

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/67

UNDER
WĀHANGA

the Education and Training Act
2020

IN THE MATTER
MŌ TE TAKE
BETWEEN
I WAENGA I A

of a charge referred to the Tribunal

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Prosecutor/Referrer | Kaiwhiu

AND
ME

**GRAHAM MICHAEL ALEXANDER
ELSMORE**

Respondent | Kaiurupare

Representation | Hei Māngai

R Belcher and J Avia for the CAC
Respondent, Self-Represented

Tribunal panel | Pae Taraipiunara

T J Mackenzie (Deputy Chair), R
McInerney, N Coe

Hearing

16 April 2024

**DECISION OF THE TRIBUNAL ON CHARGE, PENALTY, PUBLICATION
AND COSTS**

5 June 2024

Introduction

[1] The CAC has referred Mr Elsmore's alleged conduct to the Tribunal as follows:

The CAC refers the matter to the Disciplinary Tribunal on the basis that GRAHAM ELSMORE has engaged in conduct entitling the Disciplinary Tribunal to:

- a. cancel his registration as a teacher, pursuant to section 129(2)(a) and (b) of the Education Act 1989 on the basis that GRAHAM ELSMORE is:
 - i. is not (or is no longer) of good character; and/or
 - ii. is not (or is no longer) fit to be a teacher or, in the alternative,
- b. take action in accordance with sections 135(1), and 158(1)(d) and (g) of the Education Act 1964 on the basis that GRAHAM ELSMORE is:
 - i. guilty of gross misbehaviour; and/or
 - ii. guilty of conduct unfitting him for employment as a teacher; and/or
 - iii. grossly inefficient or incompetent in the discharge of his professional duties; and/or
 - iv. guilty of conduct in his capacity as a teacher or otherwise which is unbecoming to a member of the teaching service or shows his unfitness to remain in his present position or in the service.

Reasons for Referral

1. The CAC alleges that GRAHAM ELSMORE, registered teacher, of Whangarei:

- a. In or around [REDACTED], engaged in inappropriate conduct with [REDACTED] (a then [REDACTED] student) when he:
 - i. made an inappropriate sexual comment to [REDACTED]; and/or
 - ii. wrestled with [REDACTED] at the teacher's house; and/or
 - iii. gifted [REDACTED] a jockstrap.

2. The conduct in paragraph 1 individually or cumulatively amounts to conduct entitling the Disciplinary Tribunal to exercise its powers pursuant to section 129(2) of the Education Act 1989 and/or sections 135(1), and 159(5) of the Education Act 1964.

[2] Mr Elsmore was initially engaged with this matter, although to a limited extent. A number of medical issues were raised by him during the investigation and through the Tribunal proceedings in 2023. That initially led to any hearing being delayed until Mr Elsmore was of better health to participate.

[3] Mr Elsmore was reminded by the Tribunal to provide clear and up to date evidence from a medical practitioner if he was seeking to have the Tribunal further hold off any hearing.

[4] A period then followed without any engagement from Mr Elsmore. The Tribunal resolved to set the matter down for a hearing.

[5] More recently Mr Elsmore has stated to a Teaching Council investigator

that he was still unwell and that he did not wish to participate further. No further independent evidence has been provided of Mr Elsmore's medical situation or ability to engage in the case.

[6] The Tribunal has determined that the matter will proceed. Mr Elsmore has not provided up to date and independently verifiable information. The matter is quite aged (both the facts, and this proceeding) and the complainant will be required to give evidence to us. It also seems that Mr Elsmore has said all he wishes to say, in the responses that he has given to the Teaching Council and the investigator. It is not in the interests of justice to leave this case in abeyance with no certain date of hearing.

Legal principles

[7] We consider that the substantive law to apply is that from the 1989 Act. Section 189 of that Act provided that it applied to any period of registration under the Education Act 1964 as if it was a period of registration under the 1989 Act.

[8] Little will really turn on this. The conduct, if found proven, would meet any of the statutory conduct tests from the 1964 Act, 1989 Act or 2020 Act. The end result would be the same under all.

[9] The obligation rests on the CAC to prove the charge. While the standard to which the alleged facts must be proven is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in mind.¹

[10] The absence of Mr Elsmore does not mean that we automatically accept any evidence. We must still hear and determine the case.

[11] We note that Mr Elsmore has made various statements which have come into evidence. We will take those into account although the weight to be given to any denials must be limited where Mr Elsmore has not given evidence and had his evidence tested.

The evidence

[12] The complainant was sworn in and read his brief of evidence to us. This was as follows:

INTRODUCTION / BACKGROUND

1. My name is [REDACTED]. I am a [REDACTED]. I affirm this affidavit in support of the Notice of Referral filed against Graham Elsmore.
2. I attended Scots College for nine years between [REDACTED] and [REDACTED].

¹ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

3. In [REDACTED], Mr Elsmore was one of my teachers for two or three terms in [REDACTED] ([REDACTED] in today's language), when I was approximately 12 years old. I generally remember him as being a nice teacher.

BEING GIFTED A JOCK STRAP AT SCHOOL

4. One day, Mr Elsmore called me to his desk in the classroom towards the end of class. He gave me a jockstrap and told me I might find it useful. I was confused and I didn't know why Mr Elsmore gave me the jockstrap or what I was supposed to do with it.
5. I put the jockstrap into my schoolbag and walked out of the classroom. On the way home from school that day I threw the jockstrap away into the bushes along [REDACTED] in [REDACTED].
6. I did not tell anyone about receiving the jockstrap. Mr Elsmore did not bring up the jockstrap again.

WRESTLING AND INAPPROPRIATE SEXUAL COMMENT AT MR ELSMORE'S HOUSE

7. Around a month after the jock strap incident, I had maths tutoring with Mr Elsmore after school with a couple of other students. As I was leaving the grounds afterwards, Mr Elsmore offered me a ride into town. I normally caught the bus to the railway station and then caught the train home. As I didn't think anything of it, I agreed.
8. When we were driving into town, Mr Elsmore said he wanted to pick up some library books from his house. He drove me to his home which was around Roseneath and Hataitai. Mr Elsmore invited me into his house while he got the library books.
9. When we entered his house, I remember there was a lounge to the left of the entranceway, with a fireplace in it on the right-hand side. On the mantel of the fireplace were three or four photographs of Scots College boys on a sports field dressed in their PE gear. It was the Gibb House uniform; grey shorts and a red singlet. Each photo was a single shot of a different boy in PE gear. I did not recognise anyone in the photos.
10. Mr Elsmore made a comment about the photos along the lines of how it showed that he cared. I felt like he wanted me to see the photos.
11. Although I cannot recall exactly, I estimate I was at Mr Elsmore's house for approximately 15 minutes. While we were in his house, we somehow ended up play fighting – / wrestling and rolling on the ground in the lobby area when you first walk in the front door. This lasted for about a minute or two. I don't recall how the wrestling started.
12. There was no inappropriate touching but, in hindsight, I feel like it may have been building up to something inappropriate. At the time I thought it was fun, like how I used to wrestle with my dad. I thought nothing of it at the time. I don't remember how it ended.

13. After wrestling, I sat on the floor with Mr Elsmore. We had our backs against the wall. Mr Elsmore started a conversation and we chatted about various things like who he was as a person. During our conversation, Mr Elsmore said "I would like to have sex with you". He didn't say it aggressively, he was quite gentle. I said no. Mr Elsmore stopped the conversation and did not touch me after that.
14. After that, I can't remember how much longer we stayed at his house, but then Mr Elsmore drove me to the railway station.
15. I don't remember him telling me not to tell anyone what he had said or done.

IMPACT OF MR ELSMORE'S CONDUCT ON ME

16. After the incident at Mr Elsmore's house, I struggled to deal with it mentally and was confused about whether to tell my parents. Over the next six or eight months my schooling suffered. I always held teachers with respect and in high regard but after the incident, I lost respect for teachers and the school as an institution. I was a bit of a problem at school and after that. I found it hard to navigate the mental side of things.
17. It also hurt my relationship with my dad. After the events happened, I had difficulty communicating with my parents for several months. I was argumentative and my dad didn't know how to deal with me. Because I grew up in a family where we talked about our feelings, my dad struggled with the fact that I wasn't communicating with him.
18. About six to eight months after the incident at Mr Elsmore's house, I told my mum what had happened when we were in the car together. Once I told my parents about what happened, things became much better and my relationship with my Dad improved. My parents were supportive though the school were never informed about what happened.
19. Over the next three or four years I struggled with my identity. It changed how I reacted to things. I tried to become more macho. I also questioned my sexual orientation. It affected how I thought about women (as an adult).

LATER CONTACT WITH MR ELSMORE

20. After I left school Mr Elsmore's name faded from my mind.
21. On 25 October 2017, I received an email from Mr Elsmore on LinkedIn. At the time, I had on my LinkedIn profile that [REDACTED] Mr Elsmore sent me an email saying something like it was good to see that I was successful at work.
22. When I opened the email I froze in my seat. A lot of my memories and thoughts about the incident come flooding back. I was upset Mr Elsmore had contacted me after what happened so I deleted the email.
23. The same day, Mr Elsmore sent me a request to join my LinkedIn network. A copy of this is annexed and marked "A".

24. Since Mr Elsmore contacted me on LinkedIn I've had a lot of triggers come back. I have been receiving counselling from Employee Assistance Programme in relation to the events with him.

COMPLAINT TO POLICE

25. On 24 May 2021, I went to the Wellington Police Station to report what had happened with Mr Elsmore.

[13] We took the opportunity to engage with the complainant by asking him several further questions to clarify portions of his evidence. We also put various issues to him that Mr Elsmore had raised.

[14] The complainant's mother also provided an affidavit. We had no questions for her and she was not required in person. This evidence read:

INTRODUCTION

1. My name is [REDACTED]. I am the mother of [REDACTED]. I swear this affidavit in support of allegations that [REDACTED] has made about Graham Elsmore, which are the subject of the Notice of Referral before the Tribunal.

BACKGROUND AND GRAHAM ELSMORE

2. [REDACTED] attended Scots College between [REDACTED] and [REDACTED].
3. In [REDACTED], when [REDACTED] was around 12 or 13, I attended a teacher/parent event at Scots College where I first met Graham Elsmore.
4. Mr Elsmore offered to give [REDACTED] extra tutoring in maths after school, because [REDACTED] was struggling a bit at school at the time. Mr Elsmore said that he would also drive [REDACTED] to the railway station after the tutoring.
5. I was grateful for Mr Elsmore's offer and accepted it.
6. One Saturday morning, Mr Elsmore called into our home in [REDACTED]. He said that he was in the area.

[REDACTED] REPORT OF MR ELSMORE'S BEHAVIOUR

7. In Terms 1 and 2 of [REDACTED], during the time period that [REDACTED] was receiving tutoring from Mr Elsmore, [REDACTED] mentioned that Mr Elsmore had taken him to his home address on the way to the railway station to pick something up. [REDACTED] said that it had happened on two occasions.
8. During the course of [REDACTED], I noticed [REDACTED] became withdrawn and uncommunicative. This continued until [REDACTED] told me that Mr Elsmore had taken him to his home and asked him if he would have sex with him.

9. I talked at length with my late husband about the situation and whether we should approach the school. We decided not to report the incident as we thought we would not be believed and were worried that there would be repercussions for [REDACTED]. My husband talked with [REDACTED] about our decision and about what happened to him.
10. Following [REDACTED] disclosure, I noticed he was withdrawn and upset that a teacher whom he respected had behaved this way. He was totally out of his depth. [REDACTED] didn't really enjoy his secondary years at Scots College. I believe the actions of Mr Elsmore were largely responsible for his lack of academic achievement.

[15] We have also heard Mr Elsmore's position via some statements he made to the Teaching Council Investigator. When first contacted in July 2021, Mr Elsmore was advised of the complaint and the name of the complainant. Mr Elsmore stated that he "had never had any physical interactions with (him)". Mr Elsmore also asked if the school was Scot's College, which the Investigator confirmed it was. Mr Elsmore said he had not had any contact with the complainant.

[16] The Investigator provided more detail by email in August 2021. Mr Elsmore responded, again denying the allegations. However, Mr Elsmore said (amongst other comments) that "On one occasion...we did arm wrestle for a short time". He also discussed giving the complainant a ride home from the bus stop and needing to stop at his (Mr Elsmore's) home with the complainant whilst doing so, "to pick up library books to drop off". He said he offered the complainant a warm drink whilst doing so. He says that a week or so later he again gave the complainant a ride, including another visit to his house for a warm drink en route. Mr Elsmore also queries why nothing was raised at the time of the allegations, and noted that the complainant's [REDACTED]

Assessment

[17] In considering the complainant's evidence, we found it to be balanced and careful. The complainant was candid in what he could and could not recall. He was certain however over the allegations. We considered that he came across as reliable, accurate and honest, considering the context of recalling aged events. For instance, Mr Elsmore recalled two visits to his house with the complainant. The complaint only remembered one, which if anything paints a slightly better picture for Mr Elsmore.

[18] We also consider that Mr Elsmore's denials are either unreliable or not credible. We noted that Mr Elsmore when first confronted immediately named Scot's College as the school, despite the allegations being so historical. Mr Elsmore then increasingly revealed interactions that had occurred. He mentioned "arm wrestling" with the complainant, followed by taking the complainant to his house (twice). Mr Elsmore also denied any subsequent

contact with the complainant, yet the evidence showed that he had attempted to contact him online before he was aware of the allegations. All taken together, we consider that Mr Elsmore's statements lend support to something more than the innocuous having occurred.

[19] We therefore do not accept the denials of Mr Elsmore. We have accepted the complainant's account. It is also corroborated in part by his mother. It would be extraordinary if they had put together a plan to make this up after so many years. We therefore find the complainant's account proven and the alleged conduct in the referral proven.

Penalty

[20] Given the level of conduct we consider Mr Elsmore is not of good character or fit to be a teacher. We order cancellation of Mr Elsmore's registration.

[21] Even if Mr Elsmore had engaged with this process, given his denials it seems there would have been no evidence of any remorse or insight that we could have taken into account.

Non Publication

[22] We order final non publication of the name of the complainant and his mother pursuant to s 501 of the Education and Training Act 2020, and of his father's occupation.

[23] Mr Elsmore has had the benefit of an interim order. A permanent order has not been sought. We are not aware of any grounds to displace the usual presumption of open justice. Mr Elsmore's interim order is now revoked.

[24] The school, Scot's College, has not sought any non-publication orders.

Costs

[25] We consider that a 50% contribution to reasonably incurred CAC costs is appropriate. Those costs are as follows:

Complaints Assessment Committee Costs	Amount
Costs of Complaints Assessment Committee (GST exclusive)	\$1,618.94
Legal costs and disbursements for Tribunal proceedings (GST exclusive)	\$11,718.52
TOTAL COSTS	\$13,337.46
TOTAL COSTS SOUGHT (50%)	\$6,668.73

[26] We consider those costs reasonable for this matter, noting that it had

some novel aspects in terms of the legislation to apply. The age of the allegations also takes it out of the run of more simple cases. We therefore order costs to the CAC of \$6668.73.

Tribunal costs

[27] Tribunal costs will be at least \$2500. 50% is ordered, being \$1250.



T J Mackenzie
Deputy Chair
New Zealand Teacher's Disciplinary Tribunal /
Te Upoko Tuarua o Te Rōpū Whakaraupapa o Aotearoa