

VICTORIAN INSTITUTE OF TEACHING
DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 368915 Hearing Number 0343

REGISTERED TEACHER: Jamie Lee MITCHELL

PANEL MEMBERS: Heather Schnagl, Chairperson
Audrey Brown, Registered Teacher
Denise McLaughlin, Panel Member

ATTENDANCE: The teacher attended the Formal Hearing and was represented by Ms Cassie Serpell (BARRISTER), with Mr Alix Sachinidis (Industrial Officer - IEU) instructing on behalf of the teacher.

Cara O'Shanassy (VIT SOLICITOR), Instructing Solicitor on behalf of the Victorian Institute of Teaching.

DATE OF HEARING: 3 December 2019

DATE OF DECISION: 18 December 2019

DETERMINATION UNDER SECTION 2.6.46(2) OF THE *EDUCATION AND TRAINING REFORM ACT 2006*:

On 18 December 2019 the Panel decided to cancel the registration of the teacher and impose a period of disqualification for a period of three years from the date of this decision.

REASONS

BACKGROUND

On 31 January 2012, the teacher was granted provisional registration with the Victorian Institute of Teaching (the Institute), under section 2.6.10 of the Act.

On 6 October 2011, the teacher was offered a position at the School commencing 1 January 2012.

On 17 January 2013, the teacher was granted full teacher registration with the Institute under section 2.6.9 of the Act.

The teacher was a teacher at the School from 2012 until he resigned on 21 June 2017.

In accordance with section 2.6.31 of the Act, on 13 June 2017, the Principal of the School notified the Institute of action it had taken against the teacher, being his suspension from the School, as a result of allegations of rape and indecent assault made by a former student.

On 8 July 2017, the Institute exercised its interim suspension powers pursuant to section 2.6.28 of the Act and suspended the teacher's registration.

The Institute reviewed the interim suspension of the teacher's registration within 30 days after the suspension took effect and within 30 days after that review and every successive review, in accordance with the requirements of section 2.6.28E of the Act.

The teacher's registration remains suspended under section 2.6.28 of the Act.

Pursuant to section 2.6.30(1A) of the Act, the Institute was required to inquire into whether the teacher has engaged in misconduct or serious misconduct; or is unfit to be a registered teacher; or has such an impairment that his ability to practise as a teacher is seriously detrimentally affected or is likely to be seriously detrimentally affected. The inquiry under section 2.6.30(1A) took the form of an investigation.

On 20 June 2018, at the conclusion of the Institute's investigation, the Institute's Professional Conduct Committee determined that a formal hearing be held into allegations against the teacher.

The Institute advised the teacher of the Committee's decision by letter dated 21 June 2018.

THE ALLEGATIONS

The allegations of serious misconduct, as amended at the Formal Hearing, are that the teacher:

Allegation 1 – Failed to maintain a professional relationship with the student, an 18-year old student of the School until 18 November 2016 and at all material times thereafter was a recently graduated student, by:

- (a) using sexual innuendo and inappropriate language with the student and holding conversations of a personal and sexual nature of via electronic means; and or

- (b) receiving photos from the student in which she was fully nude, partially nude and/or engaging in sexual acts without telling the student to cease; and or
- (c) encouraging the student to send him lewd photos.

Allegation 2 – Failed to maintain a professional relationship with the student, an 18-year old student of the School until 18 November 2016 and at all material time thereafter was a recently graduated student, by having sexual relations with the student on 15 November 2016.

Allegation 3 – Conducted himself in an improper manner that would have an impact on his professional standing and on the profession as a whole, by having sexual intercourse with the student when she was a recently graduated student on 22 November 2016.

ORDERS MADE BY THE FORMAL HEARING PANEL

Pursuant to section 2.6.45 (e) and (g) of the Act, following application by Counsel Assisting the Institute, the Panel ordered that, in respect to the hearing relating to the teacher, any information that might enable the former student to be identified or cause the former student undue distress, must not be published or broadcast, including:

- a. The name of the former student;
- b. The name of the witnesses;
- c. The name of the school; and
- d. The location (city/town name) of the school.

Pursuant to section 2.6.45 (f) of the Act, following application by Counsel representing the teacher, the Panel ordered that prior to the final decision being made, any information that might enable the teacher to be identified must not be published or broadcast.

In addition, pursuant to section 2.6.45 (d) of the Act, Counsel representing the teacher requested that the Hearing be closed, for two reasons, namely that:

- a. Despite the above orders, it is not easy to avoid the use of names, which can inadvertently be broadcast on social media, and can never subsequently be retracted; and
- b. Following discussion with the student and her legal representative, that she wished the hearing to be closed in order for her to be present at the hearing.

Council Assisting the Institute neither supported nor opposed this request but noted the former student's desire for the hearing to be closed. The media representative present was given the opportunity to make a submission prior to the Panel making a final decision. Pursuant to section 2.6.45 (d) of the Act, in that the hearing was taking evidence of an intimate and personal nature, the Panel made orders to close the hearing.

Counsel representing the teacher also requested the Panel to make an order that the sanitised decision of the Panel not be published on the Institute website until the conclusion of the appeals process, either at the expiration of the period in which the teacher may lodge an appeal or at the conclusion of any such appeal, should the teacher lodge one. The application was supported by Counsel Assisting the Institute. As any determination to publish the Formal Hearing decision rests with the Institute Council rather than the Panel itself, the Panel determined to recommend to the Council that the sanitised decision not be published on its website until the conclusion of all possible proceedings.

THE EVIDENCE

In response to the allegations against the teacher, the Panel was presented with an Agreed Statement of Facts between the Institute and the teacher, a copy of which is attached as Attachment 1. The Panel also received Annexure 1, which was a copy of all the personal emails between the student and the teacher from 22 October 2016, the date on which the personal emails commenced, until 21 May 2017, when they ceased. Together these documents clearly demonstrated that the teacher violated the professional boundaries required by a teacher in his relationship with the student, both whilst she was a student at the School and as a recently graduated student. The private emails were clearly inappropriate and involved sexual language and the receipt of explicit photographs from the student, which was encouraged by the teacher. The agreed statement of fact outlines that the teacher had engaged in sexual relations with the student on 15 November 2016, whilst she was still an enrolled student and subsequently on 22 November 2016, four days after her graduation from school.

The Agreed Statement of Facts also obviated the need for any witnesses to be called at the Formal Hearing to substantiate the allegations, thereby considerably reducing any distress to the former student.

The Panel received a detailed written submission from Counsel representing the teacher. Counsel outlined that following the original notification of action against the teacher by the Principal of the School, the teacher's registration had been suspended by the Institute since 8 July 2017, with the suspension having been renewed a total of 31 times, with the most recent being on 22 November 2019. His registration currently remains suspended.

The Panel also received an Affidavit from the teacher which outlined his personal circumstances at the time of the allegations, with particular reference to his relationship difficulties and his chronic health condition. The Affidavit outlined how he responded to concerns that had been raised by his employer regarding professional boundaries with students, which involved working excessive hours. He also described the high level of anxiety and depression he was experiencing at the time of the allegations, which led him to meet with the school psychologist on two occasions.

The teacher stated in his Affidavit that he was now aware that rather than dealing with the issues he was experiencing at the time, he was in avoidance. Since resigning from the school in June 2017, the teacher attended approximately 20 weekly or fortnightly counselling sessions with a registered psychologist, primarily to deal with the depression and panic attacks that he was experiencing at the time. The sessions concluded when the psychologist ceased practising in the area.

In his affidavit the teacher expressed his sorrow to the student's parents, recognising that he was neither caring nor nurturing towards their daughter, something which he had seen as a personal strength. Recognising the deep hurt and damage that he had caused to the student, the teacher expressed sorrow to the student who he said had every reason to believe that he would not take advantage of her interest in him. He stated that he did know that what he had done was wrong and that his actions crossed the boundary of what was expected of a teacher.

The teacher expressed his shame and acknowledged that he had completely let down the people who had had faith in him, his principal, his school, his family, his students and their parents. He

also now understood the damage this his actions had caused to the reputation of the teaching profession.

In his Affidavit the teacher went on to state that should he be permitted to return to teaching at some stage in the future, he now had an entirely different understanding of the need for strict, professional boundaries. He indicated that should a similar situation arise in the future, he would delineate the professional boundaries and adhere to them without fail. He stated that he understood that the professional relationship between teacher and student is one that involved power, influence, trust and authority.

DISCUSSION OF THE EVIDENCE

The Agreed Statement of Facts, which had been mutually agreed between the Institute and the teacher, enabled the Panel to rely on these admissions. The teacher admitted the Institute's allegations against him without qualification. Consequently, the Panel was able to make the finding that all three allegations were substantiated.

It is to the teacher's credit both that he was open and honest with the Institute investigators in admitting his conduct with the student and in providing copies of all the private emails between the student and himself to the Institute (Annexure 1) which actually represented a period greater than that initially alleged. The teacher also provided a copy of all his school emails to the student. By resigning from his teaching position once the initial referral was made by his employer (and prior to the suspension of his registration by the Institute) the teacher assisted his employer which was to his own financial detriment and acknowledged his culpability for his actions.

In addition, in his Affidavit the teacher expressed his sorrow for the events which transpired to both the student herself and her parents and acknowledged that his actions were not those expected of a teacher. He also expressed his shame at his behaviour and that he had let so many people down, including his students, their parents, his school and the teaching profession.

Whilst in his Affidavit the teacher stated that he understood the nature of the professional relationship between teacher and student is one that involved power, influence, trust and authority, the Panel was not convinced of the teacher's clarity regarding the professional boundaries and the impact of the power imbalance between a teacher and their students, noting that he had been counselled regarding these on a number of occasions during his employment at the school. It was also unclear to the Panel whether the teacher fully recognised that the inherent power imbalance between a teacher and their students takes a considerable period of time to dissipate.

Counsel for the teacher stated that the events which led to the Formal Hearing have been life changing for him and that he keenly wished to make amends and welcomed the opportunity to undergo further counselling or training as considered appropriate by the Panel.

FINDINGS

Whilst misconduct is defined in section 2.6.1 (a) of the Act as:

'conduct of the teacher...occurring in connection with the practice of teaching that is a lesser standard than a member of the public or members of the profession are entitled to expect from a reasonably proficient teacher'

serious misconduct is not defined but must represent a serious departure from the expected conduct of a teacher.

In his Counsel's submission, the teacher accepted that his admitted conduct amounts to conduct that would reasonably incur the strong reprobation of professional brethren of good repute and competence, thereby meeting the NSW Court of Appeal decision in *Qidwai v Brown* [1984] 1 NSWLR 100 test for misconduct. The next question for the Panel was to determine whether this misconduct was serious.

The Institute's Code of Conduct identifies a set of principles outlining the expected professional and personal conduct expected of a teacher. The teacher accepted that his actions as outlined in Allegations 1 and 2 represent clear breaches of principle 1.5,

that teachers are always in a professional relationship with the students in their school, whether at school or not,

which recognises that

teachers hold a unique position of influence and trust that should not be violated or compromised.

The teacher's use of private emails with the student, which were sexual in nature, and his actions, whilst the student was enrolled at the School, clearly contravened the Institute's Code of Conduct. In addition, the teacher's conduct, as outlined in Allegation 2 and as admitted in the Agreed Statement of Facts was a clear and an extremely serious breach of principle 1.5 of the Institute's Code of Conduct and worthy of the strongest condemnation.

The teacher also accepted that his admitted conduct in Allegation 3 was in clear breach of principle 2.1 of the Code of Conduct, namely that the personal conduct of a teacher will have an impact of the professional standing of that teacher and on the profession as a whole. It goes on to state that

although there is no definitive boundary between the personal and professional conduct of a teacher, it is expected that teachers will ... be positive role models in education settings and the community, and not exploit their position for personal or financial gain.

The events of Allegation 3 occurred four days after the student's graduation from school. The significant power imbalance between a teacher and student takes considerable time to dissipate and hence in many ways at that time the young woman, whilst technically not a student at the School in that she had graduated on 18 November 2016, should have been considered still subject to the teacher - student power relationship.

Whilst the Institute's Code of Conduct is currently silent on the expectations of teachers towards recently graduated students, other codes of ethics/conduct both for teachers and other similar professions are more specific regarding the period of time required to have elapsed prior to the establishment of a personal relationship. In fact, the teacher's employer's Professional Behaviour Guidelines to which all staff were required to adhere, and in which they had undergone professional training, explicitly stated that

Employees must not engage in misconduct or sexual misconduct with a student or recently graduated student

and provided examples of behaviour which would constitute either misconduct or sexual misconduct including:

- *Unwarranted or inappropriate touching of students*

- *Suggestive remarks or actions of a sexual nature*

Consequently, the teacher must have been aware that his conduct prior to the student's graduation was in contravention of both the Institute's Code of Conduct and his employing school's Professional Behaviour Guidelines. His conduct following the student's graduation was in clear breach of his employer's requirements. The Panel, however, concluded that the teacher's conduct was in contravention of the expected behaviour of a teacher and undoubtedly, if known, would have brought the teaching profession into disrepute.

Counsel for the teacher acknowledged that the power imbalance between the teacher and the student certainly would not have dissipated by 22 November, and that this represented a continuation of the relationship that had commenced whilst the student was enrolled at the school.

The Queensland College of Teachers provides guidance to teachers with respect to romantic/sexual relationships with former students in their publication, *Professional Boundaries: A Guideline for Queensland Teachers* (The Queensland College of Teachers 2017). Recognising that teachers

...are in a unique position of trust care authority and influence with their students, which means that there is always an inherent power imbalance between teachers and students and that this would take some time to dissipate, it states that

...teachers should be wary of entering such a relationship with any young adult who was formerly a student of theirs, particularly in the first year or two after the cessation of the teacher-student relationship.

Similarly, the Teachers Registration Board, Tasmania (2018) published *Professional Boundaries: Guidelines for Tasmanian Teachers* which states that:

Romantic/sexual relationships with recent former students may breach teacher-student professional boundaries. Where there is a reasonable belief that the emotional intimacy of the relationship developed while the teacher-student relationship existed, a judgement that the teacher abused their position is likely.

It goes on to state that:

A significant factor in teacher-student relationships is the difference in power and authority between the two parties and the usually high level of trust the student and their family places in the teacher. These differences do not suddenly disappear at a specific point in time. They linger as an imbalance between the two individuals and as a potential impediment to their capacity to make decisions in their own and others' best interests. Consequently, a teacher who enters into a romantic/sexual relationship with a former student cannot assume that they will be protected from disciplinary action by claiming a relationship began only after the school term concluded or after final exams finished. Teachers should be wary of entering such a relationship with any young adult who was formerly a student of theirs, particularly in the early years after the cessation of the teacher-student relationship.

In addition, guidelines for other professionals in which there is a power imbalance with those they work, such as psychologists, clearly define a period of time in which sexual relations are prohibited. The Australian Psychological Society's Code of Ethics (2007) explicitly states in C.4.3 that psychologists:

...do not engage in sexual activity with a former client, or anybody who is closely related to one of their former clients, within two years after terminating the professional relationship with the former client.

The Panel is aware that the Institute's Code of Conduct for Victorian Teachers is currently under review and strongly recommends that consideration be given to stipulating a period of time, such as two years, during which the relationship with recently graduated students must remain a professional one.

Consequently, whilst not expressly prohibited by the Institute's current Code of Conduct, the teacher's actions following the student's graduation clearly constitute a breach of principle 2.1 of the Code of Conduct, in that his personal conduct would have been to the detriment of the teaching profession as a whole and was not that of a positive role model in both his school and the community.

Taken together Allegations 1, 2 and 3 as admitted by the teacher represent clear breaches of the Institute's Code of Conduct and supports the view that the teacher's misconduct was serious in nature.

The Victorian Civil and Administrative Tribunal (VCAT) in *Laragy v Victorian Institute of Teaching* [2009] VCAT 2651 considered actions of a teacher that were sexual in nature but did not involve sexual relations

...as wholly inappropriate and the misconduct very serious.

In its decision VCAT went on to state that:

We find it difficult to conceive of a situation where any sort of sexual overtures by a teacher to a student would not constitute serious misconduct.

Similarly, *Queensland College of Teachers v Teacher FDA* [2017] QCAT 224, found that a teacher who had entered into a relationship with a student shortly after the student graduated from secondary school was guilty of serious misconduct.

Consequently, as the teacher's conduct was of a more serious nature than that of *Laragy* [VCAT 2651] and commenced earlier than that outlined in QCAT 224, both of which were found to be serious misconduct, the Panel finds the teacher guilty of serious misconduct.

DETERMINATION

In determining the appropriate penalty, the Panel was mindful of the Institute's key role under Section 2.6.3 (1A) to consider the wellbeing and safety of children and to take into account community expectations. Counsel for the Institute and Counsel for the teacher both indicated that they supported cancellation of the teacher's registration and imposition of a five-year period of disqualification from reapplying for registration, with the option for the Panel to take into account that the teacher has already served nearly two and a half years suspension of his registration.

Cancellation of the teacher's registration and imposition of a five-year period of disqualification was supported by a similar case in Queensland, QCAT 224, in which FDA was involved in a sexual relationship with a recently graduated student for nearly a year, which imposed a five year period of disqualification. In contrast, the teacher's serious misconduct was not as extreme as that described

by Queensland College of Teachers v RGK [2019] QCAT 180, which resulted in an eight-year period of disqualification.

The sanctions imposed by the Panel need to be sufficient to give the public confidence in the Institute's role in protection of the public and especially in ensuring the wellbeing and safety of children and community expectations of the conduct of teachers. They also need to provide a sign to the profession of the importance of professional boundaries and of teachers' professional and personal conduct. The Panel considered an additional five years of disqualification from the date of decision too harsh when considering the period of suspension already served whilst inclusion of the full period of suspension in the period of disqualification would result in an insufficient period of disqualification for the teacher to be able to apply for re-registration as a teacher.

Consequently, the Panel has determined to cancel the teacher's registration and impose a period of disqualification for a period of three years from the date of this decision, which in conjunction with the period of suspension already served, makes the total period of disqualification five years and six months pursuant to sections 2.6.46(2)(j) and 2.6.46(2)(k) of the Act.

Whilst under the Act, the Panel has no power to impose conditions on any application the teacher might make for registration with the Institute once his period of disqualification concludes, the Panel recommends to the Institute that, prior to any reapplication for registration, it requires the teacher to complete the following as evidence of his suitability for registration:

1. He consult a registered psychologist with particular expertise in professional standards, for the purposes of counselling in respect of:
 - a. his emotional self-awareness and the development of strategies to better manage his emotions, behaviour and stress levels
 - b. the development of coping strategies to better handle any future challenging professional or personal circumstances
 - c. a comprehensive understanding of the Institute's Code of Conduct, both the current and any future updated Code, and the professional boundaries required by a teacher and their responsibilities with regard to the safety and wellbeing of young people
2. He provide his treating psychologist with a copy of this Panel's decision at the commencement of his treatment
3. A minimum of ten sessions would be required within a two-year period at the teacher's own cost
4. The teacher would be required to provide the Institute with a report from the registered psychologist at the conclusion of the ten sessions
5. The report from the registered psychologist should set out the psychologist's qualifications, address of practice, confirm that the psychologist has read the Panel's decision, confirmation of the teacher's attendance and matters set out in condition 1.



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HEATHER SCHNAGL, CHAIRPERSON

Heather Schnagl.

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per:
AUDREY BROWN, REGISTERED TEACHER

Heather Schnagl.

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per:
DENISE McLAUGHLIN, PANEL MEMBER