

NON-PUBLICATION ORDERS at [38]

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-70

RARO TE MANA O TE
UNDER THE

the Education and Training Act 2020
(**the Act**)

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**
Kaiwhiu | Prosecutor

ME
AND

DAVID PAUL LEE
(Authorisation 208521)
Kaiurupare / Respondent

Nohoanga | Hearing
Hei Māngai | Appearance

22 July 2024, AVL (Teams).
M Purcell for the CAC.
Respondent, Self-represented.

DECISION

1 AUGUST 2024

Tribunal: C Garvey (Deputy Chair), Nichola Coe, Kiri Turketo (Members)

Introduction | Whakataki

[1] The respondent, David Lee, faces a disciplinary charge alleging serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers in relation to two distinct courses of conduct in 2020 and 2021 while he was employed at KingsWay School. Mr Lee resigned from the school in June 2021, and a mandatory report was made in December 2021. The particulars of the charge read as follows¹:

¹ Notice of Charge dated 8 February 2024.

1. The CAC charges that David Paul Lee, registered teacher, of Auckland:

- a. Between 28 June 2020 and 17 February 2021, used a Kingsway School laptop to access pornography on multiple occasions; and/or
- b. On 19 March 2021, used a KingsWay School laptop to access PornHub and search the words “child+orgasm”; and/or
- c. In July 2021 breached professional boundaries with Student A, including by:
 - i. Messaging and emailing Student A; and/or
 - ii. Meeting Student A outside of school; and/or
 - iii. Driving in a car with Student A.

[2] Mr Lee accepted the charge, signing a summary of facts on 6 May 2024. The Tribunal held a hearing on the papers on 22 July 2024, considering the summary of facts, submissions from counsel for the CAC, and an email from Mr Lee in support of his application for permanent non-publication of his name. KingsWay School also sought permanent non-publication orders.

The Agreed Summary of Facts

[3] Mr Lee first registered in 2001. He does not hold a current practising certificate and has indicated no firm intention to return to teaching.

[4] Mr Lee had a laptop issued by the school for work purposes. The summary records that all staff at the school are required to sign a Cyber Safety Agreement which includes a declaration that:

- a. they will lock their computer or log off when it is unattended; and
- b. they will not access or attempt to access inappropriate, age restricted, or objectional material.²

[5] Such agreements are commonplace in schools, including the prohibition on access to certain material. The summary states that “objectionable” is defined in the school’s agreement as:

Material that deals with matters such as sex, cruelty, or violence in such a manner that is likely to be injurious to the good of students or incompatible with the school environment.³

[6] Mr Lee’s use of his laptop in contravention of the Cyber Safety Agreement came to light in April 2021 when he left it unattended in a classroom and some students aged 14 and 15 briefly accessed his internet browser history. The students did not click on the links or see any pornographic material.⁴

² Agreed Summary of Facts at [4].

³ n2 at [5].

⁴ n2 at [6].

[7] A senior teacher and the Principal became aware of these events and Mr Lee was advised of the complaint on 21 April 2021. He surrendered his laptop for forensic analysis. The forensic analysis report in May 2021 found access to sites on five occasions between June 2020 and March 2021 “*which could be considered inappropriate for a school computer.*”⁵ The summary goes on to record:

None of the material had intentionally been saved to the device and there was no evidence Mr Lee had viewed pornography while at school.⁶

[8] At a disciplinary meeting on 10 May 2021 Mr Lee admitted his actions and explained he had been facing personal difficulties and was at a low ebb. Mr Lee agreed to resign with immediate effect rather than be dismissed.⁷

[9] The factual foundation supporting particular 1(c) is outlined at paragraphs [17] to [25] of the summary. Mr Lee taught the student for one year, and then briefly in 2021. The notice of charge refers to Student A and the summary to Student T, so we will use T from this point. Student T experienced some behavioural difficulties at the school which Mr Lee and his wife (also a teacher) attempted to help with. The summary records:

[18] On 6 July 2021, T contacted Mr Lee through Facebook Messenger. T told Mr Lee that she was hoping to see him in person, saying “I’ve got something for you.” On 7 July 2021, Mr Lee responded to T’s message advising that he was going to be on the Hibiscus Coast that day and would be free around lunch time. T responded that she would be walking by Millwater and that [redacted] ...and that maybe she could “pop a drive”. Mr Lee responded saying “Can pick u up”. At the time, T was 15 years old.

[19] Mr Lee drove through Millwater without seeing her, pulled over at Metro Park field to watch a model airplane flying and talk to the pilot while waiting. He left a message to say he hadn’t seen her and was at the (school) “athletics day carpark”. After he had been there some time, she contacted him to say she couldn’t see him and did she get “the wrong mf place.”? Mr Lee realised she must have been at a different field near the school, so returning to his vehicle, drove back to a field near the school, stopping in the carpark as she walked [redacted] up to the passenger side. He offered for T to get into the front passenger seat of his car, which T did. Mr Lee drove to Orewa and then to Hatfields Beach where they remained for a short time, talking inside the car.

[20] T asked Mr Lee if it was true that pornography had been found on his laptop. Mr Lee told her it was true and that he did it because he was not in a good place.

[21] T’s father then phoned her and, upon learning she was with Mr Lee, told her to return home immediately. Mr Lee drove T home and dropped her a street away from her house at T’s request. The entire event took approximately 20 minutes.

[22] Although Mr Lee did not say anything specific that made her feel unsafe, T did not feel comfortable in the car. In a statement to the Teaching Council investigator she said “I just felt unsafe about the general situation where he was taking me-to the beach. I knew it was not very busy there. The general situation bothered me.” Mr Lee acknowledges that driving to

⁵ n2 at [11]

⁶ n2 at [12].

⁷ n2 at [14]-[15].

Hatfields Beach was an unwise decision, and that the original Metro Park location well beyond the vicinity of the school, would have precluded his taking this action.

[10] Student T's parents notified the school that Mr Lee had met their daughter, and Mr Budler contacted Mr Lee. The following day Mr Lee wrote T a lengthy email, to which she did not respond. The email includes:

- (a) Mr Lee's acknowledgement that he "*made some dumb decisions*".
- (b) an explanation that as Student T said she had something to give him, "*since I was already seeing people in Orewa, I was happy to drive to your place, meet your parents and pick it up.*"
- (c) that because alternate plans were made "*Driving to you meant you hopped in.*"
- (d) asking the student not to share photos if she had taken any on her phone in the car.
- (e) intimating that the student "*didn't want to be helped on the right path. Perhaps that is true?*"
- (f) that the student lied to her father and that he should have gone to her house and said "*Here's your daughter, I understand she lied about where she was, sorry about that.*"
- (g) noting the significant upset expressed by his wife, the student's father and Mr Budler about his actions.
- (h) two paragraphs directed at the student's current situation, quoting Scripture and imploring the student to seek guidance from God. The email turns the discussion from his own conduct to an uninvited critique and advice on the student's perceived situation.

Liability-principles and submissions

[11] The test for serious misconduct is conjunctive, requiring that one or more of the limbs of s10(1)(a) of the Act are engaged, together with a breach of one or more of the rules for reporting serious misconduct under rule 9 of the Teaching Council Rules 2016.

[12] Section 10(1)(a) refers to conduct that:

- (i) adversely affects or is likely to adversely affect the wellbeing 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.

[13] The CAC submit that Mr Lee's conduct engages the first limb, in that his email to T "had the potential to harm her emotional wellbeing, as it attempted to shift the blame to her for their meeting (including references to Mr Lee's wife's feelings about the situation) and implied that she was a bad student and/or makes poor choices." Counsel submits that the objectionable material on the laptop may not reach the threshold of likely harm because the students did not view the material, but is relevant to our assessment of Mr Lee's conduct.

[14] With regard to fitness, the CAC submit that Mr Lee's conduct in breach of the Cyber Safety Agreement calls his professional judgment and integrity into question. The CAC highlight that in relation to Student T, Mr Lee was the responsible adult and he failed to manage the situation appropriately and acted in breach of professional boundaries.

[15] With respect to s 10(1)(a)(iii), following the objective test⁸, the CAC submit that reasonable members of the public informed of the factual circumstances, would expect teachers to maintain professional boundaries with a student; and to not misuse school property (the laptop). The CAC also relies on a breach of the requirements of the Code of Professional Responsibility, namely cl 1.3 (to maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity), cl 2.1 (to promote the wellbeing of learners and protect them from harm) and cl 2.2 (to work in the best interests of learners by engaging in professional relationships that respect professional boundaries).

[16] As for the threshold for serious misconduct the CAC relies on r 9(1)(e) which refers to a breach of professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher. The CAC submit this is engaged on the basis that this demonstrated "*a clear breach of professional boundaries, aggravated by the subsequent email which Mr Lee sent, which involved no regard for the impact it might have on the student's wellbeing.*"

[17] Rule 9(1)(k) refers to an act or omission that brings or is likely to bring the profession into disrepute. This is, the CAC submits, also engaged by Mr Lee accessing pornography on a school laptop. This is consistent with the position taken by the Tribunal in similar circumstances.⁹

Liability - Findings

[18] We find that Mr Lee's conduct cumulatively amounts to serious misconduct. The possession of objectionable material on his school-owned laptop was a knowing breach of the Cyber Safety Agreement. Mr Lee was responsible for using school property for the purpose it was provided. We accept the CAC's submissions regarding particulars 1(a) and (b) and s10(1). The Examples in Practice include guidance on cl 1.3 with the example of accessing inappropriate digital information as conduct not demonstrating a high standard of professional behaviour or integrity.¹⁰

⁸ In reliance on *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC).

⁹ The CAC submissions refer to *Complaints Assessment Committee v Lowther* NZTDT 2016/17, 27 October 2016 at [27]; and *Complaints Assessment Committee v Teacher* NZTDT 2013/28, 14 June 2013 at [9].

¹⁰ The Code of Professional Responsibility: Examples in Practice, June 2017.

[19] With regard to Mr Lee's conduct with Student T, that she was not a student at the school and Mr Lee no longer a teacher is not relevant as they were only in contact because of the recent school connection. As Mr Lee's email seems to recognise, he showed poor judgment with his choice of meeting place, in driving the student in his car, and by not returning her home openly. It was Mr Lee's responsibility to avoid that situation.

[20] We agree that the tone and some content of Mr Lee's email risked harm by criticising T's behaviour, suggesting she did not want help and support, and in making his wife's feelings the student's concern. The Examples in Practice, in the commentary to cl 2.2, refer to the unique position of trust and care that teachers are in, and a duty to ensure that the physical and emotional wellbeing of learners is safeguarded. Teachers are expected to maintain professional boundaries "*both within and beyond the learning environment.*"

[21] We find that Mr Lee's conduct breached all three limbs of s10. The threshold for serious misconduct is met by the breach of r9(1)(k), with the potential for his conduct to bring the profession into disrepute. We do not consider it necessary to conclude a breach of r9(1)(e), for similar reasons as found in *CAC v Teacher V*¹¹, which we refer to below.¹² Teachers must avoid take care to maintain boundaries whether in physical, oral or written interactions with students, but we are satisfied that the conduct here is addressed by the breach findings we have already made.

Penalty

[22] Having found the charge proved, we may impose a penalty under s501 of the Act. The main purposes of penalty are to protect the public, and to set and maintain professional standards. Penalty should be fair, reasonable and proportionate in the circumstances, and consistent with that imposed in similar cases.

[23] The CAC submit that the cumulative conduct was "*moderately serious*" and that censure, annotation of the register for two years, and conditions on any subsequent practising certificate requiring Mr Lee to disclose this decision, are appropriate penalties. For comparative purposes counsel referred to the following cases:

- a. *CAC v Mallory*¹³, involving thousands of entries relating to inappropriate or pornographic material on a school laptop, including content with themes of coercion and non-consent, and young (teenaged) content. The respondent indicated an intention not to return to teaching; the penalties imposed were censure, annotation of the register and a requirement to disclose the findings to any future employer for two years.
- b. *CAC v Lowther*¹⁴, in which the teacher accessed pornography and dating websites on a school laptop, outside of work hours, but did not intentionally

¹¹ *Complaints Assessment Committee v Teacher V* NZTDT 2020/22, 23 November 2020.

¹² R 9(1)(e) reads: "*breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher, for example-(i) engaging in an inappropriate relationship with the child or young person: (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person.*"

¹³ *Complaints Assessment Committee v Mallory* NZTDT 2023/23, 14 December 2023.

¹⁴ *Complaints Assessment Committee v Lowther* NZTDT 2016/17, 27 October 2016.

download this. Two year 8 students who had permission to use the laptop saw some of the images and browsing history. The respondent initially blamed a family member but expressed remorse and regret for his conduct. The Tribunal imposed a censure, annotation of the register and a condition that the decision be disclosed for a period of three years.

- c. *CAC v Teacher V*¹⁵ involved a breach of boundaries with a 16-year-old student, for which no sexual motive was imputed, but which was characterised as 'a clumsy' attempt to engage with the student but which made the student uncomfortable and involved the use of language not appropriate within the professional relationship, including "I love you." The conduct invariably occurred at school and in the presence of others. While the respondent was found guilty of serious misconduct the Tribunal was not satisfied that r9(1)(e) was not engaged because of the lack of improper motive and the conduct was not of sufficient severity or character. The Tribunal ordered mentoring for one year, and that the teacher disclose the decision for a period of one year.
- d. *CAC v Teacher A*¹⁶ involved a breach of professional boundaries by a teacher who assisted two 15-year-old students into an R16 movie, met students out of hours at a McDonalds and made inappropriate and racist comments (with the explanation that humour was intended). The Tribunal found serious misconduct and imposed censure, annotation of the register for two years and conditions requiring professional development and mentoring.

[24] Mr Lee has not made submissions on penalty. From an email sent to the Tribunal addressing non-publication it appears that he plans to continue working outside of teaching although the prospect of a return to teaching appears open, in that Mr Lee has said:

If the Tribunal were to hold that my infractions were such that name suppression would be detrimental to the teaching profession, then I would rather agree never to renew my registration and thereby preclude any return to the profession rather than see my wife suffer any more than she has already. I work with heavy machinery-a job I enjoy and do not view the conditions of the teaching life with any desire to return.¹⁷

[25] Each case is assessed on its own facts. Mr Lee has, in mitigation, the relatively small number of incidents of misuse of his school laptop identified at audit, and the absence of evidence this occurred during school hours or at school. We were concerned by the search term specified in the charge, but the evidence does not suggest Mr Lee viewed related material. The breach of professional boundaries with Student T warrants a penalty that reflects the need for assurance against future such conduct. We will impose censure, annotation of the register and a disclosure requirement to be imposed on a future practising certificate given Mr Lee does not hold a current one.

¹⁵ Above n10.

¹⁶ *Complaints Assessment Committee v Teacher A* NZTDT 2020/5, 10 July 2020.

¹⁷ Email Mr Lees dated 26 June 2024.

[26] The CAC seeks a contribution towards costs pursuant to s500(1)(h), and in reliance on the Practice Note on Costs¹⁸. Acknowledging Mr Lee's cooperation with the CAC including permitting the matter to be dealt with on the papers, the CAC seeks a 40% contribution. The schedule outlines costs in the sum of \$15,699.30 of which 40% is \$6,297.72.

[27] Mr Lee has not provided specific financial detail relating to his ability to meet an order for costs, other than alluding to the difficulties associated with attempting to start a business and not earning a regular wage.

[28] We consider an order for costs is appropriate as sought by the CAC, and a contribution towards the costs of the Tribunal pursuant to s500(1)(i).¹⁹

Applications for non-publication orders

[29] The Tribunal may make orders for non-publication pursuant to s501 if it considers that it is proper to do so, balancing the public interest and the private interests of any person. The test is not the "exceptional" threshold required by the criminal jurisdiction, but must be something more than the ordinary consequences that are anticipated to arise from an adverse finding in disciplinary proceedings. These include the anticipated consequences of embarrassment or upset caused to family members by association.

[30] Applications have been made as follows:

- (a) by the CAC for non-publication of the name of Student T.
- (b) Mr Lee seeks to suppress publication of his name because of the potential adverse impact on his wife. The CAC opposes this application, essentially on the basis that the evidence relied upon is not sufficient to elevate the concerns above a bare assertion of harm.
- (c) the school also seeks a permanent order, on grounds set out in an email from the Principal, Mr Graeme Budler, dated 23 February 2024.

[31] There is no public interest in the identity of Student T being known, and their privacy takes precedence. Student T is not named in material provided to the Tribunal but out of caution we make the order sought. Similarly, the students referred to in paragraphs [6] and [7] of the summary of facts as finding evidence of objectionable material on Mr Lee's laptop are not named, and there is no public interest in them being named, and their private interests clearly take precedence.

[32] Mr Budler seeks permanent orders for the school, and while acknowledging the principle of open justice he submits:

- (a) there is a "*strong likelihood*" of potential harm to students involved in reporting the incident, who faced some 'backlash' at the time; and

¹⁸ Practice Note on Costs dated 1 April 2022.

¹⁹ This is calculated based on a fee for a hearing on the papers and does not reflect the actual costs incurred by the Tribunal.

- (b) identifying the school without identifying Mr Lee would impact the school's students as "*staff who left about the same time could inadvertently and unfairly be misconstrued as the perpetrator.*"
- (c) the community is small, so identifying the school would identify Mr Lee and "*would harm the students involved.*"

[33] When a teacher or former teacher faces an adverse disciplinary finding, a school may feel concern for their reputation, or for their students. In many if not most cases, there is not a likely risk of harm to individual students by publication of the name of the teacher and the school. Transparency is to be encouraged, and the principle of open justice pertains to schools as to individual teachers, and something more than a speculative risk is needed to set that presumption aside.²⁰

[34] We consider that suppressing the names of the students is sufficient. There is no criticism or fault attributable to the school or students. We are not satisfied, given the time that has passed, that there is an appreciable risk of harm to the students on the basis of the submission made.

[35] With regard to the respondent's application, Mr Lee's stated concerns are for his wife, and he has not advanced any personal grounds. There is no public interest in naming a family member, and nor is it necessary to publish private matters that Mr Lee has advanced in support of this application. However, we do not consider he has provided reasons that would make it proper to grant the application to suppress his name. Where competent adults are involved, we tend to consider that direct evidence ought to be provided, whether from the person on behalf of whom the application relies, or (if relevant) from an expert such as a health professional, rather than assertions by a respondent.

[36] In not suppressing the school's name, we also alleviate the potential risk of suspicion falling on others if the school is not identified, given the number of teachers on the register who share Mr Lee's surname. Naming Mr Lee alleviates the school's concern that suspicion may fall on staff who left the school at around the same time.

Orders

[37] Accordingly the Tribunal makes the following orders pursuant to s500:

- (a) Mr Lee is censured pursuant to s500(1)(b) of the Act.
- (b) The register is to be annotated for a period of two years pursuant to s500(1)(e) of the Act.

²⁰ See for example *Complaints Assessment Committee v Teacher NZTDT 2016-27* at [69] reflecting that it must be assumed that the position of schools was considered by Parliament and the principle of open justice applies, and in the majority of cases publication will be proper in the interests of the educational community at large.

(c) A condition is to be imposed on a subsequent practising certificate held by Mr Lee, pursuant to s500(1)(j) of the Act requiring that he disclose this decision to a potential employer, for a period of two years.

(d) Mr Lee is to contribute to the costs of the Complaints Assessment Committee pursuant to s500(1)(h) in the sum of \$6,279.72 and to the costs of the Tribunal, pursuant to s500(1)(i) by payment to the Teaching Council in the sum of \$582.00.

[38] The Tribunal makes the following orders for non-publication pursuant to s501:

- (a) The name and identifying particulars of the student identified in the Notice of Charge as Student A and in the Agreed Summary of Facts as Student T.
- (b) The names of the students referred to in paragraphs 6 and 7 of the Agreed Summary of Facts including the familial relationship referred to in paragraph 7.
- (c) The name of Mr Lee's wife and personal details relating to her in the evidence provided to the Tribunal.



Catherine Garvey
Deputy Chair of the New Zealand Teacher's Disciplinary Tribunal