Complaints Assessment Committee (CAC) v Fenton

2018-40

Teacher and principal Gregory James Fenton was referred to the Disciplinary Tribunal on a charge relating to the way he dealt with the suspension and subsequent exclusion of the child from Onewhero Area School (the School).

The result: The Tribunal found that cumulatively the particulars of the charge amounted to serious misconduct and ordered that Mr Fenton be censured, the register is annotated, and have conditions placed on his practising certificate. An order was made for non-publication of the name of the child involved and any identifying details. The Tribunal declined to order suppression of Mr Fenton's name.

In October 2016 Mr Fenton became aware that three girls had complained of inappropriate comments made by the child. Mr Fenton spoke with the girls and they each described that the child had touched her chest and genital area. Mr Fenton did not question the child.

The child's parents attended a meeting with Mr Fenton, and the School counsellor on 8 November 2016 and advised them of the nature of the conduct. Mr Fenton asked the child's parents to take him home and for him to remain at home until an investigation had been completed and the matter resolved. Mr Fenton said he would work with CYFS and try to get it done as soon as possible. He gave the child's parents the impression that this was an approved and lawful process. The parties agreed that it is not lawful to informally suspend a student from school and that Mr Fenton knew this.

The charge that Mr Fenton informally suspended a student from school, knowing that do so was unlawful, was proved. Mr Fenton also accepted that when he advised the Board Chairperson that the informal suspension was justified on health and safety grounds, he knew it was not lawful and not justified. He also accepted that he failed to advise the Board that a meeting with the Crisis team was not able to occur until after the disciplinary hearing and that he failed to advise the Crisis team member of the date of the disciplinary meeting.

The Tribunal found that a result of Mr Fenton's actions was that the child's emotional wellbeing and his education were adversely affected. It also found that Mr Fenton was not honest in his dealings with the child's parents or with the Board Chairperson. The Tribunal was satisfied that Mr Fenton had engaged in serious misconduct.

The Tribunal found that Mr Fenton's acts of dishonesty risked engendering a lack of trust and creating the potential for adversarial relationships between families and schools, and between staff and boards of trustees. The Tribunal found that he did not advance the interests of the teaching profession because of his unethical practice. By withholding correct information about the legal position, and by proceeding and continuing to stand the child down, Mr Fenton did not involve the parents in decision-making about the care and education of their son.

The Tribunal imposed a penalty of censure and annotation to the register, along with and strict conditions on Mr Fenton's practising certificate, including a requirement not to resume a position as principal without first undergoing mentoring.

Given the protracted procedural history of this matter, the Tribunal ordered that Mr Fenton pays 50% of the Tribunal's costs and 50% of the CAC's actual and reasonable costs.

The Tribunal ordered that the name and identifying details of the child are not be published.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-40

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	**GREGORY JAMES FENTON** **Respondent**

TRIBUNAL DECISION

22 JULY 2019

HEARING: Held on 26 March 2019 at Wellington (on the papers)

TRIBUNAL: Theo Baker (Chair)
Nikki Parsons and Dave Turnbull (members)

REPRESENTATION: Ms C Paterson and Ms E Mok for the Complaints Assessment Committee
Ms D King for the respondent

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge reads:

> *1. The CAC charges that **GREGORY JAMES FENTON,** teacher, of Tuakau:*
>
> *a. Informally suspended a student from school, knowing that to do so was unlawful;*
>
> *b. Advised the school Board of Trustees that the informal suspension was justified;*
>
> *c. Having arranged a meeting with the Ministry of Education Crisis Intervention Team (**Crisis Team**) to take place on 7 December 2016 in order to obtain assistance in relation to the student who was suspended:*
>
> *i. Failed to advise the Board of Trustees until the day of the disciplinary hearing, namely 6 December 2016, that the meeting with the Crisis Team was not able to occur until after the disciplinary hearing;*
>
> *ii. Represented at the disciplinary hearing that the meeting with the Crisis Team had been rescheduled to 7 December 2016, when in fact there had been no confirmed prior arrangement for that meeting; and*
>
> *iii. Represented at the disciplinary hearing that the Crisis Team was aware of the timeframes the Board of Trustees was working within when that had not been made clear to the Crisis Team member when the 7 December meeting was arranged;*
>
> *d. Failed to advise the Crisis Team member, when scheduling the 7 December 2016 meeting that the disciplinary hearing was scheduled for 6 December 2016.*
>
> *2. The conduct alleged in paragraph 1 either separately or cumulatively amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1) (o) of the Education Council Rules 2016 (as drafted prior t the May 2018 amendment), breaches the Teachers Council Code of Ethics and/or the Code of Professional Responsibility or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.*

Summary of decision

2. We found that the factual allegations in the Notice of Charge were established.

3. We also found that cumulatively the particulars of the charge amounted to serious misconduct, and that individually particulars (a), (b) and (c)(ii) and (iii) met that threshold.

4. The following penalties were imposed

   a) Censure under s 404(1)(b);

   b) Annotation of the register under s 404(1)(e);

   c) Conditions under s 404(1)(c) that:

      i. the respondent shall not resume a position of principal unless he has undergone a mentoring programme as outlined in paragraph ii;

      ii. the mentoring programme referred to in paragraph i. shall be with a mentor approved by the Senior Manager Professional Responsibility, will take place over at least a six-month period and will cover management of students and training in being a principal, conflicts of interests and balancing competing rights of children;

      iii. the mentor of the programme referred to in paragraph i. shall provide at least two reports to the Senior Manager Professional Responsibility, the first being at the half-way point of the mentoring programme, with the second being at the end of the programme;

      iv. irrespective of any leadership positions, within six months of the date of this the respondent shall undergo training or professional development [redacted] of the same to the Senior Manager Professional Responsibility. This requirement is to be undertaken within six months of the date of the Tribunal's decision and is not dependant on the position gained or occupied by the respondent in a school;

      v. the respondent must notify any prospective employers of the Tribunal's decision and provide them a copy of it.

5. We ordered the respondent to pay costs of 50% towards the Tribunal and the CAC costs.

6. There is an order for non-publication of the name of Child [redacted] and any identifying details.

We do not find that suppression of the respondent's name is needed to protect the identity of Child [redacted]

Findings on factual allegations contained in charge

7. The agreed facts were contained in the ASF, which runs to 12 pages. As summarised by the parties, the conduct which is the subject of the charge relates to the way in which the respondent dealt with the suspension and subsequent exclusion of Child [redacted] from Onewhero Area School (**the School**) where the respondent had been principal since 2007. We were told that Child [redacted] in 2016 he was 10 years old and in Year 6.

8. The background to these events was that on 28 October 2016 three girls complained to their teacher about Child [redacted]'s behaviour. They described being poked and prodded and being the subject of unwanted attention. This had been directed at one girl in particular, and Child [redacted] had described her as his girlfriend on several occasions. There was a school policy on sexual behaviour in children that stated that the Principal should be informed of any sexualised behaviour. That teacher, not feeling that the allegations were overtly sexual, notified the Deputy Principal who told him to report the matter [redacted] at the School.

9. On 7 November 2016 the father of one of the girls emailed the Deputy Principal and the teacher complaining of inappropriate comments made by Child [redacted] to his daughter. Later that day the three girls reported further concerns to the [redacted]. They said that Child [redacted] was "coming over into their space", "annoying them", and that Child [redacted] wanted to be the boyfriend of one of the girls.

10. The respondent's daughter is the best friend of one of the three girls who complained about Child [redacted]'s conduct.

11. The respondent then spoke with the three girls together, asking them to describe what happened. He said that each girl described that over the course of several weeks Child [redacted] had touched her chest area and genital area.

12. The respondent found Child [redacted] but did not question him. He arranged for Child [redacted]'s parents to attend a meeting at the School later that day when they were available. He then spoke to [redacted] who told him that she was aware of the "silly behaviours". Following this the respondent, the [redacted] and the school counsellor met with the parents of two of the girls. At no stage was Child [redacted] given an opportunity to put forward his version of

events. The respondent did not wish to interview Child [redacted] without first speaking to his parents.

13. Following this was the series of events that are referred to in the Notice of Charge.

a. Informally suspended a student from school, knowing that to do so was unlawful;

14. The parties have agreed that the process for removal of a student for disciplinary reasons is covered in Rule 8 of the Education (Stand-Down, Suspension, Exclusion, and Expulsion) Rules 1999 (**the Suspension Rules**):

> ***8 No imposed absences***
>
> *A principal who wants a student to absent himself or herself from school for disciplinary reasons, or who wants a parent to remove a student from school for disciplinary reasons, may bring about the absence or the removal only by standing-down or suspending the student under section 14(1) of the Act.*

15. Section 14 of the Education Act 1989 (**the Act**) provides a statutory process for suspending a student. The parties agree that process was not followed in relation to Child [redacted]. In order to illustrate the respondent's departure from that process, we have set out s 14:

> ***14 Principal may stand-down or suspend students***
>
> *(1) The principal of a State school may stand-down or suspend a student if satisfied on reasonable grounds that—*
>
> *(a) the student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school; or*
>
> *(b) because of the student's behaviour, it is likely that the student, or other students at the school, will be seriously harmed if the student is not stood-down or suspended.*
>
> *(2) A stand-down may be for 1 or more specified periods, and—*
>
> *(a) the period or periods may not exceed 5 school days in any one term:*
>
> *(b) a student may be stood-down more than once in the same year but for not more than 10 school days in total in that year:*
>
> *(c) in calculating the period of a stand-down, the day on which the student was stood-down, and any day on which the student would not have had to attend school in any event, must not be counted:*
>
> *(d) the principal may lift the stand-down at any time before it is due to expire.*

> *(3) If a student has been stood-down or suspended, the following provisions apply in relation to the student's attendance at the school:*
>
> (a) *the principal may require the student to attend the school if the principal reasonably considers the student's attendance is appropriate for the purposes of section 17A:*
>
> *(b) the principal must allow the student to attend the school if the student's parents request that the student be permitted to attend the school and the principal considers the request is reasonable:*
>
> *(c) otherwise the student does not have to, and is not permitted to, attend the school while stood-down or suspended.*

16. The parties agree that Child [redacted]'s parents attended a meeting with the respondent, [redacted] and the school counsellor on the afternoon of 8 November, and that he advised them of the nature of the conduct. When they asked what the next course of action would be, the respondent said he would like to try and avoid suspension, and that he felt that CYFS were the right people to get involved. He said he would like to understand what the background to the behaviours were.

17. The respondent asked Child [redacted]'s parents to take him home and for him to remain at home until an investigation had been completed and the matter was resolved. He said that this was for "health and safety reasons" and "for the safety of the boy and the girls". When the parents asked how long it would take, the respondent said he would work with CYFS to try to get it done as quickly as possible. He gave Child [redacted]'s parents the impression that this was an approved and lawful process.

18. The parties agreed that it is not lawful to informally suspend a student from school, and the respondent knew this.

19. Therefore we are satisfied that the conduct in particular a) of the charge is proved.

b. Advised the School Board of Trustees that the informal suspension was justified;

20. A meeting to deal with Child [redacted]'s suspension was scheduled for 2 December 2016. In attendance were the Chairperson of the Board of Trustees, the respondent, Child [redacted], and his parents. It was only at this meeting that the respondent became aware of an assessment report completed by Whirinaki (Infant, Child, Family and Youth Mental Health Services), which had been provided to [redacted] In that report Child [redacted] was described as [redacted]

21. Tabled at this meeting was a letter of complaint from Child [redacted]'s parents who had received

legal advice that a formal suspension process had not been followed. The respondent stated that Child [redacted] had been removed under the grounds of health and safety, which covers exactly this kind of situation. He said that he believed that he was well within his rights to do this, and when he had spoken to Child [redacted]s parents, he had explained this to them.

22. The respondent accepts that when he advised the Chairperson that the informal suspension was justified on health and safety grounds, he knew that it was not lawful and not justified. This particular is therefore proved.

c. Having arranged a meeting with the Crisis Team:

(i) Failed to advise the Board of Trustees until the day of the disciplinary hearing, namely 6 December 2016, that the meeting with the Crisis Team was not able to occur until after the disciplinary hearing;

23. The arrangements before and after the next disciplinary meeting are the subject of the third particular of the charge. We were told that at the disciplinary meeting on 2 December 2016, it was felt that there was insufficient information to make a decision about Child [redacted]'s suspension. During a one and a half hour adjournment of the meeting, the respondent contacted the Crisis Team to request assistance in relation to Child [redacted]'s case. The Crisis Team is a Ministry of Education Crisis Intervention Team that provides a wraparound service with interim response funding.

24. When the meeting reconvened, the respondent told everyone present that the Crisis Team had confirmed that they could have someone out to the School on Monday or Tuesday morning that is 5 or 6 December. Therefore the meeting was adjourned to 6 December in the afternoon on the basis that the Crisis Team would have attended, and the Board would then have all the information and could proceed in a way that was best for everyone. It is not clear from the Agreed Summary of Facts whether or not the respondent had actually made contact with the Crisis Team on 2 December. However, we are told that on Monday 5 December 2016 at 8.30am, Mike Crosby of the Crisis Team phoned the respondent and arranged a meeting for Wednesday 7 December at 8.15am. Mr Crosby had other pre-existing commitments at other schools on Monday and Tuesday. The respondent did not inform Mr Crosby that in fact there was a disciplinary hearing for Child [redacted]'s case on the afternoon of 6 December 2016. The respondent did not then advise the Chair of the Board or any other member of the Board of Trustees that the Crisis Team meeting would not have taken place before the disciplinary hearing on 6 December.

25. A disciplinary hearing was resumed on 6 December 2016. Present were the Chairperson of the Board of Trustees, the respondent, Child [redacted] and his parents, a representative from CYFS Pukekohe and a Youth Advocate. It was then that the respondent advised those present that the Crisis Team meeting was scheduled for the next day. Particular 1(c)(i) is therefore proved.

(ii) Represented at the disciplinary hearing that the meeting with the Crisis Team had been rescheduled to 7 December 2016 when in fact there had been no confirmed prior arrangement for that meeting;

(iii) Represented at the disciplinary hearing that the Crisis Team was aware of the timeframes the Board of Trustees was working within when that had not been made clear to the Crisis Team member when the 7 December meeting was arranged;

26. At the meeting, the Chair of the Board said that the school had been assured that the Crisis Team was going to attend a meeting at the school on Monday or Tuesday but that delay was beyond their control. According to the ASF, “In fact the Crisis Team had not assured the school that it would attend on 5 or 6 December, and no meeting had been arranged for either of those dates. The only date scheduled for a meeting with the Crisis Team at [the school] was 7 December 2016”.

27. The Board of Trustees decided to exclude Child [redacted] from the school. When Child [redacted]’s mother queried the decision, stating that she thought that the Crisis Team’s assistance had been sought to help the Board make a decision, the respondent stated that he advised the Crisis Team of the timeframe the School was working to. He said that the Crisis Team had confirmed that they would meet with him prior to the disciplinary hearing and that they had committed to coming to the School on Monday or Tuesday but they had not been able to fulfil their commitment and had rescheduled for the following day.

28. Included in the ASF is Mr Fenton’s response to the allegations. In response to the issue about the Crisis Team meeting arrangements, Mr Fenton stated to the Education Council investigator, "I would also like it to be noted that a meeting was arranged with the Crisis Intervention team, and on the day of our proposed meeting they were unable to attend as there was another matter they had to deal with. Our meeting had to be then deferred. I would like to think record keeping by the MOE personnel supported my statement".

29. The effect of this piece of information is the parties accept that this is what the respondent said in the course of the investigation. However he has signed the ASF which contains the specific words quoted above in paragraph 26. Therefore the

respondent has accepted the facts that support the second part of particular (c)(ii): that there had been no confirmed prior arrangement for that meeting.

30. Particular 1(c)(ii) and (iii) are therefore proved.

d. Failed to advise the Crisis Team member, when scheduling the 7 December 2016 meeting that the disciplinary hearing was scheduled for 6 December

31. The evidence in support of particular d is outlined in paragraph 24 above. This particular is therefore proved.

32. In summary, we are satisfied that the factual allegations contained in the Notice of Charge have been established.

Serious misconduct

33. Section 378 of the Act provides:

> ***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*.

34. The criteria for reporting serious misconduct are found in r 9 of the in the Education Council Rules 2016 (**the Rules**).[1] The CAC relied on r 9(1) (o):

> ***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.*

35. For the respondent, Ms King advised that it was accepted that the respondent's behaviour constituted serious misconduct. The Tribunal must still be satisfied that is the

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

case.

The Code

36. The Notice of Charge also invites us to make a finding that the respondent breached the Code of Ethics and/or the Code of Professional Responsibility for Registered Teachers. These events took place in December 2016, and so the latter of these codes had not taken effect.[2] We have not made a formal finding that this conduct was a breach of the Code of Ethics for the purposes of establishing the charge because a finding of serious misconduct does not require us to find there has been a breach of the Code of Professional Responsibility. The test for serious misconduct[3] involves a combination of s 378 and r 9.

37. We have however considered the respondent's responsibilities under the Code of Ethics in our consideration of whether this conduct reflects adversely on his fitness to practise.

Section 378(a)(i) - adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students

38. The parties agree that the suspension had an adverse effect on Child [redacted]'s well-being and learning. This was detailed in the ASF. We were told that Child [redacted] was distressed and upset at being kept home from school for almost 3 weeks. Although counselling services were available, there was limited discussion with his parents about this, and no counselling was arranged for Child [redacted].

39. Eventually, on 22 November, Child [redacted]'s mother asked the school about his [redacted], which were allocated to the school to be used for Child [redacted]. She arranged to bring him to school to work with [redacted] on 28 November 2016, at which time the respondent handed her a formal suspension letter. He told her that he had no choice and that CYFS still had to do their investigation. The respondent did not ensure that any counselling or schoolwork was provided for him.

40. It is evident that a result of the respondent's actions was that Child [redacted]'s emotional wellbeing and his education were adversely affected. Had the respondent followed the correct procedure, it is possible but not certain that Child [redacted] would have been suspended. The respondent did not comply with the provisions of s 14(2)(a) of the Act which specify that a stand-down period may not exceed 5 school days in any one term. The length of

[2] The Code of Professional Responsibility took effect from 30 June 2017

[3] Conduct that occurred before on or after 19 May 2018 will be covered by the amended Rules, which include reference to the Code of Professional Responsibility. (Sch 1, cl 3 Teaching Council Rules 2016)

the suspension and the failure to provide an opportunity for Child [redacted] to be heard caused unnecessary harm to him. We agree that the definition in paragraph (a)(i) is met.

Section 378(a)(ii) - reflects adversely on the teacher's fitness to be a teacher;

Section 378(a)(iii) - may bring the teaching profession into disrepute;

41. On the second limb of the definition in s 378, Ms King submits that although the respondent accepts that he knew that the suspension was unlawful, his view was that health and safety matters took precedence over suspension requirements. He believed that he was acting in the best interests of the school and the students. The difficulty with that submission, is that he also knew that it was not lawful, and he was then dishonest in his communication with the parents and the Chair of the Board of Trustees. He did not provide them with all the relevant information including all aspects of the law as he understood them.

42. The CAC has referred to the following clauses in the Code of Ethics, which, under the heading, "Commitment to Learners", required teachers to strive to:

- *develop and maintain professional relationships with learners based upon the best interests of those learners* (Clause 1 (a).
- *cater for the varied learning needs of diverse learners* (Clause 1(e); and
- *promote the physical, emotional, social, intellectual and spiritual wellbeing of learners* (Clause 1(f)).

43. The CAC also referred to the following clauses under the heading: "Commitment to Parents/Guardians and Family/Whanau" required teachers to strive to:

- *involve them in decision-making about the care and education of their children; Clause 2(a); and*
- *establish open, honest and respectful relationships* (Clause 2(b)).

44. And finally, under the heading, "Commitment to the Profession," teachers were to:

- *advance the interests of the teaching profession through responsible ethical practice* (Clause 4(a))

45. We appreciate why the CAC has referred to Clauses 1(a), (e) and (f) of the Code of Ethics. The respondent seemed to have little understanding of Child [redacted], and this deficiency raises concerns as discussed below. However the allegations contained in the charge concern his lack of integrity in dealing with a suspension, and so it is the clauses of the Code that concern honesty that interest us.

46. We are satisfied that the respondent was not honest in his dealings with Child [redacted]'s parents

or with the Chair of the Board. We therefore think that he did not establish an open, honest and respectful relationship with Child [redacted]'s parents. He led them to believe that he had the authority to suspend their son and that he had little or no choice in the matter. As parents, they should have been able to rely on the accuracy of the principal's statements and trust that he would not mislead them.

47. His acts of dishonesty risked engendering a lack of trust for this couple and for others, thereby creating the potential for adversarial relationships between families and schools, and between staff and boards of trustees. Other teachers and principals will not thank him for this. We therefore find that he did not advance the interests of the teaching profession because of his unethical practice.

48. By withholding correct information about the legal position, and by proceeding and continuing to stand Child [redacted] down, the respondent did not involve the parents in decision-making about the care and education of their son.

49. We are satisfied that on its own the unlawful "informal suspension" in particular (a) of the charge was dishonest and unethical and reflects adversely on the respondent's fitness to practise, as do each of the representations that he made to the disciplinary hearing, as charged in particulars (b) and (c)(ii) and (iii): that the informal suspension was justified, and he was "well within his rights" to do this; that the meeting with the Crisis Team had been "rescheduled" to 7 December 2016 when in fact there had been no confirmed prior arrangement for that meeting; and that the Crisis Team was aware of the timeframes the Board of Trustees was working within when that had not been made clear to the Crisis Team member when the 7 December meeting was arranged. These were lies. We also find that the conduct in each of these particulars individually may bring the teaching profession into disrepute.

50. In isolation, a failure to advise a Board of Trustees before the date of a disciplinary hearing, that the meeting with the Crisis Team was going to happen until after the disciplinary hearing might seem negligent but might not reflect adversely on a teacher's fitness to practise. The same might be said of a failure to advise the Crisis Team member of the timeline. However, when viewed alongside the other conduct, it is reasonable to infer a dishonest intent. We do not find that the respondent was open and honest with the parents, who were present at that meeting, and we find that his lack of candour with the Chair of the Board are further examples of irresponsible and unethical practice and reflect adversely on the respondent's fitness to practise. For the same reasons, we find

that the conduct may bring the teaching profession into disrepute.

51. The second limb and third limbs of the definition of serious misconduct under s 378 are therefore met.

52. Under paragraph (b) of the definition of serious misconduct, we are now required to decide if it meets any of the criteria under r 9 of the Rules. The CAC relies on r 9(1)(o), that the conduct is likely to bring discredit on the profession. We are satisfied that reasonable members of the public, informed of all the facts and circumstances of each particular (a), (b) and (c)(ii) and (iii), could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the behaviour of the respondent.[4] We also find that the remaining particulars, when viewed collectively as part of the whole series of events meet that test.

Penalty

53. 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:*

[4] The test found in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

(i) require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:

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

Further facts

54. The following information is not covered by the allegations contained in the charge, but is contained in the agreed facts and is referred to in submissions.

55. We were told that at the meeting on 6 December, as a result of its investigation CYFS considered that the nature of the behaviour demonstrated by Child [redacted] was very low level, and that in CYFS' opinion it was inappropriate for Child [redacted] to be out of school. CYFS considered the actions were of a boy [redacted], encouraged by peers in his class, and that the girls were humiliated by the class who found the conduct hilarious to watch. The CYFS representative noted that when Child [redacted]'s [redacted] was present there was no issue, and that the situation was a classroom management issue. CYFS considered that the conduct involved touching over clothes, that it could not be deemed sexual assault, and that there had been no penetration.

56. Despite CYFS's evaluation, the respondent continued to argue strongly for Child [redacted]'s exclusion from the school. He stated that he still had genuine health and safety concerns regarding the inappropriate touching by Child [redacted]. When challenged about his view, the respondent stated that he was concerned about the health and safety of all students, first and foremost, and that he was more concerned about Child [redacted]'s concerning behaviour than an alleged "loophole" .He stated that he has 550 [students] at risk.

57. A representative for Child [redacted]'s family suggested that with the Crisis Team's involvement, a plan could be made for Child [redacted] to return to school with appropriate conditions. The respondent continued to argue against CYFS' findings.

58. After a brief adjournment the Board of Trustees determined to exclude Child [redacted] from OAS. The Board of Trustees stated that it had tried to think of other ways that it could keep everyone safe and get the support for Child [redacted] that he required. The Board did not believe it could do that with Child [redacted] at OAS.

59. Also included in the ASF is Mr Fenton's response to the allegations. In response to the independent investigator engaged by the school, the respondent said "I fully understood that suspension was the option and not a 'kiwi suspension', as I did, but for what I felt

good reason at the time chose this option not to suspend straight away, trying to source the right support for the boy, his family and the girls (victims).” When asked whether he checked with any Ministry of Education circular or booklets or website before making the decision to ask Child [redacted]'s parents to keep him from school, the respondent said, "No. I know that it was wrong".

60. To the Education Council he said, "On the matter of the informal suspension, do accept responsibility of this having occurred. My reasons were noted on grounds of health and safety.”

61. In both investigations, the respondent said that he felt that he did what he did for good reason at the time and that CYFS did not give the matter sufficiently high priority.

CAC position

62. The CAC submitted the following penalty is appropriate:

a) Censure;

b) Annotation of the register;

c) Conditions that the respondent:

i. undergo training or professional development regarding special needs learners;

ii. undergo mentoring prior to resuming any leadership position in the profession and that the respondent’s mentor provide regular reports to the Manager of Professional Responsibility;

iii. notify any prospective employers of the Tribunal’s decision.

63. The CAC referred to two cases where findings of serious misconduct had been made where teachers had failed in their obligations as principals: *CAC v Bremer* NZTDT 2015-17,[5] and *Teacher Y v Education Council* [2018] NZDC 3141.[6] In the first of these a principal of a primary school failed to take reasonable steps to report to the authorities the conduct of a teacher who indecently assaulted students on two occasions, and also failed to respond to allegations about the same teacher throwing a chair during class. It was decided that it was an act of neglect rather than wrongdoing and a censure was

[5] *CAC v Bremer* NZTDT 2015-17, 5 April 2016
[6] *Teacher Y v Education Council* [2018] NZDC 3141, currently under appeal

imposed.

64. The latter case concerned a principal who, contrary to advice, decided to use a restorative justice process to resolve a complaint about an inappropriate relationship between a student and a non-teaching staff member. The principal then failed to monitor the terms of the agreement despite evidence that they were not being adhered to. We found that she should have undertaken a disciplinary investigation given the nature of the allegations and had failed to promote the student's wellbeing and had failed to act as a competent and responsible principal in a number of respects, including properly weighing the competing interests – her primary concern appearing to be that there were no professional repercussions for the staff member). We also considered that she had breached s 77 of the Act by failing to involve or objectively brief the school counsellor, and failing to inform the student's parents of her suspicion of ongoing contact between the student and staff member. We noted that the "various breaches were not of a purely administrative character but go to the heart of [Teacher Y's] professional obligations to ensure the safety and wellbeing of students".

65. The CAC submitted that the conduct was "fairly serious" when taking into account the following factors:

a) Child [redacted] was unlawfully suspended for 13 school days, disrupting the continuity of his schooling. He was upset and distressed.
b) Child [redacted] was particularly vulnerable [redacted]
c) The family and whānau had to make arrangements to accommodate the "suspension".
d) The respondent knew the suspension was unlawful, but maintained it was justified on health and safety grounds.
e) The respondent represented to the Board that the suspension was justified.
f) The respondent continued to maintain that Child [redacted] should be excluded despite CYFS' assessment that the behaviour was very low level.
g) His conduct exposed the school to a risk of legal action.
h) As principal he was in a heightened position of responsibility and had specific duties and obligations to ensure the safety and wellbeing of all students and to be a role model of positive behaviour. His concern for the safety of other students does not excuse his decision to unlawfully exclude Child [redacted].
i) An inference is available that the respondent was influenced by his daughter's

friendship with one of the three girls who complained.

j) The conflict consisted of a series of errors. Apart from the particulars of the charge, the CAC referred to the fact that Child [redacted] was not spoken to or given an opportunity to put forward his version of events.

k) Child [redacted] and his family were given limited assistance. The respondent did not ensure that he was provided with any schoolwork or counselling, in breach of his obligations under ss17A and 77 of the Act.

66. It was submitted that the present case is more serious than the conduct in *Bremer*, which involved one omission, whereas the respondent's conduct involves a series of events, and there were aspects of deliberateness.

67. In mitigation, the CAC acknowledged that the respondent has no previous disciplinary history and that it is now some time since these events.

68. However, it was also submitted that the respondent lacks insight into the impact of his conduct and continues to maintain that he had good reason for his actions.

The respondent

69. The main thrust of Ms King's submissions for the respondent was that he was motivated by concern for other students and that his actions need to be considered in that context.

70. Ms King submitted:

- Although the respondent knew that a "kiwi suspension" was unlawful, he did not think that removal on health and safety ground was unlawful;
- He saw the two matters as separate;
- The statements made about arrangements to meet with the Crisis Team were made in good faith, but the Crisis Team disputed that.

71. It was submitted that any misleading on the respondent's part was not deliberate or malicious. Ms King observed that there can be deliberate misleading and an unintentional misleading and there is a significant difference.

72. The respondent accepts that the suspension was unlawful and that he knew that. His view was that health and safety matters took precedence over the suspension requirements. He believed he was acting in the best interests of the school and the students. His view of the seriousness of Child [redacted]'s behaviour did differ from that of CYFS, but he did not have that information at the time and he believed the best course of action

was to send the child home. It was a genuine belief, based on what he thought was reasonable grounds. Ms King submitted that the fact that conduct is deliberate does not per se make it wrong or deceitful. She said that deliberateness and culpability are not necessarily synonymous.

73. Ms King took exception to the CAC's use of the word "excuse" in the submission that the respondent's health and safety concerns did not "excuse" his actions.[7] She felt this was used in a pejorative way, and submitted that there is a difference between providing a reason a person believes to be true and providing a reason that a person knows to be false. She submitted that this term should be considered in the sense of mitigation, which is relevant to penalty.

74. It was submitted that the respondent's conduct was not intended to show a lack of regard for Child [redacted]. He refrained from interviewing the child until he could contact the parents. Although the respondent did not know of the particular description of Child [redacted]

75. Ms King objected to the CAC submission that we may infer that the respondent's objectivity was compromised because one of the complainants was a friend of his daughters. It has not been put to the respondent and it imputes an ulterior motive which is highly prejudicial to him.

76. In response to the CAC's submission that "Although the respondent has accepted responsibility for what occurred, the Committee notes that the respondent does not appear to have complete insight into the impact of his conduct on Child [redacted], as he has continued to maintain that he had a good reason for his actions," Ms King submitted that this was a non sequitur; the conclusion is not supported by the premise.

Discussion

77. 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*

[7] See CAC submission above at paragraph 63 (d) pXXX

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:

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

78. In *CAC v McMillan*[8] we summarised the role of disciplinary proceedings against teachers as:

> *… 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.*

79. We appreciate that the respondent was faced with some serious allegations about Child [redacted]'s conduct, and it was important that he acted. However, he failed to appreciate that he

[8] NZTDT 2016/52, 23 January 2017, paragraph 23.

also had obligations to Child [redacted]. He was unable to navigate his way through those competing interests in the manner expected of a principal. In fact, he does not even seem to have considered that he had competing interests. Some of the distress and inconvenience that Child [redacted] and his whānau experienced are the usual consequence of a suspension. It is possible that if the respondent had followed the steps set out in the Ministry of Education Guidelines, a suspension might have been appropriate, but he did not go about things in the right way and his actions added significantly to the harm to Child [redacted] and his whānau. In particular, the respondent did not:

a) at any time attempt to interview Child [redacted]. He did not put the facts as he understood them to the student and record the response. This could have been done once he had involved the parents;

b) explain to Child [redacted] parents how the law operated[9] and what the process was. Rule 7 of the Suspension Rules provides that "…*every participant … should be guided by the following principles:*

> *(a) The need for every participant to understand the processes, practices, and procedures*

It appears that the respondent did not provide Child [redacted]'s parents with the Ministry of Education Guidelines for Parents. The respondent did not discuss with them his concerns pending an investigation. It is possible that they might have agreed that it was in everyone's best interests that Child [redacted] remain at home for a few days to provide some breathing space. Instead, he led them to believe that he had the authority to stand down Child [redacted] indefinitely;

c) ensure that during the suspension reasonable steps were taken to ensure schoolwork for Child [redacted] or that he had received counselling under s 77 of the Act;

d) explain to the Chair of the BOT what the legal process was, refer her to the Ministry of Education Guidelines on Stand-downs and Suspensions, and discuss how to balance those requirements with his health and safety concerns.

80. The respondent knew that the suspension was unlawful, but at the same time felt it was justified. We do not understand why he felt that he could depart from legal requirements without referral to the Ministry of Education Guidelines. He does not seem to appreciate

9

that it is not uncommon for a stand-down or suspension to involve issues of health and safety, and the need to consider any possible harm that might be experienced by one or more students as a result of the behaviour of another student. It does not mean that there should be a departure from the usual process.

81. We agree with the CAC that this case is more serious than *Bremer.* The respondent is guilty of a series of individual conscious omissions, as outlined above. While we accept Ms King's submission that "deliberate" is not the same as "deceitful" or "culpable", we find the assertion that the respondent inadvertently misled the Chair a little tenuous. He was not transparent in his communication with the Chair or with Child [redacted]'s parents; he did not provide all the information which was known to him, that is, that there was a process that needed to be followed and he was departing from that process.

82. The respondent's apparent lack of concern for Child [redacted] troubles us. Even if he genuinely thought that he could suspend Child [redacted] it is unclear why he took so few steps to ensure that the boy's wellbeing and education were disrupted as little as possible. The requirements to ensure that Child [redacted] had access to counselling under s 77 exist irrespective of a suspension, lawful or otherwise. It is our view that the respondent broke the law in a serious way in terms of a child's right to an education. We do not understand why the respondent did not proactively make arrangements to support the continuity of the boy's schooling. It was as though he had washed his hands of Child [redacted].

83. We do not know whether the respondent's daughter's friendship clouded his judgement, as suggested by the CAC, but we do find that the respondent seemed to be blinkered with his views. Even after the CYFS had formed a view that Child [redacted]'s conduct was not as serious as the respondent had first thought, the respondent argued strongly for exclusion from the school. He seemed unable to keep an open mind and remain impartial, and consider actions that would support Child [redacted] to remain at school. He appears to have made up his mind about Child [redacted] and did not seem able to be persuaded otherwise.

84. We understand the non sequitur Ms King referred to was that the fact that the respondent has continued to maintain he had good reason for his actions does not logically lead to a conclusion that the respondent does not appear to have complete insight into the impact of his conduct on Child [redacted]. We appreciate the point Ms King is making. However we do observe that we have not seen any expression of remorse for the unnecessary distress caused by the respondent's failure to follow the correct procedure.

85. We agree that the penalties proposed by the CAC are appropriate, but we have refined the conditions. We therefore impose the following penalty:

a) Censure under s 404(1)(b);

b) Annotation of the register under s 404(1)(e);

c) Conditions under s 404(1)(c) that:

i. the respondent shall not resume a position of principal unless he has undergone a mentoring programme as outlined in paragraph ii;

ii. the mentoring programme referred to in paragraph i. shall be with a mentor approved by the Senior Manager Professional Responsibility, will take place over at least a six-month period and will cover management of students and training in being a principal, conflicts of interests and balancing competing rights of children;

iii. the mentor of the programme referred to in paragraph i. shall provide at least two reports to the Senior Manager Professional Responsibility, the first being at the half-way point of the mentoring programme, with the second being at the end of the programme;

iv. irrespective of any leadership positions, within six months of the date of this the respondent shall undergo training or professional development [redacted] and provide evidence of the same to the Senior Manager Professional Responsibility. This requirement is to be undertaken within six months of the date of the Tribunal's decision and is not dependant on the position gained or occupied by the respondent in a school;

v. the respondent must notify any prospective employers of the Tribunal's decision and provide them a copy of it.

Costs

86. The CAC sought a 50% costs contribution, which is more than the usual 40% this Tribunal awards in cases that proceed on the papers. The reasons can be summarised as the protracted course this matter has taken because of the respondent's vacillation on the agreement of facts. In November the parties advised that agreement was likely on all but two matters which the parties were still discussing. The CAC set out the various

prehearing conferences and directions that were made between October 2018 and February 2019, including directions to file evidence, resulting in the CAC spending time liaising with witnesses and preparing statements. Three days before the CAC briefs of evidence were due to be filed, the respondent advised that he was now prepared to admit the previously disputed particulars and accepted the ASF that had previously been submitted in November.

87. Ms King submitted that while it is appreciated that proceeding with matters quickly can lower costs, we should not lose sight of the right of a person to give due consideration to matters which can have a significant impact on the person's life. Unwillingness to agree to something that a person does not believe to be accurate should not be penalised financially; it is not unusual to have exchanges about the contents of agreed statements.

88. We certainly agree that a teacher should be given a reasonable opportunity to negotiate a finalised summary of facts. However in this case, after the matter was set down for hearing of the matters in dispute, and the briefing of witnesses was all but complete, the respondent agreed to a summary that had been proffered at least three months earlier. We therefore agree that the respondent should pay 50% of the costs of conducting the hearing, under section 404(1)(h) and (i), that is 50% of the Tribunal's costs and 50% of the CAC's actual and reasonable costs. 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 he wishes to make in relation to the costs of the Tribunal or CAC. That may include information about his own income and outgoings.

89. The Chairperson will then determine the total costs to be paid.

Non-publication

The application

90. Although no application and supporting documents were filed, in Ms King's submissions, she included some statements about the size of the school and town, [redacted]

The CAC's response

91. Ms Mok for the CAC responded to this, querying the risk that Child [redacted] would be identified, and noting that there are other measures that can protect him. Although the information in the submissions was evidence "from the bar"[10] rather than through a witness, the respondent has not objected or disputed the information. The following paragraph is to be suppressed from any published decision.

92. [redacted]

93. Ms Mok also observed that these events occurred over 2 years ago.

94. We therefore order under s 405(6) that the name and identifying details of Child [redacted] are not to be published. This includes the information in paragraph 92.

Theo Baker

Chair

[10] From the bar is a term often used when a lawyer gives evidence of facts rather than producing a statement from a witness.

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).