

NZTDT 2013/28

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**UNDER  
AND**

the Education Act 1989

**IN THE MATTER**

of disciplinary proceedings commenced  
by the Complaints Assessment  
Committee of the New Zealand  
Teachers Council

**BETWEEN**

**COMPLAINTS ASSESSMENT  
COMMITTEE**

Complainant

**AND**



Respondent

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**DECISION OF TRIBUNAL**

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**Tribunal:**

Kenneth Johnston (Chair), Megan  
Cassidy, Sheila Grainger, David  
Turnbull, and Patrick Walsh

**Hearing:**

21 May 2013

**Decision:**

14 June 2013

**Counsel:**

Stefan Kaminski for Complainant  
Respondent in person

## **Introduction**

By Notice of Charge dated 30 January 2013, the New Zealand Teachers Council's Complaints Assessment Committee charges the Respondent with serious misconduct, the charge being particularised in the following terms:

### ***"Particulars of Charge***

3. *The Complaints Assessment Committee, pursuant to section 139AT(4), charges that ..., teacher of ..., behaved in an unprofessional manner amounting to serious misconduct and/or conduct warranting referral to the Disciplinary Tribunal in that while he was a teacher employed at a High School –*

3.1 *on or about June and July of 2012, he accessed and downloaded pornographic material on his school computer;*

3.2 *during that same time, on two occasions he downloaded sites during school time while teaching a class;*

3.3 *the material he downloaded included sites with the following names:*

*"Woman was violated in front of her husband"*

*"A current medical student Moenimcense Nomuia, Incest – reunited with her father"*

*"New graduate idol female employee"*

*"From a part time busty private teacher"*

*"Affectionate daughter was fucked by father and his dick was warped up slowly in cowgirl position"*

*"Young wife was raped by father-in-law and brother-in-law"*

*"Secret Female Investigator – schoolgirl will be raped"*

*"Five Fucks, Special Young Girl's Sister"*

*"Young White Wife was committed by her husband subordinates"*

*"Part time busy private teacher"*

3.4 *That this conduct was in breach of the High School's staff Internet and use of Lap top agreement."*

The Chairman convened a pre-hearing telephone conference on 26 February 2013 which Mr Kaminski participated in for the Complainant and in which the Respondent also participated. At the conclusion of the conference, the Chairman made a series of directions for the filing of evidence and submissions and set the matter down for hearing.

### **Evidence**

The Complainant's primary evidence was in the form of an affidavit made by the Principal of the [REDACTED] at which the Respondent formerly taught, to whom we will refer as Mr C.

Mr C's evidence was that he had taken up his position as Principal on 16 July 2012, at which point the Respondent had been employed at the school as a

music teacher for approximately four years. He explained that the school's policy was to provide all teachers with a computer pursuant to written terms and conditions for its use. He produced a copy of the agreement between the school and the Respondent dated 4 February 2008, signed by the Respondent, and another document, also signed by the Respondent, outlining conditions relating to the use of software. Without going into the detail, it is apparent from these documents that the arrangement proscribed the use of the computer other than for school purposes, and the accessing of "inappropriate" material.

Mr C went on to explain that during the course of his first day at the school he was informed by the school's Information and Technology Manager that he had stumbled upon evidence that the Respondent had been using his laptop and the school's internet facilities to access sexually explicit material. He explained that he was shown some of the material which the Internet Technology Manager had come across and as a result instructed that the Respondent's laptop be secured and forensically examined. The school obtained a report from a suitably qualified organisation which indicated that the Respondent's laptop contained a large number of images which Mr C described as "inappropriate". His evidence included samples of this material. It is not suggested by the CAC that any of this material is unlawful. The case is that it is "inappropriate" material indicating that the Respondent had not complied with his contractual obligations as described earlier and downloaded sexually explicit material using his school laptop.

Mr C's first response was to provide a report to the New Zealand Teachers Council dated [REDACTED].

There then followed a disciplinary process which Mr C described in detail but which we do not need to outline here. At the conclusion of this process, Mr C

informed the Respondent that he would have to refer the matter to the school's Board, whereupon the Respondent resigned.

The only real controversy in any of this seems to be whether the Respondent accessed this inappropriate material during class, or whether he only did so in his own time. In the course of the disciplinary investigation commenced by Mr C, the Respondent maintained that he did not use the laptop to access inappropriate material at the school. However, in relation to this, the Complainant also placed before the Tribunal an affidavit made by Ms Gaeline Phipps who was Counsel acting for the Complaints Assessment Committee during its investigation. Ms Phipps' evidence focused on a meeting between the CAC and the Respondent on 8 December 2012, during the course of which the Respondent was asked about the dates and on times which the forensic report indicated he was accessing inappropriate material on his laptop. On the basis of this report, it was put to him that it appeared that he had been accessing such material while teaching one of his classes. Ms Phipps' evidence was that he confirmed that, saying that the computer was on the front desk and students were at their desks, the implication being that students were not able easily to view his screen.

From the samples of the material accessed by the Respondent on the school laptop before the Tribunal, it is apparent that this material does not cross the boundary of being indecent in the sense of being unlawful. It is however relatively explicit material with close up images of male and female genitalia. On any view, it is material which is properly regarded as inappropriate for the Respondent to have accessed on the school laptop, having regard to the terms of the arrangements under which he was entitled to use the same.

### **Submissions**

For the Complainant, Mr Kaminski began his submissions by confirming that the Respondent was a registered teacher, that his registration was due to expire on [REDACTED] 2014 and that his practising certificate had expired on [REDACTED] 2012. In fact there is a degree of confusion as to the Respondent's status at the material time – mid 2012 – and, as a result of that, during the course of the hearing, the Tribunal sought copies of the relevant extracts from the Council's register. That did not result in a great deal of clarity. However, for present purposes, the Tribunal is proceeding on the assumption that Mr Kaminski's description of his status – as already outlined – is correct.

Mr Kaminski submitted that the Respondent's actions in downloading pornographic material using his school laptop amounted to serious misconduct, being both a breach of his contractual obligations and in any event entirely inappropriate. In the Tribunal's view that is a fair submission, irrespective of whether or not any such material was downloaded in the school. As to that aspect of the events, despite the Respondent's ultimate denial of this, we are entirely satisfied by the evidence which the Complainant has been able to put before us, in the form of Ms Phipps' affidavit, that the Respondent, on at least one occasion, and quite possibly on more than one occasion, accessed pornographic material during class time.

Mr Kaminski's submission was that doing so was serious misconduct as that term is defined in Rule 9(1) (k), (l) and (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004.

Mr Kaminski then referred us to a number of previous cases in which the Tribunal has concluded that using school computers to download pornographic material amounts to serious misconduct.

On the Complainant's behalf Mr Kaminski accepted that the material found on the laptop was not unlawful but emphasised that some of the titles at least suggested that it may have been approaching that status.

As to penalty, Mr Kaminski's submission was that the Respondent's "...misconduct is clearly sufficiently serious for the Tribunal to take the view that it merits cancellation of registration. On the other hand, depending on how [the Respondent] impresses the Tribunal, a more benign view is perhaps not out of the question." He went on to acknowledge that, on the evidence, the Respondent was entitled to ask the Tribunal to have regard to the fact that no student viewed any of the material he downloaded.

The Respondent appeared before the Tribunal. He elected not to give evidence (although the difference between giving evidence and merely making a submission was brought to his attention). Essentially, he spoke to a short note which he had filed and served prior to the hearing, and then answered a series of questions put to him by the Tribunal. In the circumstances, it seems appropriate to reproduce the Respondent's written submission (to the extent that it remained relevant as at the date of the hearing):

***"Introduction"***

- 1. I confirm Mr Kaminski's introduction that I am a registered teacher with a category expiry date of [REDACTED] 2014. My practising certificate expired on [REDACTED] 2012.*
- 2. I understand that I am charged with serious misconduct, essentially for accessing and downloading pornographic material using my school supplied laptop.*

3. *My submission is to face and accept any charges and consequences that may deem right by the Tribunal.*

#### ***Amendment***

4. ...

5. ...

#### ***Defence***

6. *In response to Mr Kaminski's Synopsis, paragraph 17, I did not choose the website; it was merely suggested to me as a link. As to why the site operates in such way, I can only guess but logically they would divide movies into bits to prevent data corruption due to long downloading, and also to implant spywares/viruses within the rar/zip format. I have only discovered this fact recently, and I advise everyone around me not to download anything in such formats or do so in their own risk.*

7. *In response to Mr Kaminski's Synopsis paragraph 21, I did not enlighten Mr [C] about the fact that the downloading happened during a class because it was Mr [C] that has ordered Mr [S] to take my laptop away during a class time. I honestly thought he knew about the fact that downloading was happening during class time too.*

8. *In response to 'a further potential black mark' from paragraph 24 and 25, I believe my amendment will have explained this point.*

#### ***Submissions***

9. *I acknowledge that my misconduct is clearly serious, and I am ready to accept any consequences that follow.*

10. *I did not undertake counselling simply because I did not have urges to view the materials again, and without having the symptoms of addiction I did not think it was necessary for me to*



*undertake counselling. If the Tribunal or the Teachers Council wishes me to go through such procedures, I will be happy to do so.*

*11. Please understand that the event took place for a reasonably short period of time, and that I have had no disciplinary issues or problems between other teachers or students prior to this. I have loved the students no matter what, and would never see them as anything other than students.*

*12. I sincerely regret my actions regarding the pornographic movies, and I solemnly swear that it will not happen again. But as I mentioned earlier, if there is a price to pay for my actions, I will gladly pay it."*

We mention that in the course of responding to the Tribunal's questioning the Respondent indicated that since these events he had become a member of a church, and had, to use his words, "*turned his life around*". He asked the Tribunal to accept that the prospect of him taking an interest in pornographic material in the future was very low as a result. He also indicated that the Pastor of the Church was his father and the Tribunal perceives (although it has to be said this was not entirely clear even after extensive questioning) that any counselling or guidance he has received has been of a spiritual rather than a clinical nature.

### **Discussion**

There is no doubt that the Complainant has made out its allegation of serious misconduct. For a teacher deliberately to download pornographic material on a school-owned computer in breach of his contractual commitments is not only a breach of contract but falls squarely within the definition of serious misconduct contained in the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 referred to above. It not only has the potential

detrimentally to affect the teacher's students, but calls seriously into question the teacher's fitness to teach.

As we have already indicated, despite the Respondent's denial of this, we are satisfied on the evidence that he downloaded some of this material in class time. That simply compounds the seriousness of the case.

Frankly, we are not persuaded that the Respondent was altogether frank with the school during the course of its disciplinary investigation and are not at all comforted by the evidence as to what steps he has taken to address this matter following his resignation. Protestations that a teacher has since found God are, in isolation, not especially compelling. It may be that there is a spiritual component to redemption, but, in the Tribunal's view, it is also often necessary to view such matters from a secular perspective and consider whether psychiatric or psychological assistance may be necessary.

The real question in this case is the appropriate penalty.

The Tribunal has of course been conscious of the primary purposes of professional disciplinary proceedings, those being the protection of the public (particularly school children), the maintenance of professional standards and punishment, always having regard to the fact that punishment is not the primary purpose of professional disciplinary proceedings, and that a decision-maker's obligation is to consider the least punitive outcome consistent with the primary objectives. With those considerations in mind, we have considered all of the possible alternatives set out in s.139AW.

In the end, there is something of a difference of view in the Tribunal. The conclusion of the majority (the Chairman, Mr Turnbull and Mr Walsh) is that

the most appropriate outcome is a significant period of suspension coupled with a provision that the Respondent not be allowed to obtain a practising certificate until the Council has received and is satisfied that he has obtained a report from a suitably qualified psychiatrist or psychologist confirming that the prospect of a repetition of this behaviour is not significant, and a further obligation to inform any prospective employer in the future of this disciplinary proceeding.

A minority of the Tribunal (Ms Cassidy and Ms Grainger) would have made an order de-registering the Respondent.

Although there are different views as to the most appropriate outcome, the reason for this is not so much an issue of severity of punishment as the most effective way of minimising the risk to the public in the future. In those circumstances, Ms Cassidy and Ms Grainger do not propose formally to dissent from the majority view, but simply wish their different view to be recorded.

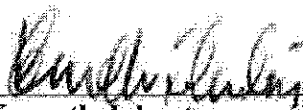
During the course of the hearing no application was made for costs. Costs are therefore reserved.

### **Conclusion**

Accordingly, the Tribunal's formal conclusion is as follows:

- Pursuant to s.139AW(1)(b) of the Education Act 1989, the Tribunal formally censures the Respondent for his serious misconduct;

- Pursuant to s.139AW(1)(d), the Tribunal orders the suspension of the Respondent's practising certificate for a period of three years from the date of his resignation (6 August 2012);
- Pursuant to s.139AW(1)(c), the Tribunal imposes a condition on the Respondent's registration that a practising certificate not be re-issued by the New Zealand Teachers Council to the Respondent at any state in the future unless and until the Respondent is able to provide to the Council (through its Manager, Teacher Practice) a report from a psychiatrist or psychologist which satisfies the Council that the Respondent has overcome whatever psychological problems may have precipitated his actions as recorded in this decision;
- Also pursuant to s.139AW(1)(c), the Tribunal imposes a further condition on the Respondent's registration that if and when he is issued with a practising certificate, for a period of three years from the date of reissue, he will, before accepting any teaching position, inform the prospective employer of this disciplinary proceeding and provide that prospective employer with a copy of this decision.

  
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.

