

<b>CITATION:</b>	<i>Queensland College of Teachers v PKP</i> [2017] QCAT 94
<b>PARTIES:</b>	Queensland College of Teachers (Applicant) v PKP (Respondent)
<b>APPLICATION NUMBER:</b>	OCR034-17
<b>MATTER TYPE:</b>	Occupational regulation matters
<b>HEARING DATE:</b>	On the papers
<b>HEARD AT:</b>	Brisbane
<b>DECISION OF:</b>	<b>Senior Member O’Callaghan</b>
<b>DELIVERED ON:</b>	29 March 2017
<b>DELIVERED AT:</b>	Brisbane
<b>ORDERS MADE:</b>	<ol style="list-style-type: none"><li><b>1. The suspension of the teacher registration of PKP is continued.</b></li><li><b>2. Other than to the parties to this proceeding, publication is prohibited of any information which may identify PKP, any of the relevant students or the relevant school.</b></li></ol>
<b>CATCHWORDS:</b>	<p>EDUCATION – TRAINING AND REGISTRATION OF TEACHERS – suspension of teacher – where Queensland College of Teachers suspended the teacher’s registration on the basis of its belief that the teacher poses an unacceptable risk of harm to children – whether the teacher does not pose an unacceptable risk of harm – whether suspension should continue</p> <p><i>Education (Queensland College of Teachers) Act 2005 (Qld), s 49, s 50(5), s 53, s 54(1)(b), s 55(6)</i> <i>Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66</i></p> <p><i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336 <i>Queensland College of Teachers v Teacher</i></p>

CXJ [2016] QCAT 511  
*Queensland College of Teachers v Teacher*  
GXM [2016] QCAT 441  
*M v M* (1988) 166 CLR 69

## APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act').

## REASONS FOR DECISION

- [1] PKP has been registered in Queensland as a teacher since 2003. On 18 January 2017 the Queensland College of Teachers ('QCT') suspended his registration pursuant to s 49 of *Education (Queensland College of Teachers) Act 2005* (Qld) ('the Act') on the basis that he posed an unacceptable risk of harm to children.
- [2] In accordance with s 50(5) of the Act, the QCT has referred the continuation of the suspension to QCAT for review and seeks orders that the suspension continue.
- [3] The Tribunal must decide to continue the suspension unless it is satisfied that PKP does not pose an unacceptable risk of harm to children.<sup>1</sup>
- [4] Directions were made by the Tribunal inviting submissions from PKP as to why he does not pose an unacceptable risk of harm to children. PKP has filed submissions that he does not pose such a risk.

## The Legislative Framework

- [5] Upon the referral of the suspension to QCAT for review, the Tribunal must invite the teacher to show why he or she does not pose an unacceptable risk of harm to children.<sup>2</sup> The Tribunal is obligated to continue the suspension, unless satisfied he or she does not pose an unacceptable risk of harm to children.
- [6] I agree with the comments in earlier Tribunal decisions regarding s 49 suspensions,<sup>3</sup> in that once the QCT has formed a reasonable belief that a teacher poses an unacceptable risk of harm to children and suspended the teacher's registration, the teacher then bears the onus of proof to satisfy the Tribunal that they do not pose an unacceptable risk of harm to children.
- [7] I also agree with comments in those decisions that the standard of proof is the civil standard of balance of probabilities in line with what is commonly

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<sup>1</sup> The Act, s 53.

<sup>2</sup> The Act, s 54(1)(b).

<sup>3</sup> *Queensland College of Teachers v Teacher CXJ* [2016] QCAT 511 [26]; *Queensland College of Teachers v Teacher GXM* [2016] QCAT 441.

referred to as the '*Briginshaw standard*'.<sup>4</sup> Thus, based on the serious consequences of findings, a teacher would not be successful in discharging the onus on the basis of inexact or flimsy evidence.<sup>5</sup>

### **What is meant by an unacceptable risk of harm to children?**

- [8] The Act does not define “unacceptable risk of harm”.
- [9] I accept the submission of the QCT that the ordinary meaning of the term should be preferred having regard to the context of the term in the Act and the purpose of the Act.<sup>6</sup>
- [10] The QCT refers the Tribunal to the High Court case of *M v M*,<sup>7</sup> which considered the degree of risk of sexual abuse which would lead to denial of parental access. The Court in that case formulated the issue as ensuring the protection of a child from '*unacceptable risk of abuse*'. The QCT submits, and I accept, that this formulation directs the Tribunal to an assessment of the '*chances*' of the risk occurring and the magnitude of potential harm if it did occur, and requires a balancing exercise of advantages and detriments.<sup>8</sup>
- [11] The question is whether there is an identifiable risk of harm and whether such risk is “unacceptable”.
- [12] Harm is defined in the QCT Act as:

#### **7 Meaning of *harm***

- (1) **Harm**, to a child, is any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.
- (2) It is immaterial how the harm is caused.
- (3) Harm can be caused by—
- (a) physical, psychological or emotional abuse or neglect; or
  - (b) sexual abuse or exploitation.
- (4) Harm can be caused by—
- (a) a single act, omission or circumstance; or
  - (b) a series or combination of acts, omissions or circumstances.

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<sup>4</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361-362.

<sup>5</sup> *QCT v Teacher CXJ* [2016] QCAT 511, at para [27].

<sup>6</sup> QCT submission dated 3 February 2017, para [8].

<sup>7</sup> (1988) 166 CLR 69.

<sup>8</sup> QCT submission dated 3 February 2017, para [9] referencing John Fogarty AM, 'Unacceptable risk – A return to basics' (2006) 20 *Australian Journal of Family Law* 3.

- [13] This definition would suggest that the identified risk of harm must be significant, rather than minor, and the degree of risk of the harm occurring must be unacceptable. The mere possibility of harm would arguably not be '*unacceptable*'.
- [14] The determination of any identified risk as unacceptable involves achieving a balance between the protection of students from harm by the conduct of the teacher on the one hand and the potential harm to the teacher of having an unjustified suspension of their registration on the other.
- [15] I accept as submitted by the QCT that this determination must be made in the context of the purpose of s 49, which is to ensure that children are protected by removing the risk that a teacher may harm, or be in a position to harm, children.
- [16] It is a protective provision which prefers the protection of children and the child's interests over the interests of the registered teacher.

**The grounds of PKP's suspension.**

- [17] The notice of suspension set out the QCT's reasons for forming the view that he posed an unacceptable risk of harm to children as follows:
- PKP was registered as a teacher from 21 January 2003;
  - He was employed as a teacher at the relevant school between 22 February 2016 and 8 July 2016; and as a teacher at another school between 11 July and 25 November 2016;
  - Between 31 October and 25 November 2016 he failed to maintain appropriate professional boundaries within the student/teacher relationship by engaging in electronic communication including sexually explicit conversation with a year 12 student at the relevant school;
  - On or about 3 November 2016 he failed to maintain appropriate professional boundaries within the student/teacher relationship by sending the student a sexually explicit video depicting him masturbating;
  - On or about 4 November 2016 he failed to maintain appropriate professional boundaries within the student/teacher relationship by having sexual intercourse with the student;
  - During this period he was aware that the student was enrolled at the relevant school
- [18] The QCT filed the material on which the decision was based including:

1. Screenshots of relevant message exchanges between 3 November 2016 and 8 November 2016;
- [19] In seeking to have the suspension set aside PKP has provided a written submission. He says, inter alia:
- a) The adult student with whom he is alleged to have had an “inappropriate relationship of a sexual nature” was born in 1998, was living independently with her ex-boyfriend at the time of their meeting.
  - b) They randomly matched on the “social dating website” Tinder on 2 November 2016, at which time her age was displayed as 19 years old.
  - c) Prior to 2 November he did not know the student, and at no time had he come into contact with her as a teacher or in the community.
  - d) They exchanged telephone numbers and became friends on Facebook. In further communication he “ascertained that she had finished school.”
  - e) Given that he believed there was no “student-teacher relationship” their interaction developed;
  - f) The student in question did not bring any claims of “misconduct or abuse”, and this matter was raised by a third party.
- [20] PKP submits that:
- a) The QCT has formed a belief that he has caused significant and detrimental harm to the student, and it is on that ground that he has been suspended;
  - b) There is no evidence to suggest that the student has suffered significant harm, “deemed detrimental in nature”;
  - c) There is no evidence to suggest that he has met and engaged with the student using his authority and position as a teacher;
  - d) There is no information to suggest there has been the existence of an “inherent power imbalance”.
- [21] The QCT has filed submissions in response:
- a) The QCT submits that the argument that during his communications PKP had ascertained that the student had finished school is disingenuous; rather the message exchanges attached to the referral “clearly demonstrate” that he knew the student was enrolled in high school when the relationship commenced;

- b) The QCT submits that PKP has sought to both mitigate and excuse his inappropriate conduct by submitting that the student has not suffered harm as defined in s 7 of the Act. It says this submission is misconceived in that the issue is one of whether QCT holds the reasonable belief PKP poses an unacceptable risk of harm.
- c) The QCT's assessment of risk "is broad, and not limited to the teacher's alleged conduct concerning a particular student, and includes an assessment of the chances of risk and the magnitude of potential harm that the teacher poses to the general school student population";
- d) Referring to *QCT v Teacher CXJ*, the QCT submits that, in any event, PKP is not in a position to provide evidence as to whether the student has suffered any harm.

### **Does PKP pose an unacceptable risk of harm?**

- [22] I accept the QCT's submission that the text message exchanges do not support PKP's submission that he ascertained during communications that the student had finished high school. In messages dated 3 November 2016 PKP and the student discuss her moving from Maths B to Maths A subjects, with the student saying "I done [sic] math B before you came but dropped to A so I had more time to concentrate on my other classes..." [emphasis added].
- [23] In further messages dated 3 November the student says "to think we've wasted a year and could've been doing this [their relationship] since like February!!", PKP says "maybe you should bring your uniform over tomorrow night" and the student refers to her assignment due that day. In messages dated 6 November 2016, PKP refers to Thursday night, and the student says "Good I will be finished with all my exams and be almost graduated and you won't be able to get in trouble...", and PKP further refers to concerns that the student not inform someone of who he is, out of concern that he "would get in trouble with my job".
- [24] That evidence could support a finding that, not only was PKP aware from at least 3 November 2016 that the student was enrolled in high school, but also that the student was aware PKP was a teacher and that both were aware that a student-teacher relationship could 'get him in trouble'. It is possible, with regard to the emphasised section above, that the student knew that PKP had previously taught at her school.
- [25] I accept the QCT's submission that PKP's submission that he ascertained the student had finished high school is disingenuous.
- [26] PKP notes in his submission that, when he randomly matched with the student on Tinder, her age displayed as 19 years old. Elsewhere in his submission however, he states her date of birth, which would lead to the conclusion that in November 2016 she was 18 years old. I also note, in a

message exchange dated 3 November 2016 PKP says “I luv that you’re only 18...”.

- [27] PKP’s submission that there is no evidence to support the statement that the student has suffered harm shows a concerning lack of insight into the potential harm that a sexual relationship between a teacher and student could cause to the student. As noted above, harm may include psychological or emotional harm.
- [28] I also accept the QCT’s submission that, in assessing whether PKP poses an unacceptable risk of harm to children, that assessment is not limited to whether the particular student in question has been harmed, but includes the chances of risk and magnitude of potential harm posed to the general school student population.
- [29] While PKP may submit that there is presently no evidence before the Tribunal of the effect of the relationship on the student, nor is there evidence which PKP may point to which indicates that she was not harmed.
- [30] PKP has the onus of satisfying the Tribunal that he does not pose an unacceptable risk of harm. PKP’s submissions do not express any insight into the potential harm of his conduct to the student. Rather, he defends his conduct based on the claim, which I have found to be disingenuous, that he was not aware that she was still a student at the relevant time.
- [31] Based on his conduct there is an identifiable risk of harm which is not insignificant. On the brief submissions provided by PKP, I am not satisfied that the behaviour would not be repeated so that PKP does not pose an unacceptable risk of harm to students in the classroom.
- [32] I note that under s 55(6) of the Act, PKP may apply within 28 days of the notice of this decision to QCAT for review of this decision. He may at that point provide additional material dealing with my concerns raised above.

### **Non-publication order**

- [33] The respondent has not sought or made any submissions concerning a non-publication order under s 66 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).
- [34] The QCT however, acknowledges that it would not be in the interests of justice for children to be identified to the public and that publication of these proceedings may lead to the identity of a number of students. The QCT submits that in this case publication of PKP’s name or that of the school may lead to identification of the former student who has recently graduated.
- [35] I am satisfied that it would be contrary to the public interest for information to be published which would identify the former student. This includes any

information that may identify the school she attended. I am also satisfied that to achieve this PKP cannot be identified.

[36] I make orders pursuant to s 66 prohibiting the publication of that information.