

VICTORIAN INSTITUTE OF TEACHING  
DECISION AND REASONS OF THE FORMAL HEARING

Please note that this is a précis of the decision and reasons handed down on 11 November 2013. The decision and reasons are in this form in order to protect the interests of some witnesses.

NUMBER: 142

REGISTERED TEACHER: Kurt Peter KERSTENS

PANEL MEMBERS: Terry Hayes, Chairperson  
Anne Farrelly, Registered Teacher  
Leneen Forde, Panel Member

ATTENDANCE: The teacher was represented by Mr John Handley, Australian Education Union  
Mr Rodney Hepburn, Counsel Assisting with Ms Jen Sheehan, Instructing Solicitor on behalf of the Victorian Institute of Teaching

DATE OF HEARING: 12 June 2013

DATE OF DECISION: 11 November 2013

FINDINGS AND DETERMINATION:

Pursuant to section 2.6.46(1) of the Education and Training Reform Act 2006, on 11 November 2013 the Panel found the teacher had engaged in serious misconduct.

The Panel determined, by majority decision (Chairperson Terry Hayes and Panel member Anne Farrelly), with Panel member Leneen Forde dissenting, that the teacher is fit to teach and remain registered as a teacher in Victoria.

The majority decision pursuant to s. 2.6.46(2)(hb) determined that the teacher be reprimanded for his conduct and that pursuant to s.2.6.46(h)(i) the following conditions be imposed on his registration:

1. The teacher has a minimum of ten monthly counselling sessions with a registered psychologist commencing no later than January 2014.
2. The psychologist be provided with a copy of this decision at the commencement of the counseling.
3. The psychologist be provided with a copy of the Victorian Teaching Profession Code of Ethics and Code of Conduct.
4. That the counselling address the following:
  - a. The teacher's entire history of criminal offending and the underlying causes of this behaviour, including those cited by the teacher and detailed in the decision.
  - b. The teacher's understanding of how his behaviour, both in offending and in failing to notify the Institute of his convictions, has breached the Victorian Teaching Profession Code of Ethics and Code of Conduct and in particular his legal obligations as a teacher and the conduct and behaviour required of a teacher.
  - c. The nexus between his offending and honesty and integrity of character.
  - d. The triggers that led to the offending.
  - e. Strategies for managing the triggers.
5. The teacher is to provide the Institute with two reports from the registered psychologist; one by 30 June 2014 and the second one by 30 November 2014.
6. The reports from the registered psychologist should include:
  - a. The psychologist's qualifications.
  - b. Address of the practice.
  - c. Confirmation that the psychologist has read the Panel's determination (including the Panel's reasons).
  - d. Confirmation of the teacher's attendance including dates.
  - e. Reflection on the manner in which the teacher is addressing the matters set out in Condition 4a-e.
7. The teacher is to provide the Institute with two letters to be written by the teacher, to accompany each of the psychologist's reports, detailing:
  - a. The teacher's personal views on his progress including reflections on the matters set out in Condition 4a-e.
  - b. The personal and professional insights he has gained.

# REASONS

## BACKGROUND

The teacher was provisionally registered with the Victorian Institute of Teaching (the Institute) on 23 March 2005 and was granted full registration on 9 March 2006.

On 4 January 2013, Victoria Police advised the Institute that the teacher had been charged with indictable offences.

Court certificates confirmed the teacher had appeared in the Magistrates' Court 1 on 21 June 2006 and 17 December 2007 and in the Magistrates' Court 2 on 18 March 2010 and that he was convicted of indictable offences.

The matter was referred to the Disciplinary Proceedings Committee (the Committee) of the Institute on 27 March 2013 and the Committee decided to refer the matter to a Formal Hearing.

On 6 June 2013, the Institute was provided with a Court Certificate confirming that the teacher had appeared in the Magistrates' Court 2 on 21 May 2013 and was convicted of a further indictable offence.

A Notice of Formal Hearing dated 8 May 2013 was served upon the teacher by registered post on 10 May 2013.

## THE ALLEGATIONS

The information the Institute has received as evidence of possible lack of fitness to teach is:

1. Whilst registered as a teacher in Victoria, the teacher:
  - (a) appeared in the Melbourne Magistrates' Court of Victoria on 21 June 2006 charged with the indictable offence of theft (s74, *Crimes Act 1958 (Vic)*). The teacher was convicted and fined \$1,250;
  - (b) appeared in the Melbourne Magistrates' Court of Victoria on 17 December 2007 charged with the indictable offence of theft (s74, *Crimes Act 1958 (Vic)*). The teacher was convicted and placed on a community based order for 12 months, and ordered to perform 80 hours of unpaid community work over a six month period;
  - (c) appeared in the Moorabbin Magistrates' Court of Victoria on 18 March 2010 charged with the indictable offence of theft (s74, *Crimes Act 1958 (Vic)*). The teacher was convicted and placed on a community based order for six months, and ordered to perform 25 hours of unpaid community work over a six month period;

(d) appeared in the Moorabbin Magistrates' Court of Victoria on 21 May 2013 charged with the indictable offence of theft (s74, *Crimes Act 1958 (Vic)*). The teacher was convicted and fined \$750.00 and \$71.40 statutory costs.

## DISCUSSION OF THE EVIDENCE

The Panel welcomed the teacher's ready admission of the veracity of the four allegations.

## FINDINGS AND DETERMINATION (MAJORITY DECISION)

The Panel find all allegations proved on the teacher's admission.

The Panel find that the teacher is guilty of serious misconduct. The incidents which were the basis of the allegations were criminal offences for which he was convicted. They transgressed the conduct expected of a teacher in the Victorian Teaching Profession Code of Conduct:

*Principle 2.1: 'The personal conduct of a teacher will have an impact on the professional standing of that teacher and on the profession as a whole', and its expectations that teachers 'be positive role models at school and in the community' and 'respect the rule of law and provide a positive example in the performance of civil obligations'. As such they run the risk of bringing the profession into disrepute.*

Given that the amendments to the *Education and Training Reform Act (2006)* now allow us to reprimand the teacher for the indictable offence for which he was charged and convicted on 21 May 2013 we do so, as much for his failure to take any preemptive action despite his awareness that he should have done so, as for the nature of the offence itself.

We find that the teacher remains fit to teach. In making this decision we drew on the arguments in *Davidson vs the Victorian Institute of Teaching VCAT 920* and, in particular, its articulation of the relationship between a finding of serious misconduct and a finding of fitness to teach, especially the latter's focus on the character of the teacher in making that judgment:

The Respondent submitted that it would be rare to find a case in which the facts warranted a finding of serious misconduct but did not also warrant a finding that the teacher was not fit to teach. It was suggested that the difference between the two was that when considering serious misconduct, the focus is on specific conduct. By contrast, when considering fitness to teach, the focus is on how the character of the teacher is reflected by the behaviour in question.

We take the view that a finding that a teacher is unfit to teach must carry with it a perception that the conduct complained of is of a continuing and persistent nature. It is conduct which throws doubt on how he would conduct himself in the future in the classroom. A teacher may commit a single act of serious misconduct, or a series of such acts, but those acts may be explicable in context and unlikely to recur. A determination that a teacher is unfit to teach appears to us to be a more severe penalty. It carries with it an assessment that that person should not be in a

position of authority and trust with children, because his whole approach to teaching and to the children in his care is profoundly and irretrievably flawed. It would often involve consideration of criminal conduct.

The Panel does not believe that the teacher's behaviour reflected adversely on his conduct in the classroom or that 'his whole approach to teaching and to the children in his care is profoundly and irretrievably flawed.' On the contrary, we accept his Principal's assessment of his worth when she described him as a teacher who 'had high expectations of his students and challenged them to think, to analyse and to be critical of themselves and what they were reading and hearing'. The Panel recognises, however, that the teacher's offences could diminish his 'position of authority and trust' with children as they compromised his ability to provide a positive role model. Notwithstanding that, the Panel was also mindful of the fact that the Principal believed that the impact of the teacher's behaviour on his capacity to be a positive role model for students could be sympathetically and judiciously justified to the school community. The Principal also made clear she would still want the teacher to continue at the school though she offered the caveat that this could be contingent on him not reoffending. We believe that it is open to speculation as to what conclusion she might have come to if she had been privy to the 'assessments' provided by the clinical psychologist and psychiatrist which suggested that the teacher's behaviour was influenced by a mental disorder.

In making this finding of fitness to teach, the key question before the Panel was whether or not the teacher's behaviour and his response to it, reflected adversely on his honesty and integrity and therefore on his character, or whether there may have been mitigating circumstances which caused him to engage in behaviour which he, his Principal, his character references, his clinical psychologist and the psychiatrist were prepared to see as aberrant.

We believe that the teacher has made a positive start to ensuring that he does not offend again in his realistic reassessment of his financial commitments, his establishment of a support group of critical friends, his appearance before the Panel and most important, his commitment to undergo professional counselling in a sustained and systematic way for as long as it takes. We believe that positive start should be supported by the imposition of a more structured set of conditions involving targeted counselling. This is a determination allowed the Panel in relation to Allegation 4 because the charge and conviction associated with the indictable offence occurred on 21 May 2013, and therefore under the jurisdiction of the amendment to the *Education and Training Reform Act (2006)* Section 2.6.46(h)(i).

The Panel makes its determination with some trepidation and with full recognition that it is placing a good deal of trust in the teacher's character in making it. The Panel does so because it feels he has recognised the gravity of his situation and the consequences of his offending re-occurring. It would mean the potential loss not only of a career that has shaped his sense of self and well being, but also his livelihood diminishing his capacity to provide for his families.

The Panel is confident that the teacher is fully cognisant of the sword of Damocles hanging over his head. Any recurrence of his offending would, ipso facto, result in another appearance before an Institute of Teaching disciplinary panel. That would be a matter of three strikes, beginning with his appearance before the Institute's registration committee interview panel in 2005.

Pursuant to section 2.6.46(1) of the Education and Training Reform Act 2006, on 11 November 2013 the Panel found the teacher had engaged in serious misconduct.

The Panel determined, by majority decision (Chairperson Terry Hayes and Panel member Anne Farrelly), with Panel member Leneen Forde dissenting, that the teacher is fit to teach and remain registered as a teacher in Victoria.

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TERRY HAYES, CHAIRPERSON



per:  
ANNE FARRELLY, REGISTERED TEACHER

## DISSENTING DECISION AND REASONS

The Panel member decided that the teacher is unfit to teach and that his registration should be suspended until such time as the Institute is satisfied that there are no more impediments to his fitness to teach, or until such time as he can demonstrate that his disqualifying conduct is no longer a bar to his registration.

The Panel member had the benefit of reading the summary of evidence of the majority Panel and in substance agrees with the analysis of that evidence. The Panel member is however, not satisfied that the teacher has appropriate insight into the condition which has led to his numerous shoplifting offences. The teacher has not sought any significant counselling in relation to his condition. In providing explanations for the various offences, the teacher offered reasons for his behaviour followed by an acknowledgment of the inappropriateness of the shoplifting. His version of events was at times doubtful. The teacher did not take unqualified responsibility for his actions. He suggested shoplifting was connected with wanting to provide for his family. The Panel member found that the teacher lacked insight into his condition.

It is not doubted that the teacher is a committed and talented teacher. He cannot however, be a good role model when troubled by shoplifting behaviour. It is accepted that the teacher is remorseful for his actions. There is however, insufficient evidence before the Panel that the teacher is currently fit to teach. The Panel requested that the teacher provide a report from a consultant psychiatrist and a report was provided. It was based on a history provided by the teacher himself. The report does not refer to the specific shoplifting offences. The report concludes that the teacher is clearly suffering from a Major Depressive Disorder and that Major Depressive Disorder is a treatable condition. It notes that from the history provided that the teacher has not been given consistent mental health care through psychiatric and psychological help until "he can recover from this debilitating disorder. If not treated, this behavior can continue despite the negative consequences that he has suffered".

Based on the evidence before the Panel, the Panel member is of the opinion that the teacher continues to suffer from a Major Depressive Disorder and left untreated, shoplifting behaviour is likely to continue.

In the circumstances until such treatment is obtained, the Panel member finds that the teacher is not fit to teach.



per:  
LENEEN FORDE, PANEL MEMBER