

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023/56

I TE TAKE O of the Education Act 1989 and the
IN THE MATTER Education and Training Act 2020

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

KO
BETWEEN **Complaints Assessment Committee**
Kaiwhiu | Prosecutor/Referrer

ME 
AND *Kaiurupare | Respondent*

TE WHAKATAUNGA Ā TE TARAIPUNARA
DECISION ON PENALTY, LIABILITY, AND COSTS.
6 January 2025

NOHOANGA: 4 June 2024 on the papers via Teams
Hearing

T

E TARAIPUNARA: Ian Murray (Tiamana Tuarua), Gael Ashworth raua ko Nichola
Coe (Ngā mema o te Taraipunara)

NGĀ ROIA ME NGĀ

KAIABWHINA: B Tantrum and A Stuart for Complaints Assessment
Committee (CAC)

Representation The Respondent was self-represented

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee (CAC) has referred a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers to the Tribunal. In a Notice of Referral dated 24 September 2023, the CAC alleged that the respondent:
 - (a) Matters raised in the mandatory report from [REDACTED] (the initiator) about the conduct of [REDACTED], (the teacher) and the own motion referral by the Teaching Council of the teacher's convictions should be considered by the New Zealand Teachers Disciplinary Tribunal (the Disciplinary Tribunal).
 - (b) The CAC refers part of the matter to the Disciplinary Tribunal in accordance with 401(4) of the Education Act 1989 on the basis that the teacher has engaged serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
 - (c) The CAC refers part of the matter to the Disciplinary Tribunal in accordance with section 497(4) of the Education and Training Act 2020 on the basis that the teacher's convictions warrant action by the Disciplinary Tribunal.

Section 401(4) - Serious misconduct

1. Pursuant to section 401(4) of the Education Act 1989, the CAC charges that the teacher has engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.

Particulars of the charge

2. The CAC charges that on or around June 2020, the teacher exchanged messages of an inappropriate nature to a [REDACTED] student (Student A).

3. The conduct described in paragraph 2 amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and any or all of rule 9(1)(e) and (k) of the Teaching Council 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.

Section 497(4) - Convictions

4. On 15 September 2022, the teacher was convicted of the following offences in the Wellington District Court:
 - a. Sexual connection with a young person under 16, which is an offence under section 134(1) Crimes Act 1961 and a specified offence under Schedule 2 of the Children's Act 2014.
 - b. Indecent communication with young person under 16, which is an offence under section 124A of the Crimes Act 1961 and a specified offence under Schedule 2 of the Children's Act 2014.
 - c. Supplying a class C controlled drug to a person under 18, which is an offence under section 6(1)(d) of the Misuse of Drugs Act 1975.

(together, the Convictions)

5. On 15 December 2022, [REDACTED] teacher registration was cancelled by the Teaching Council in accordance with the requirements of Schedule 3, Clause 6(1)(a) of the Education and Training Act 2020, on the basis that his convictions for specified offences meant he no longer satisfied the requirements for registration as a teacher.
6. The CAC considers that the Convictions as set out in paragraph 4 warrant action by the Disciplinary Tribunal. refers these convictions to

the Disciplinary Tribunal pursuant to section 497(4) of the Education and Training Act 2020.

Whakarāpopoto o te whakataunga – Summary of decision

2. We conclude that the charge has been established. We make an adverse finding in respect to his convictions and conclude that his conduct amounts to serious misconduct.
3. We censure the respondent but make no other orders because the respondent had already had his registration automatically cancelled as a result of the District Court convictions.
4. We make no order in relation to the CAC and Tribunal's costs.
5. We make a non-publication order in relation to the respondent's name and identifying particulars. This was to ensure that the District Court suppression order was respected and not undermined.

Ko te hātepe ture o tono nei – Procedural History

6. The conduct that is the subject of this hearing took place in the middle of 2020. Soon after, the complainant, Student A disclosed the behaviour and the respondent was charged by police. The school also made a mandatory report about the respondent. He was charged with sexual violation by unlawful sexual connection, exposing a young person to an indecent communication and supplying cannabis to a young person.
7. On 7 August 2020 the respondent signed a voluntary undertaking not to teach until the investigation was concluded.
8. In August 2022 he pleaded guilty to the criminal charges. On 10 October 2022, the respondent was sentenced to nine months' home detention. He was also granted permanent name suppression.
9. On 15 December 2022, as a result of Schedule 3, Clause 6(1)(a) of the Education and Training Act 2020, the respondent's teacher registration was cancelled by the Teaching Council.
10. The CAC considered the mandatory report and filed the notice of charge

on 24 September 2023 which included both a referral of the respondent's convictions and an allegation that his conduct towards the complainant was serious misconduct.

11. Initially, the respondent did not engage with the CAC but he did engage with the Tribunal process and attended the pre-hearing conferences. He was supported by his grandmother at those hearings. He expressed some bewilderment at why this process was taking place, given the cancellation of his registration and the criminal proceedings but was advised that this was a separate and independent process.
12. Initially, the respondent wished to attend in person at the hearing to explain the background to his misconduct and a hearing was set down to take place in Wellington. However, due to work commitments the respondent was unable to attend that hearing either in person or via AVL and provided his response to the charge in writing.

Kōrero Taunaki – Evidence

13. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (ASF), signed by the respondent and counsel for the CAC. The ASF is set out in full:

Summary of facts

Background

1. [REDACTED] is a former teacher. His registration was cancelled by the Governing Board of the Teaching Council following his conviction for two specified offences in September 2022, set out below.
2. Between April 2019 and July 2020, [REDACTED] worked at [REDACTED] Wellington as a teacher.
3. It was alleged that between 1 June 2020 and 20 July 2020 he supplied cannabis to his former student, sexually violated her

by unlawful sexual connection and exposed her to an indecent communication **(the allegations)**. He was subsequently charged by the Police.

4. On 7 August 2020, [REDACTED] signed an undertaking not to teach, pending the outcome of the Teaching Council's investigation or any other proceeding that arose from that investigation.
5. In August 2022, he pleaded guilty to the Police charges and, on 10 October 2022, [REDACTED] was sentenced in the Wellington District Court to a term of nine months of home detention. He has permanent suppression of name in relation to the District Court proceedings.

The Facts

6. [REDACTED] agreed the facts of the allegations for his District Court proceedings. The District Court Judge set out the agreed facts as follows.
7. [REDACTED] met the complainant because he was her teacher at college. He is now aged 27. However, when this offending occurred he would have been aged around 25. At the time of the offending the complainant was 14 years old.
8. While [REDACTED] and the complainant got to know each other through the teacher/student relationship, that then progressed with them leaving the school grounds to go to lunch together. It then moved to them contacting each other through social media platforms such as Facebook and Instagram. Eventually, they met up outside school through Mr [REDACTED] offering to supply the complainant with free cannabis.
9. Between 1 June and 20 July 2020 the two met on three occasions in person. On one occasion [REDACTED] was there as himself. On the other two he was disguised using the

identity of a fictitious friend of his called "Joseph". The first meeting involves supply of cannabis plant. They met at a bus stop in Upper Hutt. He provided her with three grams of cannabis but said that he had a friend who could provide more free cannabis.

10. Some days later the complainant contacted the defendant and asked for more cannabis. The defendant said he was out of Wellington but he had a friend, Joseph, who would give her free cannabis. Another meeting was arranged. This was on Fergusson Drive in Upper Hutt.
11. The defendant turned up to that meeting wearing a black jacket, sweatpants, gumboots and a beanie but also with a black t-shirt wrapped round his face. This meant only his eyes were visible. He gave the complainant two bags of cannabis. In providing the cannabis in this way he was holding himself out to be this fictitious friend called Joseph.
12. There was further contact between the defendant and the complainant saying that Joseph wanted to give her more bags of cannabis in exchange for a blow job. Again there is further messaging about this saying that further cannabis could be supplied but it would be the last time she got it for free. A meeting was arranged at a local school. Again, the defendant turned up to this meeting disguised as this person, Joseph. He was wearing the same clothing that hid his face other than his eyes. He showed the complainant four bags of cannabis and \$100 in cash and said that if she gave him a blow job she could have the cannabis and cash. She accepted the cannabis and the money and then proceeded to perform oral sex on the defendant. This went on for about 30 seconds before the complainant felt like she was going to throw up. The defendant put his hand on her head and forced her on to his penis to continue. She pulled away, became upset, started crying and left.
13. The incidents described show the pattern of a representative charge of supplying cannabis and the charge of unlawful sexual connection with a young person. Subsequent to that, some time

in August 2020, the defendant contacted the complainant via Facebook using a fictitious profile of Joseph Porter. He asked to meet her again at the same school where the earlier incident happened and offered to give her either two bags of cannabis or \$100. He said that she could have the bags of cannabis and money if she had sex with him and gave him a blow job. She did not meet with the defendant. That contact with the offer of providing cannabis and money for sex is what amounts to the charge of indecent communication with a young person.

██████████ has not responded

14. In February 2023 a copy of an investigation report was sent to ██████████ via his grandmother. There has not been a response to the investigation report.

Committee Investigation

15. The Complaints Assessment Committee met on 6 July 2023. ██████████ was invited but declined to attend due to the conditions of his sentence. ██████████ did send a submission of documents to be given to the panel in lieu of his appearance.

14. We must be satisfied on the balance of probabilities that the CAC has proved the charge. In this case, the admissions in the summary of facts provide an adequate basis to establish the charge. Accordingly, we find that the charge is proved.

Hapa Taumaha - Adverse finding/Serious misconduct

15. In respect to the convictions, we are not required to make a finding of serious misconduct, but simply have to make an adverse finding against the teacher before we are able to exercise our disciplinary powers. However, in order to make an adverse finding, we need to be satisfied that the conduct reflects adversely on the respondent's fitness to be a

teacher.¹

16. While we are not required to make a formal finding of serious misconduct, the threshold for making that kind of finding informs our decision as to whether to make the adverse finding. In assessing whether a teacher's fitness to teach has been affected, the Tribunal has previously considered:¹⁷

...whether the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers or by the community.

17. In respect to the other aspect of the charge we also need to consider the same test for serious misconduct so we will consider both aspects of the charge (the referred convictions and the allegation of serious misconduct).

18. Serious misconduct is defined in section 10 of the 2020 Act² 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.

19. In this case the relevant reporting rules alleged to be engaged:

- (b) emotional abuse that causes harm or is likely to cause harm to a child or young person:

¹ *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Sharp DCJ, at [47].

² The definition is for all intents and purposes the same in the 1989 Act.

- (e) 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
- (j) an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:
- (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

Ngā Kōrero a te Kōmiti – CAC Submissions

20. The CAC noted the threshold making an adverse finding and for concluding the conduct amounts to serious misconduct. The CAC submit that the relevant thresholds have been met.

Ngā kōrero a te Kaiurupare – Respondent's submissions.

21. The respondent accepted responsibility for his behaviour without formally conceding that we should either make an adverse finding or find he committed serious misconduct, but nor did he argue that we should not. He explained the context behind his behaviour and tried to explain why it occurred.

Kōrerorero – Discussion

22. In order to decide whether to make an adverse finding we will assess the behaviour against the test for serious misconduct in s 10 and the reporting criteria in rule 9 (the serious misconduct yardstick). The same test needs to be applied to the allegation of serious misconduct.
23. We do not need to consider these issues in any great depth as sexual offending against a student clearly satisfies all of the suggested criteria and is clearly serious misconduct. The actual and potential impact on Student A is obvious. Any teacher who behaves in that way is not fit to be a teacher and members of the public would rightly conclude that the teaching profession was undermined and discredited by such behaviour. Further it is emotionally abusive, breaches clear professional boundaries and is serious criminal behaviour.

24. So, for these reasons we concluded that the serious misconduct yardstick is made out, and this is an appropriate case to make an adverse finding against the respondent and conclude he committed serious misconduct.

Whiu – Penalty

25. In *CAC v McMillan*,³ 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.

26. Section 404 of the Act provides:

500 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:

³ NZTDT 2016/52, 23 January 2017, paragraph 23.

- (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 Education Council in respect of the costs of conducting the hearing:
- (j) direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.

27. The behaviour in this case is so troubling that cancellation would have been the only option if the respondent had not already had his registration cancelled as a result of the operation of Schedule 3 of the Education and Training Act 2020. In those circumstances the CAC argue that censure is the appropriate outcome. The respondent does not comment on the appropriate penalty.

28. The Tribunal agrees that the appropriate penalty is that the respondent is censured.

Ngā utu – Costs

29. The CAC sought a contribution of 40% of its costs under s 404(1)(h). The respondent has not explicitly considered the issue of costs.

30. The Tribunal has previously indicated that costs of 40% will ordinarily be appropriate in cases determined on the papers. However, this is not an ordinary case. The respondent has been subject to criminal prosecution. He agreed not to teach and once convicted his registration was cancelled. We also note that the respondent has indicated that he does not intend to teach again.

31. In this case there are two parts to the alleged serious misconduct. One part relates to convictions for sexual offending and if that was the only allegation then no costs could have been ordered.⁴
32. Because this case involves a mixture of a criminal referral and an allegation of serious misconduct, we do have the power to order costs. However, in analogous cases we have not ordered costs to honour the spirit of s 500(2) of the Act which prevents us from ordering costs in cases where the respondent has been through the criminal process.⁵
33. Further, because the respondent has already had his registration cancelled so the usual protectional purposes of disciplinary proceedings are not in play in this case.
34. In the end for all these reasons, we do not consider that he should bear the costs of the proceedings. So we make no order for costs.

He Rāhui tuku panui – non-publication

35. We make an order prohibiting publication of the name of the student, Student A, in accordance with the protections afforded to young persons under Rule 34 of the Teaching Council Rules 2016.
36. The respondent requests non-publication of his own name on the basis that his name was suppressed in the District Court case. The CAC do not actively oppose that order.
37. Non-publication is governed by section 501(3) which provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for the whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides a power to make an order prohibiting publication. This subsection provides:

⁴ Section 500(2) of the Act.

⁵ See for example *CAC v Kaur* NZTDT 2021/49 and *CAC v Gay* NZTDT 2021/46

(6) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*

(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:

(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:

(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.

38. In deciding if it is proper to make an order prohibiting publication, we must consider the relevant individual interests as well as the public interest.
39. We agree with the CAC's responsible concession on this issue. Given the distinctive factual background in the case and the fact that the District Court has suppressed the respondent's name in the criminal case, we consider it proper to order non-publication.
40. We consider that such an order is necessary and appropriate to ensure the District Court suppression order is respected and not inadvertently undermined. As a result, we order that the respondent's name and identifying particulars are not to be published.



Ian Murray
Deputy Chair