

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 011

REGISTERED TEACHER: Michelle **ALLERI**

PANEL MEMBERS

Susan Halliday	Chairperson
Marilyn Mooney	Registered Teacher
Polly Flanagan	Registered Teacher

ATTENDANCE: The teacher did not attend the formal hearing
Mr Justin Quill, solicitor for the Herald and Weekly Times
Counsel Assisting: Ms Anne Sheehan

DATE OF HEARING: December 9, Friday 10, 2004

DECISION OF THE PANEL:

On 21 January 2005 the panel decided to cancel the registration of the teacher from the date of this decision.

EFFECT OF THE DECISION

The effect of the decision is that the teacher can not undertake the duties of a teacher in a school in Victoria from 21 January 2005.

REASONS

BACKGROUND

On 31 December 2002 the *Victorian Institute of Teaching Act 2001* (the Act) was proclaimed in full. On that date most teachers in Victorian schools were deemed registered as teachers. The teacher was deemed registered pursuant to section 91(1) of the Act because she was registered with the Registered Schools Board under section 37 of the *Education Act 1958* immediately before the Act was proclaimed.

The teacher resigned from the Institute on 17 November 2003. On 3 December 2004 the Disciplinary Proceedings Committee decided pursuant to section 43 of the Act that for the purposes of the inquiry, the teacher was to be treated as if she were a registered teacher.

The teacher was employed by the College from 28 January 2002. The teacher's employment was suspended following allegations of misconduct being made and then resigned from 24 October 2003. On 20 November 2003 the College advised the Victorian Institute of Teaching (the Institute) that the College had taken action against the teacher following an allegation of serious misconduct. The matter was referred to the Disciplinary Proceedings Committee where it was decided that a formal hearing should be held in relation to this matter.

On 16 November 2004 the Institute served a Notice of Formal Hearing on the teacher by post. The Notice advised that the formal hearing would be held on 9 and 10 December 2004 and set out the following allegations:

- The teacher has a sexual relationship with a student
- The relationship had been going on for approximately two and a half months
- The relationship began with kissing and petting
- In the second week of Term 3 holidays the teacher had sexual intercourse with the student at her home
- The teacher and the student had sexual intercourse on approximately three occasions at her home
- The teacher and the student had exchanged text messages.

The issues the Panel must address in this matter are:

- Did the teacher have a sexual relationship with the student?
- Does the teacher's conduct amount to serious misconduct and/or lack of fitness to teach?
- If the teacher's conduct is serious misconduct and/or lack of fitness to teach, what is the appropriate penalty?

THE LAW

The Disciplinary Proceedings are set out in Part 4 of the Act. Section 26 provides:

26. Powers of inquiry

(1) The Institute may in accordance with this Part inquire into any information it receives under section 27 or 28 or any complaint that provides evidence of the

serious incompetence of a registered teacher, serious misconduct of a registered teacher or that a registered teacher is unfit to be a teacher.

(2) *The Institute must in writing notify--*

(a) the registered teacher; and

(b) the employer of the registered teacher; and

(c) the person who made the complaint--

of its determination to inquire or not to inquire into the registered teacher's competence or fitness to teach or the conduct of the registered teacher.

The terms *serious misconduct* and *unfit to be a teacher* are not defined in the Act.

According to the High Court in *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 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 the profession.

These procedures are not meant to punish the teacher although this may be an unintended consequence (see *New South Wales Bar Association v Evatt* (1968) 117 CLR 177). The purpose of these proceedings is to protect students in Victorian schools by ensuring that the teacher is not guilty of serious misconduct and is fit to teach. A decision to deregister a teacher is very serious and requires great care (see *Victorian Lawyers RPA Ltd v Vodicka* (2000) VSC 272).

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*.

And later

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

The observations of the High Court have been followed in numerous cases and in particular in relation to disciplinary proceedings (see *Barwick v Law Society of New South Wales* [2000] HCA 2, and *Murphy v The Bar Association of NSW* [2001] NSWSC 1191).

Whether misconduct is serious will depend upon the facts of each case. Conduct would not be serious if it was trivial or of momentary effect at the time. To be serious, conduct must be a substantial departure from the accepted standards for the teaching profession, and the departure must be the fault of the teacher (see *Parr v Nurses Board of Victoria* (decided VCAT 2 December 1998)).

If the act or omission that constitutes the misconduct is within the will, power or control of the teacher it is more likely to be serious misconduct. If the act was done wilfully or recklessly without regard for the consequences, then it is more likely to be serious misconduct (see *Re: Christine Trigger and: The Australian Telecommunications Commission* (1984) 4 FCR 242).

The **test** set out in the case law is conduct:

which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.

Allinson v General Medical Council [1891-4] All ER 768

The conduct the subject of the inquiry may indicate a character defect incompatible with the teaching profession. Or the conduct may illustrate that the teacher would not be able to work satisfactorily in a school environment. Whether conduct amounts to serious misconduct will depend on the minimum standards demanded by the teaching profession. Conduct that deserves disapproval may not be serious misconduct (see *Ziems*)

In *Health Care Complaints Commission v Litchfield* [1997] 41 NSWLR 630 the Full Court of the Supreme Court described serious misconduct as not to be measured against the worst cases of misconduct, but by the extent the conduct departed from proper standards. Otherwise, the worst members of the profession will set the standard of professional conduct. If a teacher is to adequately perform their duties and act in the best interests of their students they should be able to command the respect and confidence of the education community. If a teacher loses that respect and confidence because of their conduct they should no longer be able to exercise the privileges, duties and responsibilities that come with being a teacher.

A teacher's position is one of power and influence in relation to the student - a position of trust. The misconduct must reflect in a significant way on the suitability of the person to work as a teacher. It must illustrate attitudes or characteristics inconsistent with the moral qualities required of a teacher (see *Yelds v Nurses Tribunal & Ors* (2000) NSWSC 755; *New South Wales Bar association v Cummins* (2001) NSWCA 284.

The term *fit and proper person* is intended to cover conduct other than dishonesty and include significant impropriety, lack of integrity or bad faith. Persistent failure to meet a teacher's obligations to the education community shows a disregard for these obligations and not just carelessness, incompetence or lack of organisation. A failure by the teacher to understand that the conduct complained of was serious misconduct will indicate the teacher's unfitness to teach (see *Cameron v Bar Association of NSW* [2002] NSWSC 191 and *Marten v Disciplinary Committee of the Royal College of Veterinary Surgeons* [1965] 1 All ER 949).

A continuing lack of moral responsibility and an absence of insight and understanding of right and wrong in the context of ethical fitness would be a strong indication of unfitness (see *New South Wales Bar Association v Cummins* (2001) NSWCA 284 and *Siguenza v Secretary, Department of Infrastructure* [2002] VSC 46).

DOCUMENTS CONSIDERED

The Panel was presented with documentary evidence as follows:

- 1 Witness statements by:
 - o Principal of the College
 - o Deputy Principal 1 of the College
 - o Deputy Principal 2 of the College
 - o Teaching Colleague 1
 - o Father of the student
 - o Step mother of the student
- 2 Incident Report from the College dated October 17 – October 18, 2003
- 3 Letter from the College to the Institute dated 20 November, 2003
- 4 Facsimile transmission to the Institute from the teacher dated 27 November, 2003
- 5 Letter from the Institute to the teacher dated 28 November, 2003
- 6 Principal's records dated 2 February, 2004
- 7 Copy Police Brief
 - o Statement from the student
 - o LEAP – Victoria Police summary report
 - o LEAP – Victoria Police Incident Report

The Panel also received two documents from the solicitor for the Herald and Weekly Times in support of its application to have the formal hearing open to the public:

- o Supreme Court of Victoria, *The Herald and Weekly Times v The Magistrates' Court of Victoria and Others* (1999) VSC 232 Beach J 16 June, 29 July 1999
- o Supreme Court of Victoria, *The Herald and Weekly Times v Medical Practitioners Board of Victoria and Another* Hedigan J. 7, 8 October 1997, 10 June 1998

THE EVIDENCE

On 16 November, 2004 the teacher was notified by the Institute that a formal hearing would take place in order to consider allegations of serious misconduct and/or fitness to teach. The teacher failed to attend the hearing.

The student failed to attend the hearing as a witness even though he had been requested to attend. The panel decided not to summons the student because of the harm this might cause to the student. The panel heard evidence under affirmation or oath from Deputy Principal 1, Teaching Colleague 1 and the Principal of the College.

At the commencement of the hearing, Counsel for the Institute drew to the attention of the panel that in the absence of the teacher and the student, evidence given would be first hand hearsay and as such needed to be treated very carefully.

The panel adjourned to consider Counsel's submission to close the hearing to the public, in order to protect the identity of the student who would be named during proceedings, despite failing to present as a witness. The panel determined the hearing should be closed.

In her opening submission Counsel noted that the central issue with respect to the allegations against the teacher was not whether there was a consensual relationship, but rather whether the teacher engaged in serious misconduct and was unfit to teach.

Sworn evidence from Teaching Colleague 1

Teaching Colleague 1, a teacher at the College since 2001 had 5 years teaching experience. Teaching Colleague 1 informed the panel that she had been friends with the teacher since the beginning of 2003. The friendship was such that Teaching Colleague 1 went shopping and to the ballet with the teacher and shared personal conversations. Teaching Colleague 1 had met the teacher's husband and her mother.

Teaching Colleague 1 told the panel that the teacher had daily conversations with her about a student. When speaking about the student, the teacher would say such things as "*he's hot*" and "*he's my friend*". Teaching Colleague 1 claimed that when she was on yard duty on the oval (a place where no teacher enjoyed being) the teacher joined her there on the pretence of "*keeping her company*". Teaching Colleague 1 believes that her real motivation was to see the student, especially given the nature of her attention when on the oval.

Teaching Colleague 1 told the panel that the teacher gave the student study lessons in the library and would pick him up in her car at Safeway and take him to her house. Teaching Colleague 1 said that the student and the teacher exchanged text messages during the school day, and that the teacher had showed Teaching Colleague 1 some of the text messages. Some text messages were received in the staffroom in front of others.

The teacher admitted to her friend Teaching Colleague 1 that she was physically attracted to the student. Teaching Colleague 1 said that the teacher and the student had been to the movies together at Crown Casino and to the Botanical Gardens.

Teaching Colleague 1 stated that she believed the relationship between the teacher and the student could be termed a friendship for the first month. After a month the relationship involved dating and within a couple of weeks became a sexual relationship.

Teaching Colleague 1 told the panel that the teacher spoke to her about her first kiss with the student. She told Teaching Colleague 1 that she was going to cut ties with the student, but after they had kissed she said "*I can't do this I'm so attracted to him*". The teacher made comments of an intimate nature about her sexual relationship with the student, to Teaching Colleague 1. She talked to Teaching Colleague 1 about the student's penis size, the need to change the sheets at her home after she had had sex with the student and her fear that her husband would come home and discover the relationship.

Teaching Colleague 1 told the panel that she was concerned about the teacher's relationship with the student and tried to counsel the teacher into ending the relationship. Teaching Colleague 1 said that she put several 'what if' scenarios to the teacher but the teacher said that if ever she was confronted about details of her relationship with the student, that she would deny it. The teacher told Teaching

Colleague 1 that she would argue *"I'm a married woman"* if confronted. The teacher asked Teaching Colleague 1 via SMS to *"cover for her"* so that she could hide the relationship from her husband.

Teaching Colleague 1 informed the panel that there was considerable talk amongst other students about the student and his relationship with the teacher. Teaching Colleague 1 stated *"the boys at the school are often called by the name of their girlfriend and the student was called 'the name of the teacher' by some of the boys"*. Teaching Colleague 1 stated that there was suspicion amongst some staff that *"something was going on"* as the teacher's behaviour included flirting with the boys, and engaging in juvenile behaviour with the students, such as water fights.

Teaching Colleague 1 told the panel that she wanted to end her friendship with the teacher, but the teacher would use emotional blackmail to keep the friendship going. Teaching Colleague 1 stated that she became very concerned about the knowledge she had of the relationship between the teacher and the student. Teaching Colleague 1 stated that she felt that the teacher's behaviour was most inappropriate and decided to consult a couple of colleagues about her predicament. She was advised to pass on her concerns and knowledge to Senior Administration immediately. The situation caused Teaching Colleague 1 great personal anguish and on 17 October 2003 she spoke of her concerns to Deputy Principal 2 of the College.

About one month after Teaching Colleague 1 gave details of the teacher's relationship with the student to the Senior Administrator at the College, Teaching Colleague 1 spoke to the teacher who told her that she was on anti-depressants and that her marriage had split up. The teacher told Teaching Colleague 1 that she and the student were *"in love"*. At that time when Teaching Colleague 1 phoned the teacher, it was the student who answered the phone.

Submission put by Herald and Weekly Times

At the conclusion of Teaching Colleague 1's evidence Mr Justin Quill appearing for the Herald and Weekly Times (HWT) sought leave to present a submission to the panel with the aim of having the panel reverse its decision to close the hearing. The panel adjourned to consider the HWT submission. The panel having considered all the available information decided to vary its original decision to close the hearing in its entirety, stating that the Opening and Closing submissions of Counsel only would be open to the public. However the name of the student would not be made public at any time. Counsel agreed to repeat her opening submission during her closing submission.

Sworn evidence of Deputy Principal 1 of the College

Deputy Principal 1 of the College, a teacher for 18 years had been a Deputy Principal for 5 years.

Deputy Principal 1 informed the panel that he contacted the student's mother to explain the nature of the problem that had come to his attention, and to obtain consent to interview the student. Deputy Principal 1, in the presence of the Principal of the

College, and Deputy Principal 2 interviewed the student about the allegations made by Teaching Colleague 1.

The interview lasted about for 20-30 minutes. Deputy Principal 1 told the panel that in response to questioning, the student admitted that:

- 1 a relationship did exist between himself and the teacher
- 2 he had driven the teacher's car, and
- 3 he had had sex with the teacher in her home but not at his house

Deputy Principal 1 said that, up to this point, he knew very little about the student, and that he had never caused any problems at school. He said that during the interview, the student was guarded but expansive. He said that the student admitted to having sexual intercourse with the teacher 3 times. However Deputy Principal 1 felt that the student was understating the situation. Deputy Principal 1 believed that the student's reaction to the questions suggested that he knew the situation was a serious one, with serious implications for the teacher.

Deputy Principal 1 stated that when being questioned the student suggested that he and the teacher were in love. Deputy Principal 1 said the student was very concerned for the teacher's welfare and he discussed the possibility of changing his statement to protect her. The student appeared more concerned for the teacher than himself, in Deputy Principal 1's opinion.

Deputy Principal 1 told the panel that the student agreed to speak to his father, following which phone contact was made. The student was concerned about his father because they had a difficult relationship related to his parent's marriage breakdown. Deputy Principal 1 indicated that the student was very concerned about the consequences of his actions on his mother, his father and the teacher.

Deputy Principal 1 informed the panel that when he interviewed the teacher she accepted that she had gone beyond the normal boundaries but insisted that it was just a friendship. She denied that a sexual relationship had taken place. The teacher claimed that the SMS text messages had been of a friendly nature, not a sexual nature. The interview with the teacher lasted about 15 minutes. Deputy Principal 1 said that her responses were not expansive. Deputy Principal 1 said that the teacher admitted going to the student's house to help him with homework.

Deputy Principal 1 stated that after the interviews and the teacher's departure from the school, the student became more difficult to manage as a student. Deputy Principal 1 told the panel that the student became arrogant and argumentative. He challenged teachers and came to the notice of teachers in a way that he had not previously. Deputy Principal 1 stated that he believed that the relationship between the teacher and student continues today.

Sworn evidence of the Principal of the College

The Principal had been teaching for 25 years and was the Principal of the College for 6 years. The Principal told the panel that Teaching Colleague 1 was in possession of information that was troubling her and she reported what she knew and had been told by the teacher.

The Principal stated that during his interview the student confirmed that sexual intercourse took place between himself and the teacher on multiple occasions. The Principal said that it was his belief that the student was telling the truth and not just 'bragging'. When confronted with the allegations the Principal stated that the student asked about the repercussions for the teacher.

The Principal told the panel that when interviewed, the teacher denied the allegations. He said that she also questioned why the student would lie about her. The teacher wanted to know who the teacher was who had made the allegations about her. However this information was not shared.

The Principal told the panel that he informed the teacher that due to the serious allegations that had been brought to their attention, she was being stood down. The teacher did not agree with this course of action.

DISCUSSION OF EVIDENCE

Counsel, Ms Anne Sheehan submitted that the issue before the panel was whether the teacher's behaviour constituted serious misconduct and/or lack of fitness to teach. The teacher resigned from the Institute on 17 November 2003. The panel had the power to continue to inquire into the allegations under s43 of the Act.

Counsel submitted that in a criminal proceeding the teacher would have no case to answer because of the reliance on hearsay evidence. However, in disciplinary hearings, the issue related to professional conduct, not punishment. Further the standard of proof in the given circumstances was, on the balance of probabilities.

It was put that the first hand evidence was significant given that Teaching Colleague 1 was the confidant of the teacher. The difficult situation Teaching Colleague 1 found herself in was also noted.

Teaching Colleague 1's evidence in reports to the Principal and to the panel was consistent, clear and credible. She said that the teacher had admitted to having a sexual relationship with the student. She was able to refer to particular conversations with the teacher when intimate details of the relationship were revealed. Teaching Colleague 1 observed the teacher's behaviour when the student was present and read some of the text message the teacher received from the student. The Principal said in evidence that the student had admitted to the sexual relationship with the teacher. The Principal was of the opinion that the student was open and frank when he was interviewed in contrast with the teacher when she was interviewed. The teacher denied the sexual relationship and said she could not understand why the student would make such an allegation.

The school responded to the situation immediately with a high degree of professionalism, as evidenced by the records of conversation and documentation. The school's documentation, made available to the panel was ordered and comprehensive, and provided a clear presentation of the process of events with clear timeframes.

Counsel stated that a teacher having a sexual relationship with a student amounts to serious misconduct regardless of whether that sexual relationship is consensual. She noted that a sexual relationship that is consensual does not absolve a teacher from breaching professional standards. If and when teachers exploit, inappropriately influence and harm students, they should be held accountable for their actions.

Aware that the evidence was hearsay, the panel was advised by Counsel to treat the evidence with extreme care. The Panel observed that the evidence given by Teaching Colleague 1, Deputy Principal 1 and the Principal was clear, comprehensive and consistent. The panel found their evidence to be credible and believed that it should be accepted.

FINDINGS OF FACT

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

- 1 The teacher engaged in a sexual relationship with a student.
- 2 The relationship involved sexual intercourse on a number of occasions.

CONCLUSION

The panel was satisfied that the alleged behaviour of the teacher was substantiated and amounted to serious misconduct. The teacher's behaviour represented an extremely significant departure from the professional standards of the teaching profession. The departure from these professional standards is considered the complete fault of the teacher. Further the panel is convinced that the teacher exploited her power and position as a teacher in a conscious manner to progress a sexual relationship with a student to whom, she had indicated to her colleague, she was very attracted.

The panel is fully satisfied that the teacher failed to take on board the extremely serious nature of her evolving relationship with the student, despite having the opportunity to do so. Additionally the panel believes that the teacher chose to lie about the sexual relationship she pursued with the student, when questioned about it, providing an excuse she had in a calculated manner prepared and rehearsed with her colleague.

The teacher's orchestrated behaviour evidenced a clear absence of the core ethical and moral qualities required of teachers by the education profession and the broader community. Her interaction and purposeful pursuit of a sexual relationship with a student exemplifies a high degree of professional negligence and personal immaturity.

Falling well short of exercising her general duty of care for the student over the period of weeks leading up to the point just prior to where their relationship became sexual,

the teacher despite having an option to cease her interaction with the student, proceeded in a reckless, wilful and manipulative manner, in order to fulfil her personal sexual desires. From the available accounts this behaviour was minus any regard for the consequences for the student, the school community and the teaching profession.

The teacher's reprehensible behaviour brings disgrace upon the teaching profession and belies the confidence of the broader community in the profession. The teacher's position as a teacher was one of privilege power and influence in relation to the student – a position of trust. The teacher's improper behaviour destroyed what should be a sacrosanct professional relationship between a teacher and a student. The teacher ignored her legal and civic obligations.

DETERMINATION

Given the teacher's serious misconduct and her significant impropriety, lack of integrity and multiple demonstrations of not being able to determine what ought duly to be done, and not to be done, the panel deems the teacher unfit to teach. The Panel has determined to cancel her registration to teach from 21 January 2005.

Dated: 18 February 2005



Susan Halliday CHAIRPERSON



for Marilyn Mooney REGISTERED TEACHER



for Polly Flanagan REGISTERED TEACHER