

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

IN THE of charges of serious misconduct referred to the Tribunal pursuant to s139AT(4)
MATTER of the said Act

BETWEEN

THE COMPLAINTS ASSESSMENT COMMITTEE of the NEW ZEALAND
TEACHERS COUNCIL
Complainant

AND

XXXXXXXXXX
Respondent

UNDER

the Education Act 1989

DECISION OF THE TRIBUNAL

Hearing: 16 June 2009

Decision: 4 August 2009

Counsel: Jenny Gibson for Complainant
Nicole Carter for Respondent

Tribunal:

Kenneth Johnston (Chairman), Barbara Arnott,
Graeme Gilbert, Maraea Hunia and Patrick Walsh

Introduction

By Notice of Charge, the complainant charges the respondent with serious misconduct, the particulars of the charge being as follows:

“3. The Complaints Assessment Committee pursuant to section 139AT(4) charges that [the respondent] behaved in an unprofessional manner amounting to serious misconduct in that while he was a teacher at [the secondary school] he:

3.1 Between 9 April 2008 and 30 May 2008, viewed pornographic material on the school laptop while on school premises.

3.2 On becoming aware that students had viewed pornographic material on his laptop, failed to take appropriate action in that he –

3.2.1 failed to immediately notify any person at the school;

3.2.2 failed to take steps to ensure that students were not able to access or view pornography on his computer.

4. The conduct alleged in paragraphs 3.1 and 3.2 either separately or cumulatively amounts to serious misconduct pursuant to section 139AB of the Education Act 1989 and Rule 9(1)(k) New Zealand Teachers Council (Making Reports and Complaints) Rules 2004.”

At a pre-hearing telephone conference convened by the Chairman on 25 March 2009, attended by Ms Gibson for the complainant and Ms Carter for the respondent, the Tribunal was advised that the matter would proceed on the basis of an agreed statement of facts, the matter was set down for hearing today and the Chairman made directions for the filing and service as necessary of the anticipated agreed statement of facts and synopses of submissions on behalf of the parties.

In accordance with those directions, an agreed statement of facts and synopses of submissions were filed and served.

Evidence

We set out the agreed statement of facts in full:

“1. During 2008 [the respondent] was employed at [the secondary school] as a registered teacher. He is a technology teacher and remains employed at [the secondary school]. [the respondent] commenced his employment at the school in 2002.

2. As part of his employment, [the respondent] had access to a school laptop computer. [The respondent] had a signed agreement with the school regarding his obligations in using the laptop computer. [the respondent] was aware that he was not permitted to download inappropriate images on the school laptop computer.

3. Between 9 April 2008 and 30 May 2008 [the respondent] accessed and viewed pornographic material on the school laptop computer, while on school premises. During that time [the respondent] became aware that students had been accessing pornographic material on his laptop computer because of comments that they made and the fact he had discovered a pornographic site open behind another on his computer on three occasions. [The respondent] did not notify any person at the school of this or take any steps to ensure that students were not accessing or viewing pornographic material on his laptop.

4. On 29 May 2008 the IT manager of [the secondary school] informed the principal that the school’s screening software had indicated that inappropriate websites had been accessed from [the respondent’s] laptop.

5. On 30 May 2008 [the respondent’s] laptop was removed from him in the presence of the IT manager and the principal, [of the secondary school]. The laptop was secured with a padlock, keys retained by [the principal] with the laptop being retained by the [IT Manager].

6. On 6 June 2009, [the respondent] wrote to the principal of [the secondary school] and advised the principal as follows:

(a) That he did not know about the site until one day he was shutting down his laptop he discovered an open site which had been “hiding” behind “KAMAR”. He looked at the porn site for 20 minutes.

(b) He left the site on his laptop and went into the site “ a couple of times” after school. He stayed on the site for maybe up to 20 more minutes. He did not go into the site during class time.

(c) At times, students made comments when he usually came back from the machine room or storeroom to the effect that they were aware that he was looking at porn sites.

A true copy of this letter is annexed and marked with the letter “A”.

7. {The secondary school] instructed Decipher Computer Forensics to assess the laptop. Decipher Computer Forensics provided a computer report to [the secondary school] and a copy of the report is annexed and marked with the letter "B". The report, dated 18 June 2008, noted that forensic examination of [the respondent's] computer showed 2050 inappropriate images all of thumbnail size were identified on his laptop, although none were objectionable. It further showed that over the time period set out in paragraph 3 above the images were accessed on 12 occasions on Tuesdays and Fridays between 9.35am and 3.22pm. The school's hours commence with a staff briefing at 8.20am. Classes finish at 3.15pm, with teachers required to be working on premises or in meetings until 4.30pm.

8. [The secondary school] Board of Trustees held a disciplinary meeting with [the respondent] on Wednesday 25 June 2008. At that meeting [the respondent] stated that he had accidentally stumbled on to the site unknowingly because it was hidden behind 'KAMAR'. He said he was not the type of man who looks at pornographic material and apologised profusely for his error and promised never to do it again.

9. The Board members at that meeting were concerned from the report from Decipher that it showed that the inappropriate sites had been visited 12 times while [the respondent] said he had only visited "a couple of times". [The respondent] indicated at the meeting that the other times were probably where students had been visiting the site, while he was out of the class. [The respondent] was advised to obtain legal advice.

10. A further disciplinary meeting was held between the Board of Trustees of the school and [the respondent] on 5 July 2008 at 3pm. It was agreed that the actions that would be taken for the inappropriate and unprofessional conduct of [the respondent] were:

- (a) That a written warning would be placed on [the respondent's] personal file.
- (b) That mandatory notification would be given to the Teachers Council.
- (c) That [the respondent] would have no further use of a laptop for the remainder of 2008. He was able to reapply for the allocation of a laptop in 2009.

11. The CAC considered the mandatory report, and determined to refer the matter to the Disciplinary Tribunal after hearing from [the respondent].

12. At the outset of the mandatory report, [the respondent] advised the CAC that he deeply regretted his inappropriate and unprofessional actions and that with the benefit of hindsight, he realised that not only should he have not viewed this material, but he should have reported the fact that pornography had appeared on his laptop.

13. [The respondent] has entered, via his counsel, a guilty plea to all aspects of the charge of serious misconduct. [The respondent] agrees, via his counsel, that the facts set

out in the Agreed Statement of Facts and Charge, separately and cumulatively, amount to serious misconduct.”

That then is the factual basis upon which the Tribunal approaches the matter.

At the commencement of hearing before us Ms Carter provided the Tribunal with a letter written by the respondent to the Tribunal in these terms:

“I [the respondent] teacher of admit that I behaved in an unprofessional manner amounting to serious misconduct pursuant to s139AB of the Education Act 1989 and Rule 9(1)(k) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004. In that while I was a teacher a [the secondary school] I did the following:

(1) Between 9 April 2008 and 30 April 2008, I viewed pornographic material on the school laptop while on school premises.

(2) On becoming aware that students had viewed pornographic material on my laptop, failed to take appropriate action in that I:

2.1 failed to immediately notify any person at the school;

2.2 failed to take steps to ensure that students were not able to access or view pornography on this computer.”

The respondent also made a personal statement to the Tribunal. He began by explaining something of his background. He is of XXXXXXXXXX descent, and his first language is XXXXXXXXXX. He told the Tribunal about his professional background. He accepted that his accessing and viewing of pornographic material on the secondary school’s laptop was inappropriate and unprofessional, and he told us something of the background. He said that on an occasion in April 2008 when he returned to his classroom students in his year 10 class made some comments to him which suggested that they believed that he had been viewing pornography. He didn’t take much notice of this. But that evening when he was shutting down his computer he discovered a pornographic site open on it. He said that instead of closing it down and reporting the matter he viewed the site for about twenty minutes. The respondent told us that at that stage he assumed that his year 10 class must have accessed the site while he was outside the classroom as he had never seen the site before. Subsequently, he explained to us,

he found that the site had not been removed from his computer and that on a small number of occasions after that he had accessed it and viewed pornographic material outside school hours or at least outside the time when he was teaching. He went on to describe the school's disciplinary process during the course of which – he told us – he discovered that though he had only visited the site on a small number of occasions it had in fact been accessed on more which persuaded him that his students had accessed the site while he was outside the classroom, a conclusion also reached by the school's disciplinary body. He told us that he quite appreciated that all of these things could have been avoided had he, when he first viewed the site on his computer, reported the matter, and that the school's disciplinary body had put in place appropriate measures to ensure that the same situation couldn't arise again. He described his distress that his actions had led to students being able to access pornography and said that he understood that it was a teacher's responsibility to provide a safe learning environment for students which he had failed to do. He told us that to some extent he felt he had been "set up". He accepted, though, that he was the person with primary responsibility for the situation. He explained that the secondary school at which he taught had responded with a written warning and not terminated his employment. He described himself as being fortunate in that regard. He also said that he retained the support of his head of department. He said that the secondary school and his head of department had accepted his assurances that nothing of this type would ever happen again, and he assured the Tribunal that it had not and would not. He added that he had, since this incident, worked with his head of department and others to ensure that he was fully familiar with computer safety. The respondent told us that he enjoyed the support of his wife and adult children. He explained how embarrassing and upsetting this ordeal had been for him. He said that he was devastated by his own actions and the fact that these had led to students being able to access pornography. He described himself as weak in allowing himself to be tempted to explore the site once he saw it. He described how stressed he was about all of this, and said that his health had suffered as a result, explaining that, since the incident, he had had four admissions to hospital for high blood pressure and lost a considerable amount of weight. He said that more than anything else he wanted to retain his registration, saying that he loved teaching and was satisfied that he could remain professional in the classroom and that students were not affected in any way by these events. He asked the Tribunal to view his actions as involving a momentary slip in an otherwise exemplary career. He said that he understood that his behaviour was totally inappropriate, and serious enough to warrant censure, and that he will be required to contribute to the costs of this hearing. Finally, the respondent produced letters of support from the principal and the head and deputy head of the technology department of the secondary school at which he taught, which certainly indicate that he is well regarded as a teacher.

The complainant's submissions

For the complainant, Ms Gibson traversed the charge and the factual situation and submitted that the respondent's conduct met the test of serious misconduct in the legislation, emphasising that it both reflected adversely on the teacher's fitness to be a teacher and was of a character and severity which meets the New Zealand Teachers Council's criteria for reporting serious misconduct. In this regard she relied particularly on Rule 9(k) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 which relates to the use of pornography. She emphasised that upon becoming aware that pornographic material had been viewed by students on his laptop, the respondent failed to take appropriate action.

Ms Gibson continued by saying that whilst the complainant accepted that the respondent came across the pornographic material accidentally, he continued to view it over a period of weeks on the school laptop and while on school premises. She referred us to the agreed statement of facts which records that the respondent did not stop this activity of his own volition but only after the secondary school's IT Manager came across this material as part of a routine check. She submitted that the respondent's conduct showed a calculated use of school equipment and breach of the relevant agreement as to the use of that equipment, and known school policy and that the respondent exhibited a reckless disregard for his students, knowing that they had seen some of this material and continuing to do nothing about it.

As to penalty Ms Gibson referred us to XXXXXXXXX v CAC (unreported), XXXXXXXXX XXXXXXXXX in which the High Court emphasised that it is incumbent on disciplinary bodies deciding between various outcomes in disciplinary hearings to consider all alternatives and record their reasoning as to the adoption of one alternative as opposed to another.

She then went on to emphasise certain aspects of the case, asking us to have regard to these in considering the question of penalty and we summarise the matters to which Ms Gibson referred as follows:

- That this respondent continued to access pornographic material on his computer in breach of the agreement he had with the secondary school;
- That the respondent knew that students may have accessed pornography and yet took no steps to protect their interests;
- That the accessing of pornography only stopped because of the intervention of the school's screening system;
- That there is a discrepancy between the number of times that forensic investigations have indicated that pornographic material has been accessed and the number of occasions on which the respondent admits having accessed such material.

Ms Gibson then took us to a number of earlier cases in which the Tribunal has dealt with teachers accessing pornography on school computer equipment and she helpfully took us through these cases.

Ms Gibson concluded this component of her submissions by contending that whilst the school has decided to retain the respondent's services as a teacher this should not influence the Tribunal in its deliberations as to an appropriate outcome. At a theoretical level the Tribunal accepts that submission. The Tribunal must make an independent decision and should not be influenced by the decision of the school which may be influenced by other considerations. Nevertheless, from a practical point of view, it is probably a point in favour of the respondent that the secondary school at which he teaches has made the decision it has, if for no other reason because it emphasises the regard that the school has for the respondent.

Finally, as to costs, Ms Gibson provided a schedule of costs indicating that the costs incurred by the complainant in relation to this matter total \$3,407.18, and she sought an order as to costs.

The respondent's submissions

For the respondent, Ms Carter began by emphasising the respondent's acknowledgement of the inappropriateness of his behaviour.

She emphasised the respondent's remorse and his motivation to ensure that such behaviour never occurs again, and she described the degree of support which he has from his wife and family and from the secondary school at which he still teaches. She emphasised the circumstances in which the respondent first accessed pornographic material, submitting that he did not actively seek out that material but viewed it only when it came up on his screen. Ms Carter went on to submit that the respondent acknowledged that the correct course of action was to report the matter but that instead he wrongfully assumed that the incident was a "one off". She acknowledged that the Tribunal needed to take into account that on "another couple of occasions, the respondent viewed the pornographic material when he found it had not been removed from his computer." She did make the point that the respondent did not view any of the pornographic material while students were in his class. She emphasised how embarrassed and remorseful the respondent was and how motivated he was to ensure that this would not re-occur. She emphasised also the respondent's acknowledgment that his behaviour amounted to a breach of his arrangements with the secondary school which also reflected badly on him. She described the school's disciplinary process and how, at the end of that, the school remained supportive of him and wished to retain him.

Ms Carter then took us through the test for serious misconduct as set out in s139AB of the Act. She did not contend that the respondent's behaviour did not constitute serious misconduct, saying only that the case involved a relatively small number of images viewed on few occasions and that. "... the images were of the adult pornographic nature but were not objectionable or illegal" and therefore that "...the wrongdoing was at the lower end of the scale."

Like Ms Gibson, Ms Carter then took us through a number of earlier decisions of this Tribunal and its predecessor.

Ms Carter also made some submissions which she collected under the heading “The Disciplinary Framework” which concluded with a submission that disciplinary action is principally involved with maintaining professional standards as opposed to punishment. This provided her with a platform for a submission that in this particular case, having regard to all of the circumstances, the most appropriate response would not necessarily involve deregistration.

Turning directly to the question of penalty Ms Carter emphasised the mitigating aspects of the case in these terms:

“35. In my submission the following mitigating factors need to be taken into account before any penalty is imposed:

- [The respondent's] actions in viewing the pornography 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. The only students who would have seen the images were those that opened the site and placed it behind Kamar.
- No images were sent to other people.
- No objectionable material was viewed.
- [The respondent] admitted his wrongdoing to [the secondary school], 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.
- He did not download any images.
- The images viewed were all thumbnail images.
- Possession of the images is not in itself unlawful.
- [The respondent] did not set out to deliberately access pornographic sites.
- Viewing of the pornographic images, failing to log off a computer so that students could not go on line and failing to report the images are the only factors that reflects adversely on his good character or fitness to be a teacher. This is all behaviour he deeply regrets.
- [The respondent] has treated this matter seriously and is genuinely remorseful. He would never behave in such a foolish way again.”

On that basis, Ms Carter submitted that this was not a case which required the Tribunal to deregister the respondent and that imposing a lesser penalty would not send the wrong messages to the public or profession.

Effectively, Ms Carter contended that this was a case in which the Tribunal could deal with by way of a censure.

Discussion

The Tribunal is in no doubt that this case involves serious misconduct as that term is defined in s139AB. The viewing by a teacher of pornographic material (even of the lawful type involved in this case) on school equipment, especially when that material remains on the equipment for an extended period, certainly has the potential adversely to affect the wellbeing of students and reflect adversely on the teacher's fitness to be a teacher, and is of a character or severity which meets the Teachers Council criteria for reporting the serious misconduct because it falls within Rule 9(k) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 proscribing the viewing, accessing or possessing pornographic material while on school premises or engaged on school business. And, in this case, the respondent was aware that Year 10 students were accessing this material and took no steps to stop this happening.

The question which the Tribunal is faced with in this case is whether it is required, in the discharge of its responsibility, to cancel this respondent's registration or whether it can properly deal with the matter in some other way.

We take into account that the secondary school at which the respondent teaches has felt able to continue to employ him. We have, as we are obliged to do, considered the full range of remedies at our disposal as set out in s139AW (1) of the Act. In particular we have considered whether a censure and suspension might be an appropriate outcome. We have taken into account everything said on the respondent's behalf by Ms Carter. However, in the end, the Tribunal has reached the view that the only appropriate outcome in this case is censure and deregistration.

As to costs, the Tribunal sees no reason to depart from its usual practice of ordering the respondent to pay half of the applicant's costs.

Accordingly, the Tribunal's formal order is as follows

- (a) Pursuant to s139AW(1)(b), of the Education Act 1989, the Tribunal censures the respondent for his serious misconduct;
- (b) Pursuant to s139AW(1)(g), the Tribunal orders the respondent's deregistration;
- (c) Pursuant to s139AW(1)(h) and (i), the Tribunal orders the respondent to pay costs to the application in the sum of \$1,700.

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 of the Education Act 1989 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.