EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Richard Barber
NZ Disciplinary Tribunal Decision 2017/24

Repeat convictions for offending in a domestic setting has resulted in a teacher's registration being cancelled.

In 2016, Mr Richard Barber was convicted of a charge of wilful trespass after he went to a former partner's home despite having been served with a trespass notice warning him to stay off of her address. He pleaded guilty to the charge, but failed to notify the Education Council of his conviction.

This was not Mr Barber's first conviction. He had been referred to the CAC on two occasions previously: in 2010 for seven convictions relating to offending against his domestic partner, and in 2013 for three convictions relating to further offending against that partner.

The Education Council's Complaints Assessment Committee (CAC) investigated the conviction for wilful trespass, and decided that in light of his history, it should be referred to the New Zealand Teachers Disciplinary Tribunal (the Tribunal).

The context of all of Mr Barber's convictions was domestic offending. The CAC argued that the conviction for trespass, when considered cumulatively with the previous convictions for domestic offending, demonstrated a pattern of behaviour amounting to serious misconduct. An aggravating feature was that he did not report any of his convictions to the Council, as required under s 397 of the Education Act.

Taking into account that the Tribunal's role is not to punish a teacher a second time around, the Tribunal stated that their "mandate is to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession".

The Tribunal stated that the circumstances of the conviction, when considered together with the previous convictions, formed a pattern which is relevant in the disciplinary context and amounted to serious misconduct. The Tribunal also noted that the failure to report indicated "an indifference to the requirements and increases the gravity of the misconduct".

In determining penalty, the Tribunal found that Mr Barber lacked insight and had not taken steps to reduce the chance of repetition of his offending. Further, as a result of his two previous appearances before the CAC, he was aware of the potential consequences of further offending and a failure to report it. The Tribunal also found that Mr Barber continued to attribute the blame for his offending on his victims, an attitude the Tribunal considered was not amenable to a rehabilitative condition. The Tribunal found that his lack of insight gave rise to an appreciable risk of repetition of the behaviour, undermining his fitness to teach.

On that basis, the Tribunal censured Mr Barber and cancelled his registration.

NZTDT 2017/24

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	the referral of a conviction by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**RICHARD WAYNE BARBER** Respondent

DECISION OF TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), David Hain and Simon Williams
Hearing:	On the papers
Decision:	22 December 2017
Counsel:	Laura Hann for the referrer The respondent in person

Introduction

[1] Richard Barber pleaded guilty on 5 July 2016 to a charge of wilful trespass, against sections 4(4) and 11(2)(a) of the Trespass Act 1980. The maximum penalty for the offence is three months' imprisonment or a fine not exceeding $1,000, and the respondent was convicted and discharged by the District Court Judge who sentenced him.

[2] Mr Barber did not comply with the mandatory obligation in s 397 of the Education Act 1989 to report his conviction to the Education Council. Rather, the conviction was brought to the Council's attention by the Ministry of Justice on 20 July 2016. Section 397(2) provides that, "Failure to report a conviction to the Education Council in accordance with subsection (1) is misconduct that may give rise to disciplinary proceedings".

[3] In its notice of charge dated 3 August 2017, the CAC referred Mr Barber's 2016 conviction to the Tribunal and invites us to consider it alongside the respondent's earlier convictions for behaving threateningly and six for breaching a protection order, in 2009; and again, twice, in 2010; and breach of supervision conditions imposed by the sentencing Judge in 2010. The victim of the 2009 and 2010 offences was Mr Barber's ex-wife, whereas the 2016 offence was committed against a subsequent, now former, domestic partner (who we will call "the 2016 victim"). Therefore, the CAC's charge as framed provides that:

> The conviction for wilful trespass, considered either separately or cumulatively with the [2009 and 2010 convictions], and the conduct that resulted in the convictions, demonstrate a pattern of conduct that amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and rules 9(1)(n) and/or 9(1)(o) of the Education Council Rules 2016 and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

The evidence produced before the Tribunal

[4] The respondent signed an agreed statement of facts. Also, we were provided with a bundle of agreed documents, which receive mention in the agreed summary. The summary provides:

*The respondent, Richard Barber (**Mr Barber**), has been a fully registered teacher since 1994. Mr Barber holds a current practising certificate which has a 'subject to confirmation' status. 'Subject to confirmation' is a status*

assigned to experienced teachers who have not met the requirements for full registration.

*Mr Barber has previously come before the Complaints Assessment Committee ("**CAC**") on two occasions ("**First occasion**" and "**Second occasion**") for separate convictions relating to his estranged wife and their two children.*

First occasion

On 21 May 2010, Mr Barber's following seven previous convictions were considered by the CAC:

Conviction:	**Date offending occurred**	**Date convicted**	**Summary of facts**	**Penalty imposed**
2 x Contravenes protection order	5 March 2009 and 4 April 2009	23 June 2009	Summary of Facts and certificate of conviction **annexed** and marked "A"	Convicted; and Discharged (on both charges)
1 x Behave threateningly	13 April 2009	30 April 2009	Summary of Facts, certificate of conviction and sentencing notes **annexed** and marked "B"	Convicted: Sentenced to 9 months' supervision; and Special conditions to undertake any assessment and counselling/treatment /programme as directed by and to the satisfaction of the Probation Officer
1 x Contravenes protection order	13 April 2009	30 April 2009	Summary of Facts and certificate of conviction **annexed** and marked "B"	Convicted; Sentenced to 9 months' supervision (concurrent with the charge of behaving threateningly (above)); and Special conditions to undertake any assessment and counselling/treatmen t/programme as directed by and to the

				satisfaction of the Probation Officer
3 x Contravenes protection order	Between 4 Oct 2009 and 3 Dec 2009	9 Dec 2009	Summaries of Facts and certificates of convictions **annexed** and marked "C" and "D"	FOR EACH CHARGE: Convicted; Sentenced to 9 months' supervision; Special conditions; and A final warning

Mr Barber did not self-report any of the above convictions to the Education Council ("the Council") within the required 7 days of receiving the convictions pursuant to s 397 of the Education Act 1989 ("the Act").

*The Council became aware of the above convictions through a Police Vet Check when Mr Barber applied for his teacher registration and practising certificate on 6 November 2009. Mr Barber had disclosed the existence of some of these convictions in his application form (**annexed** and marked "E").*

*The CAC decided to take no further action on the referral of convictions. The CAC noted in their decision letter (**annexed** and marked "F") that, "Having said this, the CAC reminds your client that any further criminal convictions may warrant consideration of referring the same to the Disciplinary Tribunal of the New Zealand Teachers Council."*

Second occasion

On 5 December 2013, Mr Barber's further three convictions were considered by the CAC:

Conviction	**Date offending occurred**	**Date convicted**	**Summary of Facts**	**Penalty imposed**
2 x Contravenes protection order	Between 10 March 2010 and 29 March 2010	3 Nov 2010	Summary of Facts and certificates of convictions **annexed** and marked "G"	FOR EACH CHARGE: Convicted; and Sentenced to 200 hours community work

1 x Breach of conditions of supervision	10 March 2010	3 Nov 2010	No Summary of Facts available. Certificate of conviction **annexed** and marked "H"	Convicted; and Sentenced to 200 hours community work

Mr Barber also did not self-report any of the three above convictions to the Council within the required 7 days of receiving the convictions pursuant to s 397 of the Act.

The Council became aware of the above convictions through a Police Vet Check when Mr Barber applied for his teacher registration and practising certificate on 11 September 2013.

*The CAC took no further action on this occasion also, but stated to Mr Barber in a letter dated 24 December 2013 (**annexed** and marked "I") that:*

> *The CAC have been concerned to see you back before a CAC when, on 28 May 2010, a CAC had previously considered similar convictions and warned that further convictions may be referred to the New Zealand Teachers Disciplinary Tribunal. It did concern the CAC that when you received the letter in May 2010, you had already offended in March.*
>
> *It was clear to the CAC that you had reflected on the events that led to your convictions. The breach of protection order was described by you as due to your love of your children, grief at the loss of your relationship with them and anger over the actions of your ex-wife.*
>
> *The CAC is confident that you understand the importance of there being no further convictions. You cannot afford another breach of protection order. Such a conviction would be completely incompatible with ethical obligations.*

The Police record containing the above convictions is annexed and marked "J".

<u>Latest conviction</u>

On 5 July 2016, Mr Barber pleaded guilty and was convicted in the Porirua District Court of wilful trespass.

*The summary of facts and the certificate of conviction is **annexed** and marked "K". In short, Mr Barber was in a relationship with the 2016 victim until August 2015.*

Following their separation, the 2016 victim authorised her son to trespass Mr Barber from her home address in Paraparaumu ("the address").

On 11 February 2016, the 2016 victim's son served the trespass order on Mr Barber, warning him to stay off the address. The trespass order is ***annexed*** *and marked "L".*

At or around 7.58pm on 12 February 2016, Mr Barber was at the 2016 victim's address.

The 2016 victim's formal written statement to Police outlining the events, and her statement to the Court Victim Advisor, are annexed and marked "M".

In explanation for the offending, Mr Barber said, "The trespass notice was void as he doesn't believe the person who served it had authorisation from the occupier."

Mr Barber was convicted and discharged.

Mr Barber did not self-report this conviction to the Council. In explanation, Mr Barber states:

> *I do understand I should have self-reported my conviction immediately, am very sorry I didn't, I had so much going on including moving house, separation finance issues. My relieving teaching role was finished by end of term 1 2016 and I needed a break and time to fully recover from a motorcycle accident, where I was on crutches at work for the last week at the post.*

On 20 July 2016, Mr Barber's conviction was referred to the Council by the Ministry of Justice. The notice of conviction is ***annexed*** *and marked "N".*

Mr Barber was not teaching at the time he received any of the convictions.

Mr Barber also asks the Tribunal to note that no fine or costs were imposed.

Mr Barber accepted to the CAC that the conduct occurred, and has co-operated with the CAC's investigation.

Mr Barber agrees the above facts are true and correct.

The relevant law

[5] This case involves the referral to the Tribunal of the fact the respondent has been convicted of a criminal offence. The test that therefore applies is whether the circumstances of the behaviour that resulted in the conviction

reflect adversely on the fitness of the respondent to practice as a teacher.[1] It is only by reaching an adverse conclusion that we are empowered to exercise one or more of the powers contained in the Education Act.

[6] The District Court in *CAC v S* held that the Tribunal is not required to find the respondent guilty of serious misconduct before it can exercise the disciplinary powers available in the Education Act.[2] That being said, regardless of whether a matter reaches the Tribunal for adjudication by way of notice of referral, or by notice of charge of serious misconduct, our function is to decide if the behaviour of the teacher concerned reflects adversely on his or her fitness to teach. This explains why it is helpful to scrutinise the offending against the serious misconduct yardstick.

[7] Section 378 of the Education Act defines "serious misconduct" as behaviour by a teacher that has one or more of three specified outcomes.[3] The test under s 378 is conjunctive. As such, as well as having one or more of the adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Education Council's criteria for reporting serious misconduct, which, for the purposes of this proceeding, are those found in the Education Council Rules 2016 (the Rules). Those identified by the CAC are r 9(1)(n), which applies to "any act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more", and r 9(1)(o), which encompasses "any act or omission that brings, or is likely to bring, discredit to the profession".

[8] Where a practitioner has been convicted of a criminal offence, it is not the purpose of a professional disciplinary proceeding to punish the teacher a second time for the same offence. Rather, as we recently reiterated in *CAC v McMillan*,[4] the Tribunal's mandate is to protect the public through the

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[1] *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Judge Sharp, at [47].
[2] At [48]. We also said in *CAC v Campbell* NZTDT2016/35, at [14], that a referral to the Tribunal does not need to be framed as a charge of serious misconduct.
[3] Behaviour that adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; or that reflects adversely on the teacher's fitness to be a teacher; or that may bring the teaching profession into disrepute.
[4] *CAC v McMillan* NZTDT 2016/52, at [16] to [26], citing *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) and *Ziderman v General Dental Council* [1976] 1 WLR 330.

provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.

Should we make an adverse finding regarding the respondent's fitness to teach?

[9] Strictly speaking, we are not required to make a finding that the respondent's 2016 offence constitutes serious misconduct before we can make an adverse finding.[5] However, we agree with the CAC that the facts behind the conviction means that it reaches that threshold, and comfortably so when considered in conjunction with the offences committed in 2009 and 2010. Together, they form a pattern that is relevant in the disciplinary context. As Ms Hann puts it in her written submissions, "The respondent's numerous convictions [show] a disregard for court orders and the well-being of those the orders were made to protect". The 2016 conviction, while it was for a less serious type of offence to those committed earlier in time, indicates a persisting indifference on the respondent's part to the wishes of a former domestic partner.

[10] Also, the respondent's failure to report his convictions on three separate occasions, despite having been put on notice of his duty to do so, is indicative of an indifference to the requirement in s 397 of the Education Act, which increases the gravity of the misconduct.

[11] Using the applicable limbs of the definition of serious misconduct in the Education Act as a reference point, we accept that the respondent's conduct adversely reflects on his fitness to teach. It is trite, but practitioners have an obligation to both teach and model positive values for their students, which includes demonstrating an inherent respect for the law.[6] In terms of r 9(1)(o) of the Rules, we accept that reasonable members of the public, informed of the facts, could reasonably conclude that the reputation and good-standing of the profession is lowered by the respondent's conduct.[7] We observe that

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[5] We have approached our task on the basis that the burden rests on the CAC to prove, on the balance of probabilities, that an adverse finding is required. We have also kept in mind the consequences for the respondent that will result from an adverse conclusion regarding his fitness to teach.
[6] This obligation is contained in clause 3(c) of the Code of Ethics for Registered Teachers, which applied when the 2016 offence was committed.
[7] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

we have previously rejected the proposition that offending that did not occur in a teaching context cannot be said to bring the profession into disrepute. As we said in *CAC v Blackburn*,[8] which was a case bearing some similarities to the present, such a proposition is not sustainable; albeit, "We accept that the further divorced from teaching any actions are, the less impact they are likely to have on the reputation of the profession".

[12] Finally, we are satisfied that the behaviour is of a character and severity that meets the second limb of the test for serious misconduct. In particular, the fact the victim of the most recent offence is again a former domestic partner, obliges the Tribunal to reach an adverse conclusion.

Penalty

[13] The key issue in this case is what the disciplinary response on the part of the Tribunal should be.

[14] The CAC submits that nothing short of cancellation of the respondent's registration will meet the obligations owed to the public and the profession. On the other hand, Mr Barber emphasises the long duration of his teaching career and contends that he should be entitled to remain in the profession. While not currently employed, he describes "a gross shortage of teachers in my field", and said:

> [My] heart is with learning the young one's skills for the future, a future that needs people with capabilities in my specialised field.

[15] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[9] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[10]

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[8] *CAC v Blackburn* NZTDT 2015/45, 21 April 2016, at [35].
[9] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[10] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

[16] We have said previously that whether we must cancel a teacher's registration following conviction for a criminal offence almost always turns on the practitioner's degree of insight into the cause of the behaviour concerned, and his or her rehabilitative prospects.[11] Knowing what motivated the misconduct is a way in which to gauge the risk of repetition.[12]

[17] We must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances. With that principle of consistency in mind, we consider that cancellation is required in two overlapping situations. These are when:[13]

a. The offending is deemed 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 practitioner lacks insight into his or her behaviour, and has not taken adequate steps to reduce the chance of repetition.

[18] We accept that the respondent's latest conviction does not place him squarely in the first category. The fact the 2016 offence was not particularly serious,[14] and that it did not occur in a professional context, pull against cancellation. So too does the fact that there is a relatively lengthy gap between the respondent's most recent conviction and those entered in the past. However, we consider that the respondent is caught by the second category we have described, above. This is because:

a. The seriousness of the 2016 trespass is increased by the fact it, like the earlier offences, was committed against a former domestic partner. While the CAC was prepared to accept in December 2013 that the respondent had "reflected on the events that led to [his] convictions", the events that Mr Barber described as having triggered the offences committed in 2010, "grief at the loss of [his] relationship and anger over

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[11] *CAC v Lyndon* NZTDT 2016/61, at [18].
[12] Per *CAC v Teacher* NZTDT 2013/9, at 6.
[13] Applying what we said in *CAC v Campbell* NZTDT 2016/35, at [27], which addressed convictions for drink-driving. However, we consider that the principles are equally applicable in the context of other types of offences.
[14] As is indicated by the sentence imposed by the Judge.

the actions of [his] ex-wife", mirror the financial and relationship stressors said to have led to his offence against the 2016 victim. Notwithstanding the CAC's decision not to refer the 2009 and 2010 convictions to the Tribunal, Mr Barber did not heed the two clear warnings not to reoffend.

b. Most significantly, Mr Barber has no demonstrable insight into his behaviour and nor is he remorseful. Rather, he lays blame for his 2016 conviction at the feet of his victim and her son. Notwithstanding his guilty plea, Mr Barber disputes that he committed a criminal offence; claiming that he suspects the 2016 victim did not give her son permission to serve a trespass notice on him.[15] He describes the victim as dishonest, and contrasts her alleged lack of veracity with his own "fine character". Concerningly, the respondent also blames his ex-wife, the victim of the 2009 and 2010 offending, for his earlier convictions, which undermines the CAC's conclusion in its 2013 letter that he had reflected on his behaviour. The following statement in one of Mr Barber's emails to the Council captures the theme:

> To put it succinctly. Both my previous partners have not told the truth. I cared for them both deeply. Unfortunately, they changed and in the end were dishonest towards and about me, largely due to their change of direction in life; people change.

c. This lack of insight and unpreparedness to take responsibility distinguishes Mr Barber from the practitioner in *Blackburn*,[16] who avoided cancellation by a narrow margin because he acknowledged his conduct was unacceptable, resolved not to repeat it, and had taken positive rehabilitative and reintegrative steps after being released from prison. Mr Blackburn agreed to undertake anger management, and this was imposed as a condition on his practising certificate by the Tribunal. Based on Mr Barber's attitude towards his victims described

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[15] This explanation was provided in Mr Barber's email of 8 September 2017.
[16] Who had six convictions, including five for breaching a protection order, referred to the Tribunal. Mr Blackburn's offending was more serious than that of Mr Barber – he was sentenced to four months' imprisonment for the first four breaches and a further term of eight months after he reoffended following release from prison. Without condoning the offending, the Tribunal placed weight on the fact that the offending occurred in "what was obviously a very strained domestic context", which suggested there appeared to be negligible risk of repetition.

in his correspondence with the Council, we do not think he would be amenable to a rehabilitative condition.

d. We accept the fact the respondent has had a lengthy career is a relevant consideration. However, this factor tends to explain why it was that the CAC extended the respondent some latitude by not referring the 2009 and 2010 convictions to the Tribunal. It can no longer be dispositive, given that the respondent has provided us with no assurance that there will be no repetition.

e. The respondent's failure to report his convictions on three occasions bolsters the view that Mr Barber has an inherent disrespect for the law. This does not reflect well on the reputation of the profession. This tendency provides us with little assurance that Mr Barber appreciates his responsibility to model lawful behaviour for those he teaches.

[19] While we have anxiously considered the issue of penalty, we conclude that cancellation of Mr Barber's registration to teach is the least restrictive outcome that can reasonably be imposed given his lack of responsibility for his actions. Without such insight, we consider there to be an appreciable risk of repetition, which inevitably undermines the respondent's fitness to teach. Allowing Mr Barber to remain registered will harm the public's confidence in the profession.

Costs

[20] Under s 404(2) of the Education Act, the Tribunal is not empowered to order a teacher to contribute to the CAC's costs and those of the Tribunal following a hearing "that arises out of a report under section 397 of the conviction of a teacher". While we have addressed the charge under the rubric of serious misconduct, we agree with the CAC that we should approach costs on the basis that s 404(2) applies. As such, we do not intend to order costs.

Orders

[21] The Tribunal's formal orders under the Education Act are as follows:

a. Pursuant to s 404(1)(b), the respondent is censured;

b. The respondent's registration is cancelled under s 404(1)(g); and

c. The registered is annotated under s 404(1)(e).

Nicholas Chisnall
Deputy Chairperson

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).