

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-3

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 **RICHARD KENNETH JOHN BRIGHT**
Respondent

TRIBUNAL DECISION

23 OCTOBER 2019

HEARING: Held on 17 July 2019 at Wellington (on the papers)

TRIBUNAL: Theo Baker (Chair)
Nikki Parsons and Tangi Utikere (members)

REPRESENTATION: Ms Tahana and Mr Hullena for the Complaints Assessment Committee
The respondent did not participate

1. The Complaints Assessment Committee (**CAC**) has referred the respondent to the Tribunal because of a conviction for driving with excess breath alcohol (**EBA**).
2. According to the Notice of Referral, the respondent had failed to notify to the Education Council (**Council**)¹ of this conviction. He was convicted and sentenced by the Auckland District Court on a charge of driving with excess breath alcohol, contrary to ss 56(1) and (3) of the Land Transport Act 1998. The maximum penalty for this offence is three months' imprisonment or a fine not exceeding \$4,500. There is also a minimum disqualification from driving of six months.
3. The respondent had a previous conviction for EBA from August 2016.

Evidence

4. The parties conferred and agreed on a Summary of Facts (**ASF**), which the respondent signed. He accepted that on 1 May 2018 he was convicted and sentenced in the Auckland District Court on one charge of EBA as a result of driving a motor vehicle on 9 November 2017 with a reading of 474 micrograms of alcohol per litre of breath. He was disqualified from driving for 7 months, instated a zero-alcohol licence for three years and fined \$500.
5. The respondent failed to report these convictions to the Council within 7 days of the date of conviction, as required by s 397 of the Education Act 1989 (**the Act**).
6. We are satisfied that the ASF supports the factual allegations in the charge. However, we must now decide if the established conduct warrants a disciplinary sanction.
7. In explanation to a meeting of the CAC, the respondent did not dispute the conviction but stated that he did not believe that he would be over the limit and that lack of food was likely to be a contributing factor. At a pre-hearing teleconference (of this referral to the Tribunal) he said that he was unaware that he met the criteria for s 397 of the Act and that was why he had not reported the conviction to the Council.
8. The respondent accepted that he had a previous EBA conviction in August 2016. This matter was dealt with by a CAC who resolved to take no further action but advised him

¹ The Education Council was renamed the Teaching Council on 29 September 2018, by s 10 of the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018

that any further offence would be likely to be viewed as a serious matter. He was also reminded that he should have reported the conviction as required under s 397.

9. We were also provided with a copy of the Police Summary of Facts which records that the offence was detected because the respondent was stopped at a checkpoint.

Adverse finding

10. The CAC reminded us that where a conviction is referred to the Tribunal, we do not need to make a finding of serious misconduct, but we should make an adverse finding before exercising our powers under s 404.²
11. As we have previously said, one conviction for drinking with excess breath alcohol is evidence of poor judgement and disregard the welfare of other road users.
12. Ms Tahana provided a summary of principles from previous decisions involving EBA convictions and invited us to consider the criteria for serious misconduct on the basis of our decision in *CAC v White* NZTDT 2017-29 where we said it was useful to scrutinise the conduct against the serious misconduct yardstick. Ms Tahana submitted that the Respondent's two drink driving convictions risked public safety, and his subsequent failure to report must reflect adversely on his fitness to teach, and bring the teaching profession into disrepute. The Tribunal should reach an adverse finding and exercise its disciplinary powers under s 404.

Discussion

13. In *CAC v Fuli-Makaua* NZTDT 2017-40³ there is a comprehensive summary of the factors to consider when determining referrals of EBA convictions. In general:
 - all convictions punishable by three months' imprisonment or more must be reported to the Education Council, both by the teacher under s 397 of the Education Act 1989 (the Act) and by the employer.⁴

² The CAC cited *CAC v Fuli-makaua* NZTDT 2017-40, which in turn referred to *CAC v White* NZTDT2017/29, 28 November 2017 at [17] citing *Complaints Assessment Committee v S DC Auckland* CIV2008004001547, 4 December 2008 at [47].

³ Above, note 2

⁴ Rule 9(1)(n) of the Education Council Rules 2016 requires an employer to report any act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more.

- even one conviction may result in an adverse finding.⁵ and “places a teacher’s registration in jeopardy”.⁶ A series of convictions will certainly do so.⁷
- Driving while intoxicated poses danger to the public.⁸
- We noted in *CAC v White*, “[p]ractitioners have an obligation to both teach and model positive values for their students, and driving while intoxicated does not mirror that expectation”.⁹ Such conduct undermines a teacher’s professional commitment to “respect [their] trusted role in society” by “fostering learners to be active participants in community life...”.¹⁰
- Disciplinary proceedings are designed to further the Education Council’s overriding purpose of “ensure[ing] safe and high quality leadership, teaching and learning” through raising the status of the profession,¹¹ not to punish the teacher a second time.¹² Disciplinary proceedings further this purpose by protecting the public through the provision of a safe learning environment for students and maintaining professional standards and the public’s confidence in the profession.¹³ This is achieved through holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required.¹⁴

14. We are satisfied that the respondent’s conviction, being his second in less than two years warrants an adverse finding. He has failed to be a positive role model for his students and has breached his obligation under the Code of Professional Responsibility to respect his trusted role in society.

⁵ *NZDT2009/4* and *NZDT2011/16*.

⁶ *CAC v Korau* NZTDT2017/17 26 August 2017 at [23] citing *CAC v Teacher* NZDT2014/1 21 January 2014) at 7.

⁷ *NZDT2009/4* and *NZDT2011/16*

⁸ Above, note 6 at [14].

⁹ Above, note 2 at [22].

¹⁰ Our Code Our Standards: Code of Professional Responsibility and Standards for the Teaching Profession.

¹¹ Education Act 1989, s 377.

¹² *Ziderman v General Dental Council* [1976] 1 WLR 330; *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 ; *CAC v Campbell* at [15]; *CAC v White* at [19]; *CAC v Korau* at [13].

¹³ *CAC v McMillan* at [23] and *CAC v White* at [19]; *CAC v Korau* at [13].

¹⁴ *CAC v Bird* NZTDT2017/5, 3 July 2017 at [32].

Penalty

15. Section 404 of the Act provides:

404 Powers of Disciplinary Tribunal

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

Comparable cases

16. The CAC referred us to six cases involving referrals of EBA convictions. In two cases we cancelled the teacher's registration. One was *CAC v White*,¹⁵ where a teacher had been convicted of drink driving with a breath alcohol reading of 1026 mcg/l (two and half times the limit) and was sentenced to 200 hours community work and indefinitely disqualified. The aggravating factors were prior convictions for drink driving and

¹⁵ Above, note 2

cultivating cannabis and failure to report. We considered that the teacher had taken inadequate steps to address his alcohol issues and did not take full responsibility for his behaviour. The teacher was censured, the register annotated and his registration cancelled.

17. This was similar to the reasoning for cancellation in *CAC v Fuli-Makaua*¹⁶ where a teacher had been convicted of drink driving in December 2016 and subsequently convicted for drink driving (reading of 513 mcg/l) and driving while disqualified in August 2017. She had two earlier convictions and showed no insight into a harmful relationship with alcohol.
18. In *CAC v Campbell*¹⁷ the teacher was convicted of driving with EBA (reading of 1,236 mcg/l) and driving while suspended. She had been convicted two years prior for drink driving. The dangerous manner of the driving was material in her latest conviction. The teacher provided evidence that she was in rehabilitation and the Tribunal was satisfied she demonstrated an ability to continue her rehabilitation. The Tribunal imposed a penalty of censure, conditions on her practising certificate for three years and annotation to that effect.
19. In *CAC v Korau* NZTDT2017-17¹⁸ the teacher was convicted of drink driving (592 mcg/l) and convicted again six months later for driving while disqualified. He did not report his convictions to the Council. We took into account that there were no ongoing alcohol issues for the practitioner and imposed a penalty of censure, conditions on his registration and an annotation.
20. *CAC v Rereti* NZTDT 2014-19¹⁹ involved consideration of a 2012 EBA conviction against a background of four previous ones between 1977 and 1998. We made an adverse finding and censured her.
21. The CAC set out some penalty principles derived from *Fuli-Makaua*,²⁰ *White*,²¹ *Korau*²²

¹⁶ Above, note 1

¹⁷ *CAC v Campbell* NZTDT 2016-35, 3 October 2016.

¹⁸ Above, note 6

¹⁹ *CAC v Rereti* NZTDT 2014-19, 26 August 2014. We note that teacher was no longer registered in that case.

²⁰ Above, note 2

²¹ Above, note 2

²² Above, note 6

and CAC v *Lyndon* NZTDT 2016-61²³ and noted the following aggravating or unfavourable factors:

- The offending occurred on a school night (at about 6.10 pm on a Thursday).
- It was not long after the respondent's previous conviction in 2016.
- He failed to report the conviction to the Council, which demonstrates a disregard for the law.

22. The CAC also submitted that the respondent had failed to show any real remorse and noted his attempts to justify his failure to report (during a pre-hearing conference in March 2019).

23. In mitigation, the CAC acknowledged that the alcohol reading was not high.

24. The CAC provided a copy of a Work and Income Capacity Medical Certificate that the respondent had provided during the Council's investigation. It reported him as

[REDACTED]

[REDACTED]

[REDACTED] Ms Tahana observed that the respondent had provided no further information about these matters.

25. The CAC submitted that a penalty short of cancellation may be appropriate.

The respondent

26. The respondent engaged with the Tribunal process in the early stages, but did not demonstrate any real insight or remorse. The minutes of the pre-hearing conferences were included in the Bundle of Documents before us. At the first pre-hearing conference it was recorded that the respondent appeared not to deny the conviction, but did not think that it warranted a disciplinary response and he said that he had not notified it to the Council as he could not see in the Act that he was required to. That pre-hearing conference was adjourned so that the respondent could familiarise himself with the relevant law, with the assistance of the CAC counsel.

27. At a second pre-hearing conference, the respondent confirmed that he accepted that the Tribunal was entitled to consider and impose a penalty, but that his situation is

²³ CAC v *Lyndon* NZTDT 2016-61, 26 April 2017

different from that in the case of *CAC v Fuli-Makaua*²⁴ and we should not impose a penalty. He intended to find a lawyer or represent himself. At that stage he did not want the matter dealt with on the papers but wanted to appear in person.

28. The matter was set down for a hearing in person in early May and the respondent duly signed the Agreed Summary of Facts on or about 21 March 2019.
29. On 21 April 2019, the respondent asked for an adjournment because he was trying to obtain legal representation and could not comply with a timetabling direction for the filing of documents. The May hearing did not proceed, and a further pre-hearing conference was convened on 10 May which was not attended by the respondent, and at which it was noted that since 21 April he had not engaged with the Tribunal in any meaningful way. The pre-hearing conference was adjourned to 17 May. On that day the respondent did not attend and final directions for filing of documents were issued and the matter was set down for hearing 17 July.
30. Included in the bundle were two emails from the respondent to the Tribunal secretary. On 14 May he said that after seeking legal advice and upon personal reflection he would not be contesting the matter and that he would make written submissions in the next few days. He was relieving at that time and so could not attend the prehearing conference that was scheduled for 17 May. In the second email, also sent on 14 May, he said that his written submission would be completed by *“this Friday the 17th of June”*, which we assume was meant to read 17 May, given that was a Friday. He later added, *“Do we need a Tribunal Hearing? ... Can we ALL come to a mutual arrangement of ‘Full Registration’ with conditions – many of which I already have completed and participate in constantly...and will discuss in my final submission. Yes, I made mistakes...”*
31. There was no further submission from the respondent.

Discussion

32. Because of the respondent’s failure to provide further information to the Tribunal, we have some reservations about his current fitness to teach but consider a penalty of suspension or cancellation would be disproportionate to the offending. This is his

²⁴ Above, note 2

second EBA conviction and the reading is not very high.

33. However, should the respondent be referred to us again for an alcohol-related offence we would expect some independent evidence regarding his use of alcohol and the impact on his life and decision-making. His two EBA convictions are not far apart. We trust that the respondent is continuing to get the support that he needs.
34. We also expect that the respondent now understands not only his legal and professional obligations to keep the Council informed of any conviction that is punishable by 3 months imprisonment or more, but also the reason that the Council and the Tribunal have a legal mandate and professional responsibility to consider the impact of a conviction on his fitness to be a teacher.
35. We therefore impose the following penalty:
- The respondent is censured under s 404(1)(b) of the Act;
 - The register is to be annotated under s 404(1)(e) for a period of 3 years from the date of this decision.
36. There is no order for costs given this matter has arisen from a referral of conviction.²⁵
37. Under s 405(6) we make an order for suppression of some health details contained in paragraph 24.



Theo Baker
Chair

²⁵ See s 404(2)

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).