

# TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

## Complaints Assessment Committee (CAC) v Toni Osborne

NZ Disciplinary Tribunal Decision 2018-33

*Teacher Toni Osborne came before the Disciplinary Tribunal as a result of consuming alcohol on school grounds.*

*The result: Ms Osborne was censured, and the register annotated with conditions imposed to provide the Teaching Council with updates on her rehabilitation and to disclose the decision to employers for two years. There are no non-publication orders for this case.*

On 6 December 2017, the Assistant Principal of Howick Intermediate School, where Ms Osborne was working, detected a strong smell of alcohol on Ms Osborne's breath. Ms Osborne initially denied that she had been drinking and said the smell was mouthwash. While looking to locate the mouthwash, the Principal saw a water bottle in Ms Osborne's laptop bag which was about one third full. Ms Osborne agreed the Principal could smell the contents but then walked past the Principal and poured the contents down the drain, turned the tap on and tried to fill the bottle.

The Principal smelt the remaining contents of the bottle and detected a distinct smell of alcohol. When asked, Ms Osborne said there was water in the bottle and maintained she had not consumed alcohol.

On 7 December 2017 Ms Osborne sent an email to the Principal acknowledging that she had brought alcohol to the school and apologised for having it in her bag. She acknowledged she should never have put the Principal or the school in that position and that it was very thoughtless of her.

Later in the day, Ms Osborne confirmed to the Principal that she had consumed alcohol at the school and knew she had made a mistake. Ms Osborne resigned from the school on 7 December 2017.

The case was referred to the Complaints Assessment Committee of the Teaching Council, who proceeded with a charge of serious misconduct in the Disciplinary Tribunal.

Ms Osborne did not dispute that her conduct amounted to serious misconduct. The Tribunal found that her conduct amounted to serious misconduct on the grounds that it reflected adversely on her fitness to practise as a teacher, brought the profession into disrepute and was a severity to warrant referral to the Council.

In considering penalty, the Tribunal saw the aggravating features (Ms Osborne's pre-mediation and dishonesty) as symptomatic behaviour of an addict but agreed that Ms Osborne deserved some recognition for contacting the school the next day to acknowledge her behaviour. The Tribunal was however sceptical of Ms Osborne's explanation that the water bottle had been at school since the weekend and that she had taken a sip but not any more after realising what it was.

The Tribunal considered that Ms Osborne has taken steps towards her rehabilitation and thought transparency was an important factor in deterrence for her.

Ms Osborne was censured and had conditions imposed on her practising certificate to provide the Teaching Council with updates on rehabilitative steps every three months for one year, and to disclose the decision to employers for two years. The register will be annotated for three years to reflect these orders.



Ms Osborne applied for a permanent order for non-publication of her name. This application was heard in private and was declined. The reasons for this were set out in a separate decision which has been suppressed.

Ms Osborne was ordered to pay 40% of the CAC's costs and 40% of the Tribunal's costs.



**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2018-33**

**IN THE MATTER** of the Education Act 1989

**AND**

**IN THE MATTER** of a charge referred by the Complaints Assessment  
Committee to the New Zealand Teachers  
Disciplinary Tribunal

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

**AND** **TONI LOREEN OSBORNE**

**Respondent**

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**TRIBUNAL DECISION**

**23 April 2019**

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**HEARING:** Held at on the papers on 20 December 2018

**TRIBUNAL:** Theo Baker (Chair)  
Stuart King and Kiri Turketo (members)

**REPRESENTATION:** Mr Jeff Simpson for the CAC  
Ms Janette Andrews for the respondent

1. The Complaints Assessment Committee (**the CAC**) has referred to the Tribunal a Notice of Charge. Before the hearing the parties conferred and filed a joint memorandum and an Agreed Summary of Facts. In the joint memorandum, the CAC sought leave to amend the charge to delete one particular. By agreement, therefore, the charge is amended to read:
  1. *The CAC charges that **TONI LOREEN OSBORNE** registered teacher of Auckland:*
    - a. *On 6 December 2017, during work hours, consumed alcohol she had brought on to the school grounds;*
    - b. *On 6 December 2017, when confronted, attempted to dispose of the alcohol referred to in paragraph 1(a) above;*
2. The CAC alleges that the conduct amounts to serious misconduct under s 378 of the Education Act 1989 (**the Act**) and r 9(1)(o) of the Education Council Rules 2016 (as drafted prior to the May 2018 amendment) (the Rules), or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under s 404 of the Act.
3. The charge was heard on the papers on 20 December 2018.

### **Evidence**

4. Before the hearing the parties conferred and an Agreed Summary of Facts (**ASF**) which reads:
  1. *Toni Osborne is a registered teacher, whose practising certificate expires on 16 May 2020.*
  2. *Prior to 15 December 2017 Ms Osborne was employed as a teacher at Howick Intermediate School (**School**).*

#### ***Incident in December 2017***

3. *At around 2:50pm on 6 December 2017, the Assistant Principal, Storm de Villiers and Mrs Osborne were setting up for the School's formal dance.*
4. *Ms de Villiers detected a strong smell of alcohol on Mrs Osborne's breath. She reported this to the Principal, Yolande Franke.*
5. *Shortly after, the Principal and the Deputy Principal, Sara Pickering approached Mrs Osborne and inquired about the smell of alcohol on her breath. Mrs Osborne denied that she had been drinking and instead said that the smell was mouthwash. She said that she kept toothpaste and mouthwash at school because she was*

*conscious of bad breath.*

6. *Mrs Osborne, Mrs Franke and Ms Pickering then went to locate the mouthwash in the food technology room where Mrs Osborne worked. Mrs Osborne could not find a bottle of mouthwash after looking through her basket and her handbag.*
7. *Mrs Osborne then pulled a tube of toothpaste out of her laptop bag and said she may have run out of mouthwash the day before.*
8. *Mrs Franke saw a water bottle in the laptop bag which was about one third full. She asked Mrs Osborne if she could smell the contents.*
9. *Mrs Osborne agreed but then walked past Mrs Franke to the sink, poured the contents of the bottle down the drain, turned the tap on and tried to fill the bottle.*
10. *When Mrs Franke asked why Mrs Osborne had done this, Mrs Osborne said she wanted to rinse the bottle before giving it to her.*
11. *Mrs Franke asked if there was alcohol in the bottle. Mrs Osborne said there was not anything but water in the bottle.*
12. *Mrs Franke then smelt the remaining contents of the bottle and detected a distinct smell of alcohol. When asked about this, Mrs Osborne said the bottle might have had alcohol in it over the weekend but maintained she had not consumed alcohol.*
13. *The next day on 7 December 2017, Mrs Osborne sent an email to Mrs Franke acknowledging that she had brought alcohol to the School and apologising for having it in her bag. She acknowledged that she should never have put Mrs Franke or the School in that position and that it was very thoughtless of her.*
14. *Later that day Mrs Osborne met with Mrs Franke where she confirmed she had brought alcohol to the School the day before, had consumed it at the School and that she knew she had made a mistake.*
15. *Mrs Osborne tendered her resignation on 7 December 2017. This took effect on 15 December 2017.*
16. *On 3 January 2018, the Education Council received a mandatory report from Mrs Franke. The mandatory report was referred to the Complaints Assessment Committee for investigation.*
17. *On 1 February 2018, Mrs Osborne provided the Complaint Assessment Committee's investigator with her version of events in writing. She acknowledged that she had brought the bottle containing alcohol to the School. She stated that the bottle had been there since the weekend and she had forgotten it was there. She had taken a sip but did not have any more after realising what it was. She*

*acknowledged she made a very wrong choice on that day.*

5. The evidence in support of particular 1(a) of the charge is found in paragraph 13 and 14 of the ASF, and the evidence in support 1(b) is found in paragraphs 8, 9 and 10. In fact, she not only attempted to dispose of the alcohol, she did actually pour it down the drain.<sup>1</sup> We are satisfied that the charge is proved.

### **Serious misconduct**

6. Serious misconduct is defined in s 378 of the Education Act 1989:

***serious misconduct*** means 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; and*

(b) *that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct.*

7. The criteria for reporting serious misconduct are found in r 9 of the Education Council Rules:<sup>2</sup>

#### ***Criteria for reporting serious misconduct***

(1) *The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*

...

(o) *any act or omission that brings, or is likely to bring, discredit to the profession.*

8. For the CAC, Mr Simpson submitted that sub-paragraphs (ii) and (iii) of the definition in s 378 are most applicable, and that it is the respondent's dishonest and deceptive actions to hide her conduct which are of greater concern than the consumption and

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<sup>1</sup> Given the respondent's admission of the charge, we assume she accepts that the contents of the bottle she emptied down the drain was the alcohol that the respondent accepts she brought to school and consumed there

<sup>2</sup> The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

disposal of alcohol. He referred us to our decision of *CAC v Jenkinson* NZTDT 2018-14<sup>3</sup> in which we held that an attempt to mislead the school is “behaviour that strikes at the heart of the expectation for honesty and integrity that the profession and the public have of practitioners.”

9. Mr Simpson also referred to the Council’s Code of Professional Responsibility, which provides that teachers will maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.
10. The CAC submits that the conduct brings or is likely to bring discredit to the profession under paragraph (b) of s 378 and r 9(1)(c).
11. The respondent does not dispute that her conduct amounts to serious misconduct.

#### *Discussion*

12. In the legal authorities, there is apparent overlap between the protection of the public, the maintenance of professional standards and accountability and the maintenance of public confidence in the profession.<sup>4</sup>

13. We have summarised the purpose of disciplinary proceedings:<sup>5</sup>

*... to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.*

14. The status of the profession is lowered by teachers who consume alcohol or are under the influence of it at school, and further by teachers who try to conceal the truth when confronted. We accept the CAC’s submission that the respondent has failed to comply with her Code of Professional Responsibility which requires her to maintain public trust and confidence in the teaching profession by demonstrating a high standard of

<sup>3</sup> *CAC v Jenkinson* NZTDT 2018-14 at [25]

<sup>4</sup> [1992] 1 NZLR 720; *Young v PCC* Wellington HC, CIV 2006-485-1002, 1 June 2007, Young J

<sup>5</sup> *CAC v McMillan* NZTDT 2016/52, 23 January 2017, paragraph 23.

professional behaviour and integrity.<sup>6</sup> Her conduct was not professional, and it lacked integrity. We have no doubt that the respondent's conduct reflects adversely on her fitness to practise as teacher,<sup>7</sup> it brings the profession into disrepute,<sup>8</sup> and is of a severity to warrant referral to the Council under r 9 (1)(o) of the rules. We find on the facts presented to us, and applying the test in *Collie v Nursing Council of New Zealand*<sup>9</sup> that reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner. It therefore amounts to serious misconduct.

## Penalty

15. Section 404 of the Act provides:

### **404 Powers of Disciplinary Tribunal**

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
  - (b) *censure the teacher:*
  - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
  - (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
  - (e) *annotate the register or the list of authorised persons in a specified manner:*
  - (f) *impose a fine on the teacher not exceeding \$3,000:*
  - (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
  - (h) *require any party to the hearing to pay costs to any other party:*
  - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*

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<sup>6</sup> Clause 1.3 Code of Professional Responsibility

<sup>7</sup> Paragraph (a)(ii) of the definition of serious misconduct in s 378

<sup>8</sup> Paragraph (a)(iii) of the definition of serious misconduct in s 378

<sup>9</sup> [2001] NZAR 74 at [28]

- (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*

16. The CAC seeks a penalty of:
- (a) censure under s 404(1)(b)
  - (b) annotation of the register to reflect the censure, under se 404(1)(e)
  - (c) Under s 404(1)(c) the following conditions to be imposed on Ms Osborne's practising certificate:
    - (i) to provide the Teachers Council with written updates on her engagement with Alcoholic Anonymous, and any other steps she is taking in respect of issues she has with alcohol, every three months for a period of one year; and
    - (ii) to disclose the Tribunal's decision to any prospective employer for a period of two years.
17. Mr Simpson submitted that the main aggravating features of this conduct are:
- (a) The fact that Ms Osborne had the alcohol contained in a water bottle. This suggests some degree of premeditation and some effort to hide the contents. Even noting Ms Osborne's explanation to the CAC that the bottle had been in her bag since the weekend (which does not explain why the alcohol was in a water bottle in the first place), this remains concerning behaviour.
  - (b) Ms Osborne's dishonesty in giving a false explanation to the Principal and Deputy Principal, denying there was any alcohol in the water bottle and trying to tip out the contents when confronted. As noted above, such dishonesty is not acceptable for a member of the teaching profession.
18. The Committee notes that there is no evidence about the quantity of alcohol consumed, other than Ms Osborne's statement that she only took a sip. It is submitted that this should be taken as the absence of further aggravating factors, rather than a factor in mitigation.
19. The CAC acknowledged in mitigation that:
- (a) Ms Osborne admitted her conduct and apologised to the Principal the following day;

- (b) Ms Osborne has cooperated with the Committee investigation; and
- (c) Ms Osborne has taken steps to address any issues that she has with alcohol by attending Alcoholics Anonymous. She is reportedly alcohol free.
20. We were referred to Tribunal decisions dealing with referral of drink driving conditions. In *Complaints Assessment Committee v Fuli-Makau*,<sup>10</sup> we accepted that accountability and remorse, insight into behaviour, and evidence of rehabilitative steps that the teacher has already taken themselves will be mitigating factors in determining penalty.
21. On the matter of dishonesty, Mr Simpson referred to *Jenkinson*,<sup>11</sup> where a teacher created a false document to support a false account when confronted by his Principal about adverse conduct. The teacher admitted that he had created a false document when the school made inquiries into its authenticity. For that conduct, which involved a more sophisticated and prolonged deception than that in the present case, the Tribunal imposed censure and six months' suspension. Mr Simpson accepted that the conduct in *Jenkinson* was more serious than in the present case.
22. Therefore CAC submitted that a penalty short of cancellation or suspension was appropriate, and that the proposed penalty would meet rehabilitative objectives, maintain proper professional standards and act as a deterrent.
23. For the respondent, Ms Andrews referred to two other cases involving dishonesty: *CAC v Hill* NZTDT 2015-59,<sup>12</sup> where a teacher used a school credit card to pay for her personal petrol, and *CAC v Swinton-Robertson* NZTDT 2017-20 in which a teacher took home some toys and initially denied having taken them.
24. Ms Andrews submitted that although the respondent was initially dishonest with her employer about the alcohol, she was much quicker in fronting up to her employer and did not allow the deception to endure.
25. Ms Andrews further submitted that it was poor judgement to bring the alcohol to the school, consume some and attempt to deceive her employer, but it sits in the context of someone who was having trouble managing her relationship with alcohol. While her conduct is inherently wrong, it does not have the selfish quality of the teacher in *Swinton-Robertson* where kindergarten children were deprived of the use of toys while

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<sup>10</sup> *Complaints Assessment Committee v Fuli-Makau*

<sup>11</sup> Above, note

<sup>12</sup> *CAC v Hill* NZTDT 2015-59, 20 July 2016

his own children enjoyed them. Therefore the period of annotation should be shorter, and a period of one year would be in alignment with the Tribunal's approach in *Hill*, which she describes as a panicked response.

### *Discussion*

26. We see the matters advanced as aggravating features as symptomatic behaviour of an addict. Sadly there is often a certain amount of planning, concealment and deceit (including self-denial) required for an alcoholic to continue their habit in otherwise normal circumstances.
27. We agree that in this instance the respondent deserves some recognition for contacting the school the next day to come clean. Many in the same situation continue the lie, sometimes to quite extraordinary extremes, but she not only stopped that but she voluntarily contacted the school the next day to set the record straight. We see that as a very positive step and a significant factor in mitigation. We do then query the explanation that the respondent gave the investigator in February 2018 (referred to in paragraph 17 of the ASF), that her water bottle containing alcohol had been at school since the weekend and that she had taken a sip, but did not take any more after realising what it was. We are sceptical of this explanation.
28. In *CAC v Collins* NZTDT 2016-43,<sup>13</sup> we suspended a teacher for two years, following a defended hearing, where we had found that the teacher had consumed alcohol at school and had been under the influence of alcohol at school. The differences with that case were:
1. Only 12 to 18 months prior, the respondent had appeared before a CAC following a conviction for drink-driving and had had a number of conditions placed on his practice in light of his acknowledged history of alcoholism;
  2. Over a period of time, students and staff had reported smelling alcohol on his breath, and he had appeared intoxicated at school;
  3. There was evidence of student performance being adversely affected during this time.
29. Therefore the history and impact of that teacher's problems with alcohol put his conduct into a difference category. Based on the evidence before us, this case is of quite a

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<sup>13</sup> *CAC v Collins* NZTDT 2016-43, 27 March 2017

different nature.

30. In *CAC v Craig* NZTDT 2015-26<sup>14</sup> we suspended a teacher who had brought alcohol to school and engaged with an altercation with another staff member. The teacher agreed to a suspension until such time as she could satisfy the Council that she was fit to practise. That case involved medical opinion and impairment issues. She also had a disciplinary history.
31. We are satisfied that a penalty short of suspension or cancellation in the present case is appropriate. We are not told of any historical matters arising from the respondent's use of alcohol nor evidence of any impact on her students. She has for the most part accepted responsibility, engaged with the investigation and disciplinary process appropriately. She has also taken steps towards her rehabilitation. We hope that with the right help she will be able to make a meaningful contribution to education.
32. Because the respondent is early on in her recovery, we think it is important that any conditions on her practice allow sufficient time to support her in holding herself accountable. We think transparency is an important factor in deterrence for her. We therefore make the following orders:
- 32.1 Censure under s 404(1)(b)
- 32.2 Under s 404(1)(c) the following conditions to be imposed on Ms Osborne's practising certificate from the time she takes up any teaching position, including any relieving:
- (a) to provide the Teaching Council with written updates on her engagement with Alcoholic Anonymous, and any other steps she is taking in respect of issues she has with alcohol, every three months for a period of one year; and
  - (ii) to disclose the Tribunal's decision to any current, future or prospective employer for a period of two years.
- 32.3 Under s 404(1)(e), for a period of three years, annotation of the register to reflect the matters in paragraphs 32.1 and 32.2.

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<sup>14</sup> *CAC v Craig* NZTDT 2015-26, 15 November 2015

### Costs

33. The CAC recognises that this matter has been resolved, that Ms Osborne has accepted the charge of serious misconduct and has cooperated with the Committee's investigation. The parties agree that a contribution of 40% costs is appropriate.
34. We therefore order the respondent to pay costs of 40% under s 404(1)(h) of the Act. We also order costs of 40% under s 404(1)(i) as a contribution towards the Tribunal's costs.
35. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:
- a) Within 10 working days of the date of this decision:
    - i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs
    - ii. CAC to file and serve on the respondent a schedule of its costs
  - b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions she wishes to make in relation to the costs of the Tribunal or CAC.
  - c) The Chairperson will then determine the total costs to be paid.

### Non-publication

36. The respondent applied for a permanent order for non-publication of her name. We heard that application in private under s 405(5) of the Act. We have declined this application. The reasons are set out in a separate decision, which we have suppressed under s 405(6)(a). In that decision we have also made orders for non-publication of evidence that was in support of the application for non-publication.
37. We extend the interim order for non-publication of the respondent's name for 20 working days from the date of this decision to allow her to discuss it with her family and her advisors.




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Theo Baker  
Chair

**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).