

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 094

REGISTERED TEACHER: Martin John LIVINGSTON

PANEL MEMBERS: Susan Halliday, Chairperson
Anne Farrelly, Registered Teacher
Paul Wilhelm, Registered Teacher

ATTENDANCE: The teacher was represented by Ms Trish Riddell, Barrister, with Ms Fleur Dillon, solicitor instructing
Ms Gail Hubble, Counsel Assisting with Ms K Galanos instructing

DATES OF HEARING: 8 & 9 October 2009,
8 & 9 December 2009
21 December 2009 (viewing) and
25 February 2010

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

On 7 May 2010 the Panel decided to cancel the registration of the Teacher from 7 May 2010.

ORDERS UNDER SECTION 2.6.45 OF THE EDUCATION AND TRAINING REFORM ACT 2006 (THE ACT):

The Panel orders pursuant to section 2.6.45(d) and (e) of the Act that:

1. the hearing into the serious misconduct/fitness to teach/serious incompetence of the teacher, a registered teacher, be closed to the public because of the intimate, personal or financial nature of the evidence.
2. the identity of the following witnesses not be published or broadcast:
 - Principal 1
 - Student 1
 - Student 1's mother
 - Student 2
 - Teacher 1
 - The School Counsellor
 - Teacher 2
 - Teacher 3
 - Witness 1
 - Witness 2
 - Witness 3

NOTE – The Panel order did not cover the following witnesses

- The Detective Senior Constable
- Principal 2

The Panel orders pursuant to section 2.5.45(f) of the Act that:

in the hearing into the serious misconduct/serious incompetence/fitness to teach of the teacher, a registered teacher, any information that might enable the teacher to be identified prior to the making of a final determination must not be published.

REASONS

BACKGROUND

The Teacher has been a registered teacher with the Victorian Institute of Teaching (the Institute) since 15 December 2004.

By letter dated 23 July 2008, the school notified the Institute that it had taken action against a registered teacher, the Teacher.

In accordance with the *Education and Training Reform Act 2006* (the Act) the matter was referred to the Disciplinary Proceedings Committee (the Committee) of the Institute on 3 December 2008 and the Committee decided to refer the matter to an investigation.

On 20 May 2009 the Committee considered the Investigator's report and decided to refer the matter for a Formal Hearing.

A Notice of Formal Hearing dated 25 August 2009 was served upon the Teacher on 20 September 2009.

THE ALLEGATIONS

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

1. *During 2007 and 2008, whilst employed as a registered teacher at the school), the teacher:*
 - Engaged in inappropriate contact, including physical contact with a female student of the school, student 1, in that he:
 - a. On or around 7 May 2008, during school hours, while student 1 was in his office doing school work, called her 'sweetie' and 'darling.'
 - b. On or around 8 May 2008, while walking in the car park with student 1 after school, whispered to her to pretend that they were not walking together.
 - c. On or around 8 May 2008, after offering student 1 a lift home, drove her to his house and invited her into his house in circumstances where there were no other persons present.
 - d. On or around 8 May 2008, after offering student 1 a lift home, and driving her to his house, told student 1:
 - i. That he was lonely.
 - ii. How beautiful she was.
 - iii. That she had beautiful eyes.

- iv. To keep quiet about her being in his home as he could 'lose his job over this.'
 - v. That she should go around to his house and sunbake on his banana lounge with her bikinis on.
 - vi. That she should stand there naked, then saying 'only kidding.'
 - e. On or around 8 May 2008, while student 1 was at his home, and following having made the comments alleged in paragraph 1c., touched student 1's bottom.
 - f. On or around 8 May 2008, while student 1 was at his home, and following the incident alleged at paragraph 1d:
 - i. Told student 1 that girls should not wear ties at the School, and that they should wear their blouses unbuttoned.
 - ii. Proceeded to unbutton Student 1's school shirt.
 - iii. Put his hand inside Student 1's shirt and cupped her breast
 - iv. Tried to kiss student 1.
 - v. Allowed the student to perform oral sex on him.
 - g. On or around 8 May 2008, while student 1 was at his home, and following the incidents alleged at paragraph 1e., told student 1:
 - i. Not to tell anyone, as he didn't want his friends to look at him differently.
 - ii. That he did not wish to lose his house and job.
 - iii. That he did not wish to go to jail.
 - iv. That he wanted her to stay.
 - v. That he wanted her to return on the weekend to meet his dogs.
- 2. Engaged in inappropriate communication and/or contact with a female student of the school, student 2, including:
 - a. On several occasions during 2007 and on one occasion in early 2008, telling student 2 that he had a 4 bedroom house with a pool and that if she needed a place to stay that she should call him.
 - b. During 2007, giving Student 2 his mobile phone number and telling her he would be more than willing to help her out if she ever:
 - i. Needed help.
 - ii. Needed a lift somewhere.
 - c. During 2007, while he was driving student 2 to her work experience:
 - i. Telling student 2 that he would be more than happy for her to live with him as it was only him living there and she would have a lot of space to herself.
 - ii. Putting his hand on student 2's thigh and slowly rubbing her thigh.

3. Withdrawn

PRELIMINARY ARGUMENT

Counsel for the Teacher submitted that the Hearing should not proceed as presently conducted. It was requested that the Panel consider the need and legislative possibilities under the Act to conduct two separate Hearings, resulting in two separate determinations. It was put that Allegation 1 should be heard at one Hearing, and Allegations 2 & 3 should be heard at a separate unrelated Hearing. It was put that due to the 'difference' in the nature of the allegations that the request was justified and reasonable, and may result in the Teacher giving evidence.

The Panel considered the submission, reviewing the Act and material provided by the Teacher's representative, as well as the views of Counsel Assisting. The request was denied. The Panel noted that all allegations would be heard at the one scheduled Hearing, and that not only was it in the public interest to do so, but that the current Hearing format reflected well, both the spirit and intent of the Act. Although it is a practice in criminal hearings to run separate trials where the defendant believes he or she would be prejudiced if the trials were run together, the Panel notes that in certain circumstances the charges proceed at one trial. These circumstances apply in this case. The allegations arose out of alleged events which occurred when the Teacher was employed at the same school and at the same period. The Panel notes that this is not a criminal trial, a different standard of proof applies and the rules of evidence do not apply.

The Panel also noted that it was up to the Teacher to decide if he wished to give evidence at the Hearing.

FINDINGS UNDER SECTION 2.6.46(2)

The Panel were of the considered view that the principles of natural justice were adhered to in the lead up to, and the execution of, the Hearing. The Panel were also of the view that the Teacher had an appropriate period of time to prepare and had access to all of the relevant material.

The Panel considered the evidence before it at length. Further the Panel deliberated extensively over closing submissions and relevant case law, whilst cognisant of the responsibilities associated with, and the implications of, *Briginshaw v Briginshaw* (1938) 60 CLR 336 in relation to its decision making.

Based on the balance of probabilities the Panel agreed that Allegation 1 and Allegation 2 were proven. This decision was made mindful of the seriousness and consequences of this finding, and that Allegation 1 had been the subject of a police investigation.

The evidence of Student 1 was the only sworn direct evidence given in relation to much of what took place on 8th May 2008. The Teacher chose not to give evidence. The Teacher was present throughout the entire Hearing process and heard all of the evidence presented. He confirmed on the final day of the Hearing that he did not wish to give evidence. The events as presented by Student 1 and by Student 2 remained uncontested

by any other sworn evidence, and supported in some parts by sworn indirect evidence. The Panel made its decision well aware that complaints do not corroborate allegations.

The Teacher's decision not to give evidence was acknowledged by the Panel as the Teacher's right. The Panel noted commentary regarding the right of a professional person to refuse to give evidence in a disciplinary proceeding and that whilst the professional has an entitlement to exercise the privilege against self-incrimination, an adverse inference may be drawn by their failure to give evidence on relevant matters. Further reflecting on *NSW Bar Association v Meakes* [2006] NSWCA 340 the Panel noted that while a practitioner is not *required* to give evidence it is expected that the practitioner will give an account of matters within their knowledge. The Panel noted the Teacher had direct knowledge. Additionally the Panel noted that in *Coe v NSW Bar Association* [2000] NSWCA 13 it was stated:

"In the circumstances where a prima facie [case] against a legal practitioner has been presented and where the practitioner wishes the Tribunal to accept an explanation as to how conduct came about it is inappropriate and irregular for the legal practitioner to attempt to do so through submission from the Bar Table. If he wishes the Tribunal to accept some explanation as to how the conduct came to take place then in our view he has an obligation to meet the situation by explanation on oath."

The Panel considered that there were a significant number of key matters for which the Teacher could have provided an explanation.

Material before the Panel containing denials by the Teacher took the form of his 2008 police statements and correspondence with the Principal (February 2009). As the Teacher chose not to give evidence, this material was not tested. There is agreement in this material however that the Teacher drove the student home and that she entered his home. The Panel noted given normal practice, bolstered by advice and counselling over previous years received by the Teacher in relation to what amounted to appropriate interaction with female students, that the Teacher should have been well aware that to offer a lift in the way that he did was inappropriate. His claim in his correspondence to the Principal that amounted to it being an innocent error of judgement is rejected by the Panel.

The Panel considered Student 1 and Student 2 to be credible witnesses. In the eyes of the Panel neither had a reason to be selective in the presentation of their evidence, nor a personal purpose to fabricate their accounts. The information Student 1 relayed to her mother, female friend, male friend, the police, School Counsellor and House Coordinator within a short space of time, and the absence of the Teacher's DNA and the inability of the police to locate a cup and towel (about which there was no opportunity for the Panel to question the Teacher) were considered carefully and contextually by the Panel.

The Panel acknowledged and scrutinised the inconsistencies that emerged. Weighing up all of the relevant circumstances and factors, the events presented by Student 1 were ultimately viewed as a truthful account.

The proven allegations amount to serious misconduct. The Panel noted Kellam J in *Parr v Nurses Board of Victoria* (VCAT, 2 December 1998) "*...the question of whether or not a nurse*

has engaged in unprofessional conduct of a serious nature must depend upon the facts of each case. Clearly such conduct would not be serious if it was trivial, or of a 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 reasonably be expected of a registered nurse. This departure must be blameworthy and deserving of more than passing censure."

Further as in *Allison v General Medical Council* [1891-4] All ER 768 serious misconduct also covers that "*which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.*"

Having found Allegations 1 and 2 to be made out the Panel found that the Teacher is not fit to teach and cancelled the Teacher's registration. The Panel agreed that the position of privilege and trust extended to Teachers had been exploited and compromised in a most disgraceful way, to the significant detriment of students and the reputation of the teaching profession.



SUSAN HALLIDAY, CHAIRPERSON



per:
ANNE FARRELLY, REGISTERED TEACHER



per:
PAUL WILHELM, PANEL MEMBER