

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/11

KEI RARO I TE MANA O the Education Act 1989, s
401(3) UNDER

I TE TAKE O a charge referred by the
Complaints IN THE MATTER OF Assessment Committee to
the New Zealand Teachers Disciplinary Tribunal

KO **COMPLAINTS ASSESSMENT**

BETWEEN **COMMITTEE**

Kaiwhiu | Prosecutor/Referrer

ME



AND

Kaiurupare | Respondent

TRIBUNAL DECISION

19 April 2023

NOHOANGA: 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: Evan McCaughan, Kayes Fletcher Walker for the CAC

Representation Janette Brown, NZEI 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 18 February 2021 the CAC considered the mandatory report and found that, with respect to the teacher's conduct, the teacher had:*
 - a. *Misled management of [REDACTED] on two occasions about his actions and intentions while on Classroom Release Time.*
 - b. *Attended a conference (ULearn) on behalf of [REDACTED] and acted inappropriately by drinking excessively.*
2. *The CAC sought to resolve this matter by issuing a censure, on the grounds that the teacher's conduct in paragraph 1 above amounted to misconduct.*
3. *The CAC sought the agreement of the teacher and the initiator, as required by section 401(2)(d) of the Education Act 1989.*
4. *The initiator declined to sign the agreement to censure.*
5. *The CAC considers that the conduct of [REDACTED] warrants a disciplinary response.*
6. *The conduct in paragraph 1 cumulatively amounts to misconduct, entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.*

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 something of a procedural history to this proceeding. The incidents that are the subject of this disciplinary proceedings took place in September and October 2018. The school made a mandatory report of the behaviour the following year and the CAC investigated the incident in 2021. The CAC and the respondent agreed that the incidents in question (which were only some of the incidents referred to the CAC on the mandatory report) amounted to misconduct and warranted a censure. The Principal at the school did not agree and accordingly the investigation could not be finalised during the CAC investigation phase. As a result the CAC made a referral to the Tribunal.
4. 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:

“Introduction

1. *Mr [REDACTED] was first registered and provisionally certificated on 22 February 2017. His provisional registration expired in February 2020.*
2. *In January 2017, Mr [REDACTED] was employed as a beginning teacher at [REDACTED].*
3. *Mr [REDACTED] resigned from [REDACTED] towards the end of 2018.*
4. *On 25 October 2019 the Principal of [REDACTED] filed a mandatory report with the Teaching Council regarding Mr [REDACTED].*

Allegation a): that Mr [REDACTED] misled management of [REDACTED] on two occasions about his actions and intentions while on Classroom Release Time

5. *On 18 September 2018, during his Classroom Release Time (CRT), Mr [REDACTED] visited [REDACTED], being a school he was interested in working at. Mr [REDACTED]*

had previously made an appointment to visit the school. Mr [REDACTED] was shown around the school by the Deputy Principal.

6. Mr [REDACTED] told his supervising teacher at [REDACTED] that he was going to the bank at the time he visited [REDACTED]. He subsequently told the Principal of [REDACTED] that he had 'dropped in' at [REDACTED]. He did not mention having made an appointment.
7. On 30 October 2018, the Deputy Principal of [REDACTED] gave Mr [REDACTED] permission to use a portion of his CRT to go to the bank. Mr [REDACTED] was told he needed to be back at the school by the end of the morning tea break.
8. Mr [REDACTED] did not return to the school that day. At 11am Mr [REDACTED] emailed the school to say he would not be returning that day. Mr [REDACTED] subsequently advised the CAC that he had spent extra time at the bank and at his lawyer's office so he could complete all the financial administration required without having to take further time out of school in the future.

Allegation b): that Mr [REDACTED] attended a conference (ULearn) on behalf of [REDACTED] and acted inappropriately by drinking excessively

9. Between 10-12 October 2018, Mr [REDACTED] attended the ULearn conference with his colleagues on behalf of [REDACTED]
10. During the conference, Mr [REDACTED] went out on the last night, returning to his room late, after drinking excessively. This resulted in Mr [REDACTED] being hungover at the conference the following day.

CAC meeting

11. On 18 February 2021, the CAC met to consider the mandatory report. Mr [REDACTED] attended the meeting remotely with his NZEI representative.
12. At that meeting, with regard to the 18 September 2018 incident, Mr [REDACTED] explained that he had called [REDACTED] and asked if he could have a look around the school. When asked by the CAC why he did not advise either the Principal or the Deputy Principal that he would visit [REDACTED] while on his way to/from the bank, Mr [REDACTED] explained that he had a lot going on.
13. The CAC considered the evidence and accepted that Mr [REDACTED] had permission to visit the bank while on CRT time, but not [REDACTED]. The CAC concluded that Mr [REDACTED] conduct amounted to misconduct.
14. With regard to the 30 October 2018 incident, Mr [REDACTED] explained that he

struggled with managing his CRT as he was always interrupted with having to deal with student behaviour issues. Mr █████ acknowledged his actions would have been 'massively inconvenient' for the school.

15. *As █████ was away from school for longer than approved, the CAC found this conduct amounted to misconduct.*
16. *With regard to the ULearn conference allegation, Mr █████ explained that he attended the conference to learn, had a great time and in fact learnt a lot.*
17. *The CAC considered the evidence and Mr █████ responses and concluded, on the balance of probabilities and in light of three witness statements, that Mr █████ acted inappropriately by drinking excessively while away at the conference. The CAC found this conduct amounted to misconduct.*
18. *The CAC also considered other allegations made by the Principal in the mandatory report. The CAC considered that these matters could either not be substantiated, or did not warrant a disciplinary response.*
19. *The CAC sought to resolve the matter by issuing Mr █████ a censure. An agreement to censure was sent to Mr █████ and the Principal of █████ for signing.*
20. *On 22 April 2022 Mr █████ signed the agreement to censure, the relevant portions of which stated:*
 1. *As a result of the mandatory report, the CAC found that I had:*
 - a) *Allegation 1: Misled management of █████ on two occasions about my actions and intentions while on Classroom Release Time (CRT).*
 - b) *Allegation 4: Attended a conference (ULearn) on behalf of █████ and acted inappropriately by drinking excessively.*
 2. *The CAC considered, and I acknowledge, that my conduct amounted to misconduct in that it may bring the teaching profession into disrepute. However, it does not meet the criteria for serious misconduct set out in rule 9 of the Teaching Council Rules 2016.*

Censure

3. *The CAC has determined, with my agreement and with the agreement of the initiator, to censure me for my conduct in*

paragraph 3 above.

4. *I understand that this Agreement can be referred to again should I find myself before the CAC.*

21. *The Principal refused to sign the agreement to censure.*

22. *In the absence of agreement from the initiator, the CAC had no option but to refer Mr [REDACTED] conduct to the Tribunal under s 401(3) of the Education Act 1989”*

5. 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.

6. Accordingly, we find that the charge is established.

Hapa – Misconduct

7. 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.

8. The test for misconduct is not defined by the statute. However, the Court of Appeal have outlined the approach for determining whether behaviour amounts to misconduct:¹

...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”.

9. 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. The criteria for misconduct are:

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

¹ *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.

(iii) may bring the teaching profession into disrepute;

10. The test for deciding whether a teacher's actions are likely to bring a profession into disrepute is set out by the Court in *Collie v Nursing Council of New Zealand*.² It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.

Ngā Kōrero a te Kōmiti – CAC Submissions

11. The CAC argued that the behaviour satisfied the first limb of the test for serious misconduct because it breached the Code of Professional Responsibility (the Code) and in particular the requirement that teachers behave in a way to promote a culture of trust, respect and confidence in them as a teacher and to maintain professional standards and integrity.
12. The CAC argued that the respondent misleading the Principal at the school in combination with the behaviour at the conference breached his obligations in the Code and the behaviour in combination reflected adversely on the respondent's fitness to be a teacher and had the potential to bring the teaching profession into disrepute. As such, it amounted to misconduct.
13. In reply submissions, the CAC responded to the respondent's reversal of his earlier acceptance that his behaviour was misconduct. The CAC argued that it was not appropriate for the respondent to back track on the earlier concession that his behaviour was misconduct at the CAC stage.
14. The CAC also responded to some of the particular arguments made by the respondent, submitting that the behaviour was not trivial and rather was unprofessional behaviour on three occasions. The CAC disputed that it was the agent for an angry employer and that that statement was self-evidently incorrect. The CAC noted that the respondent had agreed to the outcome at the CAC stage which undermined its argument that the CAC was now acting inappropriately. The CAC also refuted the argument that the CAC was wasting the Teaching Council Tribunal and NZEI's

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

resources. The CAC argued that it was required to put the complaint before the Tribunal in circumstances like this.

15. Overall, the CAC maintained this behaviour amounted to misconduct.

Ngā kōrero a te Kaiurupare – Respondent's submissions

16. Despite conceding at the CAC stage that his behaviour amounted misconduct, the respondent now argued that it was not. The respondent argued that this was trivial and that it did not warrant a disciplinary response. The respondent argued that his misleading of the principal came about as a result of the deteriorating relationship between the two of them and was not done for any form of gain for the respondent and as such, did not amount to misconduct.
17. The respondent argued that the drinking at the work conference was not supported by any evidence of actual misbehaviour and did not amount to misconduct either.
18. The respondent argued that the CAC in bringing this charge are acting as the agent for an angry employer and that the charge should not have been brought at all.
19. The essence of the respondent submissions was “While Mr ██████ conduct fell short of what is expected from teachers, the surrounding circumstances mean that it is not such a serious departure from expected standards to warrant a finding of misconduct. Teachers are human and they can fall short of expected standards without their shortcomings amounting to misconduct.”

Respondent's reflective statement

20. The respondent provided us with a reflective statement. We will repeat that in full.
 1. *While I completed a Bachelor of Exercise Science, I became a Maori Mentor for three years. While in this role I decided to become a teacher. Once I completed teacher's college I was employed at ████████████████████. In my second year I was offered and accepted a unit for sports and ICT. After ████████████████████, I have travelled overseas and have now settled in Queensland, Australia.*
 2. *Due to Covid, I was stuck in Queensland. During this time I became a teacher at a residential care facility and from there have moved on to an Educational Practitioner role where I support young people with their education in and out of school. This job has been a massive challenge but it is also enriching. I am required to monitor children's education. I have seen a massive amount of success which I am very*

proud of. I contribute this to my background in mentoring Maori and Pacific university students has been very helpful when dealing with Aboriginal clients. Also because of my time as a teacher, I have a good insight into how teachers operate. My two years managing a residential centre, I also have a good insight into how the youth workers operate and their systems. I was blown away when I was offered the opportunity to be an area manager of a residential centre but turned it down for the Educational Practitioner role. I am really excited about the future.

3. *There was an issue that affected my mental health (although I did not realise it at the time). In 2018 my family was in crisis. My dad (a very kind man but unfortunately lacking financial sense) had not paid his taxes, and he had taken out loans to pay loans. In 2018 my parent's bank was taking steps to sell their home. To preserve their home, I took steps to purchase their home. I was 27 at this point and felt embarrassed that my family was in this situation. Because of this, I did not fully explain the situation to my employer. I have learnt how to speak up when faced with overwhelming stress.*
4. *During COVID my dad could not work. This put further strain on the income of my parents.*
5. *This has had a devastating effect on both of my parent's mental health but in particular my mum's. She had a car accident - in 2015 a drunk driver hit their car sending them downhill with the car rolling several times. She was unable to walk until 2017. She is 65 years old and her physical and mental health is very fragile (she struggles to go for car rides making it hard for her to get out of the house). I originally told my mum about the proceeding but as it has taken 4 years to get to this stage I have told her it has been dealt with. I love my mum very much and she has had a lot to deal with due to this. I have chosen not to let her know about these current proceedings as it would break her heart.*
6. *I am now 32 and I understand:*
 - a. *The importance of being open with an employer about what is happening when there is a family crisis so that plans can be made around this. My school was struggling to find teachers to take over my classroom and my CRT days were limited due to the behaviours in the classroom. This is why I*

was trying to get the banking requirements completed on a CRT day. I'm sorry for the way I handled this.

- b. The importance of taking leave if things become too stressful. This results in people being more supportive of your situation and prevents burnout. Thinking back on this situation I should have taken leave. During this time I tried to juggle work, transferring my parent's house to my name and being supportive of them. It was too much. After being in this profession for 7 years I have learnt that it is a long-term game and that rest is important.*
 - c. The importance of maintaining positive relationships with my employer. Moria and I previously had a good relationship. The relationship became strained through time. This strain increased when I was leaving for my next school. She became very upset when I applied for a new job having her as a reference before notifying her. I should also have visited [REDACTED] [REDACTED] after school hours. I can understand why she became upset and I have learnt to be open with employers about my plans for the future.*
 - d. I should have moderated my drinking at the Ulearn conference party, and I now do not drink at work functions. There are two key reasons for this. The first is that I understand that my professional role extends to work functions. I am now a role model for younger staff members and I take this role very seriously. The second is that I am now focusing on my health, and with my metabolism slowing down I am very careful about what I drink and eat.*
 - e. As a leader, I understand that young people, through immaturity, often handle situations poorly, and often what they need is guidance and support when things become difficult for them.*
- 7. I would like the option to return to New Zealand to be a teacher, as I value the profession. I have taught at a private school in China and work with low socioeconomic children in Australia. I know my mum will need more support in the future, but this may not be imminent. I also carry considerable financial responsibility for my family and the wage I receive in Australia gives me more opportunity to support both my parents and myself. Over this time I have become very good at developing staff members' skills in building relationships, dealing with difficult behaviours and completing paperwork/reporting to a high level. One*

example was supporting one worker who was very good at behaviour management. He would use sports to engage the children. I challenged him (and offered support on how to do this) during supervision to do an art lesson. He then did this lesson. One of the children who attended this lesson found a passion for art and uses art as an outlet to stay busy. The worker talked with me about how the lesson was easier than he expected and how much he had learnt. I find my work enriching, and I am developing skills that can be used in teaching in the future.

Whakataunga – Decision

21. 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 or had a tendency to bring the teaching profession into disrepute. While the two parties agreed at the CAC stage that the behaviour amounted to misconduct, by the time the case got to the Tribunal, the respondent had reversed his acceptance of misconduct. However, irrespective of the parties position it is always for the Tribunal to come to an independent conclusion on this issue.
22. This was not a straightforward case and we gave careful and anxious consideration to whether or not to make a finding of misconduct. In the end, we concluded by a narrow margin that this did not amount to misconduct. This in no way a criticism of the CAC for the way they acted in bringing this charge before us simply because we came to a different decision. We do not accept the respondents strong criticisms of the CAC. The CAC was required to bring the charge after the employer refused to consent to the agreed outcome. We entirely reject all of the respondent's criticisms of the CAC and if anyone deserves criticism then it should be him for reneging on his position at the CAC stage. But it is not our role to criticise anyone and rather we need to carry out our statutory role.
23. Our decision is also not meant to condone or endorse the respondent's conduct. Drinking to excess especially in a professional setting is unwise and unhealthy. Misleading your employer is inappropriate and undermines the relationship of trust between an employer and employee.
24. In this case we concluded there were some powerful mitigating features. We will outline that factors which weighed in our finely balanced conclusion that this was not misconduct:

- (i) The behaviour occurred in 2018 and the respondent's circumstances have changed significantly since then;
- (ii) The respondent was a beginner teacher at the time and he may not have the same skills and judgment of a more experienced teacher;
- (iii) It seems clear that the relationship between the respondent and his principal had become difficult at the time of these incidents.
- (iv) It can be difficult to discuss your intention to look for another position with your current employer. The respondent undoubtedly managed the situation badly but that is mitigated by the difficulty in his relationship with the principal. It is salient that the dishonesty was not for gain and appears explicable by the respondent not being able to manage a challenging relationship.
- (v) While the drunkenness occurred at a work conference, the conduct did not occur in a school setting and did not have any tendency to affect the learning of children.;
- (vi) The respondent's reflective statement outlines the respondent's challenging personal circumstances at the time of these incidents. We will not set those out but we note that they would be difficult for anyone to manage.

25. While we do not condone dishonesty in the work place at all, we do note that misleading the principal did not engage the criminal law so is of a different quality to theft or misappropriation. This type of conduct is routinely dealt with in the employment context by employers without recourse to professional disciplinary bodies. While clearly inappropriate, we do not consider that it is sufficiently serious to adversely affect the respondent fitness to be a teacher. Nor do we think that reasonable members of the public informed of the all of the background circumstances, would reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.

26. Turning to the ULearn conference incident, while we do not wish to be seen to be endorsing this type of behaviour whatsoever, we note that drunkenness at a work function is again routinely dealt with in an employment context. It does not necessarily require the intervention of the disciplinary machinery of the profession. Here unlike cases like *Howe*, we had no evidence of any unacceptable drunken behaviour and we

can only go on the information before us. While this was clearly an error, we do not consider that it is sufficiently serious to adversely affect the respondent's fitness to be a teacher. Nor do we think that reasonable members of the public informed of the all of the background circumstances, would reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's actions.

27. We reach the same conclusion on the cumulative effect of both of the limbs of the charge. In the end, we do not consider that the behaviour in totality either adversely affects the respondent's fitness to be a teacher or had the tendency to bring the teaching profession into disrepute to justify a disciplinary finding. As a result, we decided this was not a case of misconduct. This case had a number of unusual features and does not set any form of precedent.
28. We were bolstered in this conclusion by the outcome of other disciplinary tribunal decisions³ where misconduct was not established. This was also the same conclusion we reached in a broadly similar case heard on the same day as this case.⁴ In all of these cases it was concluded that misbehaviour does not always warrant a disciplinary response.
29. Before we leave this topic, we want to make a passing comment on the role of the principal in this case. Obviously, the decisions to refer the matter to the CAC is entirely a matter for the principal. There are criteria for doing that and if those are met then reporting is mandatory. However, we must note that both the CAC and the Tribunal did not consider that any of the mandatory reporting requirements were established in this case.
30. It is not clear to us why the principal 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 case could properly be dealt with within the CAC process. The Tribunal processes should be reserved for cases of serious misconduct. The principal must have considered it was too serious to be dealt with by agreement and needed to be considered by the tribunal. We obviously disagree on the seriousness of the conduct and as a result, no disciplinary finding has been made

³ *CAC v Teacher* NZTDT 2021 /54 and *CAC v Teacher* NZTDT 2022/02

⁴ *CAC v Teacher* NZTDT 2022/42

against Mr [REDACTED]

Nga Utu - Costs

31. 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 costs. We agree. So, no costs order will be made.

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

32. 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.



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).