

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

BETWEEN

THE COMPLAINTS ASSESSMENT COMMITTEE
Complainant

AND

XXXXXXXXXX
Respondent

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: 11 May 2006

Decision: 20 June 2006

Counsel:

Counsel for Complainant: Gaylene Phipps
No appearance by or for Respondent

Introduction:

1. By Notice of Charge and Referral dated 10 October 2005, pursuant to s139AT(4) of the Education Act 1989, the Complaints Assessment Committee of the New Zealand Teachers Council charges XXXXXXXXXXXX with serious misconduct and, pursuant to s139AV(3), refers to the Tribunal XXXXXXXXXXXX conviction on certain offences under the Misuse of Drugs Act 1975.

2. The referral is particularised as follows:

"(i) The Complaints Assessment Committee, pursuant to s139AV(3) considers that the following convictions may warrant action by the Disciplinary Tribunal, entitling the Disciplinary Tribunal to exercise its powers:

(a) The teacher was convicted on XXXXXXXXXXXX of a failure to answer police bail;

(b) The teacher was convicted on XXXXXXXXXXXX of possessing utensils pursuant to the Misuse of Drugs Act 1975 s13(1)(A) and (3) in that he did have in his possession a utensil, namely a cannabis pipe, for the purpose of the commission of an offence against the Misuse of Drugs Act 1975;

(c) The teacher was convicted on XXXXXXXXXXXX for obstructing a police officer whilst trying to execute a search warrant pursuant to the Misuse of Drugs Act 1975.

(ii) The convictions may reflect adversely on the teacher's fitness to practice (sic) as a teacher."

3. The charge of serious misconduct is particularised as follows:

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

3.1 On or about Tuesday 11 November 2003 -

3.1.1 used and/or shared and/or supplied a class C controlled drug (marijuana) in the presence, and with, two 15 year old boys (minors); and/or

3.1.2 was involved in an inappropriate relationship with the two 15 year old boys (minors) in that he knowingly allowed and/or assisted the said minors to use his motor vehicle to steal petrol; and/or

3.1.3 allowed the said minors to access his school laptop, and knowingly revealed information confidential to his students, regarding the preparation and content of school reports, to the said minors;

3.2 The conduct alleged in paragraphs 3.1.1 to 3.1.3 either separately or cumulatively amounts to serious misconduct pursuant to s139AB of the Education Act 1989."

4. During the course of a preliminary telephone conference on XXXXXXXXXX XXXXXXXXXX at which the complainant was represented by Ms Phipps and the respondent was represented by Ms Nicole Carter, Ms Carter indicated on behalf of XXXXXXXXXX that whilst the fact of the convictions was acknowledged, the charge of serious misconduct was to be defended. The matter was set down for hearing on 2 March 2006. Directions were given in relation to the filing of proofs of evidence, synopses of submissions and the like.

5. Subsequently, the Secretary was contacted by XXXXXXXXXX who indicated that, for reasons which do not need to be set out in this decision, Ms Carter was no longer representing him and that he was making attempts to find alternative representation.

6. During the course of a second telephone conference on 15 February 2006, at which the complainant was represented by Ms Phipps and which XXXXXXXXXX attended in person, it became apparent that it would not be possible to proceed with the fixture on 2 March 2006 because XXXXXXXXXX XXXXXXXXXX was still unrepresented but intending to find alternative representation. At XXXXXXXXXX request the fixture was vacated and the matter was set down to be heard on 11 May 2006. Alternative pre-trial directions were made. XXXXXXXXXX was told that this was a firm fixture and that it would proceed irrespective of what arrangements he was able to make by that date.

7. From subsequent correspondence and other exchanges between the Secretary, Ms Phipps and XXXXXXXXXX it became clear that XXXXXXXXXX did not intend to attend the hearing but would, when he was in receipt of all relevant documentation, and had an opportunity to do so, write to the Tribunal setting out his position.

8. We record that, at the hearing, Ms Phipps called the Tribunal's Secretary, Ms Natalia Taylor, who gave evidence of the correspondence and other exchanges involving Ms Phipps and XXXXXXXXXX and produced copies of relevant letters and emails. It is not necessary to go into any more detail about the terms of Ms Taylor's evidence, which we accept establishes that XXXXXXXXXX received copies of all relevant material, and was given every opportunity to either appear at the hearing or put material before the Tribunal.

Referral:

9. In relation to the complainant's referral pursuant to s139AV(3), Ms Phipps adopted the conventional course of putting before the Tribunal an affidavit from one of the Police officers involved in the Police investigation which led to XXXXXXXXXX conviction, Constable Richard Hansell.

10. Constable Hansell's affidavit deposed ". . .that on 9 November 2004 XXXXXXXXXX was convicted of offences under the Misuse of Drugs Act 1975 in that he had in possession a utensil,

namely a cannabis pipe, and that he wilfully obstructed Constable Glen Tweedie in the execution of his duties." The Constable's affidavit exhibited a certificate of conviction recording that on 9 November 2004 in the District Court at XXXXXXXXXX pleaded guilty to and was convicted of three charges:

- (a) That on 21 July 2004 he had in his possession a cannabis pipe for the purpose of the commission of an offence under the Misuse of Drugs Act;
- (b) That on the same date he obstructed a Police Officer in the execution of his duties;
- (c) That on 27 July 2004 he failed to answer his Police bail without reasonable excuse.

11. On the first and second counts he was convicted and sentenced to 60 hours community work. On the third count he was convicted and discharged. Constable Hansell's affidavit also exhibited the Police summaries on the basis of which XXXXXXXXXX pleaded guilty, and which we therefore treat as authoritative.

12. Materially, the summary relating to the charge of possession of a cannabis pipe says:

"On Wednesday 21 July 2004 at about 8.26am, the defendant XXXXXXXXXX was at XXXXXXXXXX , .

At about that time the Police executed a Search Warrant pursuant to the Misuse of Drugs Act 1975 at that address.

The defendant was arrested for obstruction and taken to the XXXXXXXXXX Central Police Station, where he was searched. A Cannabis pipe was located in a pocket of the defendant's jacket.

When spoken to the defendant acknowledged that the Cannabis pipe found in his jacket pocket was his property. In explanation for his actions, he stated that he was just 'doing his bit' to help out.

The defendant is a 34 year old relief teacher who has previously appeared before the Court."

13. The summary relating to the charge of obstruction begins in the same way as the earlier summary and continues:

"When Police Constables tried to gain entry to the house, an occupant of the house at first came to the door ensuring it was locked.

The Police Constables could then hear sounds of a number of people rushing about the house.

When executing Search Warrants, especially for drugs, Police find it necessary to immediately control the movements of people located at the address to be searched. This is necessary for the safety of attending Police and the people at the address, and to stop the destruction of evidence.

On entry to the house, Police located a number of people in the kitchen/dining area. The Police identified themselves and informed the occupants of the house that they were executing a Search Warrant.

A Constable asked the defendant to move from the kitchen to the hallway. The defendant refused to co-operate, and after a second request, was warned that he would be arrested for obstruction if he continued. The defendant became aggressive and when Constable Tweedie attempted to remove him from the kitchen, he resisted.

Constable Hansell then arrested the defendant for obstruction.

...

In explanation for his actions, he stated he was just 'doing his bit' to help out.

The defendant is a 34 year old relief teacher who has previously appeared before the Court."

14. Nothing further needs to be said about these convictions at this stage.

Charge:

15. Ms Phipps was in something of a difficulty in terms of the evidence substantiating the charges of serious misconduct.

16. The charges related to incidents which were said to have taken place on 11 November 2003 involving XXXXXXXXXXXXXXXXXXXX.

17. At the request of the complainant, on 22 February 2006, the Chairman signed subpoenas addressed to XXXXXXXXXXXX requiring them to attend the hearing on 11 May 2006. XXXXXXXXXXXX were both in Prison at the time these subpoenas were taken out, but, by the time they came to be served, both had been released, and could not be located.

18. In order to overcome this evidential difficulty, Ms Phipps placed before us an affidavit made by Mr Trevor Morley who is a Wellington private investigator and who said in his affidavit that he had, on 6 October 2005, travelled to XXXXXXXXXXX, gone to XXXXXXXXXXX prison and interviewed XXXXXXXXXXX. Mr Morley exhibited to his affidavit a handwritten statement which purported to record what he had been told by XXXXXXXXXXX, and which appeared on its face to have been signed by XXXXXXXXXXX. Mr Morley's affidavit also went on to say that he had subsequently been

engaged by the complainant to serve the subpoenas on XXXXXXXXXX but that he had been unable to locate them.

19. Ms Phipps asked us to accept Mr Morley's evidence, or rather Mr Morley's evidence of what he said XXXXXXXXXX had told him, as evidence of the truth of what was contained in the statement. In doing so, she relied on the Evidence Amendment Act (No. 2) 1980, s3 of which provides:

"3. Admissibility of documentary hearsay evidence.

(1) Subject to ss2 (of this section) and to sections 4 and 5 of this Act, in any proceeding where direct oral evidence of a fact or an opinion would be admissible, any statement made by a person in a document tending to establish that fact or opinion shall be admissible as evidence of that fact or opinion if:

(a) the maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; . . ."

20. We have serious reservations about allowing in Mr Morley's affidavit as evidence of the truth of what XXXXXXXXXX is said by Mr Morley to have told him.

21. First, s3 relates to civil proceedings. Whilst disciplinary proceedings are civil in their nature, the Privy Council said in *Bhandari v Advocates Committee* [1956] 1 WLR 1442 that the evidence which it will be necessary for a "prosecuting" authority to call to establish its case in professional disciplinary proceedings will alter depending on the seriousness or otherwise of the charges brought by it. When the charges allege criminal behaviour, the evidence needs to be at the upper end of the scale, more akin to the criminal standard.

22. Secondly, whilst Mr Morley's affidavit is put before us as evidence, he was not called and his evidence was therefore not tested. So, what we are asked to have regard to is Mr Morley's untested evidence as to what XXXXXXXXXX told him.

23. As against that, there is the practical point in this case that, as Mr XXXXXXXXXX was unrepresented, and did not attend the hearing, even if Mr Morley and/or XXXXXXXXXX had given evidence, the scope for that evidence to be tested would have been minimal.

24. The Tribunal accepts that it is entitled to have regard to Mr Morley's affidavit, but must decide what weight to give it.

25. The Tribunal's view is that it would be most reluctant to place any significant weight at all on Mr Morley's account of what XXXXXXXXXX told him, if that was critical in this case.

26. It is not critical here though, because XXXXXXXXXX has provided the Tribunal with his own narrative description of the events of 11 November 2003. What the Tribunal proposes to do is to

determine this case on the basis of the position that emerges consistently from the statement apparently made by XXXXXXXXXX and XXXXXXXXXX own version of events. In that way, we will avoid taking into account (and have expressly ignored) anything set out in XXXXXXXXXX statement which is not accepted by XXXXXXXXXX.

27. From those aspects of the statement which Mr Morley says in his affidavit XXXXXXXXXX made to him which are not the subject of challenge by XXXXXXXXXX in the material he has put before us, the Tribunal can be confident of the following:

(a) On 11 November 2003 XXXXXXXXXX reported in sick and took a day off work. He was not feeling particularly well. He also wished to "organise [his] employment direction for 2004."

(b) At some stage during the course of the morning he decided to go to the beach at XXXXXXXXXX in XXXXXXXXXX to collect driftwood. At the time he could not take his car because he was "out of both petrol and money." He used his push bike.

(c) At XXXXXXXXXX township he encountered XXXXXXXXXX and XXXXXXXXXX, who were both approximately 15 years old.

(d) He fell into conversation with XXXXXXXXXX and XXXXXXXXXX who he said were "hanging around" and he says that they became "increasingly animated with the conversation" because, in his assessment, they were "flattered that I was prepared to relate to them as equals".

(e) In the course of this conversation XXXXXXXXXX was informed by XXXXXXXXXX and XXXXXXXXXX that they "were keen to travel to XXXXXXXXXX".

(f) He _ XXXXXXXXXX _ had once lived in XXXXXXXXXX, and "thought that sounded like fun".

(g) He then told them that he had a car, was in XXXXXXXXXX to collect firewood, was teaching the next day, but "agreed that a trip to and back (overnight) sounded like an agreeable adventure".

(h) He invited XXXXXXXXXX back to his home and for a drive in his car.

(i) XXXXXXXXXX then went to XXXXXXXXXX beach and collected driftwood.

(j) Following that they went to XXXXXXXXXX home where they watched television and listened to the music. There they encountered XXXXXXXXXX' parents, and XXXXXXXXXX' mother apparently questioned why XXXXXXXXXX was "hanging out" with two school aged boys, commenting that XXXXXXXXXX must be at least 20. He "simply laughed, thinking she was very out of touch with apparent ages".

(k) From XXXXXXXXXXXX home the three of them set off for XXXXXXXXXXXX XXXXXXXXXXXX' home. XXXXXXXXXXXX XXXXXXXXXXXX says that he nearly left the two boys at this stage but in the end decided to wait for them "due to the encouragement of the two guys". They made their way back to XXXXXXXXXXXX home by bus.

(l) Having arrived at XXXXXXXXXXXX home, they went inside for a break and drank coffee.

(m) There, XXXXXXXXXXXX laptop "was at hand" and he says that the two boys were interested in looking at the games on it. He told them that there were no games and that he was in the process of using the computer in order to write school reports and "they were quite interested in the fact that they were in a teacher's house where he was writing reports. It is my belief that the boys only opened the laptop and saw what was on the desk top. I do not believe that they had any chance to look at the reports which were in a separate directory".

(n) Then XXXXXXXXXXXX left XXXXXXXXXXXX house in his car with XXXXXXXXXXXX driving. XXXXXXXXXXXX says that by this stage he was unsure about going to but they drove off anyway.

(o) According to XXXXXXXXXXXX then said that they would "get me a tank of petrol by masking the plates and ripping off a petrol station. They said not to worry _ they'd done it before _ and I protested; saying that I was a teacher and couldn't be part of anything like this. The guys pulled out a roll of masking tape, jumped out of the car, and began rapidly covering the plates despite my protests. I got out of the car and walked away feeling like the situation had got out of my control and I was powerless to stop them. Maybe if I had been really assertive I could have stopped them but I didn't. The job was soon done and M jumped in the drivers (sic) seat. I repeated that it was not worth it but M said that I needn't be involved; that they would be 5 minutes or so and would return to pick me up. I asked if he had a licence and he said he did. They took off, while I looked them in the eye and said I was trusting them".

(p) Predictably, XXXXXXXXXXXX again.

Conclusion:

28. On the basis of that narrative of events, the Tribunal is satisfied that the charge of serious misconduct is made out.

29. Although, on that basis, the complainant has failed to make out the allegation that XXXXXXXXXXXX was involved in the use of illegal drugs on 11 November 2003, the second and third charges are certainly established on XXXXXXXXXXXX own "evidence" ie he allowed two minors to have access to his computer which contained confidential information relating to his students, and he allowed an inappropriate relationship with two 15 year old boys to develop in which he

was implicated _ to one extent or another _ in their commission of a crime for which they were subsequently prosecuted, convicted and imprisoned.

30. Having regard to the circumstances of XXXXXXXXXX convictions in the District Court at XXXXXXXXXX on 9 November 2004 (the particulars of which have already been outlined) and his serious misconduct on 11 November 2003, the question becomes how the Tribunal should deal with the matter.

31. As Ms Phipps submitted to us, and as we outlined in (2006/10), the critical question, having reached a finding of serious misconduct, is what orders, if any, we should make pursuant to s 139AW having regard to the statutory purpose of ensuring that only persons who, as a matter of character and fitness, are suitable to teach should hold practising certificates, and whether an individual will contribute to or detract from the safety or wellbeing of students and the quality of the learning environment. Having considered those matters, and everything said to us on behalf of the complainant, and by XXXXXXXXXX in the material he put before us, we have reached the conclusion that XXXXXXXXXX registration as a teacher should be cancelled.

32. In the result, we make the following formal orders:

(a) Pursuant to s 139AW(1)(b) we formally censure XXXXXXXXXX for his serious misconduct;

(b) Pursuant to s139AW(1)(g), on the basis of XXXXXXXXXX convictions as referred to us, and his serious misconduct, we make an order for XXXXXXXXXX deregistration as a teacher.

Costs:

33. Technically, this was a defended case, even although XXXXXXXXXX did not attend the hearing and was not represented. This was therefore an appropriate case to consider the question of costs. There seems no reason to depart from the general rule that costs should follow the event, and we will make an order for costs in favour of the prosecuting complainant.

34. Ms Phipps has submitted a schedule of costs, which fall into two broad categories:

(a) The costs associated with the pre-prosecution stage ie the investigation into the matter by the Complaints Assessment Committee; and

(b) The costs associated with the prosecution of the matter down to and including the hearing before this Tribunal.

35. In (2006/1) we gave some consideration to how we might deal with the costs. In that decision, we probably did not differentiate clearly enough between these two categories of costs. What we said was that predictability was an important feature of any costs regime, and we concluded that, to the extent that we could, we would try to adhere to the District Court regime so

that both parties to any matter before the Tribunal would have a fair idea of what the likely outcome in terms of costs would be. So far as it goes, that remains our view. However we need to deal with these two categories of costs to which we have referred, because the former is not easily dealt with within the context of the District Court regime, though the latter is.

36. Ms Phipps' schedule of costs indicates that the costs in the Complaints Assessment Committee phase amount to \$5,379.20, and that the costs in this Disciplinary Tribunal proceeding (calculated by reference to the District Courts scale on a 2B basis) come to \$8,345.61.

37. In other disciplinary regimes, there is a general rule of thumb (only ever as a stating point of course, but commonly applied) that the successful party is entitled to recover 50% of actual costs. That seems to us to be a sensible way of dealing with the first category of costs.

38. Accordingly, we order XXXXXXXXXX to pay to the New Zealand Teachers Council 50% of the costs incurred in the Complaints Assessment Committee regime ie \$2,689.60 plus costs in relation to the prosecution on the District Courts scale ie \$8,345.61 and accordingly order pursuant to s139AW(1)(i), that the respondent pay to the Complainant the sum of \$11,035.21.

DATED at Wellington this 7th day of July 2006

Kenneth Johnston

Chairman