BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023/10

UNDER | WĀHANGA	the Education and Training Act 2020 (**the Act**)
IN THE MATTER | MŌ TE TAKE	of a referral of conviction by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN | I WAENGA I A	**COMPLAINTS ASSESSMENT COMMITTEE (CAC)** Kaiwhiu | Referrer
AND | ME	**VIVIENNE ANNE PREBBLE** (Registration 234698) Kaiurupare | Respondent

Hearing | Te Rongonga	AVL, 8 September 2023 – on the papers
Representation | Hei Māngai	R W Belcher and N B Murden for the CAC D B Church for the Respondent

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DECISION OF TRIBUNAL

6 October 2023

Tribunal	James Gurnick (Deputy Chair) Lyn Evans Nikki Parsons

Introduction

[1] The Complaints Assessment Committee (**CAC**) referred this matter to the Tribunal on 6 March 2023 in relation to convictions the respondent, Ms Vivienne Prebble (**Ms Prebble**), received in Australia for driving with excess blood alcohol and crossing double lines when not permitted. The offending occurred in Alice Springs in the Northern Territory and Ms Prebble was convicted on 26 March 2018.[1]

[2] The parties have agreed a summary of facts. In short:

(a) Ms Prebble was driving her vehicle and was stopped by Police and breath tested. Her blood alcohol level was found to be 0.168 per cent. This is over three times the legal limit in the Northern Territory (0.05 per cent BAC); equivalent to 168 milligrams of alcohol per 100 millilitres of blood (the limit being 80 milligrams per 100 millilitres in New Zealand).

(b) Ms Prebble was charged with driving with high-range blood alcohol content and crossing double lines where not permitted.

(c) Ms Prebble pleaded guilty to both charges and was convicted. She was fined $400, disqualified from driving for 18 months, and ordered to have an alcohol ignition lock for 12 months following the disqualification period.

The Tribunal's Disciplinary Function

[3] Under s 497(4) of the Education and Training Act 2020 (**the Act**), the CAC may, at any time, refer a matter to the Tribunal for hearing. Section 479(1)(m) of the Act requires the Teaching Council (**the Council**) to perform the disciplinary functions set out in the Act relating to teacher misconduct and reports of teachers' convictions.

[4] On referral of a conviction, the Tribunal is not required to make a finding of serious misconduct. Nevertheless, the Tribunal has had regard to the threshold for serious misconduct as a "useful yardstick" when considering other convictions for driving with excess breath alcohol, and to scrutinise whether the offending engages one or more of the three professional consequences described in the definition of serious misconduct in the Act.

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1 Education and Training Act 2020, s 497(4).

[5] Section 493 of the Act provides that all convictions punishable by three months' imprisonment or more must be reported to the Council. Ms Prebble's convictions meet this threshold, being punishable by up to 12 months' imprisonment.[2]

[6] In cases of conviction referrals, the Tribunal must determine whether to make an "adverse finding" against a teacher. The Tribunal may make an adverse finding where the behaviour that resulted in the conviction "reflects adversely on the respondent's fitness to be a teacher".[3] Section 10(1)(a) of the Act defines "serious misconduct" as conduct by a teacher that either:

(a) adversely affects, or is likely to affect, the well-being or learning of one or more children; or

(b) reflects adversely on the teacher's fitness to be a teacher; or

(c) may bring the teaching profession into disrepute.

[7] For serious misconduct to be made out, as well as meeting one or more of the three limbs set out above, the conduct must at the same time meet one or more of the Council's criteria for reporting serious misconduct. These rules make the following behaviour mandatory to report.

[8] Rule 9 of Teaching Council Rules 2016 (**the Rules**) refers to a "serious breach of the Code of Professional Responsibility".

CAC submissions on liability

[9] The CAC submits that the conviction for driving with a blood alcohol reading alone warrants an adverse finding. The conviction for crossing the centre lines is an aggravating feature which the CAC submits supports such a finding.

[10] The CAC submits that the following aggravating factors are relevant to the assessment of the conduct (and appropriate penalty) as guided by the decision of *CAC v Fuli-Makaua*:[4]

(a) The level of alcohol involved: the level of alcohol involved was high. Ms Prebble's blood alcohol content was three times the Northern Territory's legal limit, and over double the New Zealand legal limit.

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2 Traffic Act 1987 (NT), s 21.
3 *CAC v S* District Court Auckland CIV-2008-004-001547, 4 December 2008 at [47].
4 *CAC v Fuli-Makaua* NZTDT 2017/40 at [39].

(b) The nature of the driving/associated offending: alongside the drink-driving conviction, Ms Prebble was also convicted of crossing double lines, increasing the risk of collision with road users travelling in the opposite direction. The unsafe driving is an aggravating feature of the conduct.

(c) Previous convictions: Ms Prebble has a number of relevant previous convictions:

(i) On 29 October 2010 in the Tauranga District Court, Ms Prebble was convicted of driving with excess breath alcohol. The breath alcohol reading was 679 micrograms of alcohol per litre of breath, significantly higher than the legal limit at the time of 400 micrograms per litre of breath. Ms Prebble was fined $600 and disqualified from driving for six months. When this conviction came before the CAC, it resolved to take no further action. A letter was sent to Ms Prebble on 30 June 2011 advising her of the outcome and encouraging her "to exercise greater care in the future as any further offence will be likely to be viewed as a serious matter". The CAC submits that this is an aggravating factor as Ms Prebble was put on notice as to the possible consequences of a further offence, and this did not prevent her from re-offending.

(ii) Ms Prebble has also previously been charged with medium-range blood alcohol content in Australia. Her blood alcohol level was 0.133 per cent BAC, which was well over the legal limit in the Northern Territory (0.05 per cent BAC) and is the equivalent of 133 micrograms per 100 millilitres of blood in New Zealand. Ms Prebble appeared on 1 October 2013 in the Alice Springs Court of Summary Jurisdiction and although she did not receive a conviction, Ms Prebble was fined $200 and disqualified from driving for six months.

(iii) On 9 August 1983, Ms Prebble was convicted of careless driving in the Christchurch District Court, fined $140 and disqualified from driving for two months.

(iv) Failure to report convictions: Ms Prebble did not report the convictions, despite being informed by the Council in 2011 that she should have self-reported her 2010 conviction for driving with excess breath alcohol. Rather, the Council was alerted to the convictions when the Council's registration team received a notification from the Australian Federal Court.

[11] The CAC was not aware of any mitigating features relating to Ms Prebble's conduct.

[12] The CAC further submits that Ms Prebble's conduct, having regard to the above aggravating factors, reflects adversely on her fitness to teach and brings the teaching profession into disrepute pursuant to s 10(a)(ii) and (iii) of the Act. It says teachers are expected to be positive role models to students in and beyond the learning environment and members of the public should expect teachers to demonstrate basic values widely accepted in society, such as adherence to the law, and Ms Prebble has failed to do this.

[13] For the same reasons, the CAC submits that Ms Prebble's conduct is also a serious breach of the Code of Professional Responsibility and satisfies the examples outlined in r 9(1)(j) and (k) of the Rules, which discuss serious breaches as being an act or omission that may be the subject of prosecution for an offence punishable by imprisonment for a term of three months or more,[5] and an act or omission that brings, or is likely to bring, the teaching profession into disrepute.[6]

[14] The CAC submits that Ms Prebble's failure to comply with the mandatory self-reporting requirements, in addition to the offending, falls short of this expectation. The CAC submits that the Tribunal should make an adverse finding.

The respondent's submissions

[15] Ms Prebble does not deny liability in respect of the facts and acknowledges that it is open to the Tribunal to make an adverse finding against her.

[16] Mr Church, on behalf of Ms Prebble, acknowledges that under s 493(1) of the Act, a holder of a practising certificate must report a conviction where the offence is punishable by a term of imprisonment of three months or more. This mirrors the equivalent provision of what was the Education Act 1989 in force at the time of Ms Prebble's convictions in the Northern Territory in 2018.[7]

[17] Mr Church submits that it is not immediately apparent from the wording of the legislation or from publicly available information and resources that this obligation still applies where the relevant offence has been committed on foreign soil and/or the conviction entered by a court of overseas jurisdiction. Mr Church submits that this is an important point to note because there is no evidence that Ms Prebble wilfully misled or deceived the Council by failing

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5 Rule 9(1)(j).
6 Rule 9(1)(k).
7 Education Act 1989 (repealed), s 397(1).

to disclose a conviction obtained in Australia where, at the time of her drink-driving conviction in the Northern Territory in March 2018, she had been living and working as a teacher in Australia for eight years. Ms Prebble did not have any plans to relocate back to New Zealand or teach in New Zealand again. Ms Prebble claims that she had no intention to mislead or deceive the Council. It simply never crossed her mind that she needed to disclose her conviction obtained in Australia to the New Zealand statutory body.

[18] Mr Church submits that the Tribunal should not make an adverse finding primarily on the basis that Ms Prebble was unaware of her obligation to report a conviction obtained overseas to the Council, especially when she had no plans to work in New Zealand again; the offence was committed in another jurisdiction over five years ago; and there is no evidence that it has impacted on her teaching or any of her students.

[19] Despite disclosing her 2018 convictions to the relevant regulatory bodies in the Northern Territory and Queensland, Ms Prebble had no issues with her registration in either of those jurisdictions. Mr Church submits that this indicates that the Australian authorities did not consider this to be a matter which reflected on her fitness to be a teacher.

[20] Mr Church contends that the CAC's submission that Ms Prebble conduct brings the teaching profession into disrepute is an over-exaggeration. He submits that the test for whether the profession has been "brought into disrepute" is whether "reasonable members of the public, informed and with the knowledge of all the factual circumstances (**emphasis added**), could reasonably conclude that the reputation and good standing of the … profession was lowered".

[21] Mr Church submits that where, in this case, Ms Prebble is not even living in New Zealand, members of the public in New Zealand are unlikely to be aware of her convictions which occurred overseas, and even if they were, this would likely be met with a degree of apathy when she is not working as a teacher in New Zealand. It is submitted therefore that such conduct is unlikely to bring the teaching profession into disrepute. He further submits that because Ms Prebble has been teaching without issue since 2018, there should not be any real concern about her fitness to teach and that reasonable members of the public could not, and would not, reasonably conclude that the good standing of the profession has been lowered if fully informed of the facts of this case.

[22] Mr Church submits that the Tribunal retains a residual discretion not to make an adverse finding and take no further action, notwithstanding the convictions. He invites the Tribunal to adopt that approach.

Discussion

[23] As the Tribunal noted in *CAC v Fuli-Makaua*, the purposes of penalties in the disciplinary jurisdiction are to protect the public through the provision of a safe learning environment, to maintain professional standards, and to maintain public confidence in the profession.[8] The teacher's prospects of rehabilitation are also important in identifying the appropriate penalty.[9] Decisions must be fair, reasonable and proportionate in the circumstances, and should seek to ensure similar cases receive similar outcomes.

[24] The Tribunal held in *CAC v Korau* that even one conviction for a drink-driving offence "places a teacher's registration in jeopardy" and a series of convictions will certainly do so.[10] Practitioners have an obligation to both teach and model positive values for their students, and driving while intoxicated does not mirror that expectation.[11]

[25] The Tribunal noted in *CAC v Fuli-Makaua* that cancellation is required in two overlapping situations:[12]

(a) the offending is sufficiently serious that no outcome short of deregistration sufficiently reflects the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession; and

(b) the teacher has not taken adequate rehabilitative steps to address his or her issues with alcohol – this may indicate a level of apparent ongoing risk that leaves no option but to deregister.

[26] We have considered a number of cases including *CAC v Kereopa*,[13] *CAC v Snellaert*,[14] *CAC v Teacher B*,[15] and *CAC v Korau*,[16] which involve conviction referrals for driving with excess breath alcohol. Without going into the facts of each case, they are on par with the present case and in all cases an adverse finding was made. In all cases, the teacher was censured with most teachers having conditions imposed and their record annotated.

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8 *CAC v Fuli-Makaua*, above n 4.
9 At [52].
10 *CAC v Korau* NZTDT 2017/17 at [23].
11 *CAC v White* NZTDT 2017/29 at [22].
12 *CAC v Fuli-Makaua*, above n 4, at [54].
13 *CAC v Kereopa* NZTDT 2020/13.
14 *CAC v Snellaert* NZTDT 2019/70.
15 CAC v *Teacher B* NZTDT 2017/35.
16 *CAC v Korau*, above n 10.

Penalty

[27] The CAC does not seek cancellation of Ms Prebble's teaching registration. It acknowledges the offending occurred over five years ago and Ms Prebble has not committed any further offences since then. Ms Prebble's two earlier instances of drink-driving occurred 10 and 13 years ago respectively. It submits that Ms Prebble should be censured.

[28] As previously indicated, Mr Church, on behalf of Ms Prebble, submits that the Tribunal should not make an adverse finding and on that basis no penalty is required. If, however, the Tribunal decides to make an adverse finding, he submits that censure and annotation is the appropriate penalty.

Decision

[29] For the reasons set out above at [9] to [14], we accept the CAC's submissions that Ms Prebble's failure to comply with the mandatory self-reporting requirements, in addition to the offending, warrants the Tribunal making an adverse finding. We see no reason to distinguish this case from those referred to at [26] above.

[30] In our view, it is a significant aggravating factor that Ms Prebble failed to disclose her convictions when she was put on notice of her requirement to notify the Council when she was convicted for driving with excess breath alcohol in 2010.

[31] We reject the submission made on Ms Prebble's behalf that it was not immediately apparent from the wording of the legislation, or from publicly available information and resources, that the obligation to report the convictions to the Council applied where the relevant offence had been committed on foreign soil and/or the conviction entered by a court of overseas jurisdiction.

[32] The obligation to report convictions (at the time Ms Prebble failed to do so) was set out in s 397 of the Education Act 1989. The identical provision is found in s 493 of the Act.

[33] The purpose of the mandatory reporting of convictions is to ensure that a person who is the holder of a practising certificate or an authorised person is safe to teach. Section 397 falls under Part 32 of the Education Act 1989. The purpose of that part is to establish a Teaching Council, the purpose of which:[17]

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[17] Refer also Education and Training Act 2020, s 478.

> … is to ensure safe and high quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary and senior secondary schooling in English medium and Māori medium settings through raising the status of the profession.

[34] We accept that it is crucial that the Council become aware of anything which may impact on the safety of learners. The potential safety concerns of employing a teacher with convictions are obvious; these concerns remain the same whether the conviction is from New Zealand or an overseas jurisdiction. We are of the view that the obligation to report a conviction for an offence punishable by imprisonment for three months or more refers to any conviction meeting the above criteria from any jurisdiction. To give it a different meaning would exclude a wide range of convictions from the Council's purview that, in our view, cannot have been Parliament's intention. We accept the CAC's submission that s 397 of the Education Act 1989 (and s 493 of the Act) requires a holder of a practising certificate to report any conviction (punishable by imprisonment for three months or more), irrespective of the jurisdiction in which that conviction was entered.

[35] It follows that when Ms Prebble failed to disclose her convictions for driving with high-range blood alcohol content and crossing double lines, she was in breach of s 397 of the Education Act 1989, even though the convictions were obtained in Northern Territory, Australia.

[36] For the above reasons, we have decided to censure Ms Prebble and an annotation is to be recorded on the public register for a period of two years.

[37] While we note Ms Prebble has no desire to return to New Zealand to teach, the Council is directed to impose a condition that Ms Prebble notify any future employer in New Zealand of the Tribunal's decision.

Costs

[38] Section 500(2) of the Act provides that no cost orders may be made where, as here, the hearing arises out of a report under s 493. Therefore, no costs are ordered.

Conclusion

[39] For completeness, we make the following orders:

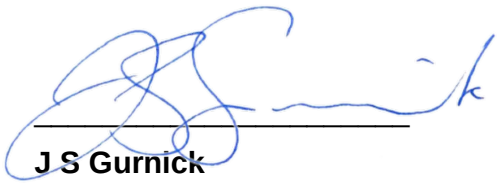
(a) Censuring Ms Prebble;

(b) There is to be an annotation recorded on the public register for a period of two years; and

(c) The Council is directed to impose a condition that Ms Prebble notify any future employer in New Zealand of the Tribunal's decision (noting Ms Prebble resides in Australia and on her own evidence has no immediate plans to return to New Zealand or to teach in New Zealand again).

[40] An interim non-publication order was made on 1 June 2023 which has lapsed. There was no application for permanent non-publication orders.

[41] No orders regarding non-publication are made.



J S Gurnick

Deputy Chair of the New Zealand Teacher's Disciplinary Tribunal