
> ……..
>
> 6. The child has suffered emotional harm, demonstrated by serious,
>
> i. anxiety,
>
> ii. depression,

iii. withdrawal,

iv. self-destructive or aggressive behaviour, or

v. delayed development,

and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

7. The child has suffered emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to remedy or alleviate the harm.

8. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 resulting from the actions, failure to act or pattern of neglect on the part of the child's parent or the person having charge of the child.

9. There is a risk that the child is likely to suffer emotional harm of the kind described in subparagraph i, ii, iii, iv or v of paragraph 6 and that the child's parent or the person having charge of the child does not provide, or refuses or is unavailable or unable to consent to, services or treatment to prevent the harm.

....

(5) Subsection (4) applies to every person who performs professional or official duties with respect to children including,

....

(c) a peace officer

....

(7) This section applies although the information reported may be confidential or privileged, and no action for making the report shall be instituted against a person who acts in accordance with this section unless the person acts maliciously or without reasonable grounds for the suspicion.

[Emphasis added.]

[170] The limitation which s. 72(7) imposes on the Tribunal when dealing with an application involving a report to a CAS was described in *K.O. v. Hospital for Sick Kids,* 2017 HRTO 145 ("*K.O.*") at para. 20 as follows:

> The Tribunal must consider the applicants' allegations in the context of the child protection regime created by the CFSA and determine if it has the jurisdiction to hear these allegations. The Tribunal must consider whether there is any evidence that the respondent acted maliciously or without reasonable grounds for its suspicion that the adult applicant's children had suffered or were likely to suffer harm when it reported its concerns to CAST.

[171] The considerations to be taken into account when determining whether "reasonable grounds" exist for the report to the CAS were set out in *K.O.*, above, at paras. 31 – 33, as follows:

> The Supreme Court of Canada considered the statutory duty to report and the protection from liability for reporting in *Young v. Bella*, 2006 SCC 3 (CanLII). The Court determined that duty and liability provisions must be read to together and the duty to report should not be narrowly construed. The Court found that any information that a child may be in need of protection is sufficient to trigger the obligation to report and there is no duty to investigate the accuracy of the information before reporting. Investigating the truthfulness of that information is the responsibility of the children's aid society.
>
> Considering that the purpose of the legislation is to protect children, the Supreme Court set a low threshold for the "reasonable cause" necessary to make a report. It is not that the person reporting must believe that abuse has occurred or will occur, but instead "need only have 'reasonable cause' to ask [the children's aid society] to consider looking into the matter." (See also *A.H. v. Toronto District School Board*, 2016 HRTO 392; and *S.T. v. Toronto District School Board*, 2009 HRTO 432).
>
> The determination of reasonable grounds involves an exercise of judgment; however, the applicants must have evidence to demonstrate that the respondent did not have reasonable cause to contact CAST about the concerns.

[172] The respondent did not call evidence to explain the decision to contact the CAS following either the September 15 or 30 incidents. However, the onus remains on the applicant to prove that the respondent did not have reasonable grounds to contact the CAS or did so maliciously.

[173] The CAS's letter to the applicant, referenced above, says that on September 15, the police reported that the applicant had vandalized school property and had sworn at and assaulted support staff and teachers. The respondent's Occurrence details for that date are reflective of this information and also indicate that police were told by the school that this was part of a pattern of conduct and that the police had been called in previously that school year.

[174] Considering the age of the applicant, I find that such behaviour in such a young child would provide 'reasonable cause' for a police officer to ask the CAS to consider looking into the matter.

[175] With respect to the September 30 incident, the Occurrence details indicate that investigation revealed that the applicant had punched and kicked students and had thrown a book at a teacher hitting him in the face. The Occurrence details indicates that there was a continued pattern of behaviour and notes the earlier police attendance relating to the applicant.

[176] Again, considering the age of the applicant, the continuing pattern of behaviour in such a young child would provide 'reasonable cause' for a police officer to ask the CAS to consider looking into the matter.

[177] It is critical to note that in both cases, the CAS did not start a child protection investigation but took the step of calling the applicant's mother to offer supportive services for the applicant following receipt of the report.

[178] It appears to me that in both cases, the reports to the CAS were made because the respondent's officers saw a child in need of help. The response of the CAS supports

this conclusion. I find that the respondent did not act maliciously or without reasonable grounds in asking the CAS to look into this situation.

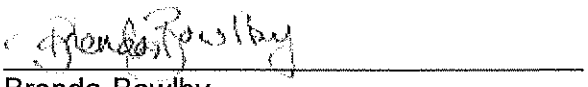
CONCLUSION

[179] For the reasons set out above, I find that the applicant's race was a factor in her treatment by the respondent on September 30, 2016 when she was placed on her stomach and her wrists handcuffed behind her.

[180] The applicant's allegations of discrimination in respect of the Respondent's reports to the CAS are dismissed.

[181] The hearing was bifurcated and as a result, the issue of remedy remains outstanding. The hearing will be reconvened to deal with this issue at a time and date to be determined by the Registrar, unless the parties are able to reach agreement on this issue.

Dated at Toronto, this 24th day of February, 2020.



Brenda Bowlby
Member