

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Teacher M

NZTD 2018-75

Teacher M was referred to the Disciplinary Tribunal (the Tribunal) after arranging to meet up with a student at a bar.

The result: The Tribunal considered Teacher M's actions amounted serious misconduct and imposed a censure, annotation of the register and conditions. Non-publication orders have been granted to Teacher M's name and any identifying details, including the name of the school.

On 10 July 2019 the Tribunal released its decision on the conduct of Teacher M.

In the lead up to the bar incident Teacher M called and texted a year 13 student to discuss the completion and submission of his assignment. Teacher M had never given their personal phone number to any students previously. In September 2017 Teacher M had drinks with friends and colleagues and became intoxicated. The student and Teacher M communicated by phone and the student told Teacher M that he was going to a local bar. Teacher M left their friends and went to the same bar as the student where they shared some drinks. Teacher M then went home alone.

The CAC submitted that Teacher M's conduct amounted to serious misconduct as meeting a student outside the education setting without a valid reason is in the Code of Professional Responsibility as an example of behaviour that may breach the boundaries of professional relationships with students. The CAC submitted that Teacher M's conduct reflects adversely on their fitness to teach and would give rise to serious concerns by any reasonable member of the public. It may also bring the profession into disrepute.

Teacher M noted that they fully accept the elements of the charge and that the level of conduct did not reach the level of serious misconduct. Teacher M would not be returning as the student's teacher so there would be no instances of the teacher abusing their authority. Teacher M also pointed to the rehabilitative steps that they have taken including attending regular AA meetings, engaging in counselling and taking antidepressant medication.

The Tribunal considered that while Teacher M's conduct amounted to serious misconduct it was very much the lower end of the scale. While Teacher M's conduct was a serious lapse in judgment which could have had highly adverse consequences it did not go any further. The Tribunal noted that inappropriate relationships which occurred immediately after the student has ceased to be a student are concerning on the basis that a teacher will likely have continued influence over a student.

The Tribunal ordered that Teacher M was censured, conditions imposed that Teacher M continue in counselling sessions or AA meetings and advise any prospective employer of the decision for two years. The register will be annotated to record the censure and conditions.

Teacher M applied for non-publication orders and provided medical evidence from a GP and evidence from a psychologist and counselling service that their mental health would be affected by the release of this decision. The Tribunal noted that the evidence could have been stronger but ordered non-publication orders on the basis of protecting the teacher against the potential significant impacts on her mental state that publication may cause and also to protect the student involved.

The Tribunal granted non-publication orders for the name of the teacher and student involved, or any details capable of identifying them, as well as the name of the school.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018/75

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

AND **Teacher M, registered teacher, [REDACTED]**
[REDACTED]

Respondent

DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

HEARING: 22 February 2019

TRIBUNAL: John Hannan (Deputy Chair), Kiri Turketo, Simon Williams

DECISION: 10 July 2019

COUNSEL: Ngaroma Tahana for Complaints Assessment Committee
CJ Pendleton and AA Strang for Respondent

Introduction

1. By notice of charge dated 8 October 2018 the Complaints Assessment Committee (CAC) charges that the respondent engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
2. The particulars of charge are that on 30 September 2017, the respondent arranged to meet a year 13 student in a bar and continued to drink with him.
3. The CAC says that this conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9 (1) (d) and/or (o) of the Education Council Rules 2016 (as they were prior to amendment on 18 May 2018) or alternatively is conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers under section 404 of the Education Act.
4. An agreed summary of facts has been prepared. The respondent has applied for permanent name suppression.

Facts

5. The agreed a summary of facts is as follows.
 1. *The respondent Teacher M was a registered teacher employed at [REDACTED] [REDACTED] (the School) between [REDACTED]. The respondent is currently on [REDACTED] leave [REDACTED].*
 2. *In 2017 the respondent was teaching [REDACTED] [REDACTED] at the School.*
 3. *In the last week of school, the respondent spoke to the student's father about the student's [REDACTED] assignment which was due. The student requested in an email the respondent call him to discuss the completion and submission of his [REDACTED] assignment.*
 4. *The student had provided his personal mobile number in the email and the respondent called this number.*
 5. *The respondent had never given her personal mobile number to any of her students before.*
 6. *The respondent finished her employment with the school on Friday, [REDACTED] [REDACTED] She intended returning to teach at the school in 2019 following her overseas experience.*
 7. *On Saturday, [REDACTED] 2017 the respondent had dinner and drinks with friends and colleagues from the school to mark her farewell. After dinner the respondent and her*

friends went to the [REDACTED] where they danced and drank more alcohol. The respondent was heavily intoxicated.

8. Although the respondent did not intend to contact the student that night, the student and the respondent communicated via mobile phones. The student told the respondent that he was going to the [REDACTED]

9. The respondent left her friends at the [REDACTED] and went to the [REDACTED]

10. The respondent entered the [REDACTED] and saw the student with some, friends. The respondent shared some drinks with the student at the bar until she left. She left the [REDACTED] alone and returned to her home.

Investigation and referral

11. The School submitted a mandatory report to the Education Council on 25 January 2018. The Complaints Assessment Committee of the Education Council (CAC) investigated the allegations and prepared an investigation report for response.

Teacher's response,

12. The respondent accepts she met with the student at the [REDACTED] where she drank with him. She denies having any physical contact with the student on the night.

13. The respondent acknowledged that her actions contravened the Professional Code of Responsibility and she expressed remorse for her actions.

Applicable Code

14. High standards of conduct are expected of teachers, as set out in the Code of Professional Responsibility (the Code). Under the Code teachers will (among other responsibilities);

(a) Maintain public trust and confidence in the teaching profession by:

(i) Demonstrating a high standard of professional behaviour and integrity¹; and

(ii) Contributing to a professional culture that supports and upholds the code².

(b) Will work in the best interests of learners by:

¹ Rule 1.3

² Rule 1.5

(i) Promoting the well-being of learners and protecting them from harm³; and

(ii) Engaging in ethical and professional relationships with learners that respect professional boundaries⁴.

6. The respondent provided an affidavit in support of her application for permanent name suppression. She also provided a series of very positive references, and reports from her GP and other medical professionals.
7. In her affidavit the respondent explains her decision to teach, and her history of employment as a teacher. She talks extensively about her passion for teaching and the development of a sense of duty and community with her kiako and fellow teachers. She says she aims at very high standards. [REDACTED]
8. She then gives evidence of her anxiety and depression. She says she has suffered from these conditions since 2011. This has either led to or exacerbated unhealthy drinking habits.
9. She had a series of sessions with a psychologist between 2014 to 2018 to address these issues.
10. In 2017 she realised she could not continue teaching at the school. She says she believes she had taken on too many roles and her workload was unhealthily high. She arranged to take a [REDACTED] with a year's leave of absence to do so.
11. She then gives an account of the context in which the incident with the student occurred. This is largely recounted in the agreed summary of facts set out above, but she explains that the student sent her an email containing his cell phone number asking her to call him about a project he needed to complete. This was in response to her calling his father by landline about the student needing to complete the project so that she could grade it before finishing her duties at the school and leaving New Zealand. The student emailed her on her last day at school. He included his mobile phone number. She ended up texting him about the logistics of getting the project to her so that she could grade it before leaving New Zealand the following week. She says she had never previously given a student her mobile number.

³ Rule 2.1

⁴ Rule 2.2

12. The next day was Saturday and that evening she went out with some friends and colleagues for a farewell dinner and drinks. She made the decision to consume alcohol after 3 months of sobriety. It was then that the communication with the student occurred and she arranged to meet at the bar.
13. She says that since the incident she has committed to a life of sobriety. She says she has not consumed alcohol since that night. She has attended regular AA meetings and continues with ongoing sessions. She supplied evidence of her AA meetings attendance.
14. She expresses remorse and says that she knows she crossed the boundary of a safe teacher-student relationship and did not behave in a way acceptable for a teacher.
15. She says she has been getting counselling and medical support [REDACTED] where she has been spending the [REDACTED]. She has been prescribed antidepressant medication. She is practising yoga, and running. In support of her application for name suppression, she says that she is "incredibly anxious" about the publication of the decision and is very stressed about it. She says she is deeply fearful that the stress could undo the positive significant changes she has made in her life.
16. The respondent provides as exhibits to her affidavit a letter from a psychologist which confirms that she presented with high anxiety and depression, and reported binge drinking. Between 2014 and 2018 the psychologist had 21 sessions with the respondent. The psychologist explains the therapy employed and says the respondent engaged fully with the therapy.. The psychologist says that she believes that publication of the respondent's name would cause a setback with respect to her anxiety, depression and long-term coping and would increase the risk of psychological damage.
17. The respondent provides emails from 2 AA members confirming her involvement in that organisation.
18. A letter dated January 2019 from a [REDACTED] General practitioner is provided which says the respondent has had regular appointments through 2018 for anxiety and depression relating to the investigation and her inability to work as a teacher the [REDACTED]. The GP says she has made major changes to her lifestyle and has been sober since September 2017. The respondent has been "extremely distraught". The letter confirms prescribing antidepressant medication.

19. There is also a letter from a [REDACTED] counselling service confirming that the respondent has engaged in counselling with the service after being self-referred following the diagnosis of anxiety and depression by her GP.
20. 3 references are provided from colleagues at the school in question. These speak very well of the respondent's dedication to teaching and the quality of her work. They also refer to her commitment to her own well-being and her improved self-awareness.
21. There are some additional references which are character references from friends, all speaking positively of her character and of her commitment to teaching.

Submissions for CAC

22. The CAC submitted that the respondent's conduct constituted serious misconduct that warrants a penalty comprising censure, annotation, and conditions on the respondents practising certificate. The CAC proposes conditions that the respondent continue with personal counselling and regular attendance at AA meetings, enrol in a professional development course directed at ensuring she is aware of proper boundaries between teachers and students, and also advise future potential employers of this decision. The CAC recognises that this was a one-off incident and the prospect of rehabilitation is such that cancellation is not appropriate.
23. The CAC notes that privately meeting a student outside the education setting without a valid context is given in the Code of professional Responsibility⁵ as an example of behaviour that may breach the boundaries of professional relationships with students.
24. The CAC produced a useful table of cases involving similar behaviour. Notably, *CAC v Teacher K*⁶. In that case a teacher contacted a student through the school Facebook account, allowed the student to sleep in the same room at the school retreat and had multiple out-of-school interactions with the student. This was held to be serious misconduct, and an aggravating factor was that the teacher sought emotional support from the student for her own mental health difficulties. The teacher engaged in professional development, was cooperative and acknowledged and regretted her actions. The penalties imposed included censure, with conditions on the teachers practising certificate and the register annotated for 3 years.

⁵ Code of Professional Responsibility – Examples in Practice at P 12

⁶ NZTDT 2018/7

25. The Tribunal sees this case as of somewhat less seriousness than the *Teacher K* case, in particular in that this was a "one-off" incident and there is no suggestion of obtaining emotional support from the student. On the other hand alcohol consumption and conduct occurring outside the school are aggravating factors.
26. The CAC submitted that the respondent's conduct reflects adversely on her fitness to teach and would give rise to serious concerns by any reasonable member of the public. As well it brings the teaching profession into disrepute.

Submissions for respondent

27. Counsel for the respondent noted that she fully accepts the elements of the charge. Counsel submitted that the conduct did not reach the level of seriousness consistent with a finding of serious misconduct. The basis for this was that this was a one-off event, the respondent had at the time of the incident finished her duties as a teacher and as the student's teacher, the respondent would not be returning as the student's teacher, there are no instances of the respondent abusing her position of authority with the student in the classroom or elsewhere. Counsel submitted that meeting a year 13 student in this context and continuing to drink with them in an intoxicated state is not of a character or severity that constitutes serious misconduct.
28. The respondent's submissions also pointed out the rehabilitative steps that she has taken up.
29. As to penalty, the respondent submits that there is no need to protect the public in the present case. The respondent has taken full responsibility and has engaged in rehabilitative steps. Counsel submitted that it is open to the tribunal to make no adverse finding against the respondent, but that if an adverse finding were made the outcome should not include a condition requiring the respondent to undertake a professional development course in relation to appropriate boundaries. The respondent accepts that censure is appropriate but submits no annotation is needed. Because there is little likelihood of any future behaviour of this type the respondent submits also that there is no need for a condition that she advise current or future potential employers of the decision, and says such a condition would be disproportionately severe.

Decision

30. Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of the following outcomes, in that it:

- (a) adversely affects, or is likely to adversely affect, the well-being or learning of one or more students; or
 - (b) reflects adversely on the teacher's fitness to be a teacher; or
 - (c) may bring the Teaching profession into disrepute.
31. As well as having one or more of these effects, the conduct must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct, as found in the Teaching Council Rules 2016 (the Rules).
32. The Tribunal considers that the respondent's conduct amounts to serious misconduct, although very much at the lower end of the scale. There was no deliberate attempt to set up contact with the student, in the sense that the provision of the respondent's mobile number was in response to the student contacting her on mobile to discuss finalising his project. However on the evening in question the respondent, in a state of intoxication, arranged to meet the student, and drank with him for a period. This was a very serious lapse of judgment which could have had highly adverse consequences. But that is as far as the contact went.
33. Maintenance of appropriate professional boundaries is fundamental as a skill, obligation and professional discipline for all teachers. Failure to do so creates dangers both for students and for teachers. Failure to maintain appropriate boundaries may result in even more serious misconduct. It should not take any reflection for a teacher to know that meeting with a student in a bar and drinking with the student is highly inappropriate, even more so if it happens late at night and/or under the influence of alcohol.
34. The Tribunal accepts that there is no suggestion of any sexual or romantic aspect to the respondent's conduct. It further notes that while it does not have information about the exact basis upon which the respondent detached herself from the situation and went home, she may in fact have exercised appropriate judgment in the end.
35. We do not accept the submission of counsel for the respondent that because the respondent had finished her employment at the school and will not be further teaching the student, the matter is of sufficiently lessened seriousness as to not warrant a finding of serious misconduct. It has not been established that the respondent had at that time completed assessing the student's work. But more importantly it is not just situations in the school context and while the student is a student of the teacher where an inappropriate crossing of professional boundaries may occur and may amount to serious misconduct. Inappropriate relationships which

occur immediately after the student has ceased to be a student are concerning, on the basis that the teacher's influence over the student by reason of their previous role as a teacher may have continued effect on how they interact, by creating a power imbalance. It is the level of risk created by the failure to maintain professional boundaries that is of concern, not just the actual outcome and effect. As well, such incidents indicate that the teacher may have an inadequate appreciation of the need to maintain boundaries and/or when of a risky situation is developing; both of those possibilities may reflect adversely on the teacher's fitness to teach.

36. In terms of the definition of serious misconduct in section 378 of the Education Act 1989, this conduct therefore reflects adversely on the respondent's fitness to practice and alternatively or additionally was capable of bring the teaching profession into disrepute. As well, it is of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. It clearly breached professional boundaries.
37. In determining what should be the appropriate outcome we have reviewed a number of previous decisions involving failure to maintain appropriate professional boundaries referred to us by the CAC and the respondent.
38. The primary purposes of professional disciplinary proceedings are the protection of the public and the maintenance of professional standards. In discharging its responsibilities to the public and profession, the Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances. It also must seek to apply the least punitive sanction which is appropriate in the particular circumstances. If rehabilitation appears a reasonable possibility that will be a highly relevant consideration.
39. On balance we have concluded that the least punitive outcome reasonable in the circumstances is censure, annotation and the imposition of appropriate conditions on resumption of teaching practice. In reaching this view we have noted that there is no suggestion whatsoever of a sexual element in the respondent's behaviour, and there is clear evidence that the respondent was suffering from anxiety and depression and had issues with excessive alcohol consumption. We see this matter as a one-off error of judgment. The respondent has exhibited insight into her condition, expressed remorse, and has taken extensive steps to undergo appropriate counselling and rehabilitation. We consider this approach is consistent with that taken in other cases where teachers have engaged in behaviour relative to students which breaches professional boundaries but has been isolated and of a more minor nature, and may have involved a teacher suffering some type of impairment., In cases such as NZTDT 2016/55, which involved significantly more serious circumstances, suspension of the

practising certificate for a period, coupled with conditions as to counselling and monitoring have been thought appropriate. We see no need for cancellation or suspension here

40. While the CAC had suggested there should be a condition on the respondent's practising certificate that she enrol in a professional development course directed at ensuring she is aware of the proper boundaries between teachers and students, and the effective means of maintaining them, we do not think this is required in this particular case. This was not a case of emotional interdependency. There is no suggestion of any previous conduct or history of behaviour involving a blurring of professional boundaries, as there was in some of the other cases where such conditions were imposed. The respondent apparently made the correct judgment to leave the bar and go home. Her issues are not, we believe, issues that involve a misunderstanding of professional boundaries.
41. The Tribunal orders as follows:
- (a) The respondent is censured;
 - (b) The register is to be annotated to record the censure and the imposition of conditions on the respondent's practising certificate;
 - (c) The following conditions are imposed on the respondent's practising certificate:
 - (i) The respondent is to continue in counselling sessions, or attendance at AA or similar meetings, to the satisfaction of the Teaching Council Manager - Professional Responsibility for a period of 2 years after resuming teaching in New Zealand.
 - (ii) For a period of 2 years after resuming teaching in New Zealand the respondent is to advise any prospective employer of this decision and provide evidence to the Manager – Professional Responsibility of the Teaching Council that she has done so.

Non-publication Orders

42. The respondent applied for an order permanently prohibiting the publication of her name and any details capable of identifying her.

43. The CAC took a neutral position on permanent name suppression although it noted similarities with other cases involving teachers with mental health issues (for which they were receiving treatment) where permanent name suppression was ordered.
44. Section 405 (6) of the Education Act provides that the Tribunal may make an order prohibiting publication of the name or particulars of the affairs of any person if the Tribunal is "of the opinion that it is proper to do so, having regard to the interest of any person... and to the public interest".
45. The default position is that Tribunal hearings are to be conducted in public and that the names of teachers who are the subject of disciplinary proceedings are to be published. This reflects the principle of open justice which applies to the Tribunal's proceedings.
46. A balance must be struck between open justice considerations and the interests of a party who seeks name suppression. The Tribunal has previously stated that a "high threshold" must be met before an order will be made for name suppression; *CAC v Adams* NZTDT 2018/11. But on the other hand the threshold is not as high as that which applies to such applications in the criminal context, and the statutory test is whether the Tribunal considers it "proper" to order non-publication in the circumstances, taking the relevant competing interests into account. This is a two-stage process; refer *CAC v Finch*⁷. Once the Tribunal has concluded that it is "proper", it may exercise its discretion to order nonpublication.
47. In order to justify a conclusion that it is proper to order name suppression there must be a real risk that publication will significantly adversely affect a teacher's rehabilitation or recovery from a mental illness or other serious impairment, or that in other ways the teacher (or in appropriate cases their family) will be affected in a serious way, beyond the ordinary embarrassment, distress, anxiety and shame which will afflict any teacher who is the subject of a published disciplinary decision. The evidence must provide sufficiently detailed information about the condition of the teacher which might cause such particular adverse effects. A bare assertion by a teacher that a condition exists or that they will suffer beyond the norm will usually not be sufficient. If the condition is a medical condition, appropriate specialist evidence may be required.

⁷ NZTDT 2016/11

48. It may in addition be appropriate to order suppression of respondent's name where publication of that name would be likely to lead to identification of the student involved in a sensitive and difficult situation.
49. The evidence put forward by the respondent as to her impaired mental state and the potential for adverse effects upon her satisfies the Tribunal that a non-publication order is proper. She has medical evidence, albeit from a GP only. She also has evidence from a psychologist and a counselling service. Some of the referees who claim to know her well speak of the potential adverse effects of publication.
50. While the medical evidence could have been stronger, the letter from her GP was a current at the time of hearing. Taking the evidence in its totality, the Tribunal considers that it is proper to order that there is to be no publication of the name of the respondent, and exercises its discretion to do so. This is on the basis of protecting the respondent against the potential significant impacts on her mental state that publication might cause, and also on the basis of protecting the student involved.
51. If the school or the student were to be identified the adverse effects on the respondent are capable of manifesting. As well, the student should be protected from distress and embarrassment. The public interest in open publication applies with greatest force with respect to the name of the teacher concerned rather than to the school. The Tribunal considers it proper to order that the names of the student and the school and any details capable of identifying them shall not be published and exercises its discretion to do so.
52. The Tribunal orders that:
- (a) there is to be no publication of the name of the respondent or any details capable of identifying her;
 - (b) there is to be no publication of the name of the student involved, or of any details capable of identifying him;
 - (c) there is to be no publication of the name of the school;
 - (d) this decision shall be redacted accordingly before publication.

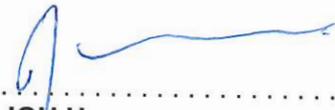
Costs

53. It is appropriate that in a professional disciplinary system the costs of carrying out appropriate professional disciplinary procedures be borne at least to a significant extent by teachers who are found to have engaged in professional misconduct, to

avoid an inappropriate burden being placed upon the balance of the teaching profession. The Tribunal normally requires teachers found to have engaged in serious misconduct to pay 50% of the costs of both the CAC, and of the Tribunal itself. In situations where the teacher has cooperated with the process and in particular has avoided the need for an in-person hearing by agreeing a summary of facts, the Tribunal will reduce the costs to 40%, and sometimes to a lesser percentage in cases involving proven hardship or other particular circumstances.

54. No particular evidence has been provided of financial hardship or inability to pay. The respondent has cooperated with the process.
55. The Tribunal orders that the respondent pay 40% of the CAC's actual and reasonable costs. No costs schedule has yet been received from the CAC. In the event that the parties cannot agree the actual and reasonable costs, the Tribunal delegates to the Deputy Chair the task of fixing the amount of those costs.
56. The respondent is also ordered to pay 40% of the Tribunal's costs. The Tribunal's costs are \$1145. 40% of that amount is \$458 and the respondent is ordered to pay that sum.

Date: 10 July 2019


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JGH Hannan
Deputy Chairperson

NOTICE - Right of Appeal under section 409 of the Education Act 1989

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. Subsections (3) – (6) of section 356 apply to every appeal as if it were an appeal under subsection (1) of section 356.