

Unlawful Discrimination and Grooming A Controversial Relationship

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A controversial relationship

A decision by a Victorian school to terminate the employment of a teacher proved costly. The dismissal took place after it came to the school's attention that the teacher, Mr Martin, had begun a sexual relationship with Samantha, a former student of the school.

Mr Martin had taught Samantha when she was in her early high school years. It was not until 2012, when she was in her final year and had turned 18, that their relationship began to develop. Samantha started to attend a gym where Mr Martin was a regular member. The two communicated by text message to meet up for training sessions together. In October 2012, another teacher (who was also a parent of a Year 12 student who was a friend of Samantha) brought this "association" between Mr Martin and Samantha to the school principal's attention. At a meeting between Mr Martin and the principal, Mr Martin denied that he was having a sexual relationship with Samantha. The principal accepted this at the time. However, the principal took the view that Mr Martin had blurred the boundaries of the teacher-student relationship. He directed Mr Martin to stop meeting with Samantha outside school, to stop training at the gym with her and to stop any electronic communications.

Early the next year, Samantha's parents met with the principal to alert him that Mr Martin and their daughter were engaged in a sexual relationship. This began after Samantha had completed her studies at the school. Samantha's parents were of the opinion that Mr Martin had "groomed" their daughter while she was a student, with the intention of later entering into a sexual relationship with her. Following this meeting, Mr Martin was stood down and the school appointed a lawyer to conduct an independent investigation into his conduct. This investigation was completed and provided to the principal in May 2013. A key finding was that Mr Martin had groomed Samantha.

The investigation report defined *grooming* this way:

*Broadly speaking, 'grooming' is conduct engaged in to establish an emotional connection with a person (usually someone with less power in the relationship) to prepare the person for a sexual relationship or sexual acts in the future.*¹

The investigator considered that "the totality of the evidence supports a finding ... that Mr Martin has clearly blurred and significantly transgressed professional boundaries and engaged in 'grooming of Samantha' from 2009 to 2012. In particular, the evidence supports a finding ... that Mr Martin has engaged in conduct towards Samantha to establish an emotional connection and this has prepared Samantha for a sexual relationship with him."²

¹ Quoted in *Pearson v Martin* [2015] VSC 696 (9 December 2015) at para 36

² Quoted in *Martin v Padua College* [2014] VCAT 1652 (24 November 2014) at para 23

The principal informed Mr Martin that he proposed to terminate Mr Martin's employment and sought a response. After considering the response, the principal dismissed Mr Martin.

Mr Martin claimed that the school had discriminated against him by treating him unfavourably when it dismissed him because of his lawful sexual activity with Samantha contrary to the *Equal Opportunity Act 2010 (Vic)*. Discrimination based on lawful sexual activity is unlawful under the Act.³ Both sides accepted that the relationship was lawful. There is no requirement in the Victorian legislation for there to be a comparator. In other words, one does not have to find that the discriminator has treated the person discriminated less favourably because of the lawful sexual activity than the discriminator would treat someone who has not engaged in such activity in the same or similar circumstances.

Samantha gave evidence to the Tribunal that Mr Martin had not, while she was a student, physically touched her in an inappropriate or sexual manner or behaved in a manner that made her feel uncomfortable. She said that she never felt emotionally manipulated by Mr Martin.

The Victorian Civil and Administrative Tribunal accepted Mr Martin's claim⁴. In particular, it did not accept the principal's evidence that Mr Martin was dismissed solely for crossing professional boundaries. The Tribunal found his assertion that the lawful sexual activity was not part of his reasoning and subsequent decision unconvincing. Mr Martin's submission "that the report had worked backwards from the sexual relationship and viewed all the retrospective evidence through the lens of grooming" was accepted. Under the *Equal Opportunity Act 2010*, the sexual activity of Mr Martin only had to be a **substantial** reason for the principal's decision for it to be discriminatory.⁵ It did not have to be the sole or dominant reason. The Tribunal found that it was a substantial reason. The Tribunal awarded Mr Martin \$90,000 in compensation.

On appeal to the Victorian Supreme Court⁶, the Tribunal's decision was upheld.

The Court held that the finding by the Tribunal that Mr Martin's lawful sexual activity with Samantha was a substantial reason for the termination of employment was a finding that was open or reasonably open to it. The Court reached the same decision as the Tribunal in holding that the reasons for his termination of employment were multi-faceted, although it made the conclusion that the lawful sexual activity was something that 'loomed large' and was a substantial reason for the principal's decision.

³ *Equal Opportunity Act 2010 (Vic)* section 6(g)

⁴ *Martin v Padua College* [2014] VCAT 1652 (24 November 2014)

⁵ *Equal Opportunity Act 2010 (Vic)* section 8

⁶ *Pearson v Martin* [2015] VSC 696

Grooming

Victorian teachers must report to the Department of Health and Human Services Child Protection if they believe on reasonable grounds that a child or young person is in need of protection.⁷ The Victorian Department of Education and Training's Policy on Child Protection - Reporting Obligations requires teachers to report where there are indications that a child is being groomed.⁸

The NSW Ombudsman says of grooming:

*... behaviour should only be seen as 'grooming' where there is evidence of a pattern of conduct that is consistent with grooming the alleged victim for sexual activity, and that there is no other reasonable explanation for it.*⁹

The NSW Department of Education states:

*Grooming behaviour is a process whereby sexual offenders 'condition' and build rapport with children or young people in order to reduce their resistance to, and increase compliance with, sexual abuse.*¹⁰

There is a case study on the NSW Ombudsman Annual Report 2007–2008¹¹ in which allegations of sexual misconduct (grooming) were sustained in relation to a female teacher found to have formed an inappropriate relationship with a vulnerable male student aged 17. The teacher entered into a sexual relationship with the student when he turned eighteen, which was not a sexual offence, but later dumped him. However, the agency clearly established the teacher had groomed the student for the sexual relationship in the year before he turned 18. The boy had formed a close and dependent relationship with the teacher during the grooming process. This included the teacher spending time alone with him at school, frequently contacting him by telephone, socialising with him outside of school, and being his confidante during difficulties with his family. The then Ombudsman, Mr Bruce Barbour, is reported as saying that "some agencies seem not to understand the concept [of grooming] at all."¹²

With respect, it seems to us that the Tribunal and the Victorian Supreme Court also did not fully understand the concept of grooming. While the Tribunal found that the sexual activity was a substantial reason for the unfavourable treatment (the dismissal), the evidence before the Tribunal seemed to suggest that the sexual activity was just part of

⁷ Sections 182 and 184 of the *Children, Youth and Families Act 2005*

⁸ <http://www.education.vic.gov.au/school/principals/spag/safety/Pages/childprotection.aspx>

⁹ NSW Ombudsman *Practice Update 2013/1: Defining Reportable Conduct*

¹⁰ NSW DET Policy dated 23 April 2004 *Responding to Allegations against Employees in the Area of Child Protection*

¹¹ Case study 25 on page 83 - http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/5169/AR_Ombo_07-08_Pt1.pdf

¹² *Sydney Morning Herald* 23 October 2008 "Schools turn blind eye to groomers" by Adele Horin <http://www.smh.com.au/news/national/schools-turn-blind-eye-to-groomers/2008/10/22/1224351351224.html>

the material that the principal took into account in finding that grooming had taken place. In other words, the principal did not dismiss Mr Martin because of the sexual activity but rather because of the grooming and repeated “boundary transgressions” of which the sexual activity was probative.

What can schools learn from this?

1. Act promptly and thoroughly

In October 2012, when allegations were first made, the principal simply put the allegations to Mr Martin who denied them. A more thorough investigation at that time may have led to Mr Martin’s dismissal before there had been any sexual activity. A discrimination claim based on lawful sexual activity could not have succeeded at that point.

We hasten to add that it can be very difficult to sustain an allegation of grooming when the conduct of the perpetrator has not yet resulted in some sexual abuse.

2. Keep good records

The Tribunal’s finding that Mr Martin’s lawful sexual activity with Samantha was a substantial reason for the termination of employment was critical. In this sort of situation, a school principal ought to make it clear that the teacher’s employment is being terminated as a result of grooming behaviour and then document this as the basis the termination.

3. Have a Code of Conduct

It is important not only to have a code of conduct but also to keep it up to date. Then, schools must ensure that all staff are aware of their duty of care to their students and that they know and understand what the code of conduct says about contacting or meeting students outside of school hours, especially through social media or by phone.

4. Tread carefully when suspending or terminating staff

There are proper procedures to be followed when dealing with allegations of staff misconduct. Schools ought to seek advice on how to investigate properly and fairly. Where appropriate, engage an external investigator. If suspension or termination appears to be warranted, it is normally prudent to get some quick legal advice rather than end up in time-consuming and costly proceedings later.

5. Know the law in your area

The anti-discrimination laws in Queensland and Tasmania, like Victoria, make discrimination on the basis of lawful sexual activity unlawful. However, the anti-discrimination laws in all other states and territories do not contain this prohibition. The attributes in respect of which discrimination is unlawful vary across the states and

territories. Therefore, it is important that schools understand the particular anti-discrimination laws that apply to them.

On a national level, the *Fair Work Act 2009 (Cth)* prohibits employers from terminating an employee's employment for a variety of reasons, including sex, sexual preference, or marital status.¹³ While it does not prohibit termination because of lawful sexual activity, an employer would not normally be justified in summarily dismissing an employee for that reason.

Is the decision out of step with community standards?

The decisions of the Tribunal and the Victorian Supreme Court in this case are all the more puzzling when considered in light of the current Royal Commission into Institutional Responses to Child Sexual Abuse. In June 2015, the Royal Commission published its Report of Case Study No. 12 which considered, among other things, the importance of policies, procedures and training on grooming behaviours.¹⁴ With child protection increasingly becoming the focus of both our legislatures and the community as a whole, the decision to pay \$90,000 to a teacher who was found by his employer to have groomed a student appears remarkable. It is also, in our opinion, a harsh result for a school which conducted an independent investigation and followed a sensible and thorough approach to dealing with the termination of the teacher's employment.

If you would like to know more about child protection, discrimination, investigations and related employment issues, please contact David Ford or Nathan Croot at Emil Ford Lawyers.

¹³ *Fair Work Act 2009 (Cth)* s 351.

¹⁴ <http://www.childabuseroyalcommission.gov.au/getattachment/ef4f35e9-1e57-4c72-8846-7de6e1365d81/Report-of-Case-Study-No-12>