

**BEFORE THE NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL**

**IN THE MATTER** of the Education Act 1989

**AND**

**IN THE MATTER** of charges brought by the Complaints  
Assessment Committee of the New  
Zealand Teachers Council

**BETWEEN**

**COMPLAINTS ASSESSMENT  
COMMITTEE**

Complainant

**AND**

**[REDACTED]**

Respondent

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**DECISION OF TRIBUNAL**

**Dated 26 November 2021**

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Tribunal:	Sam Wimsett (Deputy Chair) Rose McInerney Aimee Hammond
Hearing:	27 October 2021
Decision:	26 November 2021
Counsel:	DP Neild/LR van der Lem for the Committee AR Bell for the Respondent

1. **INTRODUCTION AND SUMMARY OF DECISION**

- 1.1. [REDACTED] is a teacher at [REDACTED]. He is the [REDACTED]. [REDACTED] is a highly respected member of staff. He has worked at [REDACTED] for [REDACTED] years.
- 1.2. In 2020, [REDACTED] used a school issued laptop to watch videos on YouTube. Some were watched during school hours, although this was primarily during the first level 4 lockdown when students were not permitted to be on school grounds. The videos were romantically themed. They were of a type that a person could legitimately watch on their own computer in their own time. Consistent with YouTube's policies, the videos did not contain pornography or illegal activity.
- 1.3. [REDACTED] takes the view that the videos were inappropriate. This is because most involved gay romantic themes when he does not identify as a gay man.
- 1.4. Looking at the matter objectively, the Tribunal does not agree that the videos themselves were inappropriate. YouTube is a mainstream website. The videos are of a similar kind to what may be found on Netflix or other commonly used streaming services.
- 1.5. The Committee alleges that [REDACTED] behaviour in relation to his school laptop amounts to serious misconduct. This is on the basis, according to the charge, that some of the videos include simulated sex scenes and nudity. It says that viewing these videos in his office at the school, both inside and outside of teaching hours, reflects adversely on his fitness to teach and may bring the profession into disrepute.
- 1.6. The Tribunal accepts that [REDACTED] should not have used his school laptop to watch YouTube videos. It also accepts that it was improper to use the search terms that he did during the school day. However, the Tribunal finds that the particulars of the charge are not sufficiently supported by the evidence put before it. The charge is therefore dismissed.
- 1.7. Had the charge been framed more broadly, to include the entirety of [REDACTED] conduct, we would have found that the behaviour did not meet the threshold of serious misconduct. Consideration would have been given to exercising the Tribunal's powers to take some action, however, having regard to the steps already taken by [REDACTED] and [REDACTED], the Tribunal would have taken no further action.
- 1.8. [REDACTED] name and any identifying particulars, including that he worked at [REDACTED], are suppressed, and may not be published. The name of [REDACTED] and any identifying particulars is also suppressed.
- 1.9. The Tribunal forms the preliminary view that there should be no order as to costs. The parties may file submissions on that issue.

2. **HEARING**

- 2.1. The matter was heard on the papers. Notice of this procedure was given to the parties. Neither objected.
- 2.2. Prior to the hearing, the Tribunal received written submissions from counsel for the Committee and [REDACTED]. Submissions addressed both the charge of serious misconduct and issues relating to the name suppression and costs. All material was considered by the Tribunal prior to the hearing and at the hearing itself.

3. **EVIDENCE**

- 3.1. In terms of evidence, the matter proceeded by way of an agreed summary of facts. Those parts that are relevant to the charge are set out below:

**SUMMARY OF FACTS**

- 1. The respondent, [REDACTED], is a registered teacher with a full practising certificate. He has been employed as a secondary teacher at [REDACTED] [REDACTED] ("the School") since [REDACTED].
- 2. The respondent became fully registered in [REDACTED]. His practising certificate is due to expire on [REDACTED].
- 3. The respondent teaches [REDACTED], [REDACTED] and [REDACTED] to year 9-13 students. He is [REDACTED], [REDACTED].
- 4. [REDACTED]  
[REDACTED]  
[REDACTED]
- ...
- 5. ...
- 6. ...
- 7. ...
- 8. ...
- 9. ...
- ...

10. ...
11. ...
12. ...the respondent had no access to the internet at home and could not access the internet on his mobile phone until he and ██████████ separated in July ██████████

### **Discovery of inappropriate material - 2020**

13. During the COVID-19 lockdown in 2020 the respondent and his wife lived and worked from home in ██████████. During this time the respondent would work either from his office at the School or from home.
14. On 14 April 2020 the respondent intended to work from home, and asked ██████████ to log his work laptop onto their home Wi-Fi network, so that he could complete E-Learning tasks.
15. ██████████ became suspicious that the respondent had been watching inappropriate material, and so proceeded to search through the work laptop's internet history. She found that the work laptop had been used to view videos on YouTube. After reviewing the names of several of these videos, and the time of day that they had been viewed at, she concluded that the respondent had been watching inappropriate material at his office during school-hours.

### **The nature of the material viewed**

16. The work laptop was subsequently analysed. That analysis confirmed that between 19 March 2020 and 9 May 2020<sup>1</sup>, the device had been regularly used to watch videos depicting sex on YouTube, showing some nudity and actors simulating sex, but not explicitly showing genitalia engaged in penetration or oral sex. The videos were age restricted.
17. The videos mostly focussed on relationships between younger gay men.
18. The respondent exclusively accessed the material on YouTube. No material was stored on either the laptop's physical hard drive or cloud services.
19. The respondent viewed the material at the School in room ██████████, which is both his office and the ██████████ room. He viewed the material both inside and outside of school hours.

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<sup>1</sup> These dates are as per the agreed summary of facts in the bundle of documents. At the request of the Tribunal, the parties provided a Word version of the summary so that it could be more easily inserted into the decision. The Word version, which was also signed had different dates. Nothing turned on the difference.

20. The following table sets out summaries of some of the content viewed. Where an exact match of the title of the video was found by the CAC's forensic analyst on YouTube this is indicated in the 'match' column. Where no match was found, the parties could agree on the facts about the video more generally, but not on the exact contents of the clip.

<b>Title of video</b>	<b>Match</b>	<b>Description</b>
Le Sexologa Capitulo 2	No	The episode is part of a Chilean "telenovela" series about a female sexologist, and is about 90 minutes long. There is brief nudity in some of the episodes.
Play Safe Play Sexy M2M	Yes	Short advertising video for a sex products store in Ireland. Features sex scenes without showing genitalia .
2become1 :Pete Any :love by chance the series	No	Part of a teenage television series shot and produced in Thailand. Does not contain sex scenes or nudity.
Gay Boy Tries to Make His Crush Jealous With a Girl	Yes	11 minute clip extracted from the 2014 Danish feature film entitled 'Speed Walking' -being a gay coming of age story. In this clip, two teenage male actors are depicted kissing in their underwear, after one of the characters places his hand on the genitals of the other, over the trousers. The full length film is available on the Amazon prime streaming service.
Engsub Bl Pair of love Full HD Short Movie	Yes	Non explicit Taiwan movie dealing with adolescent gay themes.
FANATIC LOVE - Bl	Yes	Adolescent gay themed story. Contains no explicit scenes.
I love Dreamguyz (2009)	Yes	Preview for Philippine movie about male dance/stripper group. Contains no explicit scenes.
God's Own Country - English Full Movie - One of the Best Gay Movie of all time	No	A 2017 British feature film tracking the relationship between a young British sheep farmer and a Romanian migrant worker. Mature 'M' 15+ rating.
Night Flight 2014 - Korean Gay Short Film	No	A 2014 South Korean high school drama which explores themes of friendship, sexuality and bullying.
Gay Movie Scene - Burning Blue	Yes	4 minute 44 second clip extracted from the 2013 United States aviation drama film 'Burning Blue'. Contains no explicit material.
Gay Movie Keptboy	No	A clip from gay themed movie about a relationship between an older and younger man.

24 noches. Pelicula gay muy buena	Yes	Gay themed movie; no explicit material.
Wastelands (2013) gay short film	Yes	Non-explicit gay themed short film about teenagers.
El Estimulador - The Flutter - Pelicula Gay	No	A clip from an R rated feature film following the relationships between three people in the adult entertainment industry.
(UNRATED) 2019 FULL GAY MOVIE "Romeo & Romeo" WATCH FREE NOW!!! LGBT (Directors Cut)	No	Required a logon to view. Has gay sex scenes but not explicit.
Strap gay movie 3	Yes	Features gay sex scenes, but nothing explicit.

**12 June 2020 - [REDACTED] meets with the [REDACTED] and is suspended by the Board of Trustees**

21. The respondent met with the [REDACTED] of the School on 12 June 2020 and disclosed that he had been watching inappropriate videos on YouTube for the past several months. He said that he had found these videos using search terms such as 'boy', 'penis' and 'erection', and that he would watch the videos while in his office, both inside and outside of school hours.
22. During his meeting with the [REDACTED] on 12 June 2020, the respondent advised that after his viewing of inappropriate material was discovered by his wife, he had begun counselling, and sought additional support by attending a programme through Promise Keepers, a faith-centred support group that offers a programme called "Set Free - Freedom from Porn".
23. Following this meeting the respondent was suspended from the School.

**16 July 2020 - the Board of Trustees' lifts [REDACTED] suspension**

24. On 16 July 2020 the respondent met with the [REDACTED] of the School, and also the Board of Trustees Chairperson. During this meeting the respondent confirmed that he and his wife had separated. He also accepted that he suffered from a longstanding addiction to pornography, and advised that he was continuing to engage with Promise Keepers and was attending counselling twice-weekly.
25. The Board of Trustees decided to remove [REDACTED] suspension, subject to the following conditions:
  - a. Continued attendance at the Promise Keepers programme.

- b. Continued one-on-one meetings with and support from guidance counsellor [REDACTED]
- c. Continued one-on-one meetings and support from counsellor [REDACTED]
- d. [REDACTED] School computer to be taken from him randomly once per term and checked for accessed sites. Such checks are to be at the Board of Trustees' discretion and cost. Ongoing frequency of these checks will be at the Board of Trustees' discretion.

### **Teacher's response to the Teaching Council**

- 26. On 26 July 2020 the respondent provided a written response to the Teaching Council, in which he accepted responsibility for his behaviour, expressed a wish to continue teaching, and stressed the efforts he had been making to rehabilitate himself. He noted that he is a [REDACTED]-year-old active conservative Christian, and that he does not openly identify as homosexual. He also accepted that he had accessed pornographic material, namely videos on YouTube showing simulated sex scenes containing nudity, on a School laptop while on School premises during and after School hours.
- 27. [REDACTED] voluntarily engaged in the Teaching Council's impairment process during the CAC investigation, due to an addiction to pornography.
- 28. The impairment report of 15 November 2020 noted that [REDACTED] has engaged in appropriate treatment and that there did not appear to be a significant risk in the work setting.
- 29. On 7 December 2020 the respondent spoke at the CAC meeting. The respondent confirmed that he had regularly viewed the videos in question for a period of 9-12 months before being discovered by his wife. He also confirmed that following his suspension from the School he had resumed teaching in July 2020, subject to conditions that he continue to engage in counselling and with Promise Keepers, and that his laptop was to be checked at random to ensure he was not viewing pornographic material.
- 30. [REDACTED] states that he has continued to meet all the conditions that are within his power to meet. He states that he has met with [REDACTED] twice weekly, met with the school counsellor [REDACTED] once and fortnight and has continued to attend his weekly Promise Keepers online meetings.
- 31. In their decision document of 7 December 2020, the CAC recorded that it appreciated the respondent's "genuineness, openness and honesty and

...commend[ed] him on his insight and level of support he ha[d] managed to get around him”.

- 3.2. The parts of the agreed summary that are not included in this decision relate to previous behaviour by [REDACTED]. It involved looking at material on the internet that was disapproved of by his wife. This was done in his own time on his own device. That background explains why the current issue came to his wife’s attention but is not relevant as to whether the charge of serious misconduct has been made out. The charge only alleges that [REDACTED] accessed YouTube videos showing simulated sex scenes containing nudity on his school laptop in 2020.
- 3.3. There was a level 4 lockdown in New Zealand between 25 March and 27 April 2020. Thereafter, a level 3 lockdown continued until 13 May 2020, when New Zealand moved to level 2. It is at level 2 that students returned to school. That being so, most of the videos referred to at paragraph 20 of the agreed summary of facts, were likely viewed when students were not present at [REDACTED].

#### **CHARGE AND LEGAL FRAMEWORK**

- 3.4. The Committee charges that [REDACTED] engaged in serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The particulars of the charge are as follows:

##### **Particulars of the charge**

1. The CAC charges that [REDACTED], registered teacher, of [REDACTED], during 2020, accessed videos on YouTube showing simulated sex scenes containing nudity on a school laptop while on school premises during and after school hours.
  2. The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and rule (1)(k) of the Teaching Counsel Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.
- 3.5. Section 378(1) of the Act defines serious misconduct as

**serious misconduct** means conduct by a teacher—

- (a) that—



- (i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or
- (ii) reflects adversely on the teacher's fitness to be a teacher; or
- (iii) may bring the teaching profession into disrepute; and

(b) that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

3.6. The test for serious misconduct is conjunctive.<sup>2</sup> As well as having one or more of the three adverse professional effects or consequences described in section 378(1)(a), the conduct must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct contained in rule 9 of the Education Council Rules 2016.

3.7. Rule 9(1) states that a teacher's employer must immediately report to the Council if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility which was introduced in June 2017. Rule 9(1) also states that serious breaches of the Code include, but are not limited to, examples of conduct set out in rule 9(1)(a) to (k). Rule 9(1)(k) is relied upon by the Committee in this case:

...

(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

#### 4. **PARTICULARS OF THE CHARGE vs. THE EVIDENCE PRESENTED TO THE TRIBUNAL – AND DECISION ON LIABILITY**

4.1. The Committee must prove the particulars of the charge. In this case, that involves proving that ██████ accessed videos on YouTube showing simulated sex scenes containing nudity. The method of proof in this case is by way of the agreed summary of facts. That, in essence, is the evidence relied upon.

4.2. The term "simulated sex scenes" refers to actors that are not actually performing the sex act but rather acting it out. It is how sex is portrayed in mainstream TV and film.

4.3. The agreed summary of facts includes at paragraph 20 a table summarising some of the content viewed. There are 16 videos. Many appear to be romantically themed or have some sort of romantic storyline included. The Committee has deemed it necessary to include in the description that the films are gay rather than heterosexual themed. The Tribunal sees that as having no relevance to the issue that must be determined.

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<sup>2</sup> *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

- 4.4. The first video refers to “brief nudity”, however, it does not occur in the context of a simulated sex scene. The Tribunal also notes the comment in the description column that the “brief nudity” is “in some of the episodes”. It is not stated that ██████ watched the episodes containing nudity.
- 4.5. Thereafter, none of the descriptions of the videos in the table refer to nudity and most of them state that there is no explicit material.
- 4.6. Three of the videos in the table refer to sex scenes. However, none of the descriptions of those refer to nudity.
- 4.7. The table is clearly intended to be representative of the content viewed. We infer it includes the videos that are best thought to support the charge. And yet, none of the videos have been described as containing a sex scene with nudity. We acknowledge the general statement at paragraph 16 of the agreed summary; however, it is unsupported by any specific examples – other than those included in the table. We note that ██████ laptop was analysed. Had that analysis revealed the watching of naked sex scenes, we would have expected them to be included in the summary of facts. On the information before us, we can only conclude that the computer analysis only led to the discovery of the types of videos in the representative table at paragraph 20.
- 4.8. When spoken to by the ██████ of ██████, ██████ said that he had been watching “inappropriate videos on YouTube for the past several months”. We take this to mean the type of videos referred to in the table. ██████ has determined that these were inappropriate for him to watch because he identifies as heterosexual. He is also influenced by the attitudes of his conservative Christian church and his wife. His comment does not, however, amount to an acceptance that the Committee has proven the particulars of the charge. It is simply another example of general allegations or statements being unsupported by specifics or detailed evidence.
- 4.9. ██████ said that he had found these videos using search terms such as “boy”, “penis” and “erection.” We accept that it was inappropriate for ██████ to enter those search terms when in his office at school. We note, however, that we have no evidence that students were present or nearby when this occurred. Given the Covid lockdown, it is unlikely that they were present on the school grounds. More fundamental is the fact that ██████ faces no charge for the search terms he used. He is only charged with accessing videos that contain naked sex scenes.

- 4.10. On the agreed facts, ██████ has watched the videos in his school office between March and May 2020<sup>3</sup>. During a meeting with the Committee, ██████ stated that he had regularly viewed the videos in question for a period of nine to 12 months before being discovered by his wife<sup>4</sup>. It does not follow that he has watched those videos in his school office over that period of time. Nor do we know the precise nature of the videos watched on previous occasions.
- 4.11. ██████ is clearly deeply ashamed of his behaviour. This sense of guilt is influenced by his background including being an active conservative Christian. We have a concern that this has led him to repent, or admit, more than is appropriate. For example, there is reference in the agreed summary to “pornographic material” and an “addiction to pornography”. The former is subjectively based on a tendency to watch the YouTube videos referred to in this case. However, as has been made clear, they do not meet any definition of pornography. The latter is referred to in the context of ██████ agreeing to engage in the Teaching Council’s impairment process. It is not stated whether it is the Council or ██████ who has determined he has such an addiction. If it is based on the YouTube videos, we are not convinced it is a proper diagnosis.
- 4.12. Overall, we are wary of admissions made by ██████. We acknowledge the concession apparently made to the Teaching Council<sup>5</sup>, however, if it was based on an acceptance of having watched the kinds of videos referred to in the summary of facts, we are not sure it was a proper concession. Given our wariness of ██████ concessions, we prefer to look to the material presented by the Committee in support of the allegations.
- 4.13. The Committee brought the charge. It chose the particulars. It has the obligation of proving them on the balance of probabilities. The Tribunal determines that it has not done so. This is on the basis that it has not been proven to the required standard that ██████ accessed videos on YouTube showing simulated sex scenes containing nudity. The charge is therefore dismissed.
- 4.14. Had the charge been framed more broadly, to include the entirety of ██████ proven conduct, we would have found that the behaviour did not meet the threshold of serious misconduct. Consideration would have been given to exercising the Tribunal’s powers to take some action, however, having regard to the steps already taken by ██████ and ██████, the Tribunal would have taken no further action.

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<sup>3</sup> Agreed Summary of Facts, para 16.

<sup>4</sup> Agreed Summary of Facts, para 29.

<sup>5</sup> Agreed Summary of Facts, para 26.

## 5. NAME SUPPRESSION

- 5.1. [REDACTED] has applied for name suppression. We have also received an email from his wife, [REDACTED], seeking suppression of her name as well as her relationship to [REDACTED] and her occupation.
- 5.2. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The Tribunal has previously stated that the primary purpose behind open justice in a disciplinary context, is the maintenance of public confidence in the profession concerned through transparent administration of the law.<sup>6</sup>
- 5.3. Section 405(6)(c) of the Act provides that the Tribunal may make an order prohibiting publication of the name or particulars of the affairs of any person if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person ... and to the public interest.
- 5.4. The Tribunal accepts that [REDACTED] name should be suppressed. She is the complainant in this matter and not subject to any allegation of misconduct. Publication of her name will lead to hardship to her. This includes emotional distress, unwarranted comment and possibly ridicule. Further, there is little public interest in her name and details. On that basis, any balancing exercise favours suppression being granted. We therefore suppress [REDACTED] name and any identifying particulars.
- 5.5. Reaching the conclusion that we have regarding [REDACTED] affects [REDACTED] application for suppression. The Tribunal accepts that if [REDACTED] name is published, it is almost certain that [REDACTED] would be identified and that the harm she seeks to avoid by having her name suppressed would materialise. Both are [REDACTED]. They were married for [REDACTED] years and have [REDACTED]. [REDACTED] has not actively sought suppression of [REDACTED] name, but we see any suppression orders relating to her as meaningless if [REDACTED] name was not also suppressed. To ensure that harm to [REDACTED] does not materialise, we suppress [REDACTED] name and any identifying particulars. We also suppress the name of [REDACTED] and the city in which [REDACTED] worked.

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<sup>6</sup> *Complaints Assessment Committee v Teacher NZTDT 2016/27 @ [66] citing X v Standards Committee No. 1 of the New Zealand Law Society [2011] NZCA 676 @ [18].*

5.6. The Tribunal has reached its conclusion regarding name suppression without having to determine the competing arguments regarding harm to [REDACTED] vs the public interest in the matter. We did have sympathy for the contention that publication could lead to an involuntary and unfair 'outing' and that this could lead to bullying and ridicule in an all-boys school in provincial New Zealand. As it stands, we did not determine the issue due to the position reached in relation to [REDACTED]. That was sufficient for us to make the orders that we have.

## 6. **Costs**

6.1. The Tribunal has formed a preliminary view that there should be no order as to costs. We acknowledge, however, that [REDACTED] has not made submissions on the issue in light of the decision to dismiss the charge. If [REDACTED] wishes to make submissions on the issue, they should be filed within 7 days of the date of this decision. Any submissions for the Committee should be filed within 14 days of this decision.

Dated at Auckland this 26<sup>th</sup> day of November 2021



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S N B Wimsett  
Deputy Chair

## NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).