

**PRECIS OF THE REPORT INTO THE DISMISSAL OF  
DEPUTY HEADMASTER, ROHAN BROWN**

This precis summarises the principal parts of the report submitted by Mr Ray Finkelstein AO QC and Ms Renee Enbom. For a number of reasons they advise that it would not be appropriate to publish the full report. The School has accepted this advice.

**1 Introduction**

1.1 Mr Brown was the Deputy Headmaster at Trinity Grammar School. On 8 March 2018 he was dismissed. The question is whether his dismissal was lawful.

**2 Trinity Grammar**

2.1 Trinity Grammar is a company limited by guarantee. It has a Constitution. The Constitution vests management of the company in a Council.

2.2 The Constitution also addresses the role and powers of the Headmaster. The Headmaster is “subject to the direction and control of the Council” responsible for the management of the School. He also has power to dismiss teaching staff.

**3 The Headmaster**

3.1 The Headmaster, Dr Davies was engaged under a contract of employment which provides that he has “overall responsibility for the appointment and termination of staff”. However, “in decisions involving the positions of Deputy Headmaster and the Business Manager [Dr Davies must] consult with the Chair of Council prior to implementing any decision”.

3.2 Accordingly, the decision whether or not to dismiss Mr Brown was a decision for Dr Davies alone. The only permissible involvement of the Council was that it be consulted, via the Chair, before Dr Davies could implement any dismissal decision.

#### 4 Mr Brown's employment

4.1 Mr Brown has worked at the School for almost 30 years. On 9 September 2014 Mr Brown was appointed to be the Deputy Headmaster for a period of five years (2015-19).

4.2 Mr Brown's employment contract incorporated the terms recorded in the *Trinity Grammar School, Kew Workplace Agreement (Teaching Staff) (Workplace Agreement)*. The Workplace Agreement sets out the circumstances in which Mr Brown could be dismissed:

- He could be dismissed without notice (**summarily dismissed**). The Workplace Agreement does not contain an exhaustive list of the circumstances justifying summary dismissal. However, it does provide that the circumstances include serious neglect of duty, wilful misconduct and serious misrepresentation.
- He could be dismissed by due process in circumstances where he was deemed by the Headmaster to be incompetent or where his performance was unsatisfactory but only after a process which includes counselling and periods of review.

4.3 The Workplace Agreement also provides that, from time-to-time, the School will publish policies such as those relating to occupational health and safety and harassment and that all School policies are binding upon teachers.

4.4 One policy, the Staff Code of Conduct (**Trinity Code**), sets out the standards of behaviour expected of all who work at the School. It provides that staff will, among other things:

- not harass, bully or discriminate against students;
- avoid behaviour that might reasonably be perceived as harassment, bullying or intimidation.

4.5 The Trinity Code also requires teachers to comply with the Victorian Teaching Profession Code of Conduct (**VTP Code**).

4.6 The VTP Code identifies a set of principles which describe the professional conduct, personal conduct and professional competence expected of a teacher by their colleagues and the community. The principles include:

- protecting students from intimidation, embarrassment, humiliation or harm;
- not touching a student without a valid reason.

4.7 The other policy is the Anti-Discrimination, Bullying and Harassment Policy which was adopted to ensure an equitable, positive, safe and supportive environment for all members of the School community.

4.8 This policy provides that:

- the School aims to foster an environment where students are treated with dignity, courtesy and respect;
- the School will take all reasonable steps to prevent bullying and harassment;
- bullying and harassment will never be tolerated.

## **5 The right to terminate a contract**

5.1 The expression “wilful misconduct” in the summary dismissal clause is not defined. Nor is there any rule of law that defines the degree of misconduct which is sufficiently serious as would justify dismissal without notice.

5.2 Ordinarily, in the employment context, conduct will be characterised as justifying summary dismissal if it is “so seriously in breach of the employment contract that by standards of fairness and justice the employer should not be bound to continue the

employment”. The misconduct must be of a kind that, as a practical matter, is likely to make maintenance of the contract of employment impractical.

5.3 The courts have given some guidance. They provide the following examples of conduct which is so serious as would justify summary dismissal:

- wilful disobedience of a lawful order;
- misconduct inconsistent with the due and faithful discharge of the duties for which the employee was engaged;
- habitual neglect by the employee of his or her duties.

5.4 On the other hand, as a general proposition ill-advised conduct or an error of judgment or negligently performing one’s duties (other than habitual neglect) will not be sufficiently serious.

## **6 The doctrine of election**

6.1 The breach of an important term of a contract does not automatically bring the contract to an end. It merely gives the wronged party the right to terminate the contract if it chooses to do so.

6.2 The principle (expressed in legal language) is that the wronged party is put to an election: it could terminate the contract or proceed with the contract and sue for any damages that it has suffered.

6.3 The doctrine of election in law applies to all those cases where a person has two alternative but inconsistent legal rights. Once the choice is made to pursue one of those rights the other right is permanently destroyed and can never be exercised.

## **7 Process for summary dismissal**

7.1 When it comes to exercising the right of summary dismissal, the courts have rejected the notion of implying into the employment contract an obligation on the employer to act fairly. Provided that the ground for summary dismissal exists, the employer is not bound to act reasonably, or to give reasons for his decision, or to afford his employee the opportunity to be heard in his defence and provide an explanation. That is, the common law permits an employer to act “unreasonably or capriciously if he so chooses”.

## **8 The incident**

8.1 The School has a formal policy regarding the personal appearance of students. It provides, relevantly, that “hair ... is to be groomed in a way that avoids extremes of fashion. It must always be cut off the ears and above the level of the collar.”

8.2 The first day of term for the 2018 year was 1 February 2018. On that day the students were to have their photographs taken.

8.3 During the morning of 1 February 2018 Mr Brown noticed that two or three students' hair was too long. He sent them to get a haircut. Later in the morning the Year 10 students were lining up to have their photos taken. Student A was one of them. Mr Brown noticed that the hair of two or three (including Student A although he had had a haircut the previous day) was too long. It was too late to send them home. So Mr Brown took it upon himself to cut their hair.

8.4 The episode was filmed by another student with his mobile phone. The film shows that there were several students nearby and some of them were laughing.

## **9 Letter of complaint**

9.1 Student A's father wrote to Dr Davies on 2 February 2018. The letter records that the father was making a "formal complaint" about "Mr Brown cutting [Student A's] hair in the presence of 4 classes from the Year 10 level." The letter says that: Student A was distressed and embarrassed by the act, which could be classified as a bullying incident likely leave an indelible mark on the boy.

## **10 An assault?**

10.1 It is important to record that what occurred with Student A did not constitute an assault. An assault is an indictable offence under the Crimes Act 1958. It also gives rise to a civil action in damages. Properly understood, there will be an assault only if a person intentionally or recklessly causes another person to apprehend that he/she will suffer harm, usually through the application of force. The force need not be violent, a mere touch might suffice.

10.2 Mr Brown did not intentionally cause Student A to believe he would suffer any harm. Indeed, Student A did not apprehend that he would suffer any harm at the hands of Mr Brown.

## **11 Events immediately following the letter of complaint**

11.1 Following the receipt of the letter, Dr Davies discussed the incident with members of the School's senior leadership team. It was acknowledged by all that what had occurred was a "serious incident". However, Dr Davies indicated, with the apparent approval of the others present, that it was not appropriate in the circumstances to take extreme action against Mr Brown.

11.2 Dr Davies' decision not to take any action against Mr Brown was both sensible and reasonable in the circumstances.

- 11.3 Dr Davies met Student A's father on 5 February 2018. At the meeting Student A's father confirmed the details of what he had written in his letter of complaint, emphasising that his son had been upset and humiliated by the incident. Dr Davies assured the father that the School viewed the incident very seriously and that the matter would be taken up with Mr Brown. Dr Davies said that he would request Mr Brown both to apologise to the father and speak to Student A personally about the matter. The father indicated that this would be a satisfactory resolution of his complaint.
- 11.4 On 7 February 2018 Dr Davies met Mr Brown to discuss the incident. Dr Davies then instructed Mr Brown to call Student A's father to apologise. He made it clear that Mr Brown's conduct was wrong and should never be repeated.
- 11.5 Shortly thereafter Mr Brown telephoned Student A's father. He apologised for what had happened, conceding that he should not have cut Student A's hair. He also told the father that he had not intended to upset Student A and apologised if he had done so.

## **12 The Council becomes involved**

- 12.1 On Sunday 4 March 2018, the Chairman of the Council, became aware of the incident and saw the video. Later that day, he called Dr Davies to a meeting at the School. They discussed the incident and how Dr Davies had responded to it. The discussion was left on the basis that Council would deal with Mr Brown and his continuing role at the School.
- 12.2 In the meantime, the Chairman obtained a copy of the father's letter of complaint. He thought the letter might have been drafted by a lawyer and sent as a precursor to an action against Trinity Grammar seeking damages. He was also very concerned that such an incident had occurred to a student of the School. If Student A had suffered

harm, as the letter suggested, the Chairman considered that Trinity Grammar may have breached its fiduciary duty to care for its students.

12.3 There was a meeting attended by some Council members and others. A lawyer, not from the School's usual firm, was in attendance. Following advice from the lawyer, the Chairman informed those present that:

- Having regard to the duties of care and the responsibility owed by Trinity Grammar to its students, the Council had to ensure there would be no repetition of this or any similar conduct;
- The appropriate way to deal with Mr Brown was that he be dismissed or, if possible, that they find some alternative arrangement for his removal that would protect the School and the students;

12.4 On 6 March 2018 the Chairman wrote to Mr Brown inviting him to attend a meeting at 7.30pm on 8 March 2018 "to discuss the [haircutting] incident and its consequences". The letter recorded that the Council was "gravely and seriously concerned about the incident" which breached all codes of conduct and standards of behaviour of Trinity Grammar.

12.5 The following day, there was a Council meeting by telephone. They were told of the legal advice that had been received. It was agreed by the Council members that the only option was to terminate Mr Brown's employment, subject to allowing him to provide an adequate explanation for the incident. The termination was to be immediate unless Mr Brown agreed to retire at the end of the year on the condition that he take long service leave for the remainder of the year.

12.6 The Thursday meeting took place. Mr Brown attended with a senior barrister.



12.7 Mr Brown explained his position. He said that prior to 1 February 2018 students had been advised that their haircut should meet the School's policy, that he was simply carrying out Dr Davies' instructions in regard to the way that students should wear their hair; that on the morning of 1 February he had sent three students home to have their hair cut, that in the afternoon he saw that Student A's hair was over his forehead (which was contrary to the relevant policy) so he decided to cut it. In response to a question, he said that there was no time to send Student A away to have his hair cut. He said that he had been spoken to by Dr Davies and thereafter contacted Student A's father and apologised. Finally, he apologised for the incident and said that it would not reoccur.

12.8 The Chairman advised Mr Brown of his option: summary dismissal or that he leave by the end of the year.

12.9 Mr Brown declined to leave. Accordingly, he was dismissed.

### **13 Was the dismissal lawful?**

13.1 The dismissal was not lawful. Mr Brown's conduct did breach the provisions of the Staff Code of Conduct and VTP Code referred to earlier. However, the time for dismissal had passed.

13.2 When Dr Davies received the father's letter of complaint, it was he, and he alone, who had power to decide what action should be taken against Mr Brown. Dr Davies made that decision, which was not to take any action against Mr Brown. He did not communicate that decision to Mr Brown in so many words. But he did by his conduct let Mr Brown know that no action would be taken. The conduct included, in particular, instructing Mr Brown not in the future to cut a student's hair, with the implied warning that failing to adhere to that instruction could lead to Mr Brown's dismissal; and

continuing to accept Mr Brown's performance of his duties. This conduct was a recognition that Mr Brown's employment should continue.

- 13.3 Once Dr Davies had made his decision, namely to keep the employment contract on foot, it was no longer open to Dr Davies, or, for that matter, Trinity Grammar (even if the Council had the requisite power) to take the opposite course and dismiss Mr Brown.

## 14 Terms of Reference

- 14.1 The following are the answers to the questions raised in the Terms of Reference:

Question 1 What are the School policies, codes of conduct or statutory or regulatory requirements that set out the conduct required of teaching staff?

Answer: The Staff Code of Conduct, the Victorian Teaching Profession Code of Conduct, the Anti-Discrimination, Bullying and Harassment Policy and the Child Protection Policy.

Question 2 In what circumstances can a member of the teaching staff:

- be dismissed; or
- have his or her employment contract terminated?

Answer: If a member of staff is guilty of serious neglect of duty, wilful misconduct or serious misrepresentation he/she may be dismissed without notice. Summary dismissal will also be appropriate for other serious breaches of the employment contract.

Question 3 What are the procedures that must be followed before a member of the teaching staff:

- is able to be dismissed; or
- may have his or her employment contract terminated?

Answer: There is no obligation on Trinity Grammar (via the Headmaster) to adopt any particular procedure before a teacher is summarily dismissed. The dismissal may be immediate. All that is required is that the ground of dismissal exists.

Question 4 What were the procedures that were followed leading to the dismissal/termination of the employment contract of Mr Brown?

Answer: Mr Brown was given written notice that he may be dismissed. This was followed by a meeting at which Mr Brown was legally represented. Mr Brown was given the opportunity to make submissions at the meeting.

Question 5 Were the procedures fair?

Answer: There is no legal requirement that the procedures be fair. That said, if there was such a requirement there are several aspects of what occurred that might be thought to be unfair.

First, Mr Brown was not given sufficient time to prepare his defence, as his barrister indicated.

Second, based on legal advice not from the School's retained firm, the only options the Council were willing to consider were summary dismissal and the entry into a separation agreement. There was, of course, another available option, which was to allow Mr Brown to continue in his employment, perhaps with some supervision. A decision-maker required to act fairly would necessarily consider such an option. It is recognised today that work is one of the defining features of a person's life and the loss of employment can have a devastating effect. All the more so if the

person has had a long period of employment (in this case 29 years) and, during that time, had carried out his duties satisfactorily.

Question 6 Was the dismissal decision/termination of employment contract justified, reasonable or proportionate?

Answer: The dismissal was not justified, in the sense of being permitted by the employment contract. This was because, prior to the dismissal, Mr Brown's employment contract had been affirmed.

It is an open question whether a decision to dismiss Mr Brown would have been reasonable or proportionate. This is a matter on which opinions will differ, depending upon how seriously the incident is viewed and what is to be made of Mr Brown's long and satisfactory employment history. We incline to the view that if reasonableness or proportionality were relevant criteria (and they are not), they were ignored.

This is not to suggest that it was appropriate for Mr Brown to cut or trim a student's hair. Nor is it suggested that cutting a student's hair, especially if it occurs in circumstances where it might cause the student to suffer distress may not be serious misconduct on the part of the teacher cutting the hair. However, it was not illegal.

While, in the past, it may have been acceptable for a teacher to cut a student's hair to ensure that the student was fully compliant with the School's requirements for personal appearance that is not the position today.

Even if a student gives his consent to having his hair cut, this is unlikely to be a true consent. In most, if not all, cases the student would feel compelled to agree to the haircut.

In the event there is the inevitable risk that a student would be humiliated by the event. The risk of humiliation would be ever present in all circumstances. This is unacceptable.

There are other ways in which a student's inappropriate appearance can be dealt with. The student can be sent home. The student can be sent to a hairdresser. In the case of school photographs, the student can be excluded. In none of these cases is there a need for any interference by a teacher with the person of a student.

Question 7 What other issues relating to the dismissal/termination of employment contract of Mr Brown should be brought to the attention of the School?

Answer: Several things stand out. First, by 5 or 6 March 2018, when the Council intervened, the issue of what Trinity Grammar should do was not so urgent that it needed to be dealt with in the haste it was. It seems clear to us that if a more cautious approach had been undertaken there might have been a different outcome.

Second, greater attention should have been given to the Constitutional restrictions on the Council's power (namely that it did not have the power to hire or dismiss teaching staff) and the policy behind that restriction. The division of powers between the Headmaster and the School as laid down by the Constitution is of fundamental importance. So also is the power of hiring and dismissing staff given to the Headmaster by his

employment contract. It undermines a fundamental tenant of the operation of Trinity Grammar (and any other school that has adopted a similar power structure) if these governing principles are cast aside.

## **15 Recommendations**

15.1 The most obvious failure in what occurred was the Council's decision to take away from the Headmaster his right to decide whether or not a member of the teaching staff should be dismissed.

15.2 The ability to hire and fire teaching staff is fundamental to the role of a Headmaster. This is accepted by Trinity Grammar and is the reason the right is given to the Headmaster in his employment contract. The Headmaster is best placed to make staffing decisions. The Council will rarely, if ever, be in a position to make such decisions.

15.3 We therefore recommend, for future reference, that the Council now record in its minutes that the Council will not remove from the Headmaster the power to dismiss teaching staff.

15.4 Steps need to be taken to deal with Mr Brown. Discussions should take place with Mr Brown's solicitor to determine:

- whether Mr Brown wishes to resume his employment at the School;
- if he does, the circumstances of his return.

15.5 Assuming that Mr Brown resumes his position, the Headmaster should write to Mr Brown advising:

- that he should never, in any circumstances, cut a student's hair;

- how the School's personal appearance policy should be enforced, for example, by sending a student home;
- that any breach of the instructions may result in summary dismissal.

15.6 We also recommend that the School send a notice to parents setting out the manner in which the School will deal with students who do not conform with the personal appearance policy.

15.7 We do not consider it proper that the Headmaster revise Mr Brown's duties without his consent until the end of his current five year term as Deputy Headmaster and Head of Senior School.

Dated: 31 May 2018