

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**UNDER** the Education Act 1989

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

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

Referrer

**AND** **AMIR ALI**

Respondent

---

**DECISION OF THE TRIBUNAL**

---

Tribunal: Nicholas Chisnall (Deputy Chair), Simon Williams and Tangi Utikere

Hearing: 5 September 2019

Decision: 15 October 2019

Counsel: M K Regan for the referrer  
D King for the respondent

## **Introduction**

[1] The respondent was convicted in the District Court on a charge of doing an indecent act in a public place in contravention of section 125 of the Crimes Act 1961, which is an offence that carries a maximum penalty of two years' imprisonment. The respondent was ordered to come up for sentence if called upon within 12 months of being convicted.<sup>1</sup>

[2] The Complaints Assessment Committee (CAC) resolved to refer the conviction to the Tribunal. The CAC asserts that the conduct behind the conviction obliges us to reach an adverse finding about the respondent's fitness to teach, thus requiring the Tribunal to exercise its disciplinary powers under s 404 of the Education Act 1989.

## **The background**

[3] The respondent defended the charge and was found guilty at a judge-alone trial held in the District Court. We were not provided with his Honour Judge Sainsbury's decision explaining why, having heard the evidence, he found the charge proved. However, we have read and considered the Judge's careful reasons for declining to discharge Mr Ali without conviction.

[4] What follows is taken from the agreed summary of facts presented by the parties; albeit what we say later at [5] should be kept in mind, as it necessarily modifies Mr Ali's concession recorded in the summary that he failed to disclose his conviction.

### *Introduction*

Mr Amir Ali (**Mr Ali**) gained provisional registration in 2001 and was fully certified in 2005. Mr Ali's teaching experience has included several institutions in Fiji, and Al-Madinah School in New Zealand.

Al-Madinah School is based in Mangere, Auckland. The school enrolls students between Years 1 and 15.

### *Conviction*

On 1 March 2017 District Court Judge Sainsbury convicted Mr Ali of an offence of doing an indecent act in public on 15 February 2016, after a Judge-alone trial.

---

<sup>1</sup> *Police v Ali* [2017] NZDC 18136, 16 August 2017.

Judge Sainsbury subsequently described the offending as follows (in his sentencing notes dated 16 August 2017):

*The circumstances leading to the offending were that back in February 2016 Mr Ali had been separated from his wife of some years. Effectively he was living in his car. He had been trying to continue his employment as a teacher and keep in contact with his children while living in this way. He had left his wife in the family home with the children. Given the commitment of resources towards that, he simply was not in a position at that time to find anywhere else to live. As [Mr Ali's lawyer] notes it was a particularly low point in his life.*

*In terms of this offending itself what has happened is that he was parked up in a residential area in Auckland. A woman was walking down the road. She noticed a foot sticking out of the car door. It caught her attention. She looked around and she saw Mr Ali in the car masturbating. She alerted the Police.*

*There had been some concern from the fact that the car was on a road that led down to a park, that there may be some nexus between the offending and the fact that it was a public park where families were gathered at this time of day. Having heard the evidence and noting where in fact the car was parked I do not see any connection in that.*

*What can be said in Mr Ali's credit is it did not seem to be behaviour that was directed at any member of the public, nor does it seem to be driven by some sort of deviant gratification by doing an act like this in public. The fact that he was effectively living in the car seems to have been more of a factor insofar as it can be called that.*

#### Failure to disclose conviction

Section 397(1) Education Act 1989 states that "every holder of a practising certificate and every authorised person who is convicted of an offence punishable by imprisonment for 3 months or more must, within 7 days of conviction, report the conviction to the Education Council".

Mr Ali failed to report the conviction within the required timeframe.

On 1 May 2017, the Teaching Council received Mr Ali's application to renew his teacher registration.

As part of the application, applicants are required to answer either yes or no to the following question "Are there any matters for which you are currently under investigation which may call into question whether you meet the Education Council's Good Character and Fit to be a Teacher criteria?". Mr Ali ticked the 'no' box.

On 29 May 2017 the Principal of Al-Madinah School, Mr Asin Ali, emailed the Teaching Council in regard to Mr Ali:

*... last Thursday Amir told me that there was there was [sic] an allegation of sexual nature against him and that his lawyer was going to contact me and the Education Council. Amir is supposed to be meeting me this afternoon to give further details which I can then reveal to the Education Council...*

On 29 May 2017, Mr Ali's lawyer emailed the Teaching Council referring to an error on Mr Ali's registration application. The error was about Mr Ali ticking the 'no' box on his registration application.

On 2 June 2017 the Teaching Council received a mandatory report from Principal Ali, regarding Mr Ali, stating:

*... On Thursday 25 May 2017 Amir Ali came to my office in the afternoon and told me there was an allegation of indecent act against him and that his lawyer was going to contact me and the Education Council. By the time I got further information from Amir's lawyer and interview, it seems to be clear that Amir has been convicted and is going to be sentenced on 9 June 2017. I am also concerned that he appeared to deliberately delay in making the application for the renewal of his teacher registration and when he did so he lied about his investigation...*

Mr Ali signed an undertaking not to teach that same day, 2 June 2017.

### Sentencing

Prior to his sentencing Mr Ali was interviewed by a Probation Officer, who then prepared a pre-sentence report. That report noted the following points:

- Mr Ali initially maintained his innocence, claiming that he had been merely changing his trousers in the car.
- A week later Mr Ali approached the Probation Officer and advised that he had now decided to admit his guilty – “in the next breath, he candidly admitted that this was a strategic manoeuvre and pragmatic decision to expedite his s 106 application [for a discharge without conviction] by acknowledging guilt. This was then followed by adding that he remained innocent, however. Confusingly he then soon followed this verbal assertion with a text that he was guilty and that he did what he did out of loneliness and would not do it again”.

Mr Barry Kirker, a clinical psychologist, met with Mr Ali and prepared a report for sentencing. The report noted the following points:

- Mr Ali requested that Mr Kirker not interview the Principal of Al-Madinah School, as Mr Ali did not believe that the Principal would be a supportive information source.
- Mr Kirker's view was that Mr Ali's level of insight into his psychological state at that time appeared poor.

- Mr Ali stated that he only admitted his offending after advice that it would help his case for a discharge without conviction, and that he did not want to initially be upfront with the Teaching Council about having a matter before the Court.
- When pressed, Mr Ali conceded that he may have been masturbating at the time.
- Mr Ali had previously received two discharges without conviction in relation to domestic violence incidents against his former wife in 2010 and 2011.
- Mr Ali did not appear to be suffering from any diagnosable mental health condition at either the time of his offending or at the time of the assessment.
- Mr Ali's offending was likely caused by a combination of factors including:
  - Sexual frustration and not accessing appropriate outlets.
  - Use of sex to cope with negative feelings / to lift mood – an inability to appropriately manage feelings such as sadness, anger, and anxiety.
  - Impulsivity and propensity to be disinhibited / have poor boundaries.
  - Secrecy / lack of openness about personal matters.
  - Lack of empathy for others.
  - Limited values / moral framework to guide behaviour.
- Mr Kirker concluded that deviant sexual arousal could not be ruled out until Mr Ali provided further information regarding his sexual functioning.
- However Mr Kirker noted that Mr Ali had worked around young persons as a teacher and as a soccer referee for a number of years and no information was provided regarding documented concerns about disinhibited or inappropriate behaviour in those sentencings.
- There were no factors identified that would render Mr Ali specifically unfit to be a teacher.
- It was recommended that Mr Ali never be alone with any student, in order to keep himself and students safe (Mr Kirker understood this to be standard teacher practice).

Mr Ali was sentenced by Judge Sainsbury on 16 August 2017.

Mr Ali sought a discharge without conviction. The Police opposed the application.

Judge Sainsbury considered that the offending was “at the lower end of this type of offending”, and was not specifically directed at any individual. However he considered that offending of that nature was necessarily serious.

Judge Sainsbury considered that the offending was case-specific, and “might well reflect a particular time in Mr Ali’s life that hopefully will not return”.

Judge Sainsbury noted that Mr Ali had previously received two discharges without conviction in relation to domestic violence. It appeared that the discharges were granted because of the impact on Mr Ali’s teaching career. Judge Sainsbury stated, “at some point Mr Ali has to take responsibility for avoiding offending that might impact on his teaching career”.

Judge Sainsbury declined to discharge Mr Ali without conviction on the basis that the direct and indirect consequences of a conviction were not out of all proportion to the gravity of the offending.

Instead Judge Sainsbury imposed a sentence of “to come up for sentence if called upon within 12 months”. The Judge considered that the sentence made “the point to anyone in the future that there were circumstances about the offending that were unusual and that the offending is unlikely to be repeated”.

#### Further psychological report

On 3 February 2018 Dr Sean Sullivan, registered psychologist, provided an updated psychological report regarding Mr Ali.

The assessment was based on five sessions with Mr Ali.

Dr Sullivan considered that the concerns raised in Mr Kirker’s report had either been addressed or clarified in the five sessions.

Dr Sullivan agreed with Judge Sainsbury’s comments that the offending appeared to be case specific, and was not an indication of possible ongoing sexual offending that may place students at risk.

#### Teacher’s comments to CAC

At a meeting with the CAC on 27 September 2018 Mr Ali claimed to be simply changing his trousers and denied masturbating. Later however, he acknowledged it was a one-off incident occurring due to frustration.

### **The respondent’s alleged failure to report his conviction to the Council**

[5] The CAC alleged that Mr Ali failed to report his conviction to the Teaching Council in accordance with the obligation resting on practitioners under s 397 of the Education Act. However, during the hearing counsel for the CAC, Mr Regan, accepted that Mr Ali did not breach his duty of candour. This is because the notice of charge presupposed that a conviction against

Mr Ali was entered on 1 March 2017, upon the Judge finding the charge proved. That is not correct, as Judge Sainsbury deferred entering a conviction to enable the respondent to advance an application to be discharged without conviction under s 106 of the Sentencing Act 2002. That application was heard and declined on 16 August 2017. On 29 May 2017, which fell between Mr Ali being found guilty and being sentenced, he informed the Council of the criminal proceedings.

[6] We accept that Mr Ali misled the Council when he completed his application to renew his practising certificate on 1 May 2017. As outlined in the agreed summary of facts, the form invited Mr Ali to answer whether there were, “Any matters for which you are currently under investigation which may call into question whether you meet the Education Council’s Good Character and Fit to be a Teacher criteria?” Mr Ali answered “no”. Strictly speaking, Mr Ali was not “under investigation” when he answered the question, as he had already been found guilty of the charge in the District Court. As we noted during the hearing, the question’s use of the term “under investigation” reflects the fact that it has not just the criminal context in mind.<sup>2</sup> Despite the fact that Mr Ali was not technically “under investigation”, he remained before the District Court and his offence was of a type that put his fitness to teach and character in issue. He should have ticked “yes”.

[7] We have previously said that teachers have a duty to be open and honest with both the Council and their employers. A failure to be truthful can amount to serious misconduct in its own right.<sup>3</sup> However, Mr Ali mitigated his deceit when he disclosed his criminal charge to his principal soon after the form was submitted. The principal immediately contacted the Council on 29 May, as did the respondent’s lawyer on the same day. Mr Ali’s belated honesty does not entirely extinguish his misconduct, but we accept that it constitutes a strong mitigating factor.

---

<sup>2</sup> For example, a teacher might be “under investigation” by his or her school for alleged serious misconduct in the employment context.

<sup>3</sup> See NZTDT 2010/17, 13 August 2010, *CAC v Teacher C* NZTDT 2016/40 and *CAC v Jenkinson* NZTDT 2018/40.

## **The relevant law regarding the referral of convictions**

[8] This case involves the referral to the Tribunal of the fact the respondent has been convicted of a criminal offence.<sup>4</sup> The test that therefore applies is whether the circumstances of the behaviour that resulted in the conviction reflect adversely on the fitness of the respondent to practice as a teacher.<sup>5</sup> It is only by reaching an adverse conclusion that we are empowered to exercise our disciplinary powers.

[9] The District Court made it clear in *CAC v S* that we are not required to find the respondent guilty of serious misconduct before we can exercise the disciplinary powers available to us under the Education Act.<sup>6</sup> That being said, regardless of whether a matter reaches the Tribunal for adjudication by way of notice of referral, or by notice of charge of serious misconduct, our function is to decide if the behaviour concerned reflects adversely on the teacher's fitness to teach. This explains why it is helpful, but not mandatory, to scrutinise whether the offending engages one or more of the three professional consequences described in the definition of serious misconduct under s 378 of the Education Act.<sup>7</sup>

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

[10] Mr Ali did not resist the fact that we are required to reach an adverse conclusion about the effect of his behaviour on his fitness to teach.

[11] The respondent's act of public masturbation clearly adversely reflects on his fitness to teach. Practitioners have an obligation to their students to

---

<sup>4</sup> All convictions punishable by three months' imprisonment or more must be reported to the Teaching Council, both by the teacher under s 397 of the Education Act and by the employer.

<sup>5</sup> *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Judge Sharp, at [47].

<sup>6</sup> At [48]. We also said in *CAC v Campbell* NZTDT2016/35, at [14], that a referral to the Tribunal does not need to be framed as a charge of serious misconduct.

<sup>7</sup> As we said in *CAC v Lyndon* NZTDT 2016/61 at [18] and in *CAC v Sefton* NZTDT 2017/35 at [12]. In *Sefton*, we said at [21] that, "We should be careful that in using the serious misconduct test as guidance, we do not limit ourselves in our disciplinary response. The wording of s 404 does not require a finding of serious misconduct in order to impose a penalty. We simply must hear a 'charge of serious misconduct or any matter referred to it by the Complaints Assessment Committee'."

both teach and model lawful behaviour.<sup>8</sup> Mr Ali's conduct undermines the high standard of professional behaviour the public expects of those in the teaching profession.

[12] The question that must be addressed is whether informed members of the public could reasonably conclude that the reputation and good standing of the profession is lowered by the respondent's offending. We consider there can be no doubt that Mr Ali's behaviour risks lowering the profession's standing in the eyes of the public.<sup>9</sup>

### **Penalty**

[13] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.<sup>10</sup> We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.<sup>11</sup>

[14] It is not the purpose of a professional disciplinary proceeding to punish the teacher a second time for the same behaviour where he or she has been convicted of a criminal offence. Rather, as we said in *CAC v McMillan*,<sup>12</sup> the Tribunal's mandate is to protect the public through the provision of a safe learning environment for students, and to maintain professional standards and the public's confidence in the profession.

[15] In *CAC v Fuli-Makaua*<sup>13</sup> we endorsed the point that cancellation is required in two overlapping situations, which are:

---

<sup>8</sup> This obligation is contained in clause 3(c) of the Code of Ethics for Registered Teachers, which applied at the time the respondent offended.

<sup>9</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

<sup>10</sup> The primary considerations regarding penalty were helpfully discussed in *CAC v McMillan* NZTDT 2016/52.

<sup>11</sup> See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

<sup>12</sup> *McMillan* at [16] to [26], citing *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) and *Ziderman v General Dental Council* [1976] 1 WLR 330.

<sup>13</sup> *CAC v Fuli-Makaua* NZTDT 2017/40, at [54].

- a) Where the offending is of such seriousness that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession;<sup>14</sup> and
- b) Where the teacher has no or limited insight into the cause of the offending and lacks meaningful rehabilitative prospects. Therefore, there is an apparent ongoing risk that leaves no option but to deregister.

[16] We have previously said that the outcome in the District Court, while relevant, cannot be a dispositive factor regarding the penalty we impose, as different considerations are engaged in a disciplinary proceeding. That being said, it is apparent from the sentence imposed that the Judge considered that Mr Ali's behaviour occurred at a time when he was facing challenging personal circumstances. Like the Judge, we accept that there was no element of "deviant sexual gratification" to Mr Ali's behaviour. In effect, the sexual act – while a criminal offence by virtue of the fact that it was committed within the view of members of the public – took place in what was Mr Ali's home at the time. As we said during the hearing, if Mr Ali's offence had exhibited a proclivity of the type that the Judge found to be lacking, then cancellation would have been virtually unavoidable.

[17] The agreed summary of facts and two psychological reports conveyed the impression that Mr Ali did not accept the Judge's factual findings, but wanted to be seen as contrite to improve the prospect of success of his application for discharge without conviction. Indeed, our impression was that Mr Ali was depicted as somewhat mercenary in the reports provided to the Judge. Our concerns were ameliorated by Mr Ali, who chose to give evidence before us. We are satisfied that he now accepts that he committed the offence and has an appreciation why the profession views his act with

---

<sup>14</sup> Referring to the sixth of eight penalty factors described by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [50].

such concern.<sup>15</sup> We formed the view that Mr Ali's earlier reluctance to take responsibility for his behaviour stemmed from acute embarrassment.

[18] Having read his references, we acknowledge that Mr Ali is a well-regarded and experienced practitioner.

[19] Like the Judge, we accept that the possibility of repetition is remote given Mr Ali now has a stable home life. For this reason, we are satisfied that censure, in combination with two conditions, will achieve the purposes of maintaining professional standards and preserving the public's confidence in the profession. At the conclusion of the hearing, we invited the parties to reach consensus on the wording of a condition that requires Mr Ali to be supervised by a senior practitioner. We have adopted the wording proposed by the parties. While the condition is designed to moderate the risk of further inappropriate behaviour, we urge Mr Ali to reflect upon the impact that past disturbances in his personal life had on the way he behaves, and to seek help should he face a similar situation in the future.

### **Costs**

[20] Under s 404(2) of the Education Act, the Tribunal is not empowered to order a teacher to contribute to the CAC's costs and those of the Tribunal following a hearing "that arises out of a report under section 397 of the conviction of a teacher". As such, we do not order costs.

### **Orders**

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

- a) The respondent is censured pursuant to s 404(1)(b).
- b) Pursuant to s 404(1)(c), we direct that the following condition is imposed on the respondent's practising certificate for two years: He must inform any employer or prospective employer of this proceeding and provide it with a copy of this decision.

---

<sup>15</sup> We have no jurisdiction to look behind the conviction and are bound by the Judge's factual findings.

c) Pursuant to s 404(1)(c), we direct imposition of the following condition on the respondent's practising certificate: For the first year of holding any teaching position following this decision, the respondent is to be supervised by a senior teacher who has been approved by the Senior Manager Professional Responsibility, Teaching Council. The supervising teacher is to report quarterly to the Teaching Council.

[22] The matters referred to in (a) - (c) will be annotated on the register under s 404(1)(e) for two years.



---

**Nicholas Chisnall**  
Deputy Chairperson

#### **NOTICE**

- 1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.
- 2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.
- 3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).