

NON-PUBLICATION ORDERS

+BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-39

RARO TE MANA O TE
UNDER THE

the Education and Training Act 2020
(the Act)

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

[REDACTED]
[REDACTED]
(Authorisation [REDACTED])

Kaiurupare / Respondent

Nohoanga | Hearing
Tribunal

2 February 2024, on the papers (Teams)
Catherine Garvey (Deputy Chair), Lynette Evans,
Rose McInerney (members).

DECISION|WHAKATAUNGA

LIABILITY, PENALTY AND NON-PUBLICATION ORDERS

Introduction|Whakatakinga

[1] [REDACTED] (the respondent) gained registration with the Teaching Council in February 2020, and is employed at [REDACTED]. This matter relates to driving convictions entered on 12 October 2021, which the respondent did not report to the Teaching Council. By agreement, the matter proceeded as a hearing on the papers.

[2] On 23 November 2021 the respondent applied to renew her practising certificate, triggering the standard Police vetting procedure. Notice of the convictions was given to the Teaching Council on 9 February 2022, and a referral made to the Triage Committee. After gathering further information from the District Court and the respondent, the matter was referred to a Complaints Assessment Committee (CAC). On 11 May 2023 the CAC determined to lay a disciplinary charge.

The Charge

[3] The CAC may make a referral of convictions under s 497(4) of the Education and Training Act 2020 (the Act). The particulars of the charge outline the convictions as follows:

1. Failing to stop when followed by red/blue flashing lights on 08 August 2021 – sections 52A(a)(ii) and 114(2) of the Land Transport Act 1998; and
2. Driving a motor vehicle in a dangerous manner on 08 August 2021 – section 35(1)(b) of the Land Transport Act 1998; and
3. Driving with breath¹ alcohol level over 400 Mcgs/Litre of blood on 08 August 2021 – section 56(1) land Transport Act 1998; and
4. Failing/refusing ID particulars to police on 08 August 2021 – section 33 of the Policing Act 2008.

¹ The charge initially read “blood” in error. The CAC applied to amend the notice of referral on 7 December 2023, in reliance on rule 26 of the Teaching Council Rules 2016. The Tribunal received this application within the CAC’s bundle of documents on 26 January 2024. The amendment was made on the basis that there was no prejudice to the respondent and the amendment accurately reflected the conviction for excess breath alcohol under s 56(1) of the Land Transport Act 1998.

(together, the convictions).

Reasons for Referral

5. The teacher was, on 12 October 2021, convicted and sentenced in the District Court at [REDACTED] for the offences outlined above at paragraphs 2 and 3.
6. The teacher did not report the convictions referred to in paragraphs 1 through 3 to the Teaching Council of Aotearoa as required by section 493 of the Act.
7. The CAC considers that the convictions listed at paragraphs 1 through to 4 warrant action by the Disciplinary Tribunal of the Teaching Council of Aotearoa New Zealand under section 500 of the Act.

[4] Section 493 of the Act requires both the Registrar of the Court, and a person who holds a practising certificate to report a conviction that is punishable by imprisonment for a period of 3 months or more to the Teaching Council. The teacher is required to report such a conviction within 7 days: s 493(1). Pursuant to s 493(2), failure to report is misconduct that may give rise to disciplinary proceedings.

[5] With the exception of the failure to stop under s52A(1)(ii), the respondent's convictions carry a penalty of 3 or more months imprisonment.

The Summary of Facts| Te Whakarāpopototanga

[6] The Summary of Facts annexes a copy of the Police summary of facts. This outlines that the respondent drove in a dangerous manner and failed to stop despite Police activating lights and sirens and a pursuit, leading to a Tyre Deflation Device being deployed. Breath testing found the respondent to have a breath alcohol level of 990micrograms (mcg) per litre of breath. The legal limit is 250mcg for drivers aged 20 years and over, and an offence under s 56(1) of the Land Transport Act 1998 is triggered by a reading of 400mcg of alcohol per litre of breath.

[7] The respondent was fined and disqualified from driving, as well as receiving a period of 6 months supervision and an alcohol interlock device order.

[8] The respondent engaged with the Teaching Council's Triage Committee, but not with the CAC prior to the referral of the charge. The respondent's response to the Triage Committee on 1 June 2022 accepted full responsibility for her conduct and paragraph

13 of the Summary of Facts records that she said:

- a. she was highly intoxicated at the time of the offending and, because of that, she failed to stop for the police and continued to drive;
- b. because she was intoxicated, she failed to provide personal information and did not cooperate with the Police;
- c. that she does not condone the behaviour;
- d. that she is remorseful and utterly disgusted with her actions; and
- e. that afternoon's lack of judgement was her first and will be her last.

Discussion – Liability| Ngā Kōreroreo Mo Ngā Kawenga

[9] As is apparent from the notice of referral, a qualifying conviction may lead to a finding of bare misconduct. We received written submissions from counsel for the CAC outlining that we are not required to find serious misconduct on referral of a conviction, although we may be assisted by considering the limbs of s 10(1)(a) of the Act. Counsel submitted that because the conduct occurred outside the respondent's teaching role, the focus is on whether that conduct reflects adversely on the respondent's fitness to be a teacher.

[10] The CAC referred to *Complaints Assessment Committee v Crump*² for discussion of whether conduct reflects adversely on a teacher's fitness to practise. We are to assess "*whether the teacher's conduct departs from the standards expected of a teacher. Those standards might be pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers, or the community.*"

[11] The CAC referred to *Complaints Assessment Committee v Fuli-Makaua*³ as helpful to identify aggravating factors in a case involving a conviction for driving with excess alcohol. These factors are not all present in this case but we agree that they are a useful guide:

- (a) the nature of the driving and the risk posed to the public.
- (b) whether there were any passengers in the vehicle.

² NZTDT 2019/12

³ NZTDT 2017/40, 5 June 2018.

- (c) the timing of the conduct, as this gives rise to questions of judgment and the impact on a teacher's ability to carry out their professional duties.
- (d) any other associated offending.
- (e) whether any students were placed at risk of harm.
- (f) any prior convictions.
- (g) a harmful relationship with alcohol.
- (h) a failure to report under the mandatory reporting requirements of the Act.

[12] The CAC referred to the fact that three of the four convictions met the threshold for reporting to the Teaching Council. The respondent's breath alcohol was well over the legal limit. The CAC submitted that members of the public were placed at risk by the respondent's manner of driving, including crossing the centre line (and the Police summary of facts confirms that another vehicle on the opposite side of the road was required to take evasive action).

[13] As for mitigating factors, the CAC referred to the absence of prior convictions for a driving offence, and the absence of any subsequent incidents. As discussed in *Fuli-Makaua*, it will also be relevant to consider the accountability and remorse of the teacher, insight and any rehabilitative steps that have been taken.⁴

[14] Addressing further the matter of fitness, counsel submitted that there is an expectation that teachers:

...will be positive role models to students in and beyond the learning environment. Members of the public expect teachers to demonstrate basic values widely accepted in society, such as adherence to the law, and [the respondent], by way of her conduct in August 2021, failed to demonstrate such basic values.

[15] Notwithstanding that we are not required to find serious misconduct in order to exercise our powers under s 500 of the Act, the CAC submitted that the threshold for serious misconduct is met on the basis that the respondent's conduct is in breach of rr 9(1)(j) and (k) of the Teaching Council Rules 2016. Rule 9 sets out a non-exhaustive list of the criteria for reporting of report serious misconduct, in circumstances where an employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility (the Code). Rule 9(1)(j) refers to "*an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for*

⁴ Above n3 at [50].

a term of 3 months or more”.

[16] Rule 9(1)(k) is a more general requirement to report “*an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*”

[17] Clause 1.3 of the Code sets out the expectation that a teacher will maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity. Clause 1.5 expects teachers to contribute to a professional culture that supports and upholds the Code. In guidance provided by the Council, an example of behaviour that is in breach of clause 1.3 includes a failure to meet the legal obligation to report a qualifying conviction.⁵

[18] We consider that the established facts warrant an adverse finding and an order under s 500. The conduct for which the respondent was convicted was concerning because of the high breath alcohol level, the respondent’s poor and dangerous judgment in terms of driving while intoxicated and the decision to flee Police, the risk of harm to members of the public, and a failure to provide the Police with information the respondent was lawfully required to provide.

[19] The obligation to self-report certain convictions to the Teaching Council is an important one, made more so by the absence of a report from the Court Registrar. Although the evidence is that this is a one-off incident, we are satisfied that it is misconduct that reflects adversely on the respondent’s fitness to practise given the breach of statutory reporting requirements, and the Code. We note, as is well established, that we are not required to find that the respondent is in fact not fit to teach.

Discussion – Penalty | Te Hapa Tautuku me ngā utu

[20] Section 500 sets out the orders that may be made once the Tribunal is satisfied that a teacher is guilty of serious misconduct or otherwise of conduct entitling us to make orders.

[21] The principles of penalty are primarily to protect the public and maintain professional standards. We are required to impose the least restrictive penalty that is appropriate in the circumstances, and that is proportionate to similar cases (though penalty is determined on a case-by-case basis). The most severe penalties of

⁵ The Code of Professional Responsibility, Examples in Practice, June 2017, p7.

cancellation and suspension are to be reserved for the most serious cases.

[22] Counsel for the CAC referred us to four relevant cases involving convictions for driving offences. As recorded in *Fuli-Makaua*⁶:

The penalty imposed in cases involving drink driving convictions vary widely from censure right through to cancellation. In any given case the appropriate outcome is fact dependent and must take into account not only the conduct underlying the conviction, but also the practitioner's prospects of rehabilitation.

[23] In that case, the teacher's registration was cancelled because there was seen to be no other action that would adequately protect the public in light of repeat offending and what the Tribunal considered was a lack of genuine insight and rehabilitation.

[24] In the other cases referred to us, censure and conditions were imposed, reflecting the particular circumstances relevant to each respondent. We do not repeat the facts of those cases here but agree with the CAC that the present case is of similar severity, justifying censure and conditions.⁷

[25] The respondent is remorseful and apologetic for her conduct. There is no evidence before the Tribunal to indicate an ongoing issue with alcohol or a risk of reoffending. We understand that the respondent's employer is aware of this matter and note that the respondent was supported by two more senior colleagues at a pre-hearing conference held in November 2023.

[26] We will impose a censure, and a condition requiring the respondent to report these findings to her employer and a future employer for a period of 2 years. We also consider that it is appropriate that the respondent engages with a mentor to ensure that she receives advice and guidance in relation to her ethical and legal obligations.

Non-Publication| Te Whakaputanga

[27] In the interests of the public and open justice, the default position is that hearings are public. Section 501 of the Act allows the Tribunal to make orders prohibiting publication of the names and identifying details of a party to the proceeding, or any other

⁶ Above n3 at [52].

⁷ Refer *Complaints Assessment Committee v Korau NZTDT 2017/17*, 26 August 2017; *Complaints Assessment Committee v Snelleart NZTDT 2019-70*, 7 August 2020; *Complaints Assessment Committee v Young NZTDT 2019/121*, 19 August 2021.

person, or any part of the proceedings if it considers it is “proper” to do so. We are required to balance the public interest with the interests of any person (usually the person for whom the order is sought). What is “proper” does not require exceptional circumstances. Given that there is a presumption in favour of publication despite the fact that embarrassment or upset is likely to be an ordinary consequence of publicity, something more is required. We are also required to be satisfied that the adverse consequences relied upon in support of the application are likely to follow on the basis of the evidence before the Tribunal.

[28] Prior to the hearing an interim order prohibiting publication of [REDACTED] name, and her kura, was made. The respondent made an application for permanent non-publication of her name and identifying particulars. No application was made by or on behalf of the respondent’s employer, however counsel for the CAC confirmed in written submissions that the school was on notice of the ability to apply for an order. The CAC opposes the respondent’s application and advised that the Committee would abide the Tribunal’s decision in relation to the school.

[29] The primary ground for the respondent’s application is concern that negative publicity regarding this proceeding will damage her whānau and the mana of her four tamariki, aged 11 to 17 years. The application did not state whether her tamariki attend [REDACTED].

[30] The respondent also refers to concern that there will be a backlash from publicity and refers to prior experience that leads her to be concerned about damage to herself and her whānau (in particular her tamariki).

[31] On the face of it, the Tribunal considered there might be an appreciable risk of harm to the respondent’s tamariki if they are students also attending the kura where she works. While not usual to seek additional information beyond what a teacher chooses to produce, we did seek further detail as follows:

- (a) whether some or all of the respondent’s tamariki attend [REDACTED]
- (b) detail of the likely harm the respondent perceives to her tamariki and/or herself and/or her employer if her name is published in relation to this disciplinary proceeding.

[32] The Tribunal received further evidence from the respondent on 5 February 2024.

This detailed 7 reasons the respondent considered supported non-publication, indicating self-reflection and learning following the convictions and disciplinary proceedings. The respondent expressed a strong desire to bear the burden of her conduct, rather than her children or colleagues also bearing this through the risk of being “tarnished” by her actions. In response to the Tribunal’s request for clarification the respondent wrote:

████████████████████ is an integral part of the wider ██████████ community. I am honoured to be a valued member of the staffing team, and am thankful that my tamariki can walk alongside me in this journey. My 4 tamariki are enrolled at and thriving in the Kura. We are Kura Aho Matua, and are guided by Ngā Mātāpono o te ara; Te wānanga, Te Oranga, Te Ihi, Te Wehi, Te Mana, Te Ihowai.

The kaimahi and whānau of ██████████ have provided amazing wrap around services for my tamariki. This safety net has allowed for my tamariki to flourish and expand their thinking beyond the norm. Our ██████████ whānau are an integral part of our lives, and there is a possibility that those relationships would crumble if the stigma of my actions were to follow my tamariki as they stepped through life at ██████████.

[33] The respondent refers to the support of her syndicate at the kura, and of what she has achieved with them over the last three years. The respondent writes:

When one mentions ██████████ Pōtiki (our syndicate), people immediately see myself in that cohort. Publicly noting my mistakes could negatively impact the image of ██████████ Pōtiki, and thus my colleagues. This mistake was mine, and therefore the stigma should not be attached to others, especially not those who have guided me through the beginning stages of my teacher career.

[34] Many teachers facing an adverse disciplinary finding will be concerned about the potential impact on their colleagues, place of work and their families as well as concern for their own reputation. We do not consider that the respondent’s conduct in August 2021 reflects negatively on her colleagues. The support that the respondent describes receiving is very reassuring, particularly given she is early in her teaching career. Nor do we consider the respondent unusual in terms of her concern to protect her whānau and school community from negative comments, or a potential lowering of the regard they have for the respondent. It is arguable that there is a positive lesson about resilience

and recovery from mistakes; it would be naïve however to suggest that this will invariably be the response. The respondent clearly holds her concerns deeply, informed by her understanding of the school community.

[35] The respondent concludes that she has learned from her mistake, noting:

I have:

- Not re offended
- Sought counselling
- Reflected on my actions
- Developed a plan with my syndicate to keep myself safe
- Worked hard to better myself in terms of my practice and character
- Involved myself in various Kaupapa to give back to the communities that have supported me
- Improved my attitude and skills, to be a better person, māmā, kaiako and friend.

[36] Having weighed the interests of the respondent, her tamariki and school community against the public interest in knowing the respondent's name, we consider it is proper to make an order prohibiting publication. The fact that the respondent's tamariki attend her kura has been the determining factor in this decision. We also considered the respondents evidence of rehabilitation and progress, and that this will be supported by non-publication.

[37] It is then necessary to also make an order prohibiting publication of the name of [REDACTED] given the likelihood that [REDACTED] would otherwise be identifiable.

Costs

[38] The CAC sought a contribution towards costs, and some financial information was provided by the respondent. However, as this matter involves the referral of a conviction there is no issue as to costs, pursuant to s 500(2) of the Act.

Orders

[39] Accordingly the Tribunal makes the following orders:

- (a) [REDACTED] is censured pursuant to s 500(1)(b) of the Act.
- (b) Conditions are imposed on [REDACTED] practising certificate pursuant to s 500(1)(c) of the Act:
 - (i) Notice to be given of this decision to [REDACTED] current employer and any future employer for a period of two years.
 - (ii) Mentoring to be undertaken for a period of 12 months with a senior teacher, to include guidance in the Code of Professional Responsibilities.
- (c) The name of [REDACTED] and [REDACTED] are prohibited from publication in relation to this proceeding.

[40] There are no orders as to costs.



C Garvey

Deputy Chair of the New Zealand Teacher's
Disciplinary Tribunal

Appeal Notice – Right of Appeal under section 504 of the Education and Training Act 2020

1. This decision may be appealed by a teacher who is the subject of the decision by the Disciplinary Tribunal, or by the Complaints Assessment Committee.
2. Appeals must be made within 28 days after written notice of the decision or any longer period as the court allows.