2010/6

BEFORE THE NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL

IN THE MATTER	of disciplinary proceedings pursuant to Part 10A of the said Act
BETWEEN	THE COMPLAINTS ASSESSMENT COMMITTEE Complainant
AND	XXXXXXXXX Respondent
UNDER	the Education Act 1989

DECISION OF NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL

Hearing:	11 March 2010
Decision:	3 May 2010
Counsel:	Adam Lewis for Complainant David Martin for Respondent
Tribunal:	Kenneth Johnston (Chairman), Megan Cassidy, Judith Catton, Graeme Gilbert and Patrick Walsh

Introduction

In this matter, the New Zealand Teachers Council, through its Complaints Assessment Committee, charges the respondent with serious misconduct pursuant to s139AT(4)(a) of the Education Act 1989.

The Notice of Charge, dated 24 June 2009, particularises that Charge in the following terms:

> 3. The Complaints Assessment Committee, pursuant to section 139AT(4)(a) charges that ..., teacher, of XXXXXXXXX, while she was a teacher employed at XXXXXXXXX, behaved in an unprofessional manner amounting to serious misconduct in that she:
>
> > a. Between 21 October and 17 November 2008, viewed pornographic material on a school laptop computer while on school premises and engaged on school business in that she downloaded on two occasions a Microsoft PowerPoint presentation entitled "XXXXXXXXX containing pornographic images (7 November 2008 and 17 November 2008) and failed to delete the same.
> >
> > b. On or about 17 November 2008 at approximately 9am, opened the PowerPoint presentation "XXXXXXXXX in her classroom to show a teacher aide, at which time, approximately 25 year one students were present in the classroom.
> >
> > c. Invited a second teacher aide into her classroom at lunchtime, to view the PowerPoint "XXXXXXXXX presentation on or about 17 November 2008.
> >
> > d. Breached the responsible use policy of the school relating to the use of school laptop computers, and a laptop agreement in viewing the pornographic and inappropriate material.
> >
> > e. Failed between October 2008 and November 2008 to take appropriate action in failing to notify the professional leader of the school, the Board, or appropriate agents of the board (being the relevant IT providers) of the pornographic images on her laptop computer.
>
> 4. The conduct alleged in paragraphs 3(a) to 3(e) either separately or cumulatively amounts to serious misconduct pursuant to section 139AB of the Education Act 1989.

The words which are underlined were introduced into the Notice of Charge on the Complainant's application at the commencement of the hearing. That application was made on the obvious basis that the Complainant was unable to establish the precise date on which events occurred. It was not resisted by the Respondent.

The Chairman convened a pre-hearing telephone conference on 24 July 2009. At that stage, whilst it was clear that the charge brought by the Complainant would be defended, it was not clear whether, and to what extent, the parties could agree on the factual background. Accordingly there was a prospect of the Complainant being obliged to call a number of very young school children to give evidence. At that conference, the Chairman asked the parties, through their advisers, to establish as soon as possible whether it would be necessary for these children to give evidence so that special arrangements could be made to accommodate that. Fortunately, the parties were able to agree that evidence would be by affidavit so that it would be unnecessary for viva voce evidence to be called and, by agreement, a timetable was established for the filing and service of evidence and submissions. The Tribunal is grateful to counsel for the responsible way in which they dealt with this issue.

In accordance with the timetable already referred to, the Complainant filed affidavit evidence and a synopsis of its submissions on 11 September 2009, the Respondent filed affidavit evidence and a synopsis of her submissions by

9 October 2009, and the matter was set down for hearing on 11 March 2010.

Evidence

The Complainant's evidence consisted of three affidavits, the first by the principal of the primary school at which the Respondent formerly taught, the second and third from teacher aides at the same school, and the fourth by Jackson Desmond Martin who is the Complainant's Case Co-ordinator.

In his affidavit, the principal deposed that he had been responsible for investigating an allegation that the respondent had had sexually explicit material on her school laptop which she had shown to two other staff members. He explained that the Respondent had been employed as a teacher at the school since XXXXXXXXX 2003. He said that on 19 November 2008, one of the school's teacher aides approached him, concerned that the respondent had sexually explicit images on her school computer. The principal interviewed her, and during the course of the interview he ascertained that another teacher aide at the school had also been shown these images by the Respondent. The principal then interviewed this other teacher aide. The principal went on to say that in the course of his investigation, he retrieved the respondent's laptop and had it forensically examined and that the report he received from the company who carried out this examination, XXXXXXXXX, confirmed that the Respondent's computer had sexually explicit material on it. The principal went on to say that as a result of his investigation, the Respondent's employment with the school was terminated on 2 December 2008 and that he had thereafter, on 5 December 2008, reported the matter to the New Zealand Teachers Council as required under the Act. He exhibited to his affidavit the school's report to the Council, his report to the Board of Trustees which included records of his interviews with the two teacher aides and the respondent, the agreement between the school and the Respondent in relation to the use of the laptop, the

school's responsible use policy for computer equipment, the school's letter to the respondent terminating her contract of employment, and a copy of the XXXXXXXXX report.

We need to make very few comments about any of that material, but the following points should be mentioned at this stage.

First, the agreement between the school and the Respondent in relation to the use of the laptop provides, as we would expect, that the Respondent was to use it only in accordance with the school's policy and that she would be responsible for any inappropriate use and in particular for accessing illegal or inappropriate material.

Second, the school's responsible use policy also said that the laptop was only to be used for school-related activity, and that the Respondent was to maintain high ethical standards in the use of the laptop and not to access inappropriate material.

Third, the XXXXXXXXX report, attached as it was to the principal's affidavit, was of course hearsay evidence, but no objection was taken to this and we accept it as evidence. It demonstrated that on two occasions during 2008, on 7 and 17 November, the computer was used to access what might be described as pornographic material. The report indicates that this material was originally attached to an email but was downloaded and retained on the computer. The report reproduced these images. They consisted of a series of still photographs of semi naked and naked men and women with their bodies painted in various ways and performing sexual acts. Whether or not it was objectionable material in terms of the Films, Videos and Publications Classification Act 1993, it was pornographic in the ordinarily accepted sense of the word.

We will deal with the affidavit evidence of the two teacher aides together. They both explained that they had been working as teacher aides at the same school as the Respondent. One of them worked closely with the Respondent in her classroom. She deposed that on a day in mid November 2008, she had been discussing the progress of some of the children with the Respondent and during the course of this conversation the respondent had invited her to view something on her computer. She had assumed that this was information relating to the reading levels of the children. The Respondent had set up a power point presentation on the computer and activated it for her so that she could view it. She explained that she began looking at the images and it took her a little while to realise what she was looking at. She said that she had been shocked and when she realised that she was looking at pictures of naked people performing sex acts, she had closed the computer. She explained that at the time there were children in and around the class room, although she was clear that none of the children had seen any of the images. The second teacher aide explained that at around the same time, just after lunchtime one day, she had been walking across the school quadrangle when the Respondent had sent two children to ask her to come to the Respondent's classroom. She then said in her affidavit that the principal's notes of his interview with her as to the extent of her involvement

were accurate. The principal's notes indicated that the Respondent had shown this teacher aide the images as well.

Neither of the teacher aides reported these events immediately, but in due course when they ascertained that the Respondent had shown them both these images, they reported the matter, which of course was the starting point of the principal's investigation.

Mr Martin's affidavit recorded the receipt by the New Zealand Teachers Council of the report from the principal of the school and the Complainant's investigation which followed. It appended, amongst other things, exchanges between the Complainant and the Respondent and her advisers.

It is worth recording the terms of the response provided to the principal by the respondent after the termination of her contract of employment. In her response she said:

> "I acknowledge receipt of your letter dated 20 November 2008.
>
> I acknowledge and deeply regret the thoughtless actions I have taken in accessing via webmail messages addressed to me at my personal email address. My actions in showing these to my friends at school were thoughtless and without consideration of their inappropriateness in the context of my work place. At no time was there a danger of any child seeing these images, but I realise the stupidity and carelessness of what I have done.
>
> I admit I have breached the policy of School Laptop usage through my personal email. I deeply regret this action and for this lapse of judgment and humbly apologize for any inconvenience and concerns caused. I assure you that such an incident will not be repeated in the future.
>
> I understand that this is a serious matter, and would ask you, in any punishment that you may be contemplating that you give consideration to my record with . . .. and any contribution that I have made in the nearly 6 years that I have been employed here.
>
> I have enjoyed an excellent working relationship with you as my Principal, staff, parents, students and the school community and I look forward to having an opportunity to repair the damage I have done. I hope that you will allow me to demonstrate by my actions that I am capable of restoring the trust that has always been the basis of these relationships."

We quote that letter principally because it demonstrates that the Respondent accepted a degree of responsibility for her actions from the outset.

The Respondent gave evidence. In doing so, she presented a written statement of her position and then made herself available for cross-examination and to answer questions from the Tribunal.

In her evidence, she said that she was XXXXXXXXX born and trained with a degree and formal teaching qualifications. She explained something of her career in XXXXXXXXX and New Zealand, and told us of her appointment to the school in question at the commencement of the scholastic year in 2003. She added that she had continued with her studies, obtaining various post graduate qualifications. She also said that after she had been dismissed by the school she had, for a time, been employed by another school in the same area, although she had been obliged to resign when her practising certificate expired. However, that school had offered her a position if and when she was able to regain her practising certificate. In the meantime, she told us, she was continuing her studies.

The Respondent said that she had never before been in trouble of any kind.

She confirmed that the school had provided her with a laptop computer and acknowledged both the terms of the agreement in relation to that and its relationship to the school's responsible use policy.

Her evidence was that from time to time, family and friends would send her material which she could and did access from her school computer, and in particular that her husband often sent her what she described as risqué emails or emails with risqué attachments. She said that most of the time she only accessed this sort of material on her own computer at home, but from time to time, she did use the school computer for this purpose, generally deleting emails and attachments after she had looked at them.

She said that on or about 18 November 2008 her husband had sent her an email, the stated subject being "XXXXXXXXX!!". She said that she was not immediately aware of what this was and opened it on her school computer to find that it was the power point presentation we have already described. She said that she was in her classroom that morning before school, using her laptop to access personal emails when she had come across this one, and opened and viewed the power point presentation. She then acknowledged showing the presentation to both of the teacher aides at different times, on the first occasion when there were children in the classroom. She was at pains to say that at the relevant time she was occupying the children, that her desk is in a corner of the room to which the children do not have access, and that there was no prospect of the children viewing anything on the laptop.

She then related the school's investigation of the matter and emphasised that she had admitted her wrongdoing as soon as the principal had raised it with her.

As to the material itself, the Respondent told us that at first she had found it amusing, and she went on to say that there was a small group of staff at the school who shared what she described

as an “adult” sense of humour, and exchanged “rude jokes and emails”. Presumably, although she did not say so, she put the two teacher aides into this group. She certainly described them as good friends with whom she had previously shared “adult” jokes, that she thought that they were comfortable with that, and that that made her “...think that it would be okay to share this power point and have a bit of a laugh.” She acknowledged, however, that this material may have made the two teacher aides feel uncomfortable, and that she had misunderstood and misinterpreted the situation. She acknowledged that all of this amounted to a breach of her contractual obligations and a breach of the school’s policy relating to the responsible use of her school laptop. She admitted that she had not realised the seriousness of her actions until the investigation had commenced. She accepted that having this sort of material on her school laptop presented a risk of a student seeing it, although she insisted that this risk was slight. She acknowledged that had she viewed this matter from the perspective of the children, and given any thought to the fact that children sometimes break rules, she would have acted differently, but said that she just didn’t think about those matters.

The Respondent went on to say that this was the first time in her life when she had had the use of a laptop and that her excitement about that had caused her to be thoughtless about its use.

She agreed that at the point that she realised what this material consisted of, she should have immediately deleted it. She went on to repeat her acknowledgement of the wrongfulness of her actions (as she had done to the school). She categorised her actions as errors of judgment, and assured the Tribunal that such an incident would never be repeated in the future.

The Respondent said that she felt that she had already paid dearly for her action, having lost her job and suffered a great deal of shame and emotional hardship, and asked the Tribunal to take into account that she accepted responsibility for her actions from the start. She ended her evidence by expressing an ongoing passion for teaching.

On behalf of the Respondent, Mr Martin also called the principal of the school at which the respondent had taught after the termination of her contract of employment. The principal told us that XXXXXXXXX had come to the hearing to support the Respondent. XXXXXXXXX said that, in XXXXXXXXX view, one could only judge people as one finds them, and that XXXXXXXXX had been impressed when the respondent had applied for a job with XXXXXXXXX school and had disclosed her “difficulties”. XXXXXXXXX indicated that XXXXXXXXX own view was that the Respondent had learnt a very valuable lesson from this. XXXXXXXXX then went on to say that as far as XXXXXXXXX and XXXXXXXXX school were concerned they had no concerns about the Respondent, explaining that she had worked particularly well with the children at XXXXXXXXX school and with staff and parents. XXXXXXXXX said that the Respondent worked in a way that supported children’s learning and that there was no evidence or even suspicion that she had repeated her actions in the school. XXXXXXXXX said that the Respondent was a “good person”, and not a “bad person”, and that her behaviour had been stupid but not sinister.

Submissions

Mr Lewis, on behalf of the Complainant, traversed the factual background. He then focused on the definition of serious misconduct and submitted that the Respondent's actions amounted to serious misconduct on the basis that:

- They reflected adversely on the teacher's fitness to be a teacher because the respondent was aware of the terms of the contract and the school's policy in relation to the use of computers and notwithstanding that had accessed this material, retained it on her computer and allowed others to view it whilst students were in the vicinity;
- Was of a character and severity that meets the Teachers Council's criteria for reporting serious misconduct, and in particular Rule 9(k) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004, which proscribes the viewing accessing or possession of pornographic material; and
- The respondent failed on becoming aware that she had pornographic material on her computer to ensure that the school was notified so that the material could be removed.

Mr Lewis submitted that the Respondent's contention that there was a culture which encouraged the exchange of risqué material or the possession of risqué material on computers was denied by the two teacher aides, and in any event was irrelevant, because the existence of such a culture within a school would not be an excuse for participation in that sort of behaviour. We agree.

He argued that the fact that the teacher's desk was out of bounds and that the children did not in fact obtain access to the material was at best a limited mitigating factor. Mr Lewis' contention, with which the Tribunal agrees, is that there was undoubtedly a risk of the children gaining access.

As to penalty, Mr Lewis referred us to a number of earlier decisions involving teachers using school laptops inappropriately to access pornographic material.

In his closing remarks, Mr Lewis said that the Complainant did not seek deregistration in this case.

On behalf of the respondent, Mr Martin made more extensive submissions.

As to the facts, he summarised them as follows:

> "The central facts are not disputed. On a few occasions over a relatively short time, the respondent used her school laptop while at school, to access what turned out to be sexually explicit material. She did not always immediately delete such material. On several of those occasions, the respondent shared that material with one or two colleagues. Once she did so while there were children in the classroom."

We think that is an accurate summary of the raw facts.

Mr Martin then provided a detailed analysis of serious misconduct.

Although, in his written submissions, Mr Martin's formal contention was that the Respondent's behaviour did not meet the test of serious misconduct, he resiled from that position to some extent during the course of the hearing, accepting, when it was put to him, that the evidence established that the Respondent's behaviour – as summarised by him – at least had the potential adversely to affect the wellbeing or learning of students, reflected adversely on her fitness to be a teacher and fell within Rule 9(k) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004.

The focus of his submission was that it had not been demonstrated that the Respondent was unfit to teach and in support of that he drew attention to the handbook published by the New Zealand Teachers Registration Board, the predecessor to the New Zealand Teachers Council, which, in the context of a discussion of fitness to teach, talked about such matters as trustworthiness, honesty, reliability, and other such factors.

In our view, this argument rather misses the point.

In disciplinary proceedings where there is a charge of serious misconduct, the question is whether the Complainant has been able to establish behaviour on a teacher's part which falls within the s139AB definition of serious misconduct.

It is true that that definition talks of a teacher's fitness to teach (or rather, to be a teacher). But it does not follow from that the examination is exclusively as to the teacher's fitness to be a teacher. All the section requires is that the behaviour which the Complaints Assessment Committee has been able to establish "reflects adversely on the teacher's fitness to be a teacher". If it does (and if the other requirements of the section are satisfied), then the Complainant is able to establish serious misconduct and the degree or severity becomes a matter to be taken into account in assessing the appropriate penalty (if any).

In our view, there is simply no question in this case that the Complainant has been able to establish behaviour on the part of the respondent which falls within the s139AB definition. It seems to us that the evidence demonstrates that her behaviour was such that it both created a risk for the wellbeing or learning of students, and reflected adversely on her fitness, and was of a

character or severity that meets the Teachers Council's criteria for reporting serious misconduct, because it falls squarely within Rule 9(k) which proscribes "...viewing, accessing, or possessing pornographic material while on school premises or engaged on school business."

We think that Mr Martin demonstrated the error in his analysis when he submitted to us that:

> "Not every lapse should lead to a finding that a person was unfit to be a teacher. An isolated transgression or minor failings are not indicative of someone's essential qualities."

Whilst the last sentence in that passage is one with which the Tribunal has considerable sympathy, the first sentence misstates the question to be determined.

As to outcome, Mr Martin, like Mr Lewis, referred to a number of earlier decisions of the Tribunal of a similar nature. He submitted that it was clear that the Respondent would never do anything like this again and that she had already paid a very high price in this case and was deeply remorseful. He submitted that taking into account all those considerations and the probability that the Tribunal would award costs, a censure was all that is warranted.

Discussion

The Tribunal has not found this an easy case to deal with.

As already signalled, we have no doubt that the Respondent's actions amount to serious misconduct. In the Tribunal's view, they had the potential adversely to affect the wellbeing or learning of students, reflected adversely on the respondent's fitness to be a teacher, and fell clearly within Rule 9(k).

Accordingly, the real question is the appropriate penalty, and we think that in the end both Mr Lewis for the Complainant and Mr Martin for the Respondent accepted that.

The Tribunal, of course, has a wide range of penalties available to it and the law is very clear that we must, in every case, give consideration to that entire range before determining the approach to be taken. We have done that.

Although we accept the submission that the Respondent has hitherto had an unblemished record as a teacher and, to adopt Mr Martin's terminology, she has already paid a high price for her actions, the Tribunal regards this matter as a serious one, and we are not prepared to deal with it by way of a censure alone, as is urged on us. On balance, the Tribunal accepts that this is not a case in which it is necessary to make an order deregistering this teacher. We should add, however, that two members of the Tribunal were initially inclined to think that deregistration was called for. We make that observation simply to illustrate how seriously the Tribunal regards this case.

If, as Mr Martin submits, this case involves nothing more than an error of judgment, it was a very serious error of judgment indeed. Not only did the Respondent knowingly breach her contractual obligations to the school and the school's policy for the responsible use of computers, but she did so in a way that created a real risk of very young students viewing pornographic material.

This is not a case in which the Tribunal thinks anything would be gained by imposing conditions on the teacher's practising certificate or annotating the register. We have given serious consideration to whether a fine should be imposed, but have decided that that would be inappropriate here because, as
Mr Martin says, the respondent's actions have already had a seriously adverse financial impact on her. Having considered all available options, the Tribunal has come to the view that the most appropriate outcome in this case would be to censure the teacher and suspend her practising certificate for the balance of 2010 so that she is not in a position to return to the classroom until the 2011 scholastic year.

Costs

On behalf of the complainant, Mr Lewis seeks costs, and Mr Martin has not advanced an argument against the imposition of an order for costs in this case. We therefore propose to make such an order. We observe that in a recent decision (NZTDT2010/5) we signalled the approach that we proposed to take to the starting point in relation to imposition of costs in the future. But in this case will limit the award to the costs of the hearing on grounds of fairness'

Accordingly, the Tribunal orders as follows:

> (a) Pursuant to s139AW(1)(b) of the Education Act 1989, the Tribunal formally censures the Respondent for her serious misconduct;
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> (b) Pursuant to s139AW(1)(d), the Tribunal suspends the teacher's practising certificate or authority until the end of 2010;
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> (c) Pursuant to s139AW(1)(h) and (i), the Tribunal orders that the Respondent pay half of the Complainant's actual and reasonable costs associated with hearing. As to this order, the Tribunal invites Mr Lewis to submit a memorandum as to costs and delegates to the Chairman authority to deal with the consequential costs order.

DATED at Wellington this day of 2010.

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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.