

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Carey Straayer

NZ Disciplinary Tribunal Decision 2019/41

Teacher Carey Straayer was referred to the Disciplinary Tribunal on a charge of using a school-issued laptop to view inappropriate websites, some which contained pornographic material, stored pornographic material on the laptop, compromised the security of the laptop, resulting in attempts being made by the laptop to access other websites containing adult content during school hours. Mr Straayer was further charged with using the laptop to store personal images, of a risqué nature, and including the images in a screensaver, viewable by students.

The result: the Tribunal found that the conduct amounted to serious misconduct, noting it was on the lower end of the scale of seriousness. The Tribunal ordered a penalty of censure, along with conditions on his practising certificate for two years that he inform any prospective employer of the disciplinary decision. There are no non-publication orders in this case.

Mr Straayer is a teacher at Aotea College, and has been employed at the College since 2003. Mr Straayer's conduct came to light following an anonymous complaint from a parent in March 2018. The parent complained that their child had seen sexually explicit content on Mr Straayer's computer during class.

As a result of a technical investigation of Mr Straayer's computer, it was established that there were 17 websites that he accepted he deliberately accessed which included adult comic book sites, online gaming and fan-created artwork and other material. These sites were accessed outside of school hours.

As a result of compromised security of the laptop, it attempted to access four pornographic websites, a total of 2,214 times. When an internet browser attempts to gain access to a website (whether deliberately or otherwise) it can attempt to do so again through cached data. Cached content is created when content from websites that have been accessed is stored on the computer.

The investigation found that inappropriate images were on the laptop. It was not able to establish whether the images were from websites that the respondent had deliberately visited or were on the laptop because of its compromised security. In addition, photographs of the respondent's partner were also stored on the laptop. It was further found that the browser history on the laptop had been deleted. The laptop had not been set up to automatically delete the browser history when shutdown.

Mr Straayer acknowledged that he had accessed gaming websites using the school computer, and that these sites contained adult material. He accepted that while using an online learning game during a lesson, a popup advertisement for an adult game site had been seen by students. He stated that the image of "boobs" referred to may have been a picture of his partner in which her cleavage was visible, which he had saved as a desktop background.

Mr Straayer accepted that in accessing appropriate comic book and gaming sites, he may have exposed his computer and the college system to a risk of being infected by pornographic material. He denied deliberately going to the pornographic websites but explained that the websites that he accepted going



to contain a great deal of popups for other websites that were in the nature of the pornographic websites. He also denied clearing the browser history.

Mr Straayer subsequently apologised to the college, agreed to future monitoring of his electronic devices and purchased his own laptop for personal use. He also participated in a restorative process with students affected by his actions. He accepted a final written warning from the college.

The Tribunal found that the conduct amounted to serious misconduct, though the respondent did not actively view or access pornographic material, his actions of going to those websites on the school laptop exposed students to inappropriate material. The Tribunal considered Mr Straayer's actions were careless, reckless and reflected very poor judgement and reflected adversely on his fitness to be a teacher and may bring the teaching profession in disrepute,

The Tribunal acknowledged that Mr Straayer had fully accepted responsibility for his actions, and that this has been a significant lesson for him. The Tribunal imposed a censure, along with a condition on his practising certificate for two years that he inform any prospective employer of the disciplinary decision and provide them with a copy of the decision. Mr Straayer was ordered to pay 40 percent of the Tribunal's costs.

There was no application for non-publication of Mr Straayer's name.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-41

IN THE MATTER of the Education Act 1989

AND

IN THE MATTER of a charge referred by the Complaints Assessment
Committee to the New Zealand Teachers
Disciplinary Tribunal

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND **CAREY ADRIAN STRAAYER**
Respondent

TRIBUNAL DECISION

17 SEPTEMBER 2019

HEARING: Held on 19 July 2019 at Wellington (on the papers)

TRIBUNAL: Theo Baker (Chair)
David Hain and Dave Turnbull (members)

REPRESENTATION: Ms R Kós for the Complaints Assessment Committee
Ms F Renton for the respondent

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The particulars of the charge are:

1. *The CAC charges that **CAREY ADRIAN STRAYER**, registered teacher, of Wellington between February and March 2018:*

- a. *used a school-issued laptop to view and/or access inappropriate websites, including gaming websites which contained pornographic material; and/or*
- b. *used a school-issued laptop to store pornographic material; and/or*
- c. *due to accessing the websites in a, compromised the security of the school-issued laptop, resulting in attempts being made by the laptop to access other websites containing adult content during school hours; and/or*
- d. *used a school issued laptop to store personal images, of a risqué nature, and included the images in a screensaver, viewable by students.*

2. *The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(k) and/or (o) of the Teaching Council Rules 2016 (as drafted prior to the 19 May 2018 amendment), or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.*

2. The parties conferred and agreed on a Summary of Facts (**ASF**)

Findings on factual allegations contained in charge

3. The parties conferred and submitted an Agreed Summary of Facts (**ASF**) signed by both representatives.
4. We were told that the respondent was first provisionally registered as a teacher in 2003 and became fully registered in 2006. His current practising certificate is due to expire on 18 October 2021. He has been teaching at Aotea College (**the College**) since 2003. The College is a co-educational secondary school.
5. The parties agree that between February and March 2018 the respondent accessed inappropriate websites using his school laptop, including gaming websites and others which contained cartoon pornographic material. It was also agreed that the respondent

stored images on the school laptop, including some of his partner in which her cleavage is exposed. The respondent also accepted that he compromised the security of the laptop, resulting in attempts to access other websites containing adult content that were blocked by the school's filtering system.

6. The respondent's conduct came to light following an anonymous complaint from a parent in March 2018. The parent complained that their child had seen sexually explicit content on the respondent's computer during class, and this content included a picture of "boobs" and a Facebook message reading "I have an open relationship with my husband – do you want to fuck?".
7. As a result of a technical investigation of the respondent's computer, it was established that there were 17 websites that the respondent accepts he deliberately accessed which included adult comic book sites, online gaming and fan-created artwork and other material. These sites were accessed outside of school hours.
8. The laptop had attempted to access four pornographic websites, a total of 2,214 times. It was explained that when an internet browser attempts to gain access to a website (whether deliberately or otherwise) it can attempt to do so again through cached data. This may be deliberate, or may be an attempt made by the computer itself due to the compromised security of the device. Cached content is created when content from websites that have been accessed is stored on the computer.
9. The investigation found that inappropriate images were on the laptop. It was not able to establish whether the images were from websites that the respondent had deliberately visited, or were on the laptop because of its compromised security. In addition, photographs of the respondent's partner were stored on the laptop.
10. It was further found that the browser history on the laptop had been deleted. The laptop had not been set up to automatically delete the browser history when shutdown.

Teacher's response

11. The respondent acknowledged that he had accessed 17 comic book and gaming websites using the school computer, and that these sites contained adult material. He accepted that while using an online learning game during a lesson, a popup advertisement for an adult game site had been seen by students. He stated that the image of "boobs" referred to may have been a picture of his partner in which her cleavage was visible, which he had saved as a desktop background.

12. The respondent accepted that in accessing appropriate comic book and gaming sites, he may have exposed his computer and the college system to a risk of being infected by pornographic material. He denied deliberately going to the pornographic websites but explained that the websites that he accepted going to contain a great deal of popups for other websites that were in the nature of the pornographic websites.
13. The respondent confirmed that he was aware of the high-risk nature of the websites that he visited, and that they were in breach of college policy and exposed the students and school to risk. He acknowledged that in order to access one of the sites he deliberately visited, he had intentionally disabled the internet's ad blocker. The respondent maintained that he did not clear the internet browsing history from his computer.
14. The respondent subsequently apologised to the college, agreed to future monitoring of his electronic devices and purchased his own laptop for personal use. He also participated in a restorative process with students affected by his actions. He accepted a final written warning from the college.
15. We are satisfied that the ASF supports the factual allegations in the charge. However, we must now decide if the established conduct amounts to serious misconduct.

Serious misconduct

16. Section 378 of the Act provides:

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 Education Council's criteria for reporting serious misconduct.*

17. The criteria for reporting serious misconduct are found in r 9 of the in the Education Council Rules 2016 (**the Rules**).¹ The CAC relied on r 9(1)(k) and (o):

¹ The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

Criteria for reporting serious misconduct

(1) *The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*

...

(k) *viewing, accessing, or possessing pornographic material while on school premises or engaged on school business:*

...

(o) *any act or omission that brings, or is likely to bring, discredit to the profession.*

18. We must decide if the respondent's conduct meets both parts of the test for serious misconduct.

CAC submissions

19. For the CAC, Ms Kós submitted that the respondent's behaviour met all three limbs under the definition of serious misconduct in section 378 of the Act.

20. The CAC did not elaborate on how rule 9(1)(k) was met, but it was noted that in *CAC v Witana* NZTDT2016-24,² that: *"The reason for r 9(1)(k) is because bringing the material into the school environment creates a risk of such exposure [to learners]."*

21. It was also submitted that in accordance with the High Court decision in *Collie v The Nursing Council of New Zealand* [2001] NZAR74 at [28], "Reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered when a practitioner uses a school-issued device to view pornographic material."

22. The CAC further submitted that the respondent's conduct was a breach of the Education Council's Code of Professional Responsibility. In particular, clause 1.3 requires teachers to demonstrate a high standard of professional behaviour and integrity; clause 1.5 requires a contribution to a professional culture that supports and upholds the code; and clause 2.1 requires teachers to promote the wellbeing of learners and protect them from harm.

23. Ms Kós referred to the following cases:

CAC v Witana,³ where a principal had received and saved 245 emails to which were

² *CAC v Witana* NZTDT2016-24, 30 January 2017

³ Above

attached or embedded 1,522 inappropriate pictures or videos. His email account was synchronised to four school-issued devices, and he admitted to exchanging these emails with other staff members. We consider that those factors increased the risk of students being exposed to the material.

In *CAC v Teacher* NZTDT 2015-20,⁴ a teacher twice disabled the school's internet content filtering system to access pornographic sites on his computer. These were described as "hard core" pornography. He did this on occasion during school hours. By disabling the filter, the teacher exposed the whole of the school's system and its users to potentially inappropriate content between November and January.

In *CAC v Lowther* NZTDT 2016-17,⁵ the teacher was found to have engaged in serious misconduct when he accessed pornographic websites on his school laptop computer. Two year 8 students who were using the laptop saw images of naked women, and then went into the browsing history and discovered a further 30 images of naked women and two videos.

24. Ms Kós noted that we have said in previous decisions that the use of a school computer system to access pornographic material virtually always constitutes serious misconduct. She submitted that this principle applies to the respondent's conduct, where he accessed websites that caused the laptop to access pornographic websites and store inappropriate images on the school laptop.
25. Ms Kós submitted that the conduct in this case could be considered more serious than in *CAC v Witana* and *CAC v Teacher* 2015-20 as students in this case had actually seen some of the inappropriate content during class time (although admittedly it was not the most serious content). However, the CAC acknowledges that the technical investigation of the computer could not confirm that the respondent had deliberately accessed pornography. The fact remains though that the respondent's accessing of inappropriate websites on his school laptop compromised the security of the laptop, putting students at risk of seeing inappropriate material.
26. Finally, the CAC submitted that the deletion of the browser history demonstrates the respondent's attempt to clean the laptop so as to dispose of the evidence. This was not consistent with the expectation under the Code of Professional Responsibility that

⁴ *CAC v Teacher* NZTDT 2015-20, 20 November 2015

⁵ *CAC v Lowther* NZTDT 2016-17, 27 October 2016

practitioners conduct themselves professionally and honestly.

Respondent submissions

27. Ms Renton advised that the respondent accepts that if his conduct was assessed by a reasonable member of the public, informed of all the facts and circumstances, they would conclude that his actions would have brought the teaching profession into disrepute and therefore his conduct meets the third definition of serious misconduct under section 378 of the Act.
28. The respondent also accepts that inappropriate images were on the laptop which was a school laptop in which he used while on school grounds and on school business. While he denies deliberately going to pornographic websites, he accepts that, in accessing inappropriate comic book and gaming sites, he may have exposed his computer and the college system to a risk of being infected by pornographic material, and therefore rule 9(1)(k) is met.

Discussion

29. The use of the school laptop for gaming would not ordinarily reach the threshold for a finding of serious misconduct. The Tribunal does not endorse this activity, but we think that it would ordinarily be a matter for a school to address within the employer/employee relationship, rather than being a matter requiring sanction by his disciplinary body. However, in this instance, by using the school laptop for non-school business, the respondent's actions exposed students to inappropriate material. We consider the respondent's actions were careless, reckless and reflected very poor judgement. The same may be said of his decision to have an image of his partner showing her cleavage.
30. We agree that the respondent's conduct in allowing the inappropriate advertisements and images onto his computer was likely to adversely affect the well-being or learning of 1 or more students. The fact that at least one student reported what he had seen to his parents is evidence of the possible risk. At worst, a student might be disturbed by what they had seen. At least, students must have been distracted, which might adversely affect their learning.
31. For the reasons outlined above, we find that the respondent's conduct reflects adversely on his fitness to be a teacher and may bring the teaching profession into disrepute.
32. Turning to the second part of the test for serious misconduct, r 9(1)(k), although the

respondent did not actively view or access pornographic material, we are satisfied that he “has engaged in”... “*viewing, accessing, or possessing pornographic material while on school premises or engaged on school business*”. His actions meant that pornographic material was accessed or possessed while on school materials. We also agree that reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent’s decision to use a school-issued device in such a way as to expose students to pornographic or other inappropriate material and so r 9(1)(o) is met.

33. We do not need to make findings under the Code of Professional Responsibility. There is no agreement as to whether the respondent deleted his browser history and so we make no further comment on that.

Penalty

34. Section 404 of the Act provides:

404 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher’s practising certificate or authority for a specified period:*
 - (d) *suspend the teacher’s practising certificate or authority for a specified period, or until specified conditions are met:*
 - (e) *annotate the register or the list of authorised persons in a specified manner:*
 - (f) *impose a fine on the teacher not exceeding \$3,000:*
 - (g) *order that the teacher’s registration or authority or practising certificate be cancelled:*
 - (h) *require any party to the hearing to pay costs to any other party:*

- (i) *require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing;*
- (j) *direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.*

35. In *CAC v McMillan*⁶ we summarised the role of disciplinary proceedings against teachers as:

... to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

CAC submissions

36. The CAC submitted that the Tribunal could discharge its duties to the public and profession by imposing a penalty short of cancellation, namely censure, conditions and annotation. The following conditions were proposed:
- (a) That the respondent inform any prospective employer of the professional disciplinary proceedings and provide that employer with a copy of the decision;
 - (b) That the respondent immediately handover any school-issued electronic device to the school on request;
 - (c) That the respondent attend a professional development course as agreed with the Teaching Council, addressing the safe use of electronic devices and the like.
37. Ms Kós noted that in both *CAC v Witana* and *CAC v Teacher NZTDT 2015-20*, the teachers were not deregistered.
38. For the respondent, Ms Renton emphasised that the Tribunal's task is to identify the least restrictive option that meets the seriousness of the case and discharges the Tribunal's obligations to the public and profession. In discharging its obligations, we

⁶ NZTDT 2016/52, 23 January 2017, paragraph 23.

are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances.⁷

Respondent submissions

39. In mitigation, Ms Renton noted that the respondent acknowledged his behaviour immediately to the school after the “popup” incident that caused the complaint. He cooperated fully with the investigation, including surrendering his computer for assessment and accepted full responsibility for his actions. He has apologised to the school and agreed to future monitoring of his electronic devices whenever the school considers it necessary, and has participated in a restorative process with the students affected.
40. The respondent provided a statement for the Tribunal outlining his remorse and insight into his actions. He has been consistent with his acknowledgement of his actions, the harm they caused and his commitment to ensure that this sort of incident does not happen again.
41. Ms Renton submitted that a distinguishing feature of the respondent’s case is that he did not deliberately access pornographic material. The material that the students viewed was a text popup and a picture of his girlfriend with her cleavage showing. While acknowledging this material was inappropriate, Ms Renton submitted that it is distinguishable from *CAC v Lowther* where students gained access to and viewed pornographic images.
42. Therefore, it was submitted that an appropriate penalty was censure, annotation for a year and a condition for the next three years that the respondent inform any prospective employer of the proceedings and provide that employer with a copy of the decision.
43. Ms Renton also advised that although the respondent did not object to the condition that he attend a professional development course on the safe use of electronic devices, he has not been able to find such a course to proactively complete. Ms Renton advised that Netsafe provides such training as part of a package to the full school, rather than individuals.
44. Ms Renton also noted that the school is already well within its rights to request a school-

⁷ *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC3354, at [51].

issued device to be handed in for inspection at any time and so a condition to this effect is not necessary.

Discussion

45. This conduct is at the lower end of the scale of seriousness, and is not in the same league as the other cases referred to. We accept Ms Renton's submissions and acknowledge the respondent has fully accepted responsibility for his actions as she has outlined. In our view annotation of the register is not required. We have reduced the time period for informing any employer of this decision. We therefore impose the following penalty:
- (a) The respondent is censured under s 404(1)(b);
 - (b) There is a condition on the respondent's practising certificate for a period of two years that he inform any prospective employer of the professional disciplinary proceedings and provide that employer with a copy of the decision;
46. We are satisfied that this has been a significant lesson for the respondent. We do not consider any other penalty is necessary given the steps he has taken as outlined above.

Costs

47. The CAC seeks costs of 40%. The Tribunal orders the respondent to pay 40% of the costs of conducting the hearing, under section 404(1)(h) and (i), that is 40% of the Tribunal's costs and 40% of the CAC's actual and reasonable costs. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:
- a) Within 10 working days of the date of this decision:
 - i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs
 - ii. CAC to file and serve on the respondent a schedule of its costs
 - b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions he wishes to make in relation to the costs of the Tribunal or CAC. That may include information about his own income and outgoings.
48. The Chairperson will then determine the total costs to be paid.

Non-publication

49. There were no applications for non-publication.



Theo Baker, Chairperson

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).