

VICTORIAN INSTITUTE OF TEACHING
DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 026

REGISTERED TEACHER: DAVID MISELL

PANEL MEMBERS

Garry SALISBURY, Chairperson

Kevin POPE, Registered Teacher

Jeanette BARCLAY, Registered Teacher

ATTENDANCE: The teacher was not represented

Counsel Assisting: Mr Peter Harris with Mr B Carey solicitor instructing.

DATE OF HEARING: 24 August 2005

DETERMINATION PURSUANT TO SECTION 42(2):

On 24 August 2005 the Panel decided to cancel the registration of the teacher from the date of this decision.

EFFECT OF THE DECISION

This means that the teacher cannot undertake the duties of a teacher in a school in Victoria from 24 August 2005.

REASONS

BACKGROUND

On 31 December 2002 the teacher was deemed registered pursuant to section 91(1) of the *Victorian Institute of Teaching Act 2001* (the Act) because he was a person who was registered as a teacher under section 37 of the *Education Act 1958* immediately before the commencement of the Act.

The Victorian Institute of Teaching (the Institute) received information that the teacher had been found guilty of an indictable offence. Under section 28 of the Act the Institute must conduct an inquiry to assess whether the teacher is fit to teach. At its meeting on 22 June 2005 the Disciplinary Proceedings Committee, a committee of the Institute Council considered this matter and decided to hold a formal hearing. By a Notice of Formal Hearing dated 21 July 2005, the teacher was advised that the formal hearing was to be held on 24 August 2005.

The Notice of Formal Hearing set out the following allegation:

The teacher was convicted by the Melbourne County Court of the indictable offence of soliciting a secret commission. The charge arose from the teacher's request that a former student pay the teacher a sum of money in return for a good mark in the subject "Accounting for Non-Accountants". The teacher was sentenced to a term of imprisonment of 12 months which was wholly suspended for 2 Years.

The issue the Panel must decide is whether this conviction means that the teacher is not fit to teach.

THE LAW

The Disciplinary Proceedings are set out in Part 4 of the Act. Section 28 of that Part provides:

28. Inquiry into criminal conduct

If the Institute is informed that a registered teacher has been convicted or found guilty of an indictable offence other than a sexual offence, the Institute must conduct an inquiry under this Part into the registered teacher's fitness to teach.

The term *fitness to teach* is not defined in the Act. The Panel was referred to case law in other disciplinary proceedings which refers to the term *fit and proper* person to which the Panel had regard.

According to the High Court, the purposes of disciplinary proceedings in relation to a profession are:

- to protect the public;

- to maintain proper standards of conduct for the profession; and
- to protect the reputation of that profession.

A conviction for a criminal offence does not of itself mean that a teacher's registration will be cancelled. As the High Court pointed out in *Ziems v The Prothonotary of the Supreme Court of N.S.W.* (1957) 97 CLR 279, the Institute must determine the facts that led to the conviction before deciding whether a teacher should be disqualified. The role of the Institute is not to punish the teacher. This has been done by the court. Many convictions would result in the disapproval of the public and colleagues but this does not mean that the teacher is not fit to teach.

The Institute must assess the teacher's character or reputation. An assessment can only be made when some knowledge of the underlying facts is obtained. The question for the Panel is not whether the teacher has been convicted but rather whether the teacher's conduct shows that they are not fit to teach. The Panel must be justified in holding out a teacher as being fit to be trusted with the duties and responsibilities of being a teacher. Whether a person is a fit and proper person to be a teacher will depend upon the minimum standards demanded by the teaching profession given the particular responsibilities and duties placed on teachers. It is the profession itself that sets the standard. However the Panel must only consider matters that are relevant to the teaching profession. A teacher's fitness is tested at the time of the Panel hearing, not at the time the offence occurred.

As the Supreme Court noted in *Siguenza v Secretary, Department of Infrastructure* [2002] VSC 46: *unfitness may be demonstrated by conduct totally unconnected with any such employment or employment at all.* That is, the conduct resulting in the offence does not have to be connected to a teacher's professional responsibilities for the conduct to indicate unfitness to teach. The High Court noted:

Furthermore, even where it does not involve professional misconduct, a person's behaviour may demonstrate qualities of a kind that require a conclusion that a person is not a fit and proper person to practise.

A Solicitor v The Council of the Law Society of New South Wales [2004] HCA 1

For personal misconduct the Panel will analyse the teacher's conduct to see whether it demonstrates some character defect that illustrates that the person is not fit to teach and thus their registration should be cancelled (see *Hughes and Vale Pty Ltd v The State of New South Wales (No 2)* (1955) 93 CLR 127)..

As stated in *Siguenza* a person who is fit to teach must show that they possess the knowledge to carry out their duties and responsibilities, and that they possess *sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further inquiry, as a person to be entrusted with the sort of work which the licence entails.*

In *Burgess v Board of Teacher Registration Queensland* [2003] QDC 159 the Queensland District Court stated that *any behaviour found to be inappropriate for a teacher is relevant to the ultimate question of fitness to be a teacher. The weight to be attached to that behaviour was a matter for the Board to determine.* The persistence of the inappropriate

behaviour was relevant to a finding of unfitness to teach. A teacher's conduct should not impair *the standards of the profession to which the community entrusts the immensely important task of educating young children and adolescents.*

The standard of proof that applies in disciplinary proceedings is the *balance of probabilities*. The appropriate standard of proof that applies in civil matters was considered in *Briginshaw v Briginshaw* (1938) 60 CLR 336 where the High Court said that the ordinary standard of proof applied *subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation ... is established.*

DOCUMENTS CONSIDERED

The Panel had available to it the following documents:

- Copy of Court Certificate from Melbourne County Court dated 8 February 2005 Attachments:
- Copy of Police brief obtained from Victoria Police through a Freedom of Information request including
 - Form 4A (3 pages)
 - Summary of Charges
 - Charge
- Statement student 1, unsigned, dated 19 November 2003 (5 pages)
- Statement police officer 1, typed signature, dated 2 December 2003 (3 pages)
- Undertaking of Bail
- Transcript of Interview (35 pages)
- Consent to obtain a NCHRC on behalf of a registered teacher dated 22 June 2005 Attachments:
 - Extract from the Register of Births
 - Copy of Victorian Drivers Licence
 - Money Order
- Criminal history report (Victoria Police) dated 5 July 2005 (2 pages)
- Reference dated 13 December 2001 from teacher 1, school 1.
- Reference dated 17 August 2005 from deputy principal 1, school 2
- Reference dated 3/2/2005 from a doctor, former student 1.
- Character reference dated 3 February 2005 from friend 1.
- Reference dated 27 January 2005 from friend 2.
- Reference dated 12 November 1980 from principal 1, school 3
- Reference dated 8 October 1980 from principal 2, school 4.

THE EVIDENCE

In his opening remarks, Counsel assisting said that the teacher had pleaded guilty to what was described as "corrupt solicitation" an offence under s176(1) of the *Crimes Act*. The maximum penalty for this offence is 10 years imprisonment and a level five fine. Mr Harris referred the Panel to s28 of the VIT Act which obliged the Institute to conduct an

inquiry into the registered teacher's fitness to teach if the Institute was informed of a conviction or a finding of guilt for an indictable offence. He also referred the Panel to s41 of the Act which sets out the conduct of a formal hearing. He argued that the case law indicated that the offence the teacher had been convicted of was of great seriousness and that he would be recommending the cancelling of the teacher's registration.

The teacher took an oath before making his opening remarks. He said that he was very remorseful for his actions and he realised that he had hurt the teaching profession. He said that he had 25 years experience and this behaviour had been a "one-off". He said "I know I'm a good teacher." He said that it had been a requirement at all his previous schools to have "good ethics" and that he had had good results and nothing like this behaviour (ie the behaviour he had been convicted of) had ever occurred. He said that he had good rapport with students particularly in secondary schools. He said that he loved teaching and that he would be devastated if he could not teach. He said that he was devastated and remorseful and that a day did not go by when he did not think about the events. It was like a nightmare for him.

The teacher said that he had provided the Panel with various character references. He had extensive involvement with extra-curricular activities and that he believed that he had a beneficial effect on many students. "I did my best to help them." He had a close involvement with junior football clubs on a volunteer basis and there had always been an emphasis on acting morally. He repeated that he had never had a problem in schools and that he realised the seriousness of what he had done and that teaching was his vocation.

The teacher then entered the witness box for cross-examination. He agreed with Mr Harris that he had resigned after the incident. He said that he had been interviewed on 19 November 2003. He agreed that he had initially denied the offence and denied that it was his voice on the tape. He claimed that he had been set up. When asked why he did this, he said that the student was from country 1 and that he had had no previous involvement with him. He (the student) had only completed one previous test and did not sit for the second test in August. He did not come to see the teacher and that his non-attendance in class was recorded. The teacher had had no face to face meetings with him. The teacher said "I thought he was playing some sort of game with me." and that the student was pulling some sort of scam. By November the student was behind in his assessments. The teacher disagreed that he had a meeting with the student on 14 November 2003 but agreed that he had met him on the 27 November 2003. The teacher said that his comment on his need for money for a divorce was misleading. He said that he had a \$23,000 gambling debt. When asked if the student was vulnerable the teacher said "Yes, but I thought he had a secret agenda." He was the only student who had not done the test.

The teacher agreed that it was he (ie the teacher) who had suggested the \$800 payment but that he could not understand why he had acted the way he did. The teacher said that the student needed a good result to pass the subject. He agreed that he had had time to reflect on the propriety of his actions.

The teacher admitted that he had had a gambling problem for two and a half years during the 2001-03 period. He had received treatment for the problem and saw a psychologist and a psychiatrist for 6 months. The debts were amassed by gambling on horse racing. He continued to receive treatment. He agreed that no medical reports were submitted at his County Court hearing although he told the Judge that he had a gambling problem. He did not enter the box to give evidence at his County Court hearing. He said that he had used Gamblers' Help for assistance and that he had not gambled for months. He still owes \$21,000 and had owed \$33,000 at the peak of his problems. This money was owed to individuals and bookmakers.

The teacher agreed that teacher 1's reference was provided before the offence. Friend 2's, friend 1's and former student 1's references were all submitted at the plea hearing and former student 1 appeared at the hearing. Deputy principal 1's reference was written after the hearing when he became aware of the case through publicity in the newspapers.

Mr Harris asked the teacher why he had not admitted that it was his voice on the tape. The teacher said that he was shocked, and that he thought the student had set him up. He was referred to pages 34 and 45 of the transcript of the police interview where he continued to deny that it was his voice and that it was a set-up.

The teacher said that he had pleaded guilty because he had not wanted to drag it on, he did not want to put the student through it. He agreed that at his committal hearing in August 2004 he had pleaded not guilty. He was asked why he continued to maintain his innocence between August 2004 and February 2005 and why he then changed his plea. The teacher said that he had realised that it was his fault; that he was the person at fault. He was asked why it had taken two years to sink in. The teacher said that he had had time to think about his actions, he now knew he was in the wrong, and he was guilty. He said that he had been to court on seven separate occasions. He said that he was not told about the possibility of a reduced penalty for an early guilty plea. The teacher said that the student appeared at the Magistrates Court and briefly gave evidence. The teacher was asked whether there had been no contest about the facts. The teacher said "no" and denied that he was blaming others, eg lawyers and the student for his predicament.

The teacher did not think there was a difference between the probity standards required in the TAFE sector and secondary schools. He said that ethics should apply across the board. He said that this was one black mark in a 25 year career. He had been the subject of a large amount of negative publicity. He pleaded to be given a chance and he would and could prove that he was a fit teacher.

In response to Panel members' questions the teacher said that there had only been one student involved because all the other students had followed the appropriate processes. He said that it was the student's responsibility to complete the test not the teacher's. He was asked whether he attended gambling counselling and he said that he did so once a month approximately and this was through his G.P. He was asked to describe the class. There were 35 students between 19 and 55 years of age; a very multicultural group. He met them once a week for three and a half hours and it was basically a lecture followed

by the teacher moving around the room assisting individual students. He had not met the student on a one-to-one basis. When asked if his reputation as a teacher made him unemployable the teacher replied that if he retained his registration he had been told that school 4 would employ him. When asked if he had manipulated a vulnerable student because he was from a foreign country the teacher said that he could have done this to any number of foreign students; he could have sought them out but he had never done so. The teacher repeated that he was remorseful for his actions but that he felt threatened by the student's behaviour.

The teacher said that he accepted that it was wrong to certify someone who had not completed their studies to a competent level. He said that this would never happen again and that he was happiest teaching students in years 9-12.

Mr Harris in a further questioning asked if the teacher had spoken to the student during the year when the teacher said that he would walk around and respond to questions. When asked if he was mesmerised by the student he said that the student could not resit because he had not sat for the original test. He said that the psychiatrist had suggested to him that the student's body language and his mumbling and his closeness could be seen as threatening by the teacher. Harris put it to the teacher that the student was in a vulnerable position because he had run out of options. The teacher was asked how the Panel could be sure that the gambling pressures would not surface again. The teacher said that they would not.

SUBMISSIONS

Mr Harris provided the Panel with a written list of submissions. He argued that the teacher had agreed that he had lied about his involvement in divorce proceedings. He had denied that he had had a conversation with his student and the contents of that conversation. When confronted by the tape, he had been unable to accept that it was his voice. Mr Harris argued that the teacher could not recognise his wrongdoing. In August 2004 he was still pleading his innocence and it was only in February 2005 that he pleaded guilty. The only explanation of this delay is that he was in denial. The judge in the County Court did convict the teacher and imposed a period of imprisonment, which he then suspended. Mr Harris submitted in sections 14-17 a number of cases in relation to fitness to teach. He argued that these showed that a single event could be sufficient to show unfitness to teach. He argued that in the two days between the teacher's two contacts with the student he had time to reflect on his proposed course of action and that it could only be viewed as premeditation that he still proceeded.

Mr Harris quoted from a case decided by the New Zealand Teachers Council (NZTC 02-12 25/7/02) to argue that the teacher's criminal conduct arose directly from his conduct in the course of his employment as a teacher. He argued that the teacher's behaviour undermined the standing of the profession in the most direct way.

In terms of the teacher's prospects for rehabilitation, Mr Harris submitted that there would need to be compelling evidence of a long term change of behaviour and that it is too early for the teacher to demonstrate that he is now a person who is fit to teach.

Mr Harris submitted that the Institute's recently adopted Code of Ethics makes it clear that it is not professional to accept bribes to alter a student's academic results. Under the Code it would also be regarded as undignified behaviour. He said that the teacher did not confront the issue until February 2005. He had had the opportunity to show that he had rehabilitated himself but no evidence had been provided. Indeed he continued to deny his guilt until relatively recently. He had provided no medical evidence at any point to support his rehabilitation.

In his closing remarks, the teacher said he was deeply sorry for his actions and that those actions might harm the teaching profession. He wanted a chance to teach. What had happened was past and it would never happen again. He said that he had been fit to teach in the past. He could give a lot to the community and that teaching was part of his life, his vocation. He would like the opportunity to right the wrong he had committed. He wanted to contribute across a range of activities. He wanted to be given a chance; his behaviour was totally out of character.

The Panel did not hear from any other witnesses apart from the teacher. A number of written character references were provided. In his reference teacher 1 attested that in 2001 the teacher had been a good role model for sports students. Deputy principal 1 provided evidence that the teacher had been a helpful volunteer worker with a junior football club. Former student 1 attested that the teacher had been a great role model to many students and a good family friend. Friend 1 attested that the teacher had been of great assistance to him in his sporting career and said he would describe him as honest, trustworthy and a person with integrity. Friend 2 said that the teacher had been a close family friend and had supported his children through a difficult period in their life.

DISCUSSION OF EVIDENCE

The teacher repeatedly expressed his remorse for his behaviour and argued that it was a one-off event that should be considered within the context of a blemish-free 25 year teaching career. The teacher maintained that even though his behaviour was wrong and because he experienced great feelings of remorse, he should be given another chance. The Panel was presented with evidence that the teacher continued to assert his innocence up until his County Court appearance when he changed his plea to guilty. This covers a period from 20 November 2003 to 3 February 2005.

The Panel found the teacher's explanation that he changed his mind to spare the student unconvincing, considering the lengthy period involved before the change of plea. While expressing his remorse in his evidence the teacher continued to assert that the student's behaviour was threatening in some undefined physical way and that he felt the student was playing a game, setting him or attempting a "scam". The Panel found that this attitude undermined his protestations of remorse because he was unwilling to accept that he was the one who had initiated what the County Court would find was criminal conduct. In the teacher's view, the student's behaviour in some way exonerated his own. Under questioning the teacher could offer no coherent explanation for his behaviour.

The Panel noted that the teacher continued to deny his guilt between 20 November and 3 February 2005 which undermine his claim of feelings of remorse or that he wanted to spare the student the ordeal of appearing in court. In fact, the student did appear in court. The Panel accepted the submission of Mr Harris that the character references were unsatisfactory in that none make any reference to the reasons for the teacher's criminal conduct, suggest he is remorseful or that he has done anything about rehabilitation.

The purpose of a suspended sentence is to allow the convicted person to rehabilitate themselves but the Panel found little factual evidence that the teacher had begun the journey required or that he had accepted that it was his behaviour which was at fault, rather than the student's. The teacher's claim that he was remorseful was not supported by evidence, medical opinion or his behaviour leading up to his County Court appearance.

The issue of the teacher's gambling was somewhat moot because he was the only one to raise it under questioning and no medical evidence was provided.

The teacher relied on references from previous employers and family friends to attest to his moral qualities but there was no recent evidence of his ethical behaviour in schools or in a TAFE setting. The Panel was not given any evidence in mitigation of the very serious charges he was found guilty of that his behaviour was a one-off event or that he had a history of ethical behaviour in a professional context.

FINDINGS OF FACT

After considering all the evidence the panel made the following findings:

1. That the teacher was a registered teacher under the VIT Act 2001
2. That the teacher was guilty of the indictable offence of soliciting a secret commission

CONCLUSION

It is clear that the teacher did not demonstrate the personal qualities required to satisfy the standards of the teaching profession and that his actions brought the teaching profession into disrepute in the eyes of the public. The teacher fails the test outlined in *Sobey v. Commercial Agents Board (1979) 22 SASR 70 at 76* that *a person must have sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public*. There is a clear nexus between the concept of "good character" and the standards of the teaching profession such that it is hard to imagine conduct which would undermine teaching standards or the public's confidence in the good character of teachers than the acceptance of secret commissions for inflated academic results. The teacher's criminal conduct in the course of his teaching responsibilities undermines the

standing of the profession in the most direct way and that any person who engaged in such contact would be unfit to teach.

The Panel found support for its findings in the *Decision of the NZ Teachers Council on application for renewal of Practising Certificate*. The Council found in the case of a teacher who had increased the marks of a number of students that it led the community to have doubts about entrusting pupils into a person's care and that it was a fundamental breach of a teacher's trust. The Council did not renew the teacher's practising certificate.

The teacher provided evidence that his loss of reputation and his expensive and lengthy involvement with the criminal justice system have already resulted in a significant punishment. The purpose of the Panel hearing is not to punish the teacher but to protect the standards of the teaching profession and the public's confidence in the profession. The Panel found that while the teacher expressed some remorse he still failed to show proper insight into his conduct. His persistence in the belief that the student was manipulative, his late guilty plea and the nature of his criminal conduct in a professional context, led the Panel to the view that he was unfit to teach. The teacher provided no evidence that in the intervening period he had recognised his error and reformed. Although the Panel accepts that this event was a one-off, the circumstances and its seriousness go to the heart of fitness to teach.

It is the teaching profession which has established the Institute's Code of Ethics after extensive consultation. The teacher has failed to convince the Panel that his character is of a sufficiently high standard in terms of honesty and ethical behaviour or that he is worthy of the level and extent of the trust required by the public. His behaviour amounted to an abuse of the power, influence and trust by a teacher for his own ends, in this case, financial ones. His behaviour damaged the reputation of the teaching profession.

It decided that the maintenance of proper standards of conduct for the teaching profession, the protection of the public and the protection of the reputation of that profession require that registration of the teacher be cancelled.

FINDINGS PURSUANT TO SECTION 42(2)

The Panel finds that the teacher is not fit to teach.

DETERMINATION PURSUANT TO SECTION 42(2)

On 24 August 2005 the Panel decided to cancel the registration of the teacher from the date of this decision.



Garry SALISBURY, CHAIRPERSON



per: Kevin POPE, REGISTERED TEACHER



per: Jeanette BARCLAY, REGISTERED TEACHER