

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2022/42**

**KEI RARO I TE MANA O**

*Under*

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

**I TE TAKE O**

*In the Matter of*

charge referred by the Complaints  
Assessment Committee to the New  
Zealand Teachers Disciplinary  
Tribunal

**KO**

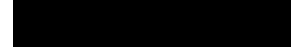
*Between*

**COMPLAINTS ASSESSMENT  
COMMITTEE**

*Kaiwhiu | Prosecutor/Referrer*

**ME**

*And*



*Kaiurupare | Respondent*

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**TRIBUNAL DECISION**

**19 April 2023**

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Rongonga: 9 March 2023 (by Microsoft Teams)

*Hearing*

**TE TARAIPUNARA:** Ian Murray (Tiamana Tuarua)

*The Tribunal* Rose McInerney raua ko Demian Shaver (Ngā mema o te Taraipunara)

**NGĀ ROIA ME NGĀ**

**KAIAWHINA:** Elena Mok/Holly Smaill, Meredith Connell for the CAC

*Representation* Dzintra King, NZ Post Primary Teachers' Association for the Respondent

## Whakataki– Introduction

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of misconduct. The particulars of the charge are that:

1. *On 2 June 2022, the CAC considered the mandatory report and found that, with respect to the teacher’s conduct, the teacher had engaged in unprofessional behaviour at the 2018 STEAM conference, specifically that he:*
  - a. *consumed excess alcohol at a school funded professional development conference;*
  - b. *was hungover to such an extent that he could not participate in the conference on the second day; and*
  - c. *engaged in intimate relations in front of a colleague` which caused distress to the colleague.*
2. *The CAC sought to resolve this matter by imposing a censure on the basis that the teacher’s conduct, as set out in paragraph 1 and its subparagraphs above, amounted to misconduct.*
3. *The CAC sought the agreement of the teacher and the initiator to impose a censure, as required by section 497(3) of the Act.*
4. *The initiator declined to sign the agreement to censure.*
5. *The CAC considers that the conduct of the teacher warrants a disciplinary response.*
6. *The conduct in paragraph 1 and its subparagraphs, separately or cumulatively, amounts to misconduct, entitling the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Act.*

## Whakarāpopoto o te whakataunga – Summary of decision

2. The Tribunal has considered the charge and concluded that it is not satisfied that the conduct amounts to misconduct. As a result, we make no finding against Mr [REDACTED] and impose no penalty.

## Kōrero whanui – Procedural background

3. There has been a significant background to this proceeding. The incident that is the subject of this disciplinary charge took place at a professional development course in May 2018. Following a complaint to the school from another teacher, an investigation was undertaken. The school concluded that Mr [REDACTED] conduct amounted to serious misconduct and imposed employment consequences including a written warning.
4. Later, following a Board of Trustees election where the composition of the school's Board of Trustees changed significantly, the matter was treated as a professional disciplinary matter and a report was made to the Teaching Council. In addition, a further employment investigation was undertaken.
5. The CAC considered the schools mandatory report and agreed with the teacher that the matter could be dealt with by way of a finding of misconduct and censure. However, the school did not agree with that outcome, and as a result the case could not be concluded during the CAC stage.
6. Subsequently, the matter was referred to the Tribunal as an allegation of misconduct rather than serious misconduct.
7. 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 below:

### ***“Background***

1. *Mr [REDACTED] is a registered teacher. He holds a practising certificate valid until 13 July 2025.*
2. *At all material times, Mr [REDACTED] worked as a teacher at [REDACTED] [REDACTED] a secondary school in Auckland (**School**). Mr [REDACTED] continues to work as a teacher at a different school as at the date of this summary of facts.*
3. *While working at the School, Mr [REDACTED] engaged in unprofessional behaviour at the 2018 STEAM conference.*

### ***Unprofessional behaviour at the 2018 STEAM conference***

4. *On 9 May 2018, Mr [REDACTED] was attending the 2018 STEAM professional development course on behalf of the School. That evening, him and a group of colleagues, including Ms [REDACTED], Ms [REDACTED] and Mr [REDACTED], went out for dinner and then continued drinking at nearby bars afterwards.*
  
5. *According to Ms [REDACTED], some of the colleagues stopped drinking as the night went on, however Ms [REDACTED] and Mr [REDACTED] did not and both appeared to be "extremely drunk". Ms [REDACTED] had stopped drinking alcohol after having one drink at dinner and was relatively sober.*
  
6. *Shortly after midnight, the group returned to the hotel. Ms [REDACTED] was sharing a room with Ms [REDACTED] and Mr [REDACTED] was sharing a room with Mr [REDACTED]. The four colleagues went to Ms [REDACTED] and Ms [REDACTED] room, where Mr [REDACTED] tried to open another bottle of wine but was stopped by his colleagues. After approximately 30 minutes, Mr [REDACTED], Ms [REDACTED] and Mr [REDACTED] left the room. Mr [REDACTED] went back to his room while Mr [REDACTED] and Ms [REDACTED] sat in the corridor talking.*
  
7. *At approximately 2:00am Ms [REDACTED] returned to her room. Shortly after, Mr [REDACTED] knocked on Ms [REDACTED] and Ms [REDACTED] door. Ms [REDACTED] invited him in and told him to get in her bed for a cuddle. Ms [REDACTED] reported hearing kissing and whispering, which made her extremely uncomfortable. She tried to block it out by putting her fingers in her ears and pillows over her head. Ms [REDACTED] said*

that she heard Ms [REDACTED] say that "they shouldn't be doing this", "no" and that "they definitely had to stop". At this point, Ms [REDACTED] advised them that she was still awake, and what they were doing was inappropriate. Ms [REDACTED] then locked herself in the bathroom until Mr [REDACTED] left, which she estimated to be about 30 minutes later. Ms [REDACTED] reported that she was crying for the time that she remained in the bathroom as a result of the situation.

8. The following day, Ms [REDACTED] stated that Ms [REDACTED] did not recall the events of the night before. She also noted that Mr [REDACTED] did not attend many of the sessions at the conference due to being hungover.

#### **School investigation**

9. In April 2019, following an investigation into Mr [REDACTED] conduct at the 2018 STEAM conference, the Board of Trustees of the School (**Board**) considered that Mr [REDACTED] conduct constituted serious misconduct and placed a written warning on his record for 12 months'. Mr [REDACTED] was also to write an apology letter to Ms [REDACTED]
10. In mid-2019, nearly all of the Board members were replaced following parent elections. The new Board members were unaware that a mandatory report regarding Mr [REDACTED] conduct had not been made to the Teaching Council by the previous Board members. Upon discovering this, the new Board members submitted a mandatory report to the Teaching Council on 20 August 2020. At the same time, the Board instructed Dr

*Bill Hodge from the University of Auckland Law School to conduct an independent investigation into Mr [REDACTED] conduct. Dr Hodge submitted his independent investigation report to the Teaching Council on 23 December 2020.*

### **Committee investigation**

11. *On 2 June 2022, the Committee met to discuss the mandatory report made by the Board of Trustees of the School. The Committee considered that Mr [REDACTED] conduct amounts to misconduct pursuant to s 497(3) of the Education and Training Act 2020 (Act) and determined that censure was the appropriate penalty.  
Section 497(3) of the Act requires the teacher's and the initiator's agreement before the Committee may impose penalty orders such as censure.*
12. *On 2 August 2022, the Board of the Trustees informed the Committee that it would not be signing the agreement to censure.*
13. *On 22 August 2022, the Committee met to consider next steps. The Committee determined to refer the matter to the Teachers Disciplinary Tribunal under s 497(4) of the Act.*

### **Mr [REDACTED] response**

14. *In his response to the School and the Committee, Mr [REDACTED] expressed regret and remorse for his conduct. He explained that he breached professional boundaries that night due to excess alcohol intake and that he has taken significant steps to*

*address his behaviour. He explained that he no longer consumes alcohol and has left his "toxic" marriage, which were both factors contributing to his behaviour at the time. Following the incident Mr [REDACTED] had sought help from a psychologist, started attending Alcoholics Anonymous and joined an online support group for men. He is an active member of a male support community- Essentially Men NZ. He also noted that he had apologised "whole heartedly" to Ms [REDACTED]*

15. *Mr [REDACTED] explained that he attended approximately three of the six sessions on second day of the conference because he was feeling ill as a result of being hungover. He noted, however, that some of the sessions he missed were not pertinent to his role."*

8. The tribunal 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 a sufficient basis to establish the particulars of the charge.
9. Accordingly, we find that the charge is established.

### **Hapa – Misconduct**

10. It is for the Tribunal to be satisfied that the established conduct amounts to misconduct or conduct otherwise entitling the Tribunal to exercise its powers.
11. The test for misconduct is not defined by the statute. However, the Court of Appeal have outlined the approach to determining misconduct:<sup>1</sup>

...if one of the matters in limb (a) of the definition [of serious misconduct] is made out, the question whether limb (b) is met determines whether the conduct is "serious misconduct" or "misconduct simpliciter".

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<sup>1</sup> *Evans v Complaints Assessment Committee of Aotearoa New Zealand* [2021] NZCA 66 at [6] citing *Teacher Y v Education Council of Aotearoa New Zealand* [2019] NZCA 637.

12. So, in deciding whether this respondent's conduct amounts to misconduct we need to look only at the criteria in section 378(a) of the Act. This section provides:

*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.*

#### *Ngā Kōrero a te Kōmiti – CAC Submissions*

13. The CAC set out the background to the proceedings and argued for why the conduct amounted to misconduct. The CAC referred to the test in *Evans* and *Teacher Y* as to what misconduct is. The CAC then focused on the statutory criteria in s 378 of the Act and argued that the respondent's behaviour was a serious breach of the Code of Professional Responsibility and in particular was contrary to clauses 1.2 and 1.3 regarding professional behaviour and integrity.
14. The focus of the CAC submissions was on the conduct affecting the respondent's fitness to be a teacher rather than the other two criteria of effect on wellbeing/learning of students or bringing the teaching profession into disrepute.
15. The CAC did not argue that any of the criteria for reporting serious misconduct were made out which was the reason why it was referred as misconduct rather than serious misconduct. However, it did argue that the respondent's fitness to be a teacher was adversely affected by his behaviour.

#### *Ngā kōrero a te Kaiurupare – Respondent's submissions*

16. The respondent acknowledged that his conduct amounted to misconduct rather than serious misconduct and noted that there had been no similar incidents since 2018, that he had informed subsequent employers of his behaviour and had taken steps to remedy the harm done.



## Whakataunga – Decision

17. Essentially, our conclusion in this case comes down to a decision about whether the misbehaviour in 2018 adversely impacts the respondent's fitness to be a teacher. While the two parties agreed at the CAC stage and before the Tribunal that the behaviour amounted to misconduct, nonetheless the Tribunal must come to an independent decision on this issue. We found this a difficult decision, but ultimately, we concluded by a fine margin that this did not amount to misconduct. That is in no way a criticism of the CAC or of the teacher for his concession of misconduct, because put simply we came to a different decision. Further it is also not meant to condone or endorse the respondent's conduct. Drinking to excess especially in a professional setting is unwise and unhealthy. Behaving in the way he did in front of a teaching colleague is unprofessional and distasteful.
18. However, not all errors or misbehaviour by a teacher amount to misconduct sufficient to engage the disciplinary process. Ultimately there were several factors which weighed in our finely balanced conclusion that this was not misconduct:
- (i) The behaviour occurred in 2018 and a large amount of water has flowed under the bridge since then;
  - (ii) While this occurred at a professional development course, the misconduct did not occur in a school setting and did not have any tendency to affect the learning of children;
  - (iii) While the behaviour must have been distressing to teacher B and we have great sympathy for the effect that it undoubtedly had on her, the school dealt with this within the school employment framework and then subsequently went back on that decision and referred it to the Teaching Council. While that is obviously the school's prerogative, we do note that the respondent had engaged with the employment process and had a legitimate expectation that the issue was dealt within that forum.
  - (iv) The respondent has taken several steps to make amends and to address the underlying causes of his behaviour. There has been no repeat of the behaviour and the respondent has continued to be a productive member of the teaching profession.

19. All of this brings us to the conclusion that we do not consider that the behaviour now sufficiently adversely affects the respondent's fitness to be a teacher to justify a disciplinary finding. So, we have concluded this is not a case of misconduct. As the Tribunal noted in other broadly comparable decisions<sup>2</sup> sometimes misbehaviour does not warrant a disciplinary response. This was an unusual case with several unusual features and does not set any form of precedent.
20. This was also the same conclusion we reached in a broadly similar case heard on the same day as this case.<sup>3</sup> In all of these cases it was concluded that misbehaviour does not always warrant a disciplinary response.
21. Before concluding we do wish to make a passing comment on the role of the school in this case. Obviously, the decisions to refer the matter to the CAC is entirely a matter for the school. There are criteria for doing that and if those are met then reporting is mandatory (although both the CAC and the tribunal did not consider that any of the mandatory reporting requirements were established in this case). It appears that one Board of Trustees did not consider the criteria were met and a differently constituted Board took the opposite view.
22. Turning to the CAC process, it is not clear to us why the school did not agree with the proposed outcome at the CAC stage. We have clearly reached the view that this was not a case of serious misconduct, so it did not need to be referred to us. Resolution at the CAC stage was in our view in everyone's best interest and this was the type of matter that we consider could properly be dealt with within in the CAC process. The school was clearly of the view it was too serious to be dealt with by agreement and needed to be considered by the tribunal. We obviously disagree as to the seriousness of the conduct and as a result, no disciplinary finding has been made against Mr [REDACTED]

### **Nga Utu - Costs**

23. The parties submitted to us that because the CAC and the respondent had reached an agreement at the CAC stage and if it had been dealt with at that stage there would have been no costs implications, accordingly this is not an appropriate case to order

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<sup>2</sup> *CAC v Teacher* NZTDT 2021 /54 and *CAC v Tattersall* NZTDT 2022/02

<sup>3</sup> *CAC v Teacher* NZTDT 2022/11

costs. We agree. So, costs order will be made.

**Ngā Whakahau whakaputanga-kore pūmau – Permanent non-publication order(s)**

24. Similarly, the parties acknowledge that if the matter had been resolved at the CAC stage as the parties had agreed, there would have been automatic name suppression. For those reasons, it is submitted that it is an appropriate case for name suppression. Again, we agree.
25. We will also suppress the names of the other teachers involved in this case, Teacher A and Teacher B. In order to make sure these suppression orders are effective we will also suppress the name of the school.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke at the end.

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Ian Murray  
Tiamana Tuarua Deputy Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).