


BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

IN THE MATTER of disciplinary proceedings commenced by a
Complaints Assessment Committee of the
Education Council of Aotearoa New Zealand

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**
Complainant

A N D 
Respondent

DECISION OF TRIBUNAL

Tribunal: Kenneth Johnston (Chair), Simon Heath
and Maraea Hunia

Hearing: 13 October 2015

Decision: 20 November 2015

Counsel: Adam Lewis for Complainant
David Martin and Janette
Andrews for Respondent

Introduction

[1] In this case the Education Council of New Zealand charges the Respondent with serious misconduct.

[2] The Notice of Charge is dated 7 April 2015, and, as amended, particularises the charge in the following terms:

"1. Mr [REDACTED] is a Registered Teacher with full registration which expires on 13 June 2021, and who holds a Practising Certificate which expires on 13 June 2016.

2. Mr [REDACTED] was the Principal of [REDACTED] School in [REDACTED] (the School), and resided in the School house.

3. In late 2014 and early 2015, Mr [REDACTED]:

3.1 Twice disabled the School's internet content filtering system;

3.2 Used the School's computers to access pornography sites;

3.3 Accessed "hard-core" (albeit not legally "objectionable") pornography;

3.4 Did so on occasion during school hours;

3.5 Utilised "proxy services" and "torrents" in the process;

3.6 By disabling the filter, exposed the whole of the School's system and its users to potentially inappropriate content from 7 November 2014 to 9 January 2015 and after 12 January 2015.

4. Mr [REDACTED] resigned effective 30 January 2015."

- [3] By Notice of Application dated 28 April 2015, supported by an affidavit sworn by the Respondent on the same date. The Respondent applied for an order pursuant to r 32 of the New Zealand Teacher's Council (Conduct) Rules 2004 suppressing his name.
- [4] The Chairman convened a pre-hearing telephone conference on 4 June 2015.
- [5] At the conclusion of the conference the Chairman set the matter down for hearing and made directions in relation to the filing and service of evidence and submissions as necessary. He also made an interim order pursuant to r32 suppressing all details of the case pending the hearing, on the basis that the Tribunal would consider the Respondent's application for name suppression at the hearing.
- [6] Prior to the hearing the parties filed an Agreed Statement of Facts. This was dated 13 August 2015, and signed by counsel for both parties.

Evidence

- [7] The Tribunal dealt with the case on the basis of the Agreed Statement of Facts, and we therefore set this out in full:

"May it Please the Tribunal:

1. *The Complaints Assessment Committee ("Complainant") laid a Notice of Charge against Mr [REDACTED] ("Respondent") alleging that he engaged in serious misconduct, the particulars of which are:*

Particulars

1. *The Respondent is a Registered Teacher with full registration which expires on 13 June 2021, and who holds a Practising Certificate which expires on 13 June 2016.*
2. *The Respondent was the Principal of [REDACTED] School in [REDACTED] (the School), and resided in the School house.*
3. *In late 2014 and early 2015, the Respondent:*

- 3.1 *Twice disabled the School's internet content filtering system;*
 - 3.2 *Used the School's computers to access pornography sites;*
 - 3.3 *Accessed "hard-core" (albeit not legally "objectionable") pornography;*
 - 3.4 *Did so on an occasion during school hours; and*
 - 3.5 *Utilised "proxy services" and "torrents" in the process.*
 - 3.6 *By disabling the filter, exposed the whole of the School's system and its users to potentially inappropriate content over a span of some months from 7 November 2014 to 9 January 2015 and after 12 January 2015.*
4. *The Respondent resigned effective 30 January 2015.*

Professional background

2. *The Respondent was first registered as a teacher on 13 January 2003 and has a current certificate valid until 13 June 2016.*
3. *At the time of the events the subject of the Notice of Charge, the Respondent was the Principal of [REDACTED] School ("School") near [REDACTED]. He resided in the School house.*

N4L reporting of inappropriate content

4. *On 15 January 2015, the Ministry of Education ("Ministry") alerted the Chair of the Board of Trustees of the School that the Ministry had received a report from Network for Learning ("N4L"). N4L reported that there had been inappropriate websites accessed on the School computer account.*
5. *N4L was created by the Government to build a managed network for New Zealand schools. N4L produces a report, showing categories of sites and top websites accessed, as part of regular monthly reporting to the Ministry. The*

information sharing arrangement between N4L and the Ministry is noted in the agreement schools sign with N4L.

6. *The N4L report to the Ministry in January 2015 noted access in the School to inappropriate content, breaching the Acceptable Use Policy for the School. N4L identified that the School managed its own content filtering and what websites were allowed or blocked for access.*
7. *The N4L report showed that immediately after the Respondent was given access to the website filtering dashboard on 7 November 2014, the Respondent changed the filter to allow access to all types of content and all types of traffic. Within an hour, a pornographic website was accessed at the School.*
8. *N4L reinstated the Schools filtering on 9 January 2015, assuming the allowance of all traffic was an error.*
9. *On 12 January 2015 an attempt to view a regularly accessed pornographic website was made but blocked by the filter. The filtering administrator, a responsibility held by the Respondent, changed the filter immediately after the attempt. The content was allowed and accessed.*
10. *Over a period of 7 November 2014 to 15 January 2015, almost all the downloading of inappropriate material came from the same IP address, lasting for period of five to ten minutes, with the same pattern of access through a website www.sex.com.*

Netsafe analysis

11. *Netsafe analysed the information provided by N4L. A copy of the report from Netsafe is **attached** to this agreed summary of facts.*
12. *The Netsafe report shows that:*
 - 12.1 *The logs showed access to pornography, via the website www.sex.com on one occasion during School time on 7 November 2014 at 14.45pm for one minute;*

- 12.2 *All other access to the pornography was outside of normal working hours;*
 - 12.3 *Other than the instance in 12.1 above, there was no access to adult sites in times students or staff were likely to be at school;*
 - 12.4 *The IP website was accessed through four addresses, relating to two computers, a MAC OSx 10.10.1 and an IPAD IOS 8.1.2*
 - 12.5 *Pornographic and other inappropriate content would have been available to all users of the School network at all times between 7 November 2014 and 9 January 2015, and after 12 January 2015;*
 - 12.6 *The majority of content on www.sex.com website is what they describe as “hard core pornography”, containing “nudity, masturbation, and explicit sexual acts”;*
 - 12.7 *They did not find any links to illegal content, or any attempt to search for content that would be illegal. “Illegal content” refers to “objectionable material” as defined in the Films, Videos and Publications Classifications Act 1993; and*
 - 12.8 *The logs show access to proxy services and torrents. Proxy services are used to provide anonymity or privacy or to defeat content filters by masking their activity from logging tools. Torrents technology allows files to be downloaded from small pieces in different locations. Torrents are primarily used to download material in breach of copyright agreements.*
13. *The School carried out an investigation and asked for an explanation from the Respondent. The Respondent wrote to the Chair of the Board of the Trustees of the School. The Respondent accepted the inappropriateness of his actions.*

14. *On 30 January 2015, the Respondent tendered his resignation to the Chair of the Board of Trustees.*

15. *The Respondent accepts that the conduct alleged in the Notice of Charge including Particulars 1 through to 4, are correct and amount to serious misconduct and/or conduct warrant referral to the Disciplinary Tribunal pursuant to section 139AB of the Education Act 1989 and Rule 9(1)(k) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004."*

[8] The Respondent also gave evidence. His evidence focused on his actions, the consequences for himself and others and his regret and remorse.

[9] He told the Tribunal of having had a devastating experience about five years before these events which had resulted in him suffering from chronic depression. He regarded himself as on the way to recovery when he applied for the position at [REDACTED]. He said that at [REDACTED] he began to experience flash-backs to the previous experience which arrested his recovery. He put his use of pornography down to an attempt to escape from the psychological pressure he was under at the time. He said that he was not putting this forward as an excuse, but rather as an explanation.

[10] The Respondent spoke at length about the devastating effect that his actions had had on his mental state and his career, and on the lives of his wife and daughter. He said that the cumulative effect of his actions had resulted in a recurrence of his depression and "... put me at the lowest point I have ever been."

[11] He expressed regret and remorse, and a determination to get well again and to resume his career.

[12] The Principal of [REDACTED] School, Mrs [REDACTED], also gave evidence.

[13] Mrs [REDACTED] said that she had met the Respondent about 10 years ago when they had both worked at the [REDACTED] campus of the College of Education in [REDACTED]. She told us that they had worked closely together during this time. She described the

Respondent as a "... caring, family oriented person who enjoys challenge, relishing problem solving situations, and often willingly giving his own time to support others to solve technical issues." . She said that she had read the Agreed Statement of Facts in this case and having spoken to the Respondent could confirm his sincere remorse. In a relatively understated way, Mrs [REDACTED] said that she did not believe that the Respondent had acted maliciously, and certainly that he had not intended to endanger children.

[14] The Tribunal also had before it a report from the Respondent's psychologist, Ms Shona Tourell, as to his ongoing medical care.

[15] Ms Tourell told us that the Respondent's mental state "... was somewhat improved, though remaining fragile, but has more recently deteriorated subsequent to ongoing difficulties finding employment and the strain this is placing on his family." She said that whilst the Respondent is "... trying to take steps to move on in his life, such as exercising and applying for jobs, it seems to me that his self-esteem, which has never been high, will probably always be affected, to some extent, by his actions and the consequences that have resulted." She also spoke of the impact that the Respondent's actions had had on his family environment and the repercussions for the Respondent. In this regard, she told us that she "... continue(s) to believe that publication of his name would constitute further insult to an already damaged marriage." Her assessment was that, were the Tribunal's decision to be published in a form which included the Respondent's name, this would impair his recovery.

[16] Finally, the Tribunal had before it a copy of a letter from the Chair of [REDACTED], Ms [REDACTED]. Ms [REDACTED] told the Tribunal that, putting the events which are the subject of this proceedings aside, the Respondent was an effective Principal of the School, and that the Board recognised his potential during the relatively short period that he was employed there. She also offered her view as to the adverse effect that the publication of the Respondent's name would have on him, although of course she was not qualified to give evidence of that sort.

Liability

- [17] The parties are in agreement that the Respondent's actions as particularised in the Notice of Charge constitute serious misconduct as that term is defined in s139AB of the Education Act 1989 and rule 9(1)(k) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004. The Tribunal agrees.
- [18] The issue therefore is one of the appropriate penalty.

Penalty

- [19] The primary purpose of professional disciplinary proceedings are, as this Tribunal has stated on many occasions, the protection of the public and the maintenance of professional standards.
- [20] Although punishment may be an inevitable outcome of the imposition of any penalty – such as a censure – it is not itself an object of professional disciplinary proceedings.
- [21] The Tribunal's obligation is to consider all available options before deciding on the appropriate outcome in any given case, and ultimately, to identify the least punitive option which will meet the seriousness of the case and enable the Tribunal to discharge its principal obligations as already explained.
- [22] In his submissions in connection with penalty, Mr Lewis referred us to a number of previous decisions of the Tribunal which involved teachers accessing and viewing pornographic material. The similarity between these cases and the present accepted, the wide range of culpability of the teachers involved is reflected in the fact that the penalties imposed by the Tribunal ranged from a censure through to deregistration. A central theme of all of the cases is an acceptance on the Tribunal's part that for a teacher to access pornographic material on a school system is serious misconduct. Over and above that, it appears clear from these cases that the ultimate outcome in terms of penalty depends very much on the particular factual circumstances of the case which is what Mr Lewis submitted to us.

[23] Mr Lewis' submission was that this was a case which justified the cancellation of the Respondent's registration, primarily because of the aggravating features of the case which he submitted included:

- The Respondent's manipulation of the school's computer system in order to access pornography;
- Accessing pornographic websites during school hours;
- The accessing of *"hard core pornographic containing nudity, masturbation, and explicit sexual acts"*;
- The risk that the Respondent created for students; and
- The Respondent's level of determination evident from the steps he took to access material.

[24] On the Respondent's behalf, Mr Martin sought to distinguish those cases in which the Tribunal had felt obliged to cancel the respondent's registration, and drew a parallel between NZTDT 2006/12 and this case on the basis that in both the teacher concerned was under considerable psychological stress, the implied submission being that the Tribunal could regard that factor as justifying a penalty short of deregistration here.

[25] Mr Martin accepted the existence of aggravating considerations (and indeed pointed to more such factors), but also emphasised a number of factors which he submitted could be brought to account by way of mitigation. We summarise the points he referred to:

- The material viewed was not unlawful;
- The overwhelming majority of material was viewed outside school hours;
- There was no evidence that anyone other than the Respondent accessed this material;
- Most of the viewing of pornographic material occurred over a relatively short period of eight weeks and was limited to five sessions of a few moments;

- The Respondent lived on the school premises and did not have private internet access so that the boundaries between his private and public lives were more blurred than is normally the case;
- The Respondent's psychological illness and the associated effect on him;
- The steps the Respondent has taken and is continuing to take to get assistance;
- The Respondent's immediate admission of the inappropriateness of his behaviour and resignation and subsequent cooperation with the Education Council enquiry;
- The Respondent's insight into his behaviour;
- The Respondent's remorse; and
- The fact that the Chair of [REDACTED] is prepared to offer him a level of support as to his technical ability.

[26] Mr Martin submitted that the Tribunal would be justified in dealing with this case without deregistering the Respondent, provided that it imposed conditions requiring him to receive ongoing treatment.

[27] He did not resist the costs order sought on the Complainant's behalf.

[28] Finally, Mr Martin developed an argument in support of an order under rule 32(1)(c) for name suppression in this case, submitting that the publication of the Tribunal's decision including the Respondent's name would be detrimental to both the Respondent, his wife and his daughter, and potentially also to the school and past and present students.

Discussion

[29] As the Tribunal has said in any number of previous decisions, for a teacher to use a school computer system to access pornographic material virtually always constitutes serious misconduct. Even acknowledging the point made on this Respondent's behalf that the line between his private and public life was perhaps not as clear as it

is in other cases, that is more so when a teacher accesses pornographic material in school premises and in school time.

- [30] Having said that, the Tribunal is prepared to accept that this is a case in which the Respondent was labouring under serious psychological difficulties at the relevant time, and the evidence that this behaviour on his part was a reaction to that, and out of character. We give the Respondent credit for having accepted responsibility for and come to grips with his own frailties, and having determined to obtain assistance.
- [31] We also acknowledge the other points made on the Respondent's behalf.
- [32] This is not a case in which the Tribunal has found it easy to determine the most appropriate of penalty.
- [33] At one level, Mr Lewis correctly submits on behalf of the CAC that the Respondent's misconduct is of a serious nature. In the end, though, we have reached the conclusion that the Respondent does not present an ongoing threat to the public or children, and that it is unnecessary to order his deregistration in order to maintain professional standards.
- [34] However, the corollary of that is that in our view it is necessary to put a regime in place to assist the Respondent with his recovery.
- [35] Against that background, we have concluded that the least punitive outcome that we can impose involves a censure, and the imposition of conditions on the Respondent's practising certificate which require him to receive supervision for a period of 18 months from the date of this decision.
- [36] As to costs, we will order that the Respondent pay half of the CAC's costs associated with the prosecution of this matter.
- [37] In the course of his submission concerning costs in this case, Mr Lewis drew attention to a disparity between the Tribunal's Practice Note of 17 June 2010 and, the practice which has developed. Whereas the Practice Note suggests that the Tribunal will make

costs orders addressing both the Tribunal's costs and the parties' costs, the Tribunal has tended to deal only with the latter.

[38] It would be unfair on the Respondent in this case to change an existing practice in dealing with costs here. But, the Tribunal takes this opportunity to signal that in the future it will, in addressing costs, deal with both the Tribunal's costs and the parties' costs, as foreshadowed in the Practice Note. In practical terms, this will mean that in relation to every hearing the Tribunal will need a schedule of the Tribunal's costs, and that future costs orders are likely to deal with these as well as the parties' costs.

[39] Name suppression too has been a difficult matter to dispose of in this case. However, we are persuaded that the Respondent's recovery will be assisted by an order suppressing his name, and that if no such order be made this would have adverse effects on the Respondent's wife and daughter, and potentially on the school and past and present students.

[40] In the interests of all of those parties, we propose to make orders suppressing the Respondent's name and that of the school.

Conclusion

[41] The Tribunal's formal orders are as follows:

- Pursuant to s139AW(1)(b) of the Education Act 1989, the Tribunal formally censures the Respondent for his serious misconduct;
- Pursuant to s139AW(1)(c), the Tribunal imposes the following conditions on the Respondent's practising certificate:
 1. For a period of 18 months from the date of this decision the Respondent is to continue to receive such ongoing counselling as Ms Shona Tourell of the Dunedin South Community Mental Health Team of the Southern District Health Board should suggest;
 2. The Respondent is to authorise Ms Tourell or another Psychologist from the Mental Health Team to provide three-

monthly reports as to his progress to the Education Council's Manager, Teacher Practice;

3. If and when the Respondent applies for any position for which he is required to hold registration as a teacher he is to inform the prospective employer of this professional disciplinary proceeding and provide the prospective employer with a copy of this decision;

- Pursuant to s 139AW(1)(e) the register is to be annotated by reference to this decision;
- Pursuant to s 139AW(i)(h), the Respondent is to pay to the Complainant the sum of \$1,900 by way of a contribution to its costs;
- Pursuant to r32 of the New Zealand Teacher's Council (Conduct) Rules 2004, the Tribunal makes an order suppressing the Respondent's name and the name of the school by which he was formerly employed.

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.

