

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 102

REGISTERED TEACHER: ACS

PANEL MEMBERS: Jane O'Shannessy, Chairperson
Terry Hayes, Registered Teacher
Anne Farrelly, Registered Teacher

ATTENDANCE: The teacher was represented by Ms A Duffy, Barrister, with Mr D Matson instructing
Ms S Bingham Counsel Assisting with Ms N Gingold, instructing

DATE OF HEARING: 28 July 2010

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

On 2 August 2010 the Panel determined that the teacher remains a registered teacher.

REASONS

BACKGROUND

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

By letter dated 22 June 2009, the principal of the school notified the Institute that they had taken action in relation to the alleged serious misconduct and/or lack of fitness to teach of the teacher.

The matter was referred to the Disciplinary Proceedings Committee (the Committee) of the Institute on 22 July 2009 and the Committee decided to refer the matter to an investigation.

On 16 December 2009 the Committee considered the Investigator's report and decided to refer the matter to a Formal Hearing.

A Notice of Formal Hearing dated 16 June 2010 was served upon the teacher by registered post on 18 June 2010.

THE ALLEGATIONS

The allegations of serious misconduct and/or lack of fitness to teach as set out in the Notice of Formal Hearing are:

Whilst employed as a registered teacher at the school, the teacher:

1. In 2009, violated his professional relationship with students, including:
 - a. On or about 23 April 2009, used sexual innuendo and/or had a conversation of an inappropriate nature with student 1 in the presence of another female student, student 2, in circumstances where he:
 - i. stopped student 1 and student 2 while they were walking on the top floor of the school and said to student 1 words to the effect of: "I saw you in town A during the holidays. I saw this girl walking from behind and I thought to myself that looks nice. When I drove past I saw it was you." He then laughed and walked away from student 1 and student 2.
 - ii. then, when student 4 queried whether he heard the teacher's comment to student 1 correctly, the teacher said to him "you didn't hear anything" or words to that effect. The teacher then laughed again.

- b. On or about 27 April at approximately 2.45 p.m., in the changeover between period 6 and 7, used sexual innuendo and/or had a conversation of an inappropriate nature with Year 12 student, student 3, in circumstances where he followed her into a classroom and said, in reference to her nose piercing, words to the effect of:
 - i. "Oh, so you are a rebel."
 - ii. "Have any of the other teachers ticked you off yet?"
 - iii. "If any other teachers comment on it then tell them that this is your good piercing and your other piercing can't be seen as it is in a place where only your partner can see."
 - iv. "No, no even better. Tell them that your Brazilian waxer has to take care not to damage the piercing when she is waxing you."

THE EVIDENCE

At the commencement of the hearing Counsel Assisting tabled a statement of agreed facts related to Allegation 1(a). The statement reads as follows:

On or about 23 April 2009, whilst employed as a registered teacher at the school, the teacher

- a. stopped female Year 12 students, student 1 and student 2, while they were walking on the top floor of the school
- b. said to student 1 words to the effect of "I saw you in town A during the holidays. I saw this girl walking from behind and I thought to myself that looks nice. When I drove past I saw it was you."
- c. then, when Year 12 student, student 4, queried whether he heard the teacher's comment to student 1 correctly, the teacher said to him "no you didn't" or words to that effect.

On the basis of the statement the Panel determined not to call student witnesses to give evidence related to that allegation.

Student 3 gave verbal and written evidence under oath.

Student 3 told the Panel she was currently studying at a tertiary institution. At the time of the incident that forms the basis of Allegation 1(b) she was a Year 12 student at the school which she had attended since 2004.

Student 3 stated that on 27 April 2009 she and the teacher walked towards the computer room where she was to do a class in the last period of the day. The teacher commented on her recent nose piercing and said he did not like them. Student 3 said that she replied that she liked being different and that some people thought that she was always perfectly in uniform. The teacher had replied with something like "Oh, so

you are a rebel?" She had replied in a dismissive tone to get rid of him, "No I just wanted something different." She then walked into the computer room and sat down at a computer. The teacher also came into the room, went to the teacher's desk and then said to her something like "Have any of the other teachers ticked you off yet?" She had replied "No, but one had acknowledged it (the nose piercing) was there." The teacher had then said that if any other teachers asked about the nose piercing she should say that my other piercing is in a place that only my partner can see. Student 3 said she had laughed awkwardly and said that her only other piercings were in her ears. Student 3 said that the teacher had replied "No, no, even better. Tell them that your Brazilian waxer had to take care not to damage the piercing when he is waxing you." Student 3 said that the teacher was standing behind her when he made this remark. At this point other students were starting to arrive for the class and the teacher picked up things and left the room.

Student 3 stated that she was so shocked by what the teacher had said that she had asked another student, student 5, who was in the room at the time when the teacher made his remarks had he heard what the teacher had said. Student 5 had had his i-pod in his ear and said that he was not listening.

Student 3 said that the teacher's comment made her feel "cornered, vulnerable and pretty disgusted." She had recorded her reactions on Facebook. Her sister had seen the comments and mentioned them to their mother who contacted the vice-principal who then interviewed her on 30 April. She said the vice-principal asked her if this kind of thing had happened before and she had told him of a conversation the teacher had had with her friend student 1 a week or two earlier. Student 3 stated that the vice-principal kept her informed of what was happening and some days later asked her if she was sure about the words used by the teacher about the Brazilian waxer. She had replied that they were the exact words.

Under cross examination student 3 disagreed with some of the teacher's recollections. She said he had had made the remark about wanting to be a rebel and had followed her into the room. She had not been in the room beforehand. She had no doubts that he made the remarks about the Brazilian waxer because she was sure she would have remembered something as "distinctive as that." She also said she did not see the teacher collect materials from the colour printer.

The vice-principal gave verbal and written evidence under oath.

The vice-principal is currently the Principal at the school. At the time of the incidents described in the allegations he was vice-principal. One of his duties was responsibility for student wellbeing including staff-student relationships.

The vice-principal stated that the school has its own procedures and protocols for staff-student relationships available to staff electronically and in printed form. As well the staff had been alerted to ways of accessing the Institute's Code of Conduct and an Institute Field Officer had spoken to staff at a professional learning activity on professional conduct.

The vice-principal stated that on 30 April, 2009 he received a phone call from student 3's mother alleging that the teacher had sexually harassed her daughter. The vice-principal then interviewed student 3 who stated the teacher had spoken to her on 27 April during a changeover between lessons.

Student 3 said the conversation had initially been about nose piercing at the school and then proceeded to the point where the teacher had said that if any other teachers commented about her nose piercing she should say that the nose piercing was her good one and that her other piercings could not be seen as they were in a place where only her boyfriend or a Brazilian waxer could see them. The vice-principal said that student 3 had said she felt very uncomfortable about the conversation with the teacher and he subsequently asked her to provide a written statement about the incident, which she did.

The vice-principal added that during his discussion with student 3 she made references to comments made by the teacher to other students with specific reference to an encounter between him and student 1. Student 1 subsequently confirmed this and her statement was corroborated by student 2 and student 4.

The vice-principal states that he and the principal had their first formal interview with the teacher on 6 May at which the principal informed the teacher that there was a matter under investigation regarding the sexual harassment of two students. The teacher was provided with the school policies related to sexual harassment, professionalism, equal opportunity and bullying and harassment, and informed of the procedures to be followed. The vice-principal said he outlined the allegations made by both students and the teacher stated that the allegations were accurate. The principal then informed the teacher that he would be suspended from his teaching duties on full pay until such time as the allegations had been fully investigated, and that he was entitled to have a representative at future meetings.

The vice-principal said that at a meeting on 11 May at which the teacher was accompanied by the union representative, the principal proceeded to interview the teacher about the allegations raised by student 3. In response the teacher said he agreed with the allegations with the exception of the alleged remark regarding the Brazilian waxing. The teacher stated that he could not recall making such a remark. The vice-principal stated that the principal informed the teacher that he (the vice-principal) would re-interview student 3 regarding the alleged remark.

The vice-principal said that the principal then interviewed the teacher about the allegations raised by student 1. In response the teacher said that the allegations were accurate and, when asked why he had elected to make such a comment to student 1, he replied that the comment was complimentary, not sexually motivated. The vice-principal said it was agreed that he would interview student 1 and the other students present when the teacher made the alleged comment.

The vice-principal stated that at a meeting on 12 May, attended by himself, the union representative, the principal and the teacher, the principal tabled a summation of the statements provided by the students. In it student 3 was clear and definite in her

account of her conversation with the teacher. The outcomes of the interviews with the other students were also presented. In them the students clearly recalled the comments by the teacher. The vice-principal said that the principal then re-interviewed the teacher about the statement provided by Student 3. The teacher stated that he did not recall making a remark about Brazilian waxing despite have admitted that all the allegations were accurate in the interview of 6 May. The teacher stated that he did not recall his statement and if he had stated that it would have been because he was motivated by stress at the time. The vice-principal said the principal then re-interviewed the teacher about the statements provided by the other students. The teacher again denied his comment to student 1 was sexually motivated but had been purely complimentary. The vice-principal said that the principal stated that he believed the allegations raised by the students were accurate and that he needed a short period of time to reflect on how the school would bring the matter to closure.

The vice-principal stated that at a meeting on 18 May, attended by himself, the principal, the teacher and the union representative, the principal stated that the school viewed the matters alleged as extremely serious. The teacher then made a statement that regret on his part would be an understatement, that he had thought about the matter a lot and “town A would be a tough place to be.” On behalf of the teacher, the union representative sought an exit package comprising a monetary component and a reference from the principal. The teacher offered to resign his position at the school and subsequently tendered a letter of resignation on 22 May.

The principal gave verbal and written evidence under oath.

The principal is currently the Principal of school 2. At the time of the incidents involved in the allegations he was Principal of the school.

The principal said that the teacher began as an IT teacher at the school in 2005. He said that in 2008 the school had advertised for an e-learning coordinator. As there had been no strong external candidates he had approached the teacher to accept the position on a short term basis though it had not been possible to offer the teacher the time release associated with the position because of his already committed teaching allotment. The principal said he believed that by May 2009 it was evident that the teacher was struggling with his workload.

The principal reiterated what the vice-principal had stated regarding the series of interviews with the students and the teacher, their content and outcomes. In his verbal evidence the principal stated that student 3 had been questioned in his presence about the teacher’s alleged remark about the Brazilian waxer and had reiterated her statement in a very clear and matter of fact fashion.

The principal stated that he had been comfortable providing the teacher with a reference related to his subject knowledge, which was very strong.

The teacher gave evidence under oath.

Before giving evidence the teacher provided the Panel with his curriculum vitae which attested to a 25 year career in a variety of state, Catholic and independent schools, as well as sessional teaching at TAFE and university.

He is currently employed at school 3 on a six-month contract and provided references from two experienced teachers there, teacher 1 and teacher 2. Both teacher 1 and teacher 2 affirmed that the teacher had informed them of the disciplinary proceedings against him and, having read the allegations believed them to be "out of character" and "an aberration of character" given what they had observed of the teacher's professional behaviour in the time that they had worked with him.

The teacher also provided the Panel with reports from the two psychologists he had been seeing since the incidents in question, psychologist 1 and psychologist 2. Psychologist 1 stated in his report that the teacher had seen him four times for psychological counselling during May and June 2009 because of "anxiety, depression and panic disorder" as a result of the disciplinary action taken against him.

Psychologist 2 stated that the teacher has been in counselling with him since March 2010. He said he found the teacher to be "an honest and straightforward person whom I believe to be a man of genuine integrity" who "fully acknowledges what he said at the time (to the students) and that what he said was unprofessional and inappropriate."

In relation to Allegation 1(a) the teacher said that student 4 was a school leader who had a medical condition. The teacher said he responded to him in the incident the way he did to him in class, that is by being extremely literal and by answering the question exactly as asked.

In relation to Allegation 1(b) the teacher stated that he had gone to collect materials related to a forthcoming interview with the principal about his workload from the only colour printer in the school which was located in the computer room where the incident took place. He said he had unlocked the computer room and found student 3 and another student already present in the room. Student 3 said that she was there doing some printing. The teacher said, although he had not taught student 3 since she was in Year 8, the school had a strong sense of community and one spoke to all students as one moved around.

The teacher said that the school had very strict rules about nose piercing and he asked student 3 why she had done it and if anyone had commented on it. He said, as he recalled, it was student 3 who said she said she "wanted to be a rebel in a little way" or words to that effect. He had made a remark about piercing in places that other people could not see but could not recall making a remark about Brazilian waxing. The teacher said he realized that his remarks were definitely inappropriate but he had not intended them to convey sexual connotations or to be unpleasant. He had had in mind belly button not genitalia piercing.

The teacher said he was aware of the inappropriateness of his comments within minutes, in part because of student 3's facial expressions in reaction to them and had no reason to believe that student 3 would not have felt embarrassed and mortified. Back in his office he said he had said to himself that what he had said was really stupid and he was upset that he had made a gaffe of that nature. He did not consider that going back to talk to student 3 would have been a sensible move. As well he was focused on his forthcoming interview with the principal regarding his workload.

Under cross examination from Counsel Assisting the teacher conceded that a reference to where only a partner could see body piercing could be taken to have sexual connotations. He also agreed that the comment he made to student 1 could be seen in a similar light even if that was not his intention.

The teacher also insisted that student 3 was already in the room and he had made his remarks not when he was standing behind her but as he moved towards the door to leave. He said he could not recall other students entering the room.

The teacher stated that he had made the remarks he conceded in the incidents at a time when he was under a great deal of stress because of his workload, as well as the fact that he had taken on an extra job to pay for his daughter's school fees. He had wanted to ensure that e-learning would be beneficial to all students but felt he was not coping even though he had returned to school after the term holidays determined to be positive and "jolly." He had subsequently made an appointment with the principal to discuss his workload.

The teacher informed the Panel that after the incidents he had sought a referral from his doctor for psychological counselling (from psychologist 1) to better understand what had happened, why he had made the comments and to make sure he did not do so again. He had subsequently transferred to another psychologist, psychologist 2, closer to his home and workplace to address the following priorities: one, to cope with the stress related to the forthcoming panel hearing; two, to understand why he had behaved as he did; and three, to focus on issues to be dealt with after the panel hearing. The teacher stated that he believed a similar situation as described in the allegations could not arise again. He was upset that he had upset both students by his remarks. He realised that he had been overly familiar with them and should not be talking to them as their friends might.

The teacher said he enjoyed teaching and "getting kids to learn", especially at school 2 where students had learning difficulties. He felt confident about teaching students but was now more cautious about talking to them about personal matters.

The teacher said that he had been aware of the policies and procedures at the school relating to staff-student relationships since he joined the school in 2005. Regarding the Institute's Code of Conduct, he said he would have looked at it when it was being developed and considered it the kind of professional reading necessary to keep up to speed about professional behaviour.

DISCUSSION OF THE EVIDENCE

The Panel welcomed the teacher's admission, despite his disputing some of the facts in Allegation 1(b), that his behaviour and comments to the female students, especially to student 3 were overly familiar and inappropriate. The Panel believed he now understood that, while he insisted that he intended nothing sexual by his remarks, that they could be misconstrued and caused considerable distress to the students. The Panel was of the opinion that his behaviour contravened both the Institute's Code of Conduct in relation to the need to maintain a professional distance with students and the school's own procedures relating to staff-student relationships especially the advice regarding "the need to take measures to avoid situations that are open to misinterpretation such as minimizing ambiguity in gestures and words." The Panel believed the teacher now had a clear understanding of the distinction the Code of Conduct makes between a teacher being friendly towards students and being a friend of students.

His comments about body piercing were of the intimate kind that a friend may have a right to make but a teacher never does.

The Panel also viewed sympathetically the fact that the teacher had undertaken psychological counselling, of his own volition, the better to understand his behaviour and to ensure that such situations did not occur again.

The Panel noted that there were discrepancies between student 3 and the teacher's accounts regarding certain facts related to the incident that formed the basis of Allegation 1(b). These discrepancies were in relation to whether the teacher had followed student 3 into the computer room after speaking to her in the corridor or whether student 3 was already in the room; whether the teacher made his remarks as he was leaving the room or whether he said them while standing behind her; whether the teacher or student 3 used the term "bit of a rebel"; and most importantly, whether the teacher made the remark about Brazilian waxing.

The Panel found student 3's account of the incident the more credible one. She found the teacher's remarks sufficiently offensive to immediately express her affront and disgust on Facebook and then provided a clear recall of what he said in her first statement provided to the vice-principal on 30 April. She offered a clear reiteration of the incident in further interviews with school personnel and the Institute investigator. Regarding the "Brazilian waxer" comment she said she was not mistaken about something as "distinctive as that." By contrast the teacher's memory of the incident was selective: he was sure of some matters, but could not remember or recall others.

The Panel also commended the school authorities for the punctilious way in which they conducted the investigation, giving due weight to both the students' sensitivities and the teacher's rights.

FINDINGS UNDER SECTION 2.6.46(1) OF THE ACT

The Panel found both Allegation 1(a) and Allegation 1(b) proved, largely on the basis of the teacher's own admissions. The teacher described his behaviour as inappropriate. The Panel would go further and believes that he transgressed the professional relationship that the community, parents, students and the profession itself expect of teachers in their dealings with students.

The Panel determined that the teacher's behaviour amounted to misconduct but did not constitute serious misconduct, and he remained fit to teach.

In making its determination that the teacher's behaviour amounted to misconduct rather than serious misconduct the Panel was mindful of the ruling in *Kellam J in Parr v Nurses Board of Victoria VCAT* (2 December 1998):

"In my view the question of whether or not a nurse has engaged in unprofessional conduct of a serious nature must depend on the facts of each case. Clearly such conduct would not be serious if it was trivial, or of momentary effect only at the time of the commission or omission by which the conduct was so defined. It must be a departure, in a substantial manner, from the standards, which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure."

The Panel does not want to dismiss or trivialise the inappropriate nature of the communication with the students. It sees it as a lapse of judgement on the part of the teacher. The Panel also recognised that there were positive components in the teacher's response to the incidents, both immediately after their occurrence, and in his subsequent behaviour.

These included:

- his apology to student 1 immediately after the incident in Allegation 1(a)
- his insight into the inappropriateness of his behaviour and his admission of such
- his remorse at having caused distress to the students
- his seeking of professional assistance to better understand his behaviour and to ensure that it would not reoccur
- his full cooperation with both the school and Institute investigations and the panel hearing.

The Panel also recognised that the incidents occurred close together at a time when the teacher was feeling a considerable degree of stress because of his workload. While not in any way condoning this as an excuse for his behaviour the Panel accepted that these were the only blemishes in a 25 year teaching career and that two of his colleagues, on

the basis of what they had observed of his professional behaviour, were prepared to consider them “out of character” and “an aberration of character.”

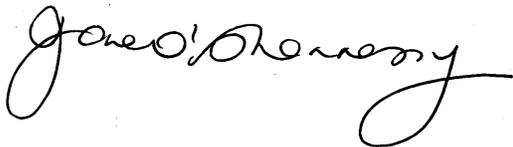
The Panel does not believe that the teacher’s conduct was of a ‘continuing and persistent nature’. Instead it sees it as a momentary aberration in his teaching career.

In determining that the teacher remains fit to teach, the Panel reflected on the decision in *Davidson v Victorian Institute of Teaching* [2007] VCAT 920 in which it was noted that “in relation to lack of fitness to teach there is a perception that the conduct complained of is of a continuing and persistent nature; that it is conduct which throws doubt on how the teacher will conduct himself in the future; and there is a perception that the person should not be in a position of authority and trust with children because their whole approach to teaching and children in their care is profoundly and irretrievably flawed.”

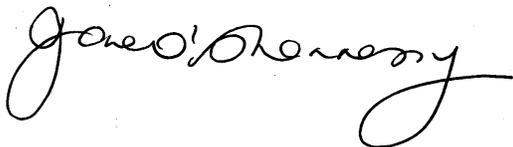
The Panel determined that the teacher remains registered as a teacher.



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JANE O'SHANNESSY, CHAIRPERSON



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per:
TERRY HAYES, REGISTERED TEACHER



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per:
ANNE FARRELLY, PANEL MEMBER