

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 085

REGISTERED TEACHER: Benjamin Andrew TOY

PANEL MEMBERS: Heather Schnagl, Chairperson
Jane O'Shannessy, Registered Teacher
Kevin Pope, Registered Teacher

ATTENDANCE: The teacher did not attend the formal hearing
Gail Hubble Counsel Assisting with Ms C Sherman,
instructing

DATE OF HEARING: 16 April 2009

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

On 16 April 2009 the Panel determined to suspend the registration of the teacher from 16 April 2009 to 31 December 2010.

REASONS

BACKGROUND

The teacher has been a registered teacher with the Victorian Institute of Teaching (the Institute) since 31 December 2002.

By letter dated 21 September 2007, the employer notified the Institute that it had taken action in response to allegations of serious misconduct and/or unfitness to teach of the teacher. The teacher resigned from his employment at the school, with effect from 14 September 2007.

The Institute conducted an inquiry to assess whether the teacher was guilty of serious misconduct and/or was not fit to teach.

The Notice of Formal Hearing dated 15 August 2008 set out the following allegations:

In 2007, whilst employed as a registered teacher at the school, the teacher:

1. Engaged in inappropriate use of his laptop computer in that:

1.1 Having the movies set out in 1.1(a) and 1.1(b) below on his laptop computer, took his laptop computer to school in circumstances where students and staff could access the movies:

- a. Movies in a Lime Wire Folder entitled:
- i. 'BB.mpeg'
 - ii. 'RS.mpeg'
 - iii. 'CSS7.mpg'
 - iv. 'Jenna Jameson & Stacey Valentine ...'
 - v. 'Best 18yo Petite Blond Lolita blowjob...'
 - vi. 'Screaming orgasm – Chick squirts cum....'
 - vii. 'This hot college chick is a super wild fuck....'
 - viii. 'College invasion extract....'

- b. Movies in the hard drive entitled:
- i. VTS_01_2.VOB
 - ii. VTS_01_3.VOB
 - iii. VTS_01_4.VOB

1.2 Having the movie/file titles set out in 1.2(a) below on his laptop computer, took his laptop computer to school in circumstances where students and staff could read the titles:

a. Movies titles on the hard drive, as follows

<u>Name</u>	<u>Date Modified</u>
i. 'Adult movies...'	23 August 2008 3.53PM
ii. 'Blonde teen lesbian...'	23 August 2008 3.47PM

iii. 'Hot girls masturbation...'	23 August 2008 3.53PM
iv. 'Some for jenny...'	22 August 2007 3.39PM
v. 'Female ejaculation...'	23 August 2007 1.16PM
vi. 'Female ejaculation...'	23 August 2007 1.17PM
vii. '5 Young student...'	22 August 2007 3.38PM
viii. '69 Lolitas lesbians...'	22 August 2007 3.35PM
ix. 'Brianna Banks...'	23 August 2007 4.12PM
x. 'Lesbian Lesbian...'	22 August 2007 3.35PM
xi. 'Lesbian – Sap...'	22 August 2007 3.35PM
xii. '2CD Girls lesbian...'	22 August 2007 3.35PM
xiii. 'Sex training - S...'	23 August 2007 1.16PM
xiv. 'Cum swallowing...'	23 August 2007 4.17 PM

1.3 Used his laptop computer at school, and during times when students and staff could reasonably be expected to be at school:

- a. To download the movies/files set out in 1.2(a) above.

After considering the evidence at a Formal Hearing on 15 September 2008, a differently constituted Panel concluded that the allegations were substantiated and determined that the teacher was guilty of serious misconduct and was unfit to teach for the term of his suspension.

On 15 September 2008, the Panel determined under section 2.6.46 of the *Education and Training Reform Act 2006* that it would suspend the registration of the teacher from that date until at least 31st December 2008 and impose the following conditions:

1. That the teacher undertake counselling with a registered psychologist and provide the Panel with a report from his treating psychologist before 31 December 2008 which indicates that he has successfully addressed emotional issues related to his serious misconduct which impedes his effectiveness as a teacher.
2. That the teacher provide the Panel with an undertaking that states that he has a clear and comprehensive understanding of the conduct and behaviour required of a teacher as outlined in the Victorian Institute of Teaching's Code of Ethics and Code of Conduct. That understanding is to be provided in writing.

The teacher was advised by letter dated 6 January 2009 that the Institute had not yet received the report from his treating psychologist, as required by condition 1. The teacher was reminded that a failure to comply with the conditions on his registration would constitute a failure to comply with the Panel's determination.

In a letter dated 7 January 2009 and received by the Institute on 13 January 2009, the teacher advised that he no longer wished to be registered with the Institute.

The matter was referred to the Disciplinary Proceedings Committee ('the Committee') on 18 February 2009 and under section 2.6.47 of the Act, the Committee decided that the teacher should be treated as if he is a registered teacher for the purposes of conducting an

inquiry under section 2.6.53(3). According to section 2.6.53(3) of the Act, a registered teacher who does not comply with a determination under section 2.6.46 is guilty of serious misconduct. The Committee decided to refer to a formal hearing the issue of whether the teacher had complied with the conditions placed on his registration.

DOCUMENTS CONSIDERED

The Panel was provided with the following documents:

- Hearing book and attachments, including the Notice of Formal Hearing and attachments (Exhibit A)
- Prakash v Health Care Complaints Commission [2006] NSWCA 153 (16 June 2006) (Exhibit B)
- Victorian Institute of Teaching v Atkins Decision No 45 (Exhibit C)

THE EVIDENCE

The teacher did not attend the Formal Hearing nor was he represented at the hearing. Consequently both Counsel Assisting the Institute and the Panel were mindful of the principles of natural justice and were careful to ensure that the proceedings were fair at all times. The Panel requested confirmation that the teacher has received the formal notice of hearing and a complete copy of the hearing book. Counsel Assisting outlined the documentation, which showed that the hearing papers had been sent to the teacher by registered mail on 6 March 2009 and the Institute had received advice that these had been collected by the teacher on 12 March 2009. The instructing solicitor also had a telephone conversation with the teacher on 8 April 2009 from which it was clear that the teacher had been given an opportunity to attend the hearing and that he had made the decision he did not wish to participate in the hearing.

The Panel also noted that the Institute had decided to continue with its inquiry even though the teacher had withdrawn his registration from the Institute. Whilst the teacher had notified the Institute in a letter dated 7 January 2009 that he no longer wished to be registered with the Institute, the Disciplinary Proceedings Committee of the Institute decided on 18 January 2009 that a formal hearing should be held given that the teacher had allegedly not complied with the conditions on his registration.

Counsel Assisting spoke to the chronology of events as outlined in the hearing book (Exhibit A). On 15 September 2008 the teacher, on the basis of his own admissions to all three allegations, was found guilty of serious misconduct and not fit to teach. The Panel accepted the fact that the teacher displayed genuine contrition and remorse for his behaviour. He recognised that he had seriously abused the trust placed in him by his colleagues and consequently forfeited their respect. He also understood that his behaviour seriously compromised his relationships with his students.

In reaching its determination at this time the Panel, mindful of the teacher's personal circumstances at the time of his serious misconduct, took specific note of The teacher's

own undertaking, namely that he would be willing to attend counselling to ensure his continuing registration as a teacher. Consequently rather than cancelling his registration, the Panel imposed a period of suspension until 31 December 2008 with the two conditions as already outlined.

It is therefore extremely disappointing and of very serious concern that this second hearing heard evidence that the teacher had not complied with, nor did he appear to have any intention to comply with, either of the conditions imposed upon his registration by the first Panel. The Panel heard evidence that the Institute had not received the report from the teacher's treating psychologist by 31 December 2008 and nor had the Institute received an undertaking from the teacher that he understands the ethical requirements that a teacher is to comply with according to the Institute's Codes of Ethics and Conduct.

The Panel was also advised that the teacher had resigned from the Institute in January 2009. In a letter dated 7 January 2009 the teacher wrote he had intended fulfilling the conditions on his registration up until a newspaper article was published discussing his case. The teacher considered that this newspaper article would prevent him from ever getting another teaching job and as such he wished to let his registration lapse and never again return to teaching.

DISCUSSION OF THE EVIDENCE

Of particular concern to the Panel was that the teacher had not complied with the first condition imposed on his registration, namely that he undertake counselling with a registered psychologist and provide the Panel with a report from his treating psychologist before 31 December 2008 which indicates that he has successfully addressed emotional issues related to his serious misconduct which impeded his effectiveness as a teacher. Given that it was in fact the teacher himself who volunteered this condition as a way to maintain his registration as a teacher in the initial hearing, the Panel had no option but to view the teacher's failure to comply with this condition in the most serious light.

Whilst it was natural for the teacher to be distressed by the adverse publicity that was generated in response to his original hearing, this was not considered by the Panel as an acceptable excuse for his failure to comply with the conditions imposed on his registration. Rather than accepting the consequences of his actions and participating in the required counselling and giving the required undertaking, the teacher appears to have decided that 'it is all too hard' and tried to make the matter 'go away' by resigning from the Institute.

Whilst the teacher claimed that his original serious misconduct was 'an occasional lapse of judgement', the initial Hearing Panel declined to agree and accepted Counsel Assisting's argument that his behaviour was not of a fleeting or transitory nature but that it occurred frequently over a sustained period of time in ways which showed a cavalier and careless attitude to the consequences of them (the videos on his laptop) being accessed by students and staff.

The Panel considered whether the first condition imposed on the teacher's registration, was unduly onerous. Given the serious nature of his initial serious misconduct, although not illegal, the Panel found that the condition imposed was not onerous and could reasonably be achieved in the time frame given. The condition was appropriate because it enabled the community to regain trust in the teacher's ability to undertake the duties of a teacher.

The Panel also considered whether the teacher's failure to comply with the first condition was due to an acceptable reason and whether the failure was inadvertent or deliberate. The Panel found that whilst the teacher may have initially intended to comply with the condition, once there was adverse publicity regarding his behaviour, his initial preparedness to undergo personal counselling was no longer there and that he had no intention of complying with the condition. The Panel agreed with the suggestion of Counsel Assisting that there was no reasonable likelihood of the teacher complying with this condition in the foreseeable future and hence they were not prepared to reimpose the original conditions as had occurred in the previous case of *Bill Atkin [2007] VIT 45*.

The Panel further considered whether the teacher had understood the condition imposed. Given that the first condition was actually suggested by the teacher himself, there can be no doubt that he fully understood the requirements of this condition.

Whilst the teacher has as yet also not complied with the second condition, there was no time limit imposed on this and hence in theory the teacher had unlimited time to comply with this condition, although his registration was not able to be resumed prior to the Institute receiving this undertaking. Legally it would be presumed that this condition ought to be complied with within a reasonable time limit, and certainly prior to the lifting of the suspension of the teacher's registration. However, it could be argued that the teacher may yet intend to comply with this condition and hence the Panel made no finding with respect to the second condition.

In *Coroneos v Medical Board of Qld [2003] QCA 269 Davies and Williams JJA and Atkinson J* referred to the tribunal decision and reasons in which it was stated that the purposes of disciplinary proceedings (with respect to health professionals).

“are to protect the public, to uphold standards of practice within (health) professions and to maintain public confidence in health professions.”

The tribunal went on to say, with respect to breaches of conditions

“If medical practitioners are allowed to ignore conditions imposed by the very tribunal set up to discipline registrants then it will be impossible for the Medical Board or any Board of a like nature to uphold standards of practice within the profession.”

In a similar vein if the Victorian Institute of Teaching permitted teachers to ignore conditions imposed by its disciplinary procedures on registered teachers, it too would find it difficult to uphold the standards of professional practice and risk losing public trust in the teaching profession.

In *Prakash v Health Care Complaints Commission [2006] NSWCA 153 Santow JA* at paragraph 45 refers to a statement adopted by the tribunal from a decision of a Medical

Tribunal in Re Dr Than Le (Medical Tribunal decision, 20 September 2001 at 46 para 95). The Tribunal stated that

“Particularly when imposed in a disciplinary context, such restrictions are not lightly imposed nor may they be treated lightly. Any practitioner whose registration is subject to conditions could not reasonably hold any view of those conditions other than they must be scrupulously observed.”

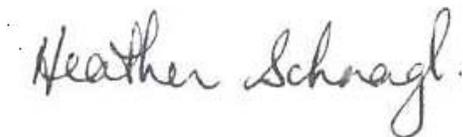
Consequently the Panel is required to consider a breach of the conditions imposed on a teacher’s registration in the most serious light.

FINDINGS UNDER SECTION 2.6.46(1) OF THE ACT

The Panel found that the teacher had not complied with nor did it appear that he was likely to comply with either of the conditions imposed on his registration at the original hearing. Given the lack of clarity regarding the time frame required for the teacher to comply with condition 2, the Panel restricted its finding to condition 1. Consequently the Panel found that the teacher is guilty of serious misconduct for failure to comply with condition 1, which was imposed on his registration on 15 September 2008.

If the teacher was currently registered with the Institute, the Panel would have imposed a significant period of suspension on his registration until 31 December 2010 and reimposed both the original conditions to be completed by this date.

As the teacher is currently not registered as a teacher with the Institute, the Panel determined to suspend the teacher’s registration until 31 December 2010. The effect of this decision is that should the teacher wish to resume his teaching career, he is not eligible to re-apply for registration as a teacher prior to 31 December 2010. This Hearing Panel agreed with the findings of the original Panel that if the teacher wished to return to teaching that he should undertake counselling of a personal rather than of a professional nature to enable him to better cope with the emotional consequences of his behaviour. Given that the Panel is not able to impose conditions where a teacher is no longer registered, it is strongly suggested to the teacher that, prior to making any reapplication for registration as a teacher, that he needs to demonstrate that he has addressed the initial Panel’s concerns regarding his personal circumstances which led to his initial serious misconduct.



HEATHER SCHNAGL, CHAIRPERSON

Heather Schnagl.

per:
JANE O'SHANNESSY, REGISTERED TEACHER

Heather Schnagl.

per:
KEVIN POPE, REGISTERED TEACHER