

VICTORIAN INSTITUTE OF TEACHING
DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: OO6

REGISTERED TEACHER: DAA

PANEL MEMBERS

Peter Ryan, Chairperson

Nick Sciola, Registered Teacher

Loula Rodopoulos, Panel Member

ATTENDANCE: The teacher

Ms Janine Garner Counsel Assisting

DATE OF HEARING: 15 July 2004

DECISION OF THE PANEL:

On 5 October, 2004 the Panel decided that the teacher was fit to remain registered as a teacher.

EFFECT OF THE DECISION

This means that the teacher remains registered under the *Victorian Institute of Teaching Act 2001* as a teacher in Victoria.

REASONS

HISTORY

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 he was registered with the Registered Schools Board under section 37 of the Education Act 1958 immediately before the Act was proclaimed.

By letter dated 15 October 2003 the employer advised the Victorian Institute of Teaching (the Institute) that it had taken action against the teacher and that, in accord with Section 26(1) of the Act, it was required to notify the Institute of that action. Documentation that formed part of its internal enquiry was provided by the employer.

On 21 January 2004 the Disciplinary Proceedings Committee, a committee of the Institute Council, decided that this complaint should be referred to a formal hearing. The teacher was sent a Notice of Formal Hearing with all relevant documents attached on 11 May 2004 advising him that the formal hearing was set down for 24 June 2004. The formal hearing was rescheduled to 15 July 2004.

The information the Institute received as evidence of possible serious misconduct or lack of fitness to teach, as set out in the Notice of Formal Hearing was that:

- on 23 February 2001 the teacher sent two emails to his brother using the schools email network
- both emails contained inappropriate language
- on 1 March 2001 the teacher sent an email to his brother in which he wrote:
I was tutoring a young virgin last night, 16yo, and she kept flashing her crotch revealing her soft white panties. I blew immediately. I was that grateful I forgot my payment. I intend going around tonight and stealing them off the clothes line. I'll post them to you if they will fit in an envelope.
- The employer has an email policy that forbids using the employer's property and the email network for matters not related to the employer's business.

THE ISSUES

The issues the Panel must address in this matter are:

- Did the teacher send emails to his brother which contained inappropriate language and comments?
- Did those actions amount to serious misconduct and/or lack of fitness to teach?
- If those actions were 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.

The terms *serious misconduct* and *unfit to be a teacher* are not defined in the Act. The Panel was referred to case law regarding disciplinary proceedings in other jurisdictions.

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 a self respecting 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:

- Letters from the employer dated 3 April 2001 (3), 28 August 2001
- Letters from the teacher dated 29 March 2001, 20 March 2001,

- Letters from the School dated 7 March 2001, 22 March 2001
- Two emails sent by the teacher on 23 February 2001 and one on 1 March 2001
- Memorandum from a third party dated 30 March 2001
- Email message from a third party dated 3 April 2001
- The employer's Internet Acceptable Use Policy and Email Acceptable Use Policy
- Computer Use Statement of the school

In addition, prior to the hearing's commencement, the teacher provided to the Panel:

- A medical certificate from Doctor 1, dated 6 August, 2001
- A medical certificate from Doctor 2, dated 17 July, 2001
- A copy of a letter from Doctor 2 to worker's compensation insurer dated 18 July, 2001
- A statement from an Optometrist, dated 6 August, 2001
- A character reference from a teaching colleague dated 6 August, 2001
- An undated copy of a nomination for "Teacher of the Year" from a third party
- Following adjournment of the hearing and at the request of the Panel, the following documents were provided:
 - A medical report Doctor 2, dated 21 July, 2004.
 - A letter from the Principal of the school the teacher is currently employed at, dated 26 July, 2004
 - A report from Doctor 3, Counselling and Consulting Psychologist, dated 4 August 2004.
 - A report from Doctor 4, Consultant Psychiatrist, dated 9 September, 2004.

A further psychiatric report requested by the worker's compensation insurer during the teacher's Workcover assessment was not made available to the Panel by the insurer.

BACKGROUND TO THE ISSUES

The teacher was a teacher with the school when the alleged events in 2001, subject of these proceedings, occurred. He claims that at the time he was suffering from depression for which he had been prescribed medication since 1998. His medication was changed in July, 2001. Around the year 2000 he claims that his alcohol intake increased and his efficiency as a teacher deteriorated and he experienced increasing difficulties and stresses with his employment at the school from early that year. The Panel understands that these difficulties arose from an apparent breach of his employment conditions, namely his conducting of a private tutoring business. He resigned from the employer on 10 September 2001 and in February 2002 commenced teaching at another school.

OPEN HEARING

At the outset, the teacher requested that the hearing be closed, in accord with section 41(d) and (e) of the Act, because of the intimate and personal nature of the evidence to be presented. Counsel Assisting did not oppose the teacher's request. However, the Panel was of the view that the spirit of the legislation was that the normal course of events should be that a hearing be open. Thus, after consideration, it determined not to close the hearing, on the grounds that there was no identifiable victim who stood to be embarrassed by the proceedings. It was acknowledged that some embarrassment may accrue to the teacher but, given the particular nature of this matter, the Panel believed that, if this hearing could not remain open, then it was difficult to imagine any that could in the future.

THE EVIDENCE

Neither the Institute nor the teacher called witnesses, other than the teacher himself.

The Panel heard evidence, under cross examination and under affirmation from the teacher.

In presenting his evidence with respect to sending of the emails, the teacher

- Acknowledged that the emails in question were sent by him to his brother
- Acknowledged that the emails were sent from the school, on the school property, in contravention of the employer's policy known to him
- Stated that, while he was quite aware that he was contravening policy by using the school computer and network to send the emails in question, his state of mind at the time was such that he "just didn't care"
- Suggested that, as the emails were a private communication, it was difficult for others to interpret them accurately. He asked, "How on earth does anyone understand other people's word?"
- Denied that the "sixteen year old virgin" to whom reference was made in one of the emails was, in fact, an actual person, but was, rather, a fantasy
- Claimed he did not know how old his (teenage girl) students were and that he was not tutoring sixteen year old girls at the time
- Acknowledged that the crude language contained in the emails was typical of the interactions he habitually had with his brother and explained that the e-mails in part referred to family members
- Told the Panel that reference to "stealing underwear from the clothes line" was an in-joke between himself and his brother with its genesis in an earlier private conversation
- Acknowledged that some of the wording in the e-mails (such as "fuckwit" and "virgin vibrating sisters") was inappropriate
- Acknowledged that the writing of such e-mails was "wrong- totally wrong"

In presenting his evidence with respect to his state of mind at the time of sending the emails and afterwards, the teacher

- Claimed that he had a "spotless" twenty five year teaching record – evidence that he was not preying on students
- Suggested that he had an excellent teaching and professional record up until the time of these events

- Indicated that a clash with the principal of his school over issues of his tutoring business had led to a period of clinical depression, with suicidal tendencies, exacerbated by heavy drinking and his use of prescribed anti-depressant drugs resulting in his not thinking “in a logical way”
- Claimed that with a change in his medication his health had improved
- Claimed that, with a change of employment, his professional performance had returned to its previous high standard
- Claimed that he was not the same person that he was three years ago and that he was now fit to teach.

The Panel understood that the teacher considered that there were mitigating psychological health factors that it should take into account when making its determination.

ADDITIONAL EVIDENCE

The Panel, having heard the teacher’s oral evidence sought and received additional information in the form of:

- A current professional reference from the teacher’s present Principal, supporting the “full and ongoing registration” of the teacher. He states that he found him “to be entirely professional, completely dedicated and has undertaken all duties with full diligence. His teaching has been of a very high standard and his relationships with both staff and students has (sic) been without fault.”
- His General Practitioner Doctor 2 confirms that the teacher had attended the medical clinic since March 2000. He confirms the teacher’s account of his depression and medication. He records that a trial of medication after “good mental health through to July 2002” resulted in a relapse of depressive symptoms and he was recommenced on medication in January 2003.
- A Counselling and Consultant Psychologist, Doctor 3 confirms that the teacher attended his service on March 2001, being referred by Doctor 2 for assessment and treatment of depression with somatoform symptoms. The teacher failed to follow through with Doctor 3 who noted nothing remarkable in his presentation and testing undertaken commenting that the teacher reported that he had been drinking more at weekends:- “This was particularly so since a particular incident at school had occurred. As my notes record, the incident involved an email to his brother in which the word ‘fuck’ was written and reference made to a sixteen year old virgin.”
- The psychiatric report, requested by the Panel and provided by Doctor 4 confirms that the teacher did suffer from a depressive disorder in the past, aggravated by alcohol misuse and concludes that “The teacher’s drinking problems are now under control and that there has been a very substantial improvement in his depression.” Doctor 4 further opines that he would be “very surprised indeed were he to engage in similar behaviour in the future” and that he does “not see him as being at risk of exhibiting inappropriately sexualised behaviour directed towards students.” Doctor 4 sought the teacher’s explanation of the “tutoring a young virgin” e-mail as being a joke. The teacher could not explain why he had sent this and the other e-mails through the school system, commenting that he was in a “nihilistic frame of mind” at the time. He readily acknowledged that people may find the content of the emails offensive.

DISCUSSION OF THE EVIDENCE

The Panel accepts that the teacher experienced a period of clinical depression exacerbated by his heavy drinking at the time that he sent the e-mails. It accepts that he now acknowledges the inappropriateness of his actions but questions the depth of his insight into the seriousness of the matter. The Panel is not entirely convinced that the “tutoring a young virgin” e-mail was a joke or a fantasy. It remains concerned about the off-hand and dismissive approach demonstrated by the teacher to issues raised by Counsel Assisting the Panel regarding the seriousness of the issue.

Nevertheless the Panel, on the basis of the available evidence, accepts that the emails in question were a private communication between the teacher and his brother and there was no identifiable victim of the teacher’s indiscretion.

FINDINGS OF FACT

Based on the evidence before it, the Panel made the following findings:

1. The teacher was employed as a teacher in early 2001 at the the school, and was subsequently deemed registered as a teacher.
2. He is a teacher currently registered with the Institute to teach in Victoria.
3. On 23 February 2001 he sent two emails to his brother.
4. The teacher used the property of the employer to send the emails in contravention of the employer’s policy
5. On 1 March 2001 he sent an email to his brother containing inappropriate language.
6. The teacher was suffering at the time from a depressive condition exacerbated by inappropriate use of alcohol and prescribed drugs.
7. He is aware of the inappropriateness of his actions at the time.
8. The teacher was suffering at the time from a depressive condition exacerbated by inappropriate use of alcohol and prescribed drugs.
9. He has addressed his drinking problem and his depressive condition.
10. He is presently teaching at another school.
11. That his current principal supports the full and ongoing registration of he teacher and that at all times the teacher presents in a most professional manner.

CONCLUSION

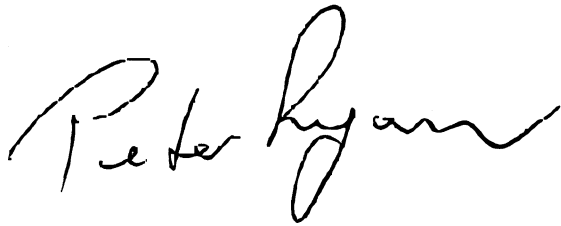
It remains for the Panel to determine whether, in sending the emails in question and using the employer’s property to do so, the teacher has

- engaged in serious misconduct or demonstrated a lack of fitness to teach and
- if so, to determine an appropriate penalty.

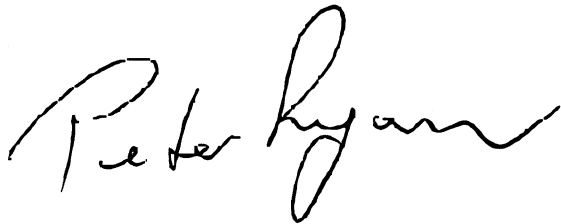
The Panel was of the view that the use of the employer’s property is a breach of the employer’s policy and, as such, is an employment matter, falling outside the jurisdiction of the Institute and of the Panel.

The critical issue in this case is whether by sending the emails, with their particular content, the teacher is guilty of serious misconduct and/or lack of fitness to teach.

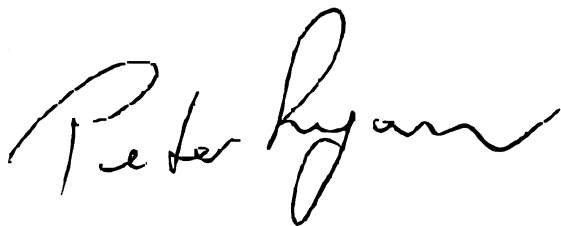
The Panel is of the view that the sending of these emails represents a serious error of judgement on the teacher's part and, in fact, reflects adversely on him. The Panel has also taken into consideration that, on the evidence presented, no student was directly at risk. It has also considered the teacher's account of his state of psychological health at the time and the fact that these events seem to be of a "one off" nature. Thus, the Panel is of the view that the teacher cannot be considered to have engaged in serious misconduct, nor do his actions demonstrate a lack of fitness to teach.



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Peter RYAN, CHAIRPERSON



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for
Nick SCIOLA, REGISTERED TEACHER



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for
Loula RODOPOULOS, PANEL MEMBER