

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Queensland College of Teachers v MSX* [2020] QCAT
192

PARTIES: **QUEENSLAND COLLEGE OF TEACHERS**
(applicant)

v

MSX
(respondent)

APPLICATION NO/S: OCR274-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: Date of orders 2 May 2019
Reasons delivered 2 June 2020

HEARING DATE: 2 May 2019

HEARD AT: Brisbane

DECISION OF: Member Holzberger
Member Oliver
Member McDonnell

ORDERS:

1. **The suspension of the registration of MSX as a teacher is ended.**
2. (a) **MSX must provide to the Queensland College of Teachers a detailed and independent psychologist's report addressing:**
 - (i) **MSX's awareness of what constitutes appropriate and inappropriate communication and behaviour with children and students;**
 - (ii) **MSX's understanding of the concept of professional boundaries for the protection of children;**
 - (iii) **How MSX determines and implements professional boundaries with individual students;**
 - (iv) **MSX's understanding of the extent and nature of the student, parental and community trust vested in a teacher;**
 - (v) **MSX's understanding and full adherence to the Queensland's College**

of Teachers’:

A. Code of Ethics; and

B. Professional Boundaries: A Guideline for Queensland Teachers;

- (vi) Whether or not the psychologist is satisfied that MSX has adequately understood and addressed the above points.
- (b) The costs of obtaining the psychologist’s report are to be met by MSX.
- (c) The psychologist’s report must be provided to the Queensland College of Teachers within six months of the Tribunal’s order.
- (d) Upon receipt of the psychologist’s report, the Queensland College of Teachers must decide if the report addresses the issues to the satisfaction of the Queensland College of Teachers. If the Queensland College of Teachers is so satisfied, it will be noted on MSX’s details on the Register of Approved Teachers that the requirements has been fulfilled and its monitoring will be deactivated. If the Queensland College of Teachers is not so satisfied, then the Queensland College of Teachers must consider whether to commence new proceedings by referring the matter to the Tribunal on the basis that the respondent has failed to provide a report to the satisfaction of the Queensland College of Teachers.
3. Other than to the parties to this proceeding and until further order of the Tribunal, publication is prohibited of any information which may identify MSX, any relevant student or former student and the relevant school.

CATCHWORDS:

EDUCATION – EDUCATORS – DISCIPLINARY MATTERS – GENERALLY – 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 – whether the suspension should continue – where allegations are not corroborated by evidence other than of the student’s – where the grounds are not substantiated

Education (Queensland College of Teachers) Act 2005

(Qld), s 49, s 92(1)(h)

Queensland College of Teachers v ELN [2018] QCAT
149

**APPEARANCES &
REPRESENTATION:**

Applicant: E J Houston, in-house counsel

Respondent: E Burke, solicitor of Holding Redlich Lawyers

REASONS FOR DECISION

- [1] MSX, a teacher at a relevant school, was referred to the Tribunal for his failure to behave in a way generally expected of a teacher by failing to maintain professional boundaries with respect to a student, SJX, and awarding that student an ‘A’ grade in a subject after she sent revealing photos of herself despite not completing the required assessment to satisfy such a grade.
- [2] On 23 April 2018, the Queensland College of Teachers (‘QCT’) suspended MSX’s registration on the basis that he posed an unacceptable risk of harm to children.¹
- [3] QCT referred the continuation of the suspension to the Tribunal seeking an order that the suspension continue, and following a hearing on the papers on 21 May 2018 the Tribunal ordered that the suspension is continued. It also made a non-publication order and published reasons for its decision.²
- [4] In a statement of agreed facts filed by the parties on 20 February 2019 it was agreed, among other things, that:
- (a) MSX engaged in social media contact with students and former students of the school; and
 - (b) The proposed sanction for that conduct was the provision to the QCT of a detailed independent psychologist report on specific terms.
- [5] Following a hearing of the disciplinary proceeding on 2 May 2019, the Tribunal made orders:
- (a) Ending the suspension;
 - (b) Requiring the production of a psychologist report on the terms proposed in the statement of agreed facts; and
 - (c) Continuing the non-publication on terms of the Tribunal’s earlier orders.
- [6] It was indicated at the time that having regard to MSX’s ongoing suspension, the decision should be made as soon as possible with written reasons for the decision to follow at a later date. Those reasons are set out below.

Background

- [7] MSX was:

¹ *Education (Queensland College of Teachers) Act 2005* (Qld) s 49.

² *Queensland College of Teachers v ELN* [2018] QCAT 149.

- (a) Continuously registered as a teacher since 11 February 2013;
 - (b) Employed as a teacher at the relevant school from 13 February 2013; and
 - (c) SJX's grade 12 recreational studies teacher throughout 2017.³
- [8] SJX graduated from year 12 at the end of 2017 just prior to her 17th birthday.⁴
- [9] In addition to his teaching duties throughout 2017, MSX and his partner operated a business. In a document described as 'respondent's statement of agreed and disputed matters' filed in the Tribunal on 10 January 2019, MSX's solicitor described the business as follows (footnotes and paragraph numbering omitted):
- (a) MSX owns an online business ('the business');
 - (b) The business primarily sells skateboards and the website encourages customers to 'follow' the business on Instagram and Facebook;
 - (c) The business utilises a software name Automated Social Networking Instagram Management Software ('Followadder'); and
 - (d) Followadder is a software that is designed to increase an individual's or a company's Instagram 'traffic'. The software automatically 'likes' images on Instagram and sends comments which can include emojis.⁵
- [10] In his Response to Notice of Investigation⁶ and in oral evidence MSX both confirmed and expanded on that description as follows:
- (a) Fundamental to his approach to business was the use of social media which appealed to the younger demographic with a view to generating 'as much traffic as possible';
 - (b) Followadder would identify and respond with likes or emojis to certain types of photos relevant to their particular type of business;⁷
 - (c) Followadder 'likes and unlikes users photos every one to two minutes' automatically;⁸
 - (d) As its full name suggests, Followadder is specific to Instagram accounts only and not to other forms of social media; and
 - (e) Both he and his partner remained active on Instagram responding to posts with comments, likes and emojis.
- [11] I do not understand any of the evidence contained in paragraphs 9 and 10 of these reasons to be in dispute. Certainly no rebuttal evidence has been called.

³ Statement of agreed facts filed 20 February 2019 [4]-[5], [7].

⁴ Ibid [8].

⁵ Respondent's statement of agreed and disputed matters filed 10 January 2019 [7]-[10].

⁶ Queensland College of Teachers' material filed 18 October 2018, annx 8 – MSX's written submission to section 98 Notice dated 12 July 2018, 65-68.

⁷ Ibid annx 13 – Instagram Profile Screenshot 2, 77-78.

⁸ Ibid annx 8 - MSX's written submission to section 98 Notice dated 12 July 2018, 66.

Grounds of disciplinary proceedings

[12] Particulars of MSX's behaviour which is said to fall below the behaviour expected of a teacher is set out in the referral as follows:⁹

1. Between July 2017 and October 2017 MSX engaged in appropriate communications with Year 12 school student SJX including:
 - a. Liking photographs posted by SJX on her Instagram;
 - b. Replying to photographs posted on SJX's Instagram story including but not limited to:
 - i. Sending a 'wow' emoji or a 'love heart eyes' emoji;
 - ii. Telling her that he deleted Snapchat and couldn't talk on Instagram;
 - c. Sending a photograph via Snapchat depicting himself with a tablet on his tongue which SJX believed was ecstasy;
 - d. Taking SJX aside in class and telling her that she shouldn't have posted a photograph in her swimwear and telling her that he liked it;
 - e. Asking SJX via Snapchat to send revealing photographs to him in exchange for improving her grade in recreational studies;
 - f. Receiving photographs via Snapchat of SJX in her swimwear and underwear;
 - g. Sending photographs via Snapchat to SJX including:
 - i. On several occasions, shirtless photographs of himself;
 - ii. A photograph of his face before going out;
 - iii. On at least two occasions, a naked photograph of himself showing his penis;
2. MSX awarded SJX an 'A' grade in recreational studies after she sent revealing photographs despite SJX not completing the required assessment to satisfy such a grade.

[13] All of the conduct referred to in 1(a) and 1(b) relates to MSX's (and his partner's) business Instagram account. In respect of each he concedes, correctly in our view, that a ground for disciplinary action is established.

Ground 1(a)

[14] In respect of 1(a) SJX said in her interview that MSX 'really promoted his business to his students' and 'heaps of people in my class and in my grade followed his

⁹ Application or referral – disciplinary proceeding filed 18 October 2018, annx A.

business as well.¹⁰ Specifically, he encouraged students to follow his Instagram page.¹¹

- [15] She said he would (apart from the exchange referred to in 1(b)) reply to her stories – ‘let’s just say a photo of me’ – just using an emoji, like a ‘wow’ emoji or a ‘love heart eyes’ emoji.¹²
- [16] This is consistent with MSX’s evidence of how his business operated. He or his partner could have responded directly though he has no recollection of it but in all likelihood the Instagram posts received an automated response, a like or an emoji, from Followadder.
- [17] While those responses could not by themselves be said to be concerning or conversational that is not to say that they were not inappropriate. Whether MSX actively encouraged his students to follow the business Instagram account, it can hardly be a surprise to him that one or more students (or many more) did. They are after all part of his target market.
- [18] Any response to such posts by MSX or his partner may well have been perfunctory, and those generated by Followadder automated and impersonal, but the whole purpose was to appear personal, engaging and encourage further interaction.
- [19] MSX in oral evidence conceded that there was ‘room for misinterpretation’.
- [20] We find that the behaviour alleged in 1(a) is proven and establishes a ground for disciplinary action under s 92(1)(h) of the *Education (Queensland College of Teachers) Act 2005* (Qld) (‘the Act’).

Ground 1(b)

- [21] The behaviour alleged in ground 1(b) is more concerning. It concerns the only recorded Instagram exchange between SJX and the business on the evening of 18 October 2017, involving communication by the business and SJX other than likes and emojis.¹³
- [22] The exchange consists of a photo of SJX taken by herself in a mirror. The business responds with a ‘wow’ emoji. SJX then says ‘why did you delete me off snap’ and the business responds ‘deleted it ... can’t talk on here ... see u tomorrow talk then ... swimming’.
- [23] MSX admits that he participated in the exchange and does not dispute SJX’s evidence that he and SJX had a conversation during a swimming class the next day. SJX alleges in her record of interview that there were a number of face to face exchanges with MSX but those are not grounds for disciplinary action in these proceedings.

¹⁰ College of Teachers’ material filed 18 October 2018, annx 35 – Transcript of interview with SJX dated 19 April 2018, [137]-[164].

¹¹ Ibid 145, [62].

¹² Ibid 142, [58].

¹³ The exchanges are found in annexure 27, pages 107 and 108 of the Queensland College of Teachers’ material filed on 18 October 2018, which records the date but excludes the photo image, and also in annexure 33, pages 134 and 135 which excludes the date but includes the image. It is not in issue that the same exchange is recorded. SJX explained in evidence that page 108 was from her phone and page 135 was a screenshot saved in a friend’s phone.

- [24] SJX does not either in the interview or in her evidence suggest that there were any other conversational Instagram exchanges. This appears to be the only occasion where it occurs.
- [25] Nonetheless it illustrates the inappropriateness of the business' social media policy. We find the behaviour alleged in grounds 1(b)(i) and 1(b)(ii) is proven and establishes a ground for disciplinary action.

Grounds 1(c) – 1(g)

- [26] Grounds 1(c) – 1(g) relate to interactions between MSX and SJX on Snapchat. They are, on any view of it, more serious allegations than those involving Instagram. They concern MSX sending SJX inappropriate images (1(c) and 1(g)), including inducing SJX to send him inappropriate images (1(e)), receiving those images (1(f)) and taking her out of class to comment on a photograph she sent to him (1(d)).
- [27] Neither party called expert evidence on the workings of Snapchat. SJX said in oral evidence that images posted on Snapchat only last 10 seconds. An image would be saved if it was screenshotted but the sender would be notified if that occurred.
- [28] Her evidence is that 'out of nowhere' she received a friend request from someone and although she was not sure who it was she accepted anyway.¹⁴ She does not know how he got her username but believes it was through the school's social media location.
- [29] MSX said in oral evidence he first got Snapchat around 2016 but did not use it until he started his business and his research had indicated that he should use it for that purpose. He said that while he did not invite any students to do so he received a number of friend requests including one from SJX which he accepted, it being his business policy to 'accept anyone and everyone'.
- [30] When asked in examination in chief whether he used Snapchat to converse with students he said he recalled receiving a message from SJX and responded to the effect that he couldn't talk and would see her at school.
- [31] He said he deleted Snapchat because he 'couldn't get my head around how to use it in my business', found it time consuming and inferior to other social media platforms.
- [32] He has consistently denied sending any images to SJX or receiving any from her. He denies offering to improve her grade if she forwarded images to him.
- [33] SJX said in her statement that she told a friend and fellow student, CSX, that 'MSX's snapchatting me what should I do?'.¹⁵ But when asked in cross-examination SJX could not recall what advice if any she had received.
- [34] Sometime later she told another fellow student, CEX, who apparently indicated MSX had done a similar thing to her older sister.¹⁶

¹⁴ Queensland College of Teachers' material filed 18 October 2018, annx 35 - Transcript of interview with SJX dated 19 April 2018, 147, [137]-[139].

¹⁵ Ibid 163, [415].

¹⁶ Ibid [244], [345].

- [35] CEX did not give evidence but her interview confirms that while she believed a similar thing happened with her older sister she was not aware of the identity of the teacher involved. There is no evidence from the older sister.
- [36] There is no evidence that CSX or CEX or anyone else for that matter saw any of the images it is said were sent or received.
- [37] SJX did not report the exchanges to anyone at the school or her family because she thought she may get into trouble.
- [38] There is no other evidence which supports or corroborates SJX's allegations.
- [39] In her interview when asked whether she kept any of the photos SJX responded:
No. I believe I screenshotted one photo. Don't take my word for it. And like he got really mad at me and said like delete it.¹⁷
- [40] During cross-examination SJX was certain that she screenshotted one photo and saved it to her camera for approximately half an hour until MSX became angry and messaged her to delete it which she did.
- [41] In QCT's evidence summary it is noted:
On 19 April 2018 the QCT obtained the mobile phone used by SJX. A Cellebrite analysis of the mobile phone was conducted by a Cellebrite certified operator (CCO). There was no evidence obtained during the analyses of the mobile phone.¹⁸
- [42] It was put to SJX in cross-examination that a photo saved to her camera would be retrievable by a Cellebrite analysis. When asked why it did not show she responded, understandably, that she did not know.
- [43] No evidence was called to explain the process of Cellebrite analysis or what it could be expected to retrieve.
- [44] In a series of emails dated 26 July 2018, 3 August 2018 and 7 August 2018, Mr Brad Sandever emailed SJX asking her to download her Snapchat data. In the last of those he explained:
MSX is denying the allegations and claims that you sent him a friend request. It's quite important that I have the snapchat download to provide me with further evidence.
- [45] He offered to travel to meet her and assist the process. She did not respond.¹⁹
- [46] SJX said in evidence that she did not respond because she did not think anything could be retrieved. QCT advised that immediately prior to the hearing she had cooperated but the analysis would not be available for the hearing.
- [47] Again there is no evidence that the proposed analysis could identify whether SJX or MSX sent the friend request but clearly that is the suggestion and the adverse inference must be drawn from SJX's unwillingness to participate.

¹⁷ Queensland College of Teachers' material filed 18 October 2018, annx 35 - Transcript of interview with SJX dated 19 April 2018, 150, [172].

¹⁸ Queensland College of Teachers' material filed 18 October 2018, 9, [3.20].

¹⁹ Exhibit 6.

- [48] While we appreciate that some time has elapsed, SJX's recollection of events and timeframes was unimpressive. When asked in cross-examination whether she had a good memory she responded 'no. I can't remember what I had for breakfast let alone 6 months ago'.
- [49] The investigation of MSX commenced as a result of a report by a student of MSX's Snapchat and Instagram contact with two other students. SJX was named as another possible recipient. Subsequently another student was named.
- [50] Apart from SJX none gave evidence and no weight can be attached to what are in effect hearsay reports of similar conduct. SJX's evidence is uncorroborated. There is no evidence that any other person saw any of the alleged Snapchat exchanges. A Cellebrite analysis of SJX's phone did not provide corroborating evidence. SJX did not, despite requests, download her Snapchat data which may have assisted.
- [51] In those circumstances we do not accept the uncorroborated evidence of SJX and find that the allegations in grounds 1(c), 1(d), 1(f) and 1(g) are not substantiated.

Grounds 1(e) and 2

- [52] Substantiation of ground 2, awarding SJX an undeserved 'A' for sending revealing images, is largely dependent on substantiation of the allegation in ground 1(e) that MSX effectively blackmailed SJX into providing those images. In her interview SJX says MSX nagged her to send photos of herself and after sending revealing photos of himself urged her to respond. She says MSX said 'you know I'll up your grade, you know you don't have to do anything' and later 'you'd rather have a B than a C'.²⁰
- [53] In cross-examination, SJX stepped back from this saying twice that MSX did not threaten her. He said her grades would improve if she complied not that they would 'go the other way [sic]' if she did not but he made her feel that they might.
- [54] MSX had consistently said the allegations are 'completely untrue'. SJX's evidence is the only evidence of the allegations and it is uncorroborated and for reasons set out above we, on the basis of that evidence alone, are not satisfied that ground 1(e) is substantiated.
- [55] SJX says that she did not deserve the 'A' she was awarded by MSX in the aquatics and water safety component of her year 12 recreational studies course.²¹
- [56] She 'hated swimming like I just hated it' and did not want to participate even if it meant a bad grade. On being advised by MSX that he would give her a good grade she 'did like two or three assessments like of what we had to do. And I think there was a couple that I didn't do, like I didn't even do half of them and I still got a good grade'.²²
- [57] MSX's evidence is that this was the last component of her recreational studies course. His students would graduate in the fifth week of the component and many had 'switched off'. He says he encouraged attendance by indicating that certain components were accessible but the major part of the assessment was 'outside the pool'. He says all students were assessed leniently.

²⁰ Queensland College of Teachers' material filed 18 October 2018, [152], [157], [206]-[208].

²¹ Ibid annx 32 – Year 12 SSHS Recreational Studies Assessment Instruments, 132.

²² Ibid annx 35 - Transcript of interview with SJX dated 19 April 2018, [274].

[58] MSX says SJX was consistently getting good grades. MSX says she ‘always got good grades in recreational studies ... high Bs, As’. In circumstances where various components of the assessment were misrepresented to encourage participation and in fact attendance, it is difficult to see how SJX’s assessment of her performance should be preferred to MSX’s.

[59] We are satisfied that ground 2 is unsubstantiated.

Penalty

[60] We have found the behaviours alleged in grounds 1(a) and 1 (b) proven and establish a ground for disciplinary proceedings under s 92(1)(h) of the Act.

[61] MSX has conceded as much and the parties have agreed that the appropriate sanction is a provision of an appropriate psychologist report. We are of the view that the penalty proposed is appropriate in all circumstances.

[62] We note in particular that MSX was suspended on 23 April 2018, pursuant to s 49 of the Act and that suspension continued until the Tribunal ended it on 2 May 2019. Whilst such a suspension is protective rather than punitive we accept MSX’s evidence of the devastating effect it has had on him. Nothing is to be achieved by imposing any additional penalty to that contained in the Tribunal’s orders.