

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER The Education Act 1989

IN THE MATTER	of charges brought by the Complaints Assessment Committee of the New Zealand Teachers Council
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BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**
Complainant

AND	XXXXXXXXXX Respondent
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DECISION OF NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL

Tribunal: Mr Kenneth Johnston (Chairman), Ms Barbara Arnott, Ms Lyn Brash, Ms Debra Marshall-Lobb and Ms Lorraine Skiffington

Hearing:	12 May 2006
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Decision: 7 July 2006

Counsel:	Counsel for Complainant: Gaylene Phipps Counsel for Respondent: Nicole Carter
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Introduction:

1. By Notice of Charge dated 10 October 2005, the Complaints Assessment Committee of the New Zealand Teachers Council refers to the Tribunal a report received by the Council pursuant to s129AT(4) of the Education Act 1989, and charges the respondent with serious misconduct, particulars of the charge being as following:

"3. The Complaints Assessment Committee, pursuant to s139AT(4)(a) charges that XXXXXXXXXX, teacher, of XXXXXXXXXX:

(i) During the month of March 2005, accessed and possessed a number of pornographic images, using a school laptop, while situated on school premises.

(ii) During the month of March 2005 accessed pornographic images in breach of the school standards as to the use of his allocated school laptop.

4. Any one or more of the particulars referred to in paragraphs 3(i)-(ii) above constitute serious misconduct either separately or cumulatively, under rule 9 of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 and s139AB of the Education Act 1989."

2. At a preliminary telephone conference held on 12 December 2005, which Ms Phipps attended for the complainant and Ms Carter attended for the respondent, Ms Carter indicated that the charge of serious misconduct would not be defended and that the question for the Tribunal would simply be the appropriate sanction. Counsel also indicated that an agreed statement of facts would be available, and the Chairman directed that any agreed statement of facts, together with written submissions on behalf of the parties, were to be lodged with the Secretary ten working days before the hearing. During the course of that conference the matter was set down for hearing on 2 March 2006, but that fixture was later vacated for reasons which need not be canvassed here, and the matter was set down for hearing on 12 May 2006.

3. Counsel were able to settle an agreed statement of facts which was duly lodged with the Secretary and distributed to the Tribunal members prior to the hearing. As this is a relatively compact document, we set it out in full:

"1. On 12 May 2005, the New Zealand Teachers Council received a mandatory report of the resignation of the respondent in accordance with s139AK of the Education Act 1989.

2. In the report, the principal of [the respondent's former employer] notified the Council that the resignation had followed discovery that the respondent had accessed and viewed pornography using the school's server and his school lap top.

3. The principal provided a copy of the school's agreement on computer use, titled "Computer and Internet Acceptable Use Agreement _ Staff". A copy is annexed and marked "A".

4. The principal also provided the Teachers Council with a copy of the report of the forensic investigation which is annexed and marked "B". The user detail statistics are annexed and marked "C".

5. The mandatory report recorded that the respondent had acknowledged that his conduct was inappropriate and that the respondent had outlined to the school the measures he had taken to avoid future incidents, including psychological help and counselling.

6. The Complaints Assessment Committee wrote to the respondent to provide him with an opportunity to comment on the report.

7. The respondent replied promptly and advised:

'I humbly apologise for my unprofessional and injudicious use of the . . .College internet server to view inappropriate material on my laptop. I have been teaching for more than twenty years and this is the first time that my behaviour has fallen below what could be expected of a teacher. I can only say again how embarrassed I am and how deeply and sincerely I regret my actions in this regard.

Prior to this incident occurring, I had already accepted a position at . . .College to commence in July 2004. This had already been negotiated by the Principals at both schools. Following my resignation, I began teaching at . . .College where the Principal and Board are fully aware of what transpired at . . .College.

I want to assure the Committee that I am deeply committed to ensuring I do not err in this way again. In addition to the steps I outlined to . . .College that you have, I am regularly meeting with the staff counsellor and . . .College and also with my own pastor, sometimes accompanied by my wife. My wife and I have found the assistance we have been given very beneficial.

Again, I believe that the steps I have taken have helped to consolidate my resolve not to behave in this way ever again.

In conclusion, I apologise for my inappropriate actions and for the Committee being required to consider them.'

8. The respondent also provided the Complaints Assessment Committee with a letter from the Minister of . . .Community Church which is annexed and marked "D".

9. The Complaints Assessment Committee resolved that the conduct met the threshold for serious misconduct and resolved to refer the matter to the Disciplinary Tribunal.

10. The respondent has advised, through Counsel, that he will be admitting the charges at the earliest opportunity."

4. For the complainant, Ms Phipps began her submissions by noting that the charges were admitted and referring us to earlier decisions of this Tribunal (NZTDT 2006/3 and 7) in which we concluded that the downloading of pornography on a school computer contrary to school policy constituted serious misconduct. She then referred us to the fact that the forensic report obtained by the school in this case indicated that:

"5.1 The downloading of pornography over a period of over 4 days, namely 1 March 2005 between 12.34pm and 12.47pm entitled 'Sleazy Dreams' and an internet site showing

hardcore pornography entitled 'Busty Nurse' was assessed _ see exhibit B to the agreed statement of facts.

5.2 On 2 March 2005 between 2.45pm and 2.50pm 'Sleazy Dreams' and 'JP Fuckfest' were accessed.

5.3 On 9 March 2005 between 2.27pm and 2.38pm 'Sleazy Dreams' was visited.

5.4 On 15 March 2005 between 2.50pm and 3.27pm 'Sleazy Dreams' was visited. It is appropriate to note that daylight saving time may make these times one hour out.

5.5 The websites were saved for future reference and viewed again. The images were viewed in full size rather than small thumbnails and were of nudity rather than sex acts. There is no evidence of any payment being made.

5.6 It is accepted that the amount of material is significantly less than that accessed in the case of NZTDT 2006/7 where the teacher accessed 600 images over the period of a month."

5. Ms Phipps acknowledged, and the Tribunal regards this as an important acknowledgement, that the material downloaded "*was not objectionable*". By this the Tribunal understood Ms Phipps to be acknowledging that the material was not of such a nature that accessing or downloading it could amount to a criminal offence.

6. In relation to the question of outcome, Ms Phipps contented herself by making the following submissions:

"6. The range of penalty options available to the Disciplinary Tribunal is set out in s139AW.

7. The teacher has, it is submitted, as a professional person, misused his position to access pornography and it is for the Tribunal to determine penalty if the charge is found to be proven.

8. Balanced against this, the teacher has taken more steps to address the conduct than any other teacher appearing on such charges, which is a strong mitigating factor. Costs are sought on behalf of the CAC as per the attached schedule."

7. The Tribunal would observe that, this being a case in which the charges brought by the complainant are admitted, it is not a question of whether the charges are proven. It is merely a question of the Tribunal's view as to an appropriate response. With that qualification, the Tribunal agrees with those submission made on the complainant's behalf by Ms Phipps.

8. For the respondent, Ms Carter began by calling XXXXXXXXXX who was sworn and gave evidence. His evidence traversed the background to this matter in some detail. No very useful purpose would be served by trying to summarise this evidence, but some aspects of it might usefully be highlighted.

9. At the time of these incidents, the respondent told us, this was his first appointment as a Head of Department and he found the role stressful, particularly struggling with the recently introduced NCEA requirements and what he described as personality conflicts within the Department. He found himself working long hours and, as a man with a wife and two young children, this placed some strains on his relationship with his family. XXXXXXXXX acknowledged that his actions in viewing pornography were wrong and expressed deep regret for the impact that his actions had had on others. He explained that, as soon as the College Principal had confronted him with evidence of his having accessed pornography, he acknowledged his wrongdoing. By that stage, he had already accepted a position at another college. The respondent referred us to the Principal's report in which he had recorded his _ the respondent's _ immediate acknowledgment of wrongdoing. He said that following this he had spoken with the Principal of his new employer college about whether the College was still prepared to employ him and established that it was. He then offered his immediate resignation to his existing employer College which was accepted. There was therefore something of a gap between his departure from his existing College and taking up his position at his new College. The respondent said that he has since taken a series of steps directed at ensuring that this behaviour never occurs again. He told the Tribunal that he was a committed Christian, his point being that his actions were not only a breach of his obligations as a teacher, and to his then employer, but also against his religious beliefs. He emphasised, as Ms Phipps had acknowledged for the complainant, that the material viewed was, to use the respondent's words, "*titillating but..not illegal*". He said that his viewing of this material was done in a locked area with access restricted to staff and emphasised that students at the College did not have access to his laptop at any time. He then made a point about payment for the laptop. As the Tribunal understands it, the point he was making was that because he was himself paying some or all of the costs of the laptop, he was under the impression that the laptop was not the College's but his. This point fell away somewhat under questioning.

10. The respondent explained to us how, following the incident, he engaged the services of a clinical psychologist and attended a lengthy series of sessions with that psychologist. As at the date of the hearing these have run to some 60 sessions of 90 minutes each approximately once a month. The respondent said that these had been beneficial in a number of ways, although they had placed something of a financial strain on him. He produced two reports from this clinical psychologist, which the Tribunal has considered. Generally, they might be said to be favourable to the respondent in the sense of indicating that the clinical psychologist believed that the respondent had addressed and dealt with the underlying issues that had led to this behaviour. The respondent told us how the steps he had taken had led to a number of behavioural changes on his part, and to the implementation of strategies for stress management. He went on to explain that he has, since changing employers, put in place further mechanisms for ongoing guidance, and he described his strong relationship with his local Pastor and with his new employer College's guidance counsellor, both of whom, he said, had been of great assistance to him. He described for us how he and his wife had dealt with this matter. He described a number of practical steps at home and at work which he had implemented, such as limiting his

entitlement or ability to use his home computer or his College computer. The respondent explained that since his employment at his new College there had been two changes of Principal, and he said that on the occasion of each change he had had to go through the process of explaining his background to the new Principal and on each occasion had gained that Principal's ongoing support, pending of course the outcome of these professional disciplinary proceedings. He concluded his evidence by saying that this entire exercise had been stressful and at times debilitating and that it was important to him to get this process behind him and move on with his life, all of which we can understand. Finally, the respondent told us that his financial position is not particularly robust.

11. The respondent's Pastor also spoke on his behalf. He described how the respondent and his wife and family had been members of his congregation since moving to the area, and he spoke of the relationship which he had developed with the respondent and of his confidence that the respondent had put this matter behind him and would not "*reoffend*".

12. On behalf of the respondent, Ms Carter made detailed submissions. These commenced with an acknowledgement of the respondent's acceptance of his inappropriate behaviour and went on to emphasise a series of important points:

- (a) That the incidents did not occur when the respondent was teaching and were always carried out in private so that there was no risk of any other person observing the images;
- (b) That at the time the incident came to light the respondent had already accepted another position at another College;
- (c) That the respondent immediately accepted responsibility when confronted by the Principal of his existing College which ultimately led to the respondent resigning;
- (d) That the respondent was overworked and suffering from stress at the time, and that it was this overwork and stress which caused him to act in the way he did, which was out of character for him;
- (e) That immediately following the incident the respondent sought counselling and took a series of other important steps so as to ensure that the incident was not repeated;
- (f) That his psychologist's reports disclose that the respondent is fully aware of the mistake he has made, is remorseful, has been and remains highly motivated to make changes in his life to ensure it does not happen again, and has done so;
- (g) That in addition to that counselling the respondent has had the benefit of a support network involving his local Pastor and the College guidance counsellor;
- (h) That the respondent's wife has been extremely supportive ". . .and has worked through with him the various issues that this incident has raised".

13. Both Ms Phipps for the complainant and Ms Carter for the respondent took the Tribunal through the test for serious misconduct.

14. As they both submitted, the test for serious misconduct is set out in s139AB of the Act and requires that the conduct of a teacher:

*"(a)(i) Adversely affects, or is likely to adversely affect, the wellbeing or learning of one or more students; or
(ii) Reflects adversely on the teacher's fitness to be a teacher; and
(b) Is of a character or severity that meets the Teachers Council's criteria for reporting serious misconduct."*

15. Rule 9 of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 sets out those criteria and refers amongst other things to viewing, accessing, or possessing pornographic material while on school premises or engaged on school business.

16. It is fair to say that, in their submissions, both Ms Phipps and Ms Carter tended to put this case at the lower end of the scale of seriousness.

17. In this regard, we note that Ms Carter referred us to a number of New Zealand Teachers Council cases. We have of course, as Ms Carter invited us to, reviewed these cases and we do not regard the reasoning evident from them as in any sense irrelevant to our thinking. On the other hand, it needs to be remembered that those cases were decided under a different legislative regime by a Tribunal which no longer has the same disciplinary responsibilities, at least in cases involving allegations of serious misconduct. As we say, we have looked at those cases and taken into account what was said in them.

18. Ms Carter also took us through some important aspects of the Education Act 1989 which put into context the responsibility this Tribunal has in deciding how to deal with this matter.

19. In the end, Ms Carter summarised the points she wanted the Tribunal to have regard to in bullet point form in the following terms:

- "• XXXXXXXXXX accepted immediate responsibility for his wrongdoing and resigned.*
- XXXXXXXXXX mistakenly thought by paying a lease for his laptop computer it was his not his employers.*
- XXXXXXXXXX actions occurred in private and did not involve either students or staff.*
- There is no evidence of concerns regarding the safety of other colleagues or students. No student or colleague was easily able to access the images on his laptop. No images were sent to other people.*
- No objectionable material was viewed.*

- XXXXXXXXX admitted his wrongdoing to his then employer College, his new employer College, the Complaints Assessment Committee and the Disciplinary Tribunal preventing further evidence having to be adduced.
- There is no conflicting evidence in this case nor was any additional evidence required to be adduced.
- XXXXXXXXX was at a particularly vulnerable point in his career _ he was an acting Head of Department working long hours. He also had a young family.
- The images were relatively few in number viewed over a short period of time.
- Possession of the images is not in itself unlawful.
- Viewing of the pornographic images is the only factor which reflects adversely on his good character or fitness to be a teacher.

20. Based on those points, Ms Carter's submission was that this was a case which does not warrant de-registration: the Tribunal agrees.

21. The Tribunal is satisfied that the respondent's admission that his behaviour amounted to serious misconduct was justified. By viewing pornographic material on the school computer he breached the terms of his contractual arrangement with his employer and undoubtedly engaged in conduct which breaches s139AB. That reflects adversely on the respondent's fitness to be a teacher, and meets the New Zealand Teachers Council's criteria for reporting.

22. That said, the incident was, as Ms Phipps acknowledged, and Ms Carter emphasised, at the lower end of the scale, involving the downloading of a small number of images over a short period of time of objectionable but not unlawful material in an environment which did not impact on the respondent's colleagues or _ even more importantly _ students. In addition, this respondent has gone to extraordinary lengths to grapple with this slip in his standards of behaviour and we are satisfied that the prospects of any reoccurrence are minimal.

23. Considering the matter in the round, the Tribunal has reached the conclusion that the most appropriate response is as follows:

(a) Pursuant to s 139AW(1)(b), the Tribunal censures the respondent for his serious misconduct.

(b) Pursuant to s 139AW(1)(i) of the Act, the Tribunal orders the respondent pay costs to the complainant in accordance with the District Court scale on a 2B basis. The Tribunal anticipates that counsel will be able to agree on the quantum of costs payable but if not, the matter can be referred back to the Chairman by way of memoranda and can be determined by him.

DATED at Wellington this 7th day of July 2006

Kenneth Johnston

Chairman

NOTICE

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 139AU(2) or 139AW may appeal to a District Court.
2. An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.
3. Subsections (3)-(7) of section 126 apply to every appeal as if it were an appeal under subsection (1) of section 126.