

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**UNDER** the Education and Training Act 2020

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

**BETWEEN** **THE COMPLAINTS ASSESSMENT  
COMMITTEE**

Referrer

**AND** **KYLIE MAREE DEWAR**

Respondent

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**DECISION OF THE TRIBUNAL**

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Tribunal: Hannah Cheeseman (Deputy Chair)  
Simon Williams and Celeste Harrington (Members)

Hearing: 20 July 2022

Representation: C Paterson and J Ah Koy for the referrer

## **Introduction**

- [1] The Complaints Assessment Committee ("CAC") has charged the respondent with one charge of engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under the Education and Training Act 202 ("The Act").
- [2] The CAC alleges that the respondent, on 17 July 2019, was convicted and sentenced in the Tokoroa District Court for permitting her premises to be used for the purpose of the commission of an offence against the Misuse of Drugs Act 1975, namely possession of cannabis contrary to section 12 of the Misuse of Drugs Act 1975. The teacher was sentenced to 9 months supervision and fined \$300.
- [3] The teacher did not self-report the conviction to the Teaching Council as required by section 493 of the Act.
- [4] The CAC considers that the conviction warrants action by the Disciplinary Tribunal of the Teaching Council of Aotearoa New Zealand.

## **Procedural History**

- [5] No agreed summary of facts has been obtained as the respondent has not engaged with the CAC throughout the course of the proceedings. Rather, the hearing proceeded on a formal proof basis with the evidence taken from the investigator's brief of evidence.

## **Evidence**

### *Background*

- [6] The respondent is a registered early childhood education teacher. Her full practising certificate is due to expire on 14 December 2023. The respondent applied for renewal of her practising certificate in September 2020 and the conviction was uncovered during the Police vetting process.

### *Circumstances of the Offending*

- [7] The respondent entered a guilty plea at the Tokoroa District Court and was sentenced on 17 July 2019 to one charge of permitting her premises to be used for the purpose of the commission of an offence against the Misuse of Drugs Act 1975, namely possession of cannabis contrary to section 12 of the Misuse of Drugs Act 1975. The teacher was sentenced to 9 months supervision and fined \$300.
- [8] The facts of the offending were summarised in the Police Summary of Facts as follows:

#### **Circumstances**

On Friday 17th May 2019 at about 10:55 a.m. Police went to the defendant DEWAR's home address at 133 Grampian Street, TOKOROA. She is the owner of the house. Her 16 year old and 19 year old sons live with her.

A property search warrant was conducted, in relation to a recent ram-raided burglary, of which the defendant's son had committed.

After arriving inside, Police staff could smell cannabis lingering in the air. While checking all bedrooms Police found 8 cannabis deal bags along with \$60 cash sitting on a set of drawers in the back bedroom.

A warrantless search for drugs, pursuant to the Search & Surveillance Act 2012 was then commenced.

A search of the defendant's bedroom located a silver tin sitting on her drawers, which contained about 2 grams of cannabis head material.

A further search of her bedroom located a used glass meth smoking pipe, hidden in a sweatshirt inside her wardrobe. Another used glass meth smoking pipe was located in the defendant's bag, along with a couple of used point bags, cut straws and her passport.

A search of her 19 year old son's bedroom located 8 x \$20 value cannabis deal bags sitting on top of his drawers along with \$60 cash. A belt full of shotgun ammunition was laying on the floor nearby, in plain view. In an open wardrobe was a .270 rifle. Behind a set of drawers was a long barrel shotgun in a case, which also contained ammunition. Under the bed was a short barrel shotgun. Further smaller amounts of cannabis and ammunition were located in various containers in the bedroom along with empty brand new deal bags and a set of electronic weighing scales.

A search of her 16 year old son's bedroom located 118 cannabis seeds.

Several cannabis smoking pipes/bongs were located in the bedrooms.

A search of the garage found bulk cannabis. Hanging up in the middle of the garage was dried cannabis plant, which had 120 grams of cannabis head material attached to it. In a large box on the ground were numerous cannabis stalks, which had been stripped of cannabis head material and leaves, which indicates that a significant amount of cannabis had been through the garage.

The defendant and her 19 year old son arrived as Police were completing their search.

### **Defendant's Comments**

In explanation the defendant stated that she was aware about cannabis being at the address

and that she chose to ignore it. She admitted to using cannabis about twice a week, In relation

to the meth pipes, she claimed that her young son must have hidden them in her room

The defendant has not previously appeared before the Court.

- [9] The CAC investigator made a series of attempts to contact the respondent and obtain a response from her but was unsuccessful. The respondent has taken no steps in these proceedings to date.

## Relevant Law Regarding the Referral of Convictions

- [10] This case involves the referral to the Tribunal of the fact that a respondent has been convicted of a criminal offence.<sup>1</sup> The test that therefore applies is whether the behaviour that resulted in the conviction reflects adversely on the fitness of the respondent to practice as a teacher.<sup>2</sup> It is only by reaching an adverse conclusion that we are empowered to exercise our disciplinary powers.
- [11] The District Court made it clear in *CAC v S* that we are not required to find the respondent guilty of serious misconduct before we can exercise the disciplinary powers available to us under the Act.<sup>3</sup> That being said, regardless of whether a matter reaches the Tribunal for adjudication by way of a notice of referral, or by notice of a charge of serious misconduct, our function is to decide if the behaviour concerned reflects adversely on the teacher's fitness to teach. This explains why it is helpful, but not mandatory, to scrutinise whether the offending engages one or more of the three professional conduct consequences described in the definition of serious misconduct under section 10 of the Act.<sup>4</sup> The serious misconduct yardstick is an important tool when assessing whether an adverse finding can be established.

## Submissions

- [12] The CAC submits that the respondent's conduct meets the definition of serious misconduct as it engaged the criteria for reporting serious misconduct under rules 9(1)(j) and (k) of the Teaching Council Rules 2016 ("the Rules") and reflected adversely on the teacher's fitness to be a teacher together with risking bringing the teaching profession into disrepute.
- [13] Section 10(1) of the Act<sup>5</sup> defines serious misconduct as follows:

*Serious misconduct means conduct by a teacher—*

(a) *that—*

(i) *adversely affects, or is likely to adversely affect, the wellbeing or learning of 1 or more students; or*

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<sup>1</sup> All convictions punishable by three months' imprisonment or more must be reported to the Education Council, both by the teacher under section 493 of the Education and Training Act and by the employer.

<sup>2</sup> *Complaints Assessment Committee v S*, Auckland DC, CIV2008-004001547, 4 December 2008, Judge Sharp, at [47].

<sup>3</sup> At [48]. We also said in *CAC v Campbell*, NZTDT 2016/35, at [14] that a referral to the Tribunal does not need to be framed as a charge of serious misconduct.

<sup>4</sup> As we said in *CAC v Lyndon* NZTDT 2016/61 at [18] and in *CAC v Sefton* NZTDT 2017/35 at [12]. In *Sefton* we said at [21] that, "We should be careful that in using the serious misconduct test as guidance, we do not limit ourselves in our disciplinary response. The wording of section 404 does not require a finding of serious misconduct in order to impose a penalty. We must simply hear a 'charge of serious misconduct or any other matter referred to it by the Complaints Assessment Committee'."

<sup>5</sup> We note this wording is the same as the definition previously contained in section 378 of the Education Act 1989

- (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.*

- [14] The test under section 10 is conjunctive.<sup>6</sup> That is, the Tribunal must find that the teacher's conduct meets one of three criteria in section 10(1)(a) as well as meeting 10(1)(b).
- [15] The CAC submits that in respect of section 10(1)(b), the Teaching Council's criteria for reporting serious misconduct is contained in rule 9 of the Teaching Council Rules 2016. Rule 9 states that a teacher's employer must immediately report to the Council in accordance with the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility. Relevantly, this includes rule 9(1)(j), being conduct that could be the subject of a prosecution for an offence punishable by three months' imprisonment or more, and rule 9(1)(k) being conduct likely to bring the teaching profession into disrepute.
- [16] In relation to rule 9(1)(k), the High Court has interpreted the words "*any act or omission that brings, or is likely to bring, discredit to the profession*" as meaning that a reasonable member 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 engages in the alleged conduct.<sup>7</sup> This objective test has been applied by the Tribunal on a number of occasions. In respect to section 10(1)(a)(iii), which uses the similar language, this is arguably a lower threshold requiring the Tribunal to find only that the respondent's conduct "may" bring the teaching profession into disrepute.
- [17] The CAC submits that the respondent's conduct amounts to serious misconduct. It meets both aspects of the definition of serious misconduct in the Act.
- [18] Specifically with respect to the criteria in section 10(1)(a), the CAC submits that the criteria are met as follows:
- a) Section 10(1)(a)(ii), the CAC submits the involvement in drug-related offending, involving possession of a large quantity of drugs, plainly raises significant issues about a teacher's fitness to practice.
  - b) Section 10(1)(a)(iii), the CAC submits that any reasonable member of the public informed of the facts and circumstances would reasonably conclude that the reputation and good standing of the profession is lowered and lessened when a practitioner engages in drug-related offending. The CAC submits, therefore, that the Tribunal can conclude that the respondent's conduct "may" bring the teaching profession into disrepute.

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<sup>6</sup> *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141 at [64].

<sup>7</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28].

- [19] The CAC further submits that the respondent's conduct meets the Teaching Council's criteria for reporting the matter as serious misconduct, noting that:
- a) Rule 9(1)(j) the offence is punishable by a maximum of three years' imprisonment, and
  - b) Rule 9(1)(k) that engaging in drug-related offending is illegal and dangerous conduct that the public would not view as appropriate for a teacher.
- [20] The CAC refers the Tribunal to the decision in *CAC v Kem*,<sup>8</sup> where the Tribunal noted that teachers should not be involved in the use or possession of prohibited drugs as they have an obligation to teach and model positive values. The Tribunal was satisfied that the respondent's criminal offending reflected adversely on her fitness to teach and was of a nature that brings the teaching profession into disrepute. The Tribunal were satisfied that Ms Kem's conduct reached the threshold of serious misconduct. Accordingly, the Tribunal has found this type of conduct in the past to constitute serious misconduct.
- [21] The CAC submits that an adverse finding is required in this case, because:
- a) The highest standards of honesty and integrity are expected from teachers as role models to the students in their charge.
  - b) This conviction cannot be regarded as a single incident, given the respondent's admission to Police that she uses cannabis twice a week. The repeated use of drugs is a clear cause for concern and is, in the CAC's submission, the antithesis of the standard expected of teachers.
  - c) If reasonable members of the public were information that the respondent had been convicted of this type of offence, and the factual circumstances underpinning the offence, they would consider that the reputation of the profession was lowered by the conduct.
- [22] The CAC submits that where the respondent's conduct in this case is viewed against the definition of serious misconduct as provided in the Act, the Rules and the Code, and compared with recent, similar cases where the Tribunal has made findings of serious misconduct, the Tribunal can be satisfied that the respondent's conduct reflects adversely on her fitness to teach.

### **Should We Make an Adverse Finding Regarding the Respondent's Fitness to Teach?**

- [23] We are satisfied that we are required to make an adverse finding.
- [24] As we have said, we are not required to conclude that the respondent's conviction constitutes serious misconduct before we can make an adverse finding.

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<sup>8</sup> *CAC v Kem* NZTDT 2019/16.

[25] That said, we accept that the facts behind the conviction mean it reaches that threshold. Using the applicable limbs of the definition of serious misconduct as set out above, as a reference point, we accept first, that the respondent's conduct adversely reflects on her fitness to teach, noting that practitioners have an obligation to both teach and model positive values for their students and that being associated with large quantities of illicit drugs, and using those drugs, does not mirror that expectation. Secondly, the respondent's commission of an offence involving the illegal drugs brings the teaching profession into disrepute when considered against the objective yardstick that applies.<sup>9</sup>

## **PENALTY**

[26] The CAC submits that the start point for consideration of penalty in the present case, taking into account the seriousness of the offending and the respondent's lack of participation in the disciplinary process, is cancellation of her registration.

[27] The CAC notes the Tribunal's powers on making an adverse finding are set out at section 500 of the Act, and notes that the purposes of penalties in professional disciplinary proceedings were discussed in the case of *CAC v McMillan*. In that case, the Tribunal stated:

The role of disciplinary proceedings is therefore 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.

[28] The CAC submits that from time to time considerations other than the protection of the public and maintenance of professional standards may become relevant, noting that rehabilitation is often an important purpose of the disciplinary process.

[29] The CAC referred the Tribunal to a number of previous cases where the Tribunal has emphasised the need to ensure that the disciplinary response or penalty for serious misconduct is consistent with previous similar cases. The CAC submits that the following cases may assist when assessing penalty.

- a) In *CAC v Kem*, set out above. In that case the respondent was censured, conditions placed on her practising certificate, and the register was annotated.
- b) In *CAC v Saxby*<sup>10</sup>, the teacher was convicted of selling cannabis, permitting premises to be used for the cultivation of cannabis, being in possession of a pipe, and being in possession of cannabis. The teacher was provisionally

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<sup>9</sup> *Collie v Nursing Council of New Zealand*.

<sup>10</sup> *CAC v Saxby* NZTDT 2015/43

registered at the time the practising certificate had expired. The Tribunal reached an adverse conclusion and noted that “any teacher convicted of drugs related charges of this sort is guilty of misconduct at one level or another.” As the teacher was not registered and did not have a practising certificate, censure was the only penalty.

- [30] The CAC submits that the conduct in *Kem* is less serious than in the present case as there is no evidence that Ms Kem was a user of cannabis, and her involvement as one peripheral.
- [31] The CAC submits that the conduct on this occasion was of similar seriousness to *Saxby*.
- [32] The CAC submits that the offending is moderately serious, and notes that is aggravated by the amount of cannabis found in the house, and the present of methamphetamine paraphernalia, together with firearms and ammunition.
- [33] The CAC further submits that the respondent’s failure to engage with the Committee is an aggravating feature. This submission refers to the decision of the High Court in *Hart v Auckland Standards Committee 1 of the New Zealand Law Society*.<sup>11</sup> In that case, the Court made it clear that a failure by a professional to respond to a request by a regulator is a serious issue. There is an expectation that professionals will act in a professional, candid and straightforward way when dealing with investigating committees and with complaints, even when the professional considers them to be without merit.
- [34] Further, in *CAC v Webster*<sup>12</sup> the Tribunal commented that the teacher’s:  
...[F]ailure to engage with the CAC’s process amounts to serious misconduct. In doing so, we send a clear message that a teacher who fails to engage with the investigation arm of its professional and regulatory body risks his or her registration.
- [35] The Tribunal went on to infer:  
from her lack of engagement that she is not interested in pursuing her teaching career. Her failure to engage with the CAC process, while not the most serious aspect of the charge before us, when considered alongside her failure to participate in this hearing in any way might be indicative of her indifference or even lack of respect for her profession. Or it may be that she is suffering from some sort of impairment which has made it impossible to communicate. Either way, her position leads us to question her fitness to practise. We might have considered suspension, but in the circumstances, it is difficult to order anything other than cancellation.
- [36] The CAC acknowledges that the respondent has no previous disciplinary history, but submits that censure and cancellation are appropriate in the circumstances of this case.

### *Discussion*

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<sup>11</sup> *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 1331

<sup>12</sup> *CAC v Webster* NZTDT 2016/57-1



- [37] The primary motivation regarding the establishment of penalty and professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.<sup>13</sup> We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and the profession.<sup>14</sup>
- [38] It is not the purpose of professional disciplinary proceedings to punish a teacher a second time for the same behaviour where he or she has been convicted of a criminal offence. Rather, as we said in *CAC v McMillan*, the Tribunal's mandate is to protect the public through the provision of a safe learning environment for students and maintain both professional standards and the public's confidence in the profession.
- [39] The Tribunal notes the decision in *CAC v Fuli-Makaua*<sup>15</sup> where the Tribunal held that cancellation would be required in two overlapping situations:
- a) where the offending is sufficiently serious that no outcome short of deregistration could sufficiently reflect the adverse effect on the teacher's fitness to teach or its tendency to lower the reputation of the profession, and
  - b) where the teacher had not taken adequate rehabilitative steps to address his or her issues.
- [40] The decision in *Fuli-Makaua* relates to drink driving convictions, but the principles are relevant to the present case.
- [41] In considering the appropriate penalty, we take into account the seriousness of the charge, having a maximum penalty of three years' imprisonment, the quantity of cannabis, together with other drug paraphernalia, firearms and ammunition found in the respondent's home, together with cannabis and methamphetamine paraphernalia being found in the respondent's room and handbag. We also note the respondent's admission to Police that she smoked cannabis regularly. We accept that there was no previous offending and we note that the respondent did not meet her obligation under section 493 of the Act to self-report this conviction to the Council. Further, we are concerned by the Respondent's failure to engage with either the CAC investigation or the Tribunal process.
- [42] As the Tribunal said in *CAC v Fuli-Makaua*, a teacher is in less jeopardy of cancellation if he or she has insight into the genesis of the offending and is taking, or has taken, meaningful steps to reduce the risk of it happening again. The Tribunal expects a teacher to provide concrete evidence of the steps taken to reduce the risk of relapse.

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<sup>13</sup> The primary considerations regarding penalty were helpfully discussed in *CAC v McMillan*.

<sup>14</sup> See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZ High Court 3354, at [51].

<sup>15</sup> *CAC v Fuli-Makaua* NZTDT 2017/40.

[43] In the present case there is no evidence available concerning any steps taken by the respondent in relation to this offending, and in relation to reducing the risk of further offending of this type.

[44] Taking into account the serious nature of this offending, the complete absence of participation in the CAC process by the respondent and the complete absence of any information relating to rehabilitation or mitigation of the risk of re-offending, the Tribunal considers that the only available outcome to it is cancellation of the respondent's registration.

## **COSTS**

[45] Under section 500(2) of the Education Act, the Tribunal is not empowered to order a teacher to contribute to the CAC's costs and those of the Tribunal following a hearing "*that arises out of a report under section 493 of the conviction of a teacher*". As such, we do not order costs.

## **ORDERS**

[46] The respondent's registration and practising certificate is cancelled pursuant to section 500(1)(g) of the Act.



Hannah Cheeseman  
Deputy Chairperson

## **NOTICE**

1. A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 500 of the Education and Training Act 2020 may appeal against that decision to the District Court (section 504(1)).
2. The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 500 (section 504(2)).
3. An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.
4. Clause 5(2) to (6) of Schedule 3 to the Education and Training Act 2020 applies to every appeal under section 504 as if it were an appeal under clause 5(1) of Schedule 3