

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023/33

UNDER | WĀHANGA

the Education and Training Act
2020 (**the Act**)

IN THE MATTER | MŌ TE TAKE

of a charge referred to the
Tribunal

BETWEEN | I WAENGA I A

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

AND | ME

JOHN MALLORY

(Registration 259284)

Kaiurupare / Respondent

Hearing | Te Rongonga

AVL, 23 November 2023 – on the papers

Representation | Hei Māngai

M Mortimer-Wang for CAC

F Renton for Respondent

DECISION DATED 14 DECEMBER 2023

Tribunal:

James Gurnick

Lyn Evans

Kiri Turketo

Introduction

[1] The Complaints Assessment Committee (**CAC**), in accordance with s 497 of the Education and Training Act 2020 (**Act**), referred this matter to the Tribunal on the basis that Mr John Mallory had engaged in serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers in that:

- (a) between January 2021 and September 2021, Mr Mallory used his school laptops to access websites containing pornographic stories, videos and material, including:
 - (i) content purporting to involve teenagers;
 - (ii) content based around a teacher/student relationship; and
 - (iii) content containing themes of coercion and non-consent;
- (b) on 13 September 2021, Mr Mallory unlocked his school laptop at school, which displayed a pornographic image or video.

[2] The CAC alleges that the conduct referred to above, separately or cumulatively, amounts to serious misconduct pursuant to s 10 of the Act and any or all of r 9(1)(f) and/or (k) of the Teaching Council Rules 2016, or alternatively amounts to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to s 500 of the Act.

[3] The parties have agreed a summary of facts, as follows:

Introduction

1. The respondent, John Mallory, is a fully registered teacher. He currently holds a full practising certificate, which is due to expire on 21 September 2023. He was first registered as a teacher in July 2005.
2. At all material times, Mr Mallory was employed as a maths teacher at Karamu High School, a co-educational secondary school for students in Years 9 to 13 located in Hastings (School).

Inappropriately using a school laptop to access pornography

3. At the start of each year, staff at Karamu High School are required to sign 'Annual Agreements' which include a declaration that they will observe the School's expectations for acceptable use of all ICT equipment, software and files. Those agreements in turn cross-referenced to policies requiring Mr Mallory to "use [any school-provided] device for the purposes it was provided". Mr Mallory signed these agreements in 2019 and 2021.

4. As part of an IT renewal process, around 28 January 2020, Mr Strickland obtained Mr Mallory's old laptop to manually move any data that was not synched to the 'Cloud' (an online data storage space) from his old laptop to his new laptop. This included internet webpage 'bookmarks'. Whilst undertaking this process, Mr Strickland came across a bookmark to a pornographic website in an unusual location on Mr Mallory's laptop, in a different place to where bookmark data would ordinarily be located on a laptop. This was reported to the Principal, Dionne Thomas, including that it could have been an innocent error, and there was not other evidence to suggest there was anything inappropriate. Mrs Thomas made a note of this and no further action was taken at the time.
5. Mr Mallory was issued with his new laptop which utilised a newer version of the web browser, Firefox, than his old laptop. The new version of Firefox had a different means of clearing the cache and web browser search history. Around 30 or 31 January 2020, Mr Mallory approached Mr Strickland enquiring about how to clear the web browser history and cache on his new device. Despite thinking this was an unusual request, Mr Strickland told him how, thinking nothing more of it at the time.
6. In the middle of 2021, Mr Mallory approached Mr Strickland after encountering a problem with his laptop. As the problem could not be fixed immediately, Mr Strickland made a backup of Mr Mallory's folders and data, and sent the laptop away for repair. Mr Mallory was provided with a temporary replacement laptop. The backup data taken from Mr Mallory's malfunctioning laptop included data from any applications used, including logs and history from internet web browsers. Mr Mallory's laptop ultimately could not be repaired, so he retained the temporary replacement and the backup data remained saved on Mr Strickland's device.
7. On the morning of Monday 13 September 2021, Mr Mallory approached Mr Strickland, who was talking to another colleague at the time, for assistance setting up two-factor authentication on his device. Mr Mallory opened his laptop and unlocked it, where Mr Strickland immediately saw a pornographic video with naked bodies which looked like adults engaging in sexual intercourse. Mr Mallory immediately closed the video and did not say anything. Mr Strickland was standing next to Mr Mallory and was unable to see Mr Mallory's expression.
8. Mr Strickland did not alert Mr Mallory to the fact he had seen the video, but after taking a few days to process what he had seen, he reported it to Ms Thomas, who immediately uplifted Mr Mallory's laptop.
9. Given the unusual bookmark Mr Strickland had noticed in early 2020, he and Ms Thomas reviewed the web browser history from the backup data from the old laptop and the new temporary replacement laptop, to see the nature of the videos viewed by Mr Mallory. They discovered the content was pornographic. Mr Strickland and Ms Thomas only reviewed three or four videos to get a sense of what they contained. All pornographic content appeared to have been streamed over the internet; nothing was saved or downloaded to the laptops.
10. As part of the School's investigation process, Mr Strickland was asked to provide a copy of the web browser history from both laptops. Upon viewing the data, numerous websites were identified as containing pornographic content which had been visited over the duration of 2 January 2021 to 17 September 2021, including:

- a. www.xvideos.com (a pornographic video sharing and viewing website);
 - b. www.LiveJasmin.com – Hot Live Sex Shows (live sex performances);
 - c. www.literotica.com (erotic fiction and fantasy website);
 - d. www.asstr.org (Alt Sex Stories Text Repository);
 - e. www.joinforjoy.com/erotic_stories (website featuring sexually explicit material).
11. The data obtained from the laptops was the full web browser history that was available at the time it was extracted. Any cached data that was cleared from the web browser history would not have been available to be extracted.

School process

12. On 18 September 2021, the day after Mr Strickland reported what he saw to Ms Thomas, Ms Thomas wrote to Mr Mallory, inviting him to a meeting to discuss the issues of concern raised by Mr Strickland.
13. On 20 September 2021, a further letter to Mr Mallory indicated that, as a result of further enquiries, internet search history and internet search terms had been obtained from the two laptops.
14. On 21 September 2021, Mr Mallory attended a staff disciplinary meeting with Ms Thomas and Deputy Principal, Mr Damien Hollands, together with a PPTA Field Officer. During that meeting, Mr Mallory advised that his actions were a misjudgement and he thought that all of the individuals in the videos and images were over 18 and only adults. Mr Mallory stated that 90% of the pages were short stories, but that he knew he should not have used the school laptops. Mr Mallory said that it had only happened this year (2021) and that it was only short stories, not pictures and videos. However, it was then put to him by a meeting attendee that there was evidence of searches for videos and use of words indicating searches that appeared to be for young persons. Mr Mallory stated that he felt shame and that it was the stupidest thing he could have done. Following the meeting, Mr Mallory was subsequently suspended from his employment pending a full investigation.
15. Following his suspension, on 22 September 2021, Ms Thomas submitted a mandatory reporting form to the Teaching Council | Matatū Aotearoa and the Teaching Council's Triage Committee referred the matter to a Complaints Assessment Committee (Committee) to investigate.

Digital Forensic Assessment

16. In August 2022, a Digital Forensic Report was prepared by Digital Forensic Analyst, Anthony Drake, at the request of the CAC investigator which related to a review of the internet history extracted from Mr Mallory's two laptops over the nine-month period, January to September 2021.
17. Mr Drake viewed 9,822 records and found that 5,850 entries related to sites which would be considered inappropriate for a school computer – the majority of which came from two websites primarily:

- a. www.literotica.com (4,452 entries found relating to this website); and
 - b. www.xvideos.com (975 entries found relating to this website).
18. In addition to identifying which websites had been accessed and on how many occasions, Mr Drake was also able to identify search terms used by Mr Mallory on those websites. Given Mr Mallory's position as a secondary school teacher, approximately 100 of the search terms identified, were considered by Mr Drake to be of significant concern. These included:
- a. 'Teen orgasm';
 - b. 'Reluctant sex';
 - c. 'Forced orgasm';
 - d. 'Reluctant orgasm';
 - e. 'Teen sex';
 - f. 'Forced creampie';
 - g. 'Non consent sex';
 - h. 'Young innocence sex'; and
 - i. 'Forced sex'.
19. Mr Drake also identified a minority (indicatively approximately 200) other of the 5850 webpages accessed by Mr Mallory which contained in the description of the page content stories about non-consensual sex acts and/or rape, including on one occasion, a story about a male planning a home invasion and rape of a girl aged between 14 and 15. Approximately 200 other webpages identified story content titles that centred around inappropriate relationships and relationships with minors, including teenagers and people of the age of his students. Such titles included the following references:
- a. to teenagers and school girls, including "innocent teen", "teen virgin", "petite teen", "seducing her teacher at prom night" and "young sex";
 - b. to rape, abuse, reluctant sex, non-consent and forced sex;
 - c. "Teacher learns a lesson";
 - d. "Teen schoolgirl gets knocked up by teacher"; and
 - e. "One of my students".
20. In addition to the volume of records and entries, the data obtained from Mr Strickland and analysed by Mr Drake indicated that Mr Mallory would often access this kind of material for periods of up to three to four hours on some occasions, and at all hours of the day, though not during school hours on school days. Often, the sites would be accessed minutes apart. Mr Mallory accessed pornographic material on average four to five days every week during the period of the charge. As outlined above, one video

he accessed remained on his laptop screen when he had it at school during school hours.

Teacher's comments

21. On 1 November 2022, a draft copy of the Committee's Investigation Report, prepared by investigator Kate Abernethy, was sent to Mr Mallory's PPTA representative. On 25 November 2022, Mr Mallory's representative responded on his behalf, stating that he had been teaching for 50 years and was regarded as a well-respected and effective teacher and colleague. His PPTA representative explained that Mr Mallory did not dispute he accessed the websites on his school computers and has no explanation as to why he did so.

22. Notwithstanding the above, his PPTA representative raised a number of points concerning the investigation and the allegations in general, which included:
 - a) Accessing pornography is not illegal in New Zealand;
 - b) The websites visited contained pornographic stories, poems, essays, illustrated and audio stories written by registered users, and were accessed on adult websites explicitly identified as being R18;
 - c) Mr Mallory's intention was only to access material where the participants or characters in a story were over 18 and that the School and investigation report had not provided a credible basis for saying otherwise;
 - d) The content from these websites was streamed, not stored on the laptops;
 - e) Whether material denoting a couple having sex can be described as "pornographic" is subjective to the person viewing it;
 - f) Mr Mallory being adamant that he did not access any of the websites during school hours on school days. Mr Mallory lived close to the school and so could access these websites any time after 3:30pm. His representative also stated that there was no indication in the forensic report whether the data regarding times and dates the websites were accessed took into account daylight savings, school and public holidays, as well as teacher only days, sports days and Accord days, during all of which Mr Mallory would have been at home.

23. In the response, Mr Mallory reiterated his remorse for his actions and for the harm caused to others. He determined that he would not teach again and would voluntarily relinquish his practising certificate. Mr Mallory did not attend the Committee's meeting.

Process

[4] The parties agreed that the hearing could proceed on the papers. We have received written submissions from both parties. At the outset, the respondent accepts his conduct amounts to serious misconduct.

Law

[5] Section 10(1)(a) of the Act defines “serious misconduct” as conduct by a teacher that either:

- (a) adversely affects, or is likely to affect, the wellbeing or learning of one or more children; and/or
- (b) reflects adversely on the teacher’s fitness to be a teacher; and/or
- (c) may bring the teaching profession into disrepute.

[6] For serious misconduct to be made out, as well as meeting one or more of the three limbs set out above, the conduct must at the same time meet one or more of the Teaching Council’s criteria for reporting serious misconduct. These rules make the behaviour mandatory to report.

[7] In this case, the CAC relies on r 9(1)(f) and/or (k).

CAC’s submissions

[8] While the burden rests on the CAC to prove the charge on the balance of probabilities, we note, as above, that Mr Mallory accepts his behaviour constitutes serious misconduct.

[9] We are satisfied that the conduct reflects adversely on Mr Mallory’s fitness to be a teacher.¹ The use of the laptops as described above was a breach of the school’s IT policies. Mr Mallory committed to only use school-provided devices for the purposes for which they were provided.

[10] We accept the CAC’s submission that the conduct, which included seeking out material related to students, young persons and non-consensual activity on school-issued laptops legitimately calls into question Mr Mallory’s observation of appropriate boundaries and indicates a lack of professional judgement and integrity.

[11] In addition, the behaviour, in our view, is likely to bring the teaching profession into disrepute.² As the Tribunal has said before, “parents and the community at large do not expect school property to be used for accessing pornography”.³ While we accept that the sites visited

¹ Education and Training Act 2020, s 10(1) definition of “serious misconduct”, limb (a)(ii).

² Education and Training Act 2020, s 10(1) definition of “serious misconduct”, limb (a)(iii).

³ *CAC v Teacher A* NZTDT2018/16, 8 July 2019 at [39].

and material viewed were not objectionable,⁴ or involved under-age participants, the conduct does show a lack of integrity and professional judgement on the part of Mr Mallory when using a school device to access relevant material.

[12] Clause 1.3 of the Code of Professional Responsibility (**Code**)⁵ requires teachers to maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity.⁶ The guidance to the Code expressly refers to inappropriate use of school resources as an example of conduct that may breach this provision of the Code.⁷

[13] Mr Mallory's conduct engages r 9(1)(f) and (k) of the reporting criteria.⁸ The 13 September 2021 incident was isolated but represents an occasion of "possessing" pornographic material while at school.⁹ We accept the CAC's submission, more generally, that the access of pornographic material on a school-issued laptop is likely to bring the teaching profession into disrepute.

[14] We acknowledge the CAC does not advance the first alternative limb of serious misconduct: that the conduct is likely to adversely affect the wellbeing or learning of one or more students.¹⁰ Beyond the 13 September 2021 incident, there is nothing to suggest that the content was otherwise available at the school. We highlight that none of the content was saved or downloaded to the laptops.¹¹

[15] We agree with previous findings of the Tribunal that accessing pornography on school-issued devices will meet the definition of serious misconduct.¹²

The respondent's submissions

[16] Mr Mallory admitted his behaviour, has shown remorse, and acknowledged the impact his actions would have had on the staff who had to manage the situation. He has stopped

⁴ As defined by s 3 of the Films, Videos, and Publications Classification Act 1993.

⁵ The Code of Professional Responsibility, Examples in Practice (Education Council, Wellington, June 2017).

⁶ The Code of Professional Responsibility – Examples in Practice (2017).

⁷ At 7.

⁸ Education and Training Act 2020, s 10(1), definition of "serious misconduct", limb (b).

⁹ Teaching Council Rules 2016, r 9(1)(f).

¹⁰ Education and Training Act 2020, s 10(1), definition of "serious misconduct", limb (a)(i).

¹¹ Summary of facts at [9].

¹² *CAC v Lowther* NZTDT2016/17, 27 October 2016 at [27]; *CAC v Teacher* NZTDT2013/28, 14 June 2013 at [9].

teaching; his practising certificate expired on 21 September 2023, and he does not intend to apply for another one.

[17] He acknowledges the aggravating factors in this case include the amount of material accessed and the nature of some of the search terms.

[18] He reiterates that his intention was only to access material where the participants or characters were over 18 years. A detailed forensic investigation does not suggest otherwise.

[19] Mr Mallory submits that there have been no concerns raised during his long teaching career about his conduct towards staff or students, or any other disciplinary matters. He accepts his actions constitute serious misconduct and will accept the penalty the Tribunal deems appropriate.¹³

Penalty

[20] The CAC submits the appropriate penalty is censure and a condition that, for a period of at least two years, Mr Mallory inform any employer or prospective employer of the Tribunal's finding.

[21] We agree with the CAC that conduct of this type does not need to be met with suspension or cancellation, but it does require censure and a condition that will facilitate awareness on the part of employers in the profession and monitoring in the future.

[22] While we note that Mr Mallory does not intend to apply for another practising certificate, the imposition of censure and conditions ensures against the risk that Mr Mallory does change his mind and mitigates against any ongoing risk to learners and the reputation of the profession. It also fulfils the purpose of general deterrence by ensuring that serious misconduct is formally marked by a penalty.

[23] For that reason, we make the following orders:

- (a) Censuring Mr Mallory for his conduct.
- (b) An annotation is to be recorded on the public register for a period of two years.
- (c) The Teaching Council is directed to impose a condition on any future practising certificate of Mr Mallory's that he is to notify any future employer of the Tribunal's decision. This condition means that should Mr Mallory seek to be employed again

¹³ Respondent's submissions dated 27 September 2023 at [21].

(even although we note his practising certificate expired in September 2023), he will need to notify any future employer of the Tribunal's decision. The condition does not lapse in two years.

Non-publication

[24] Mr Mallory does not seek permanent name suppression.

[25] Karamu High School applies for a permanent non-publication order.

[26] We are not satisfied that this case reaches the high threshold for non-publication. There are no teachers of Karamu High School or students referred to in the decision other than Mr Mallory. The conduct occurred between January 2020 and September 2021.


[27] One of the submissions by the school principal is that a significant period of time has passed since Mr Mallory has left and this will raise suspicions about other staff actions should the school's name be published. To the contrary, the fact that the teacher's name is published means that there can be no suspicion relating to the above conduct about any other staff as it is clear the conduct was by Mr Mallory and not others. That submission, in our view, favours publication as compared with suppression.

[28] For the above reasons, there is no non-publication order.

Costs

[29] As this matter has been determined on the papers and the respondent has fully co-operated, both in terms of the investigation and in accepting responsibility, it is appropriate that a reduction in costs is made. On that basis, we direct that an award of costs in favour of the CAC is appropriate in the amount of \$3,195.72.¹⁴

[30] In addition, it is appropriate that the Tribunal's costs be met. For the same reasons, the Tribunal's costs totalling \$582 are also ordered to be paid by Mr Mallory.¹⁵



J S Gurnick
Deputy Chair
New Zealand Teacher's Disciplinary Tribunal

¹⁴ Being 40 per cent of actual costs of the CAC in accordance with the Education and Training Act 2020, s 500(1)(h) and Practice Note 1 of the Teachers Disciplinary Tribunal relating to costs.

¹⁵ Forty per cent of the total costs of the Tribunal.