

VICTORIAN INSTITUTE OF TEACHING
DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: O12

REGISTERED TEACHER: RAM

PANEL MEMBERS

Susan Halliday, Chairperson

Marilyn Mooney, Registered Teacher

Kathleen Bragge, Panel Member

ATTENDANCE: the teacher did not attend the hearing and was not represented

Ms Anne Sheehan Counsel Assisting

DATES OF HEARING: 28, 29 and 30 September 2004

DECISION OF THE PANEL:

On 22 February 2005 the Panel decided that the teacher was not guilty of serious incompetence.

EFFECT OF THE DECISION

The teacher is no longer registered as a teacher in Victoria following his resignation from the Victorian Institute of Teaching.

REASONS

BACKGROUND

On 31 December 2002 the teacher was deemed registered as a teacher pursuant to section 91(1) of the *Victorian Institute of Teaching Act 2001* (the Act) because he was registered with the Registered Schools Board under section 37 of the *Education Act 1958* immediately before the Act was proclaimed

On 2 September 2003 the Victorian Institute of Teaching (the Institute) was advised by the Principal of the school that the teacher had resigned from the School after allegations of serious incompetence had been made. The Disciplinary Proceedings Committee of the Institute decided on 29 October 2003 to refer this matter for investigation in preparation for a formal hearing.

A Notice of Formal Hearing was sent to the teacher on 30 August 2004. The allegations contained in that Notice were that:

2003

1. The teacher failed to complete professional tasks of preparation and reporting on time outside normal school hours if necessary
2. The teacher failed to carry out the directions of the Principal
3. The teacher failed to teach the set curriculum
4. The teacher failed to plan in advance for Year 11 examinations and failed to provide appropriate examination questions and cover sheet
5. The teacher refused to teach the required text by Marsden
6. Too many of the teacher' students received an 'N' and final gradings were not backed by formal assessments
7. The teacher did not follow the proper procedures for awarding an 'N' grade
8. The teacher' reports were unacceptable in terms of the comments made and the inconsistency between the results and comments
9. The teacher was late or absent from class without good reason
10. The teacher breached the privacy of a student, and his mother, when counselling the student

2002

11. The teacher did not follow SAC Procedures for network examination Term 1, 2002
12. The teacher did not provide students with sufficient criteria information in VCE Economics in Term 2, 2002
13. The teacher did not follow SAC Procedures regarding supervision of students Term 2, 2002
14. The teacher did not grade the assessment task by the VCE grading criteria in October 2002
15. Eighteen semester 1 reports did not follow the procedures when awarding an impending 'N' in June 2002
16. The teacher was required to be reminded about attendance at Morning Briefings in September 2002

2001

17. On 4 December 2001 the teacher accessed the confidential and personal files of a colleague and did not close down the workspace immediately when asked.

The Law

The Disciplinary Proceedings are set out in Part 4 of the Act. Section 26 of that Part 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.*

The term *serious incompetence* is not defined in the Act. There is very little case law that refers to the incompetence of a professional in a regulatory framework. The Panel was referred to cases in other jurisdictions that might be of guidance.

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.

Simple negligence or errors of judgement are not sufficient for serious incompetence. However negligence of a sufficiently high level could amount to incompetence. If a teacher's practice is such that it would defeat the cause of imparting knowledge to students then this would be serious incompetence.

The conduct need not be criminal, committed in bad faith or involve moral wrongdoing to be incompetent. There is a duty on all teachers to achieve and maintain an appropriate level of competence and care. If the teacher has been guilty of negligence or incompetence in a professional capacity which has been to such a degree or so frequent to reflect on the teacher's fitness to teach, then the teacher would be seriously incompetent (see *Raylee Patricia Harley v Robert McDonald & Ors* [1999] NZCA 145).

In *Zechner v Department of School Education* [1999] FCA 445 a teacher was dismissed for incompetence. After hearing the evidence the Court found that the teacher was incompetent. In finding incompetence the Court noted that the teacher was:

- unable to implement meaningful lessons
- unable to communicate ideas or information
- unable to develop rapport and confidence with students
- not trusted by parents or other teachers to perform the duties of a teacher
- poor relationship with colleagues
- unable to maintain teacher/student relationship
- deficiencies in curriculum knowledge
- unable to see the need to improve teaching skills.

These skills were fundamental requirements for a teacher and a failure to exercise these skills indicated incompetence.

Whether incompetence 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 of the act or omission. 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* decision of 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. However if the teacher's conduct was caused by their inability to cope with the work situation, this may be incompetence but may also be lack of appropriate support. If the conduct was caused by ill health then it will not be misconduct (see *Christine Trigger and: The Australian Telecommunications Commission* (1984) 4 FCR 242). However the teacher may be unfit to teach.

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).

The Evidence

The teacher advised the Institute before the Hearing that he would not be attending. He believed that he was in such poor health he was unable to attend.

The investigator's report had supported holding a formal hearing and provided witness statements all showing that the teacher had behaved illogically and displayed a lack of judgement in his teaching practice. At the hearing a number of witnesses, teachers from the school, were called and gave evidence. Their evidence supported the allegations about the teacher's irrational behaviour at the school. The evidence also revealed that the teacher was a relatively new teacher having completed his studies in 1998 and commenced teaching in 1999.

During the hearing, evidence was provided that the teacher had been sick in 2003 and had had a substantial period on sick leave.

On 23 September 2004 the teacher requested that his registration with the Institute be cancelled. The Institute recorded that the teacher had resigned from the Institute on 28 September 2004 following his request. The Panel was not advised that the teacher had resigned until after the formal hearing had been adjourned.

Subsequently the teacher confirmed with the Institute that he did not wish to return to teaching. He is 63 years old and in 2003 developed a serious medical condition resulting in surgery. He was granted the disability support pension by Centrelink and in the teacher's opinion it is unlikely he will ever be well enough to return to teaching. He prided himself on keeping up to date in the subjects he taught. Since he left teaching he had not kept up to date in his subject areas.

Findings

1. The teacher is 63 years old.
2. He commenced teaching in 1999.

3. In 2003 the teacher suffered from a serious illness resulting in surgery. He has been permanently incapacitated for work since that time.

Conclusion

Under section 43 of the Act the Institute can continue its inquiry including holding a formal hearing even though the teacher has resigned. The teacher would be treated as though he is a registered teacher for the purposes of the formal hearing.

The Panel carefully considered whether it should accept the teacher's resignation and his advice that he would not be returning to teaching, or whether it should continue with the hearing.

The arguments in support of accepting the teacher's resignation are:

1. The teacher is 63 years old.
2. He is a relatively new teacher with limited experience.
3. He has suffered from a serious illness that has left him permanently incapacitated.
4. The teacher has stated that he does not wish to return to teaching.
5. He is receiving the Disability Support Pension.
6. It seems most unlikely that the teacher would ever return to teaching.

Given the above circumstances the Panel decided that it would not recommend that a decision be made under section 43 to continue with the formal hearing.

The Panel had to decide on the evidence before it whether it should find that the teacher is seriously incompetent. The Panel has no doubt that during the period in question in 2003 the teacher was not competent to undertake the duties of a teacher. He was a relatively inexperienced teacher who was coping with the symptoms of a serious illness. As pointed out in *Trigger* if a teacher's conduct is caused by ill health it is not incompetence. A question may be raised about a teacher's fitness to teach. However in this case it is not necessary to raise that question because the teacher has resigned from the Institute.

Determination

The Panel decided that the teacher is not seriously incompetent.



Susan Halliday, Chairperson



per Marilyn Mooney, Registered Teacher



per Kathleen Bragge, Panel Member