

NZTDT 2012/21

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY  
TRIBUNAL**

**UNDER** the Education Act 1989

**IN THE MATTER** of disciplinary proceedings pursuant to Part 10A of the  
said Act

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

**Complainant**

**A N D**

**Respondent**

---

**DECISION OF TRIBUNAL**

---

**Tribunal Members:** Kenneth Johnston (Chair)  
Barbara Arnott  
Megan Cassidy  
Susan Ngarinu-Goldsmith  
Elizabeth Pakai

**Hearing date:** On the papers

**Decision date:** 26 October 2012

**Counsel:** Gaeline Phipps for Complainant

Kelly Flavell for Respondent

## Introduction

The Complainant charges the Respondent with serious misconduct, the Notice of Charge dated 3 May 2012 particularising the charge in the following terms:

3. “The Complaints Assessment Committee, pursuant to section 139AW(4) charges that [the Respondent], teacher, of ... behaved in an unprofessional manner amounting to serious misconduct in that, while he was a teacher employed at ... he:
  - 3.1 Viewed or accessed pornographic material via the internet on his school laptop computer on multiple occasions but at least between 27 August 2009 and 31 October 2009;
  - 3.2 Viewed, accessed or possessed pornographic material on a school laptop computer from either the hard drive of the school laptop, or from a USB device in his name inserted into the school laptop, on various dates between 28 August 2009 and 10 April 2010;
  - 3.3 On or about November 2009 on a picnic day at the school, brought to the school his USB device which he then lost during a tug-of-war, and the USB when found contained 42 flash video or DVD video files of a pornographic nature.
4. The conduct alleged in particulars 3.1 to 3.3 amounts to serious misconduct pursuant to section 139AB of the Education Act 1989 and Rules 9(1)(k), of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004.”

The Chairman convened a pre-hearing telephone conference on 22 July 2011, which was attended by both Ms Phipps and Mr Flavell, at which directions

were made which presumed that an agreed Statement of Facts would eventually be lodged, as counsel had foreshadowed.

In due course an agreed Statement of Facts was lodged, and both Counsel filed and served submissions.

The matter was dealt with today on the papers as had been requested by both parties.

### **Evidence**

As already stated, the evidence was in the form of an agreed statement of facts and we set this out in full:

1. At all material times, the Respondent was employed as a teacher at ... school. He held the position of ... and teacher in charge of ...
2. As part of his employment, the teacher was provided with a laptop.
3. That on 15 February 2007 he signed an agreement regarding laptop use, a copy of which is attached to this agreement.
4. In or about November 2009, on a picnic day at the school, the respondent brought to the school his USB device. During a tug-of-war, he lost it.
5. On or about 24 May 2010, the USB device was discovered at the school. When opened, it was found to contain inappropriate material including 42 flash video or DVD video files of a pornographic nature.

6. A copy of the material found on the USB device is contained in the forensic report of ... and on the DVD which is submitted with this Agreed Statement of Facts.
7. In all, 274 pornographic images were found on the USB and laptop. These images were viewed or accessed via the internet on the respondent's school laptop computer on multiple occasions but at least between 27 August and 31 October 2009 but not on the school site. In addition, the respondent viewed, or accessed pornographic material on his school laptop computer from either the hard drive or from a USB device in his name inserted into the school laptop on various dates between 28 August 2009 and 10 April 2010 but not on the school site.
8. None of those images met the legal definition of "objectionable".
9. Prior to its discovery, the Respondent did search unsuccessfully to find the USB device but did not take any steps to report the USB as lost or in other ways actively try to minimise the possibility of students looking at material on it.
10. These files were viewed on the school laptop but were not stored on the hard drive.
11. The Respondent has acknowledged that the USB was his and at all times cooperated with the investigation of the school and the Complaints Assessment Committee."

### **Submissions**

Ms Phipps began by noting that the Respondent had admitted serious misconduct, and then referred to a number of the Tribunal's previous decisions

dealing with cases in which teachers had been in possession of pornographic material. We do not think it is necessary to traverse those cases here.

Her submission very properly recorded that there was no evidence that the material in this case was accessed on school premises. However, she noted that the material was accessed using a school laptop which was contrary to school's policy. She also submitted that the Respondent's failure to take care of the USB device that contained the pornographic material posed a risk to students. In the same vein she went on to submit that, having lost the USB device, the Respondent failed to take steps to safeguard against students accessing the material by reporting its loss and doing what he could to retrieve it.

Ms Phipps noted that none of the material contained in the USB port was "objectionable", which the Tribunal takes to mean unlawful in terms of the relevant legislation, and that the Respondent co-operated with both the School's investigation and the Complainant's.

Having submitted that the Respondent's actions amounted to serious misconduct, Ms Phipps made no submission as to penalty, but sought costs on the Complainant's behalf and submitted memoranda dated 23 March and 28 June 2012 which itemised costs totalling \$6,735.11.

For the Respondent, Mr Flavell, in his submission, began by confirming the Respondent's acceptance of the charge of serious misconduct. He reminded the Tribunal that the Respondent had been a teacher for 33 years and at the time of the occurrence had been employed at the secondary school at which he then taught for some years and had held a senior position.

He went on to submit that the Respondent's teaching credentials were first class and at the time when the formal investigation by the Complainant began, he had made an application for a New Zealand [REDACTED] [REDACTED] fellowship, which application he had since had to abandon. He

made the point that this matter had ultimately led to the Respondent having to resign his position.

As Ms Phipps had done, Mr Flavell emphasised the extent to which the Respondent had co-operated in the investigation of this matter.

He then went on to submit that the Respondent, having been prevented from teaching for more than a year, was desperate to return to the profession.

As to the details of the incident itself, Mr Flavell emphasised that there was no evidence that the Respondent had viewed pornography at the school, which of course the Complainant accepts. He said that the Respondent had learned his lesson and now appreciates that pornography, lawful or otherwise, has no place in a school environment. He went on to emphasise the profound impact that this matter had had on the Respondent and his family.

Mr Flavell then passed on the Respondent's apology to all concerned.

His submission, in the end, was that this matter justified no more than a censure.

On the Respondent's behalf Mr Flavell was able to produce a very positive reference from the Principal of the secondary school at which the Respondent formerly taught, which included the Principal's view that this matter should be dealt with by way of a censure.

### **Discussion**

The Tribunal has of course listened carefully to the submissions made by both Ms Phipps and Mr Flavell on behalf of the parties. It has also taken into account the independent views of the Principal of the school at which the Respondent formerly taught, which it was grateful to receive.

The Tribunal views this matter seriously. For any teacher to access inappropriate material (albeit lawful material) on a school computer in breach of the school's protocols in relation to the use of computers and then to bring that material to the school, and a school event, is a serious breach of the teacher's responsibilities to the school and its students. The Tribunal regards the Respondent's acceptance that his behaviour constitutes serious misconduct as appropriate. That said, the Respondent is entitled to some credit for his years of service to the profession and his obvious contrition. It is also relevant that he has the support of his former Principal. The Tribunal regards it as relevant consideration also that the Respondent has faced up to his wrongdoing, accepted responsibility, and co-operated both with the school's disciplinary process and the Complainant's investigation.

The Tribunal is conscious of its responsibility to consider all available options before determining an appropriate outcome. We do not regard it as appropriate in this case to limit the outcome to a censure, as we do not think that would adequately mark the seriousness of the Respondent's misconduct. In the end, after careful consideration of the options, the Tribunal takes the view that the appropriate decision is to suspend the Respondent's practising certificate for a period of two years, but backdated from the date of his resignation, which would enable him to resume teaching from the start of the academic year in 2013.

As to costs, the Tribunal's approach in all but exceptional cases is to award costs in favour of the successful party of half of that party's actual and reasonable costs. No reasons were advanced in this case for adopting any other approach.

**Conclusion**

The Tribunal's formal order is as follows:

- (a) Pursuant to S139AW(1) (b) of the Education Act 1989 the Respondent is censured for his serious misconduct;
- (b) Pursuant to S139AW(1) (d) of the Act the Respondent's practising certificate is suspended for a period of two years, the period of suspension to commence on 1 January 2011;
- (c) Pursuant to S139AW(1) (h) and (i) of the Act, the Respondent is ordered to pay costs to the Complainant in the sum of \$3,367.50.

---

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.

