

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Lianne Kem

NZTD 2019/06

Registered teacher Lianne Kem was referred to the Disciplinary Tribunal for allegedly breaching the conditions on her practising certificate and permitting her premises to be used for the cultivation of cannabis.

The result: the Tribunal agreed that the conduct had occurred as alleged and imposed a censure, annotation of the register and conditions on Ms Kem's practising certificate. She was also ordered to contribute to the CAC and Tribunal's costs. There are no non-publication orders in this case.

On 19 August 2019 the Tribunal released its decision following a hearing on the papers.

In 2013 Ms Kem engaged in conduct that required a disciplinary response from the CAC. Conditions were placed on her practising certificate. Ms Kem failed, within a reasonable period of time, to comply with three conditions placed on her practising certificate. Ms Kem stopped teaching until 2018 when she reapplied for a practising certificate. During that application process it was identified that she had not met the conditions on her practising certificate.

In addition, the mandatory Police vet identified that Ms Kem had been charged with permitting her premises to be used for the manufacture of drugs (both cannabis and methamphetamine). Ms Kem pleaded guilty in relation to the cannabis. The charge in relation to methamphetamine was withdrawn and she was discharged without conviction for the charge relating to the cultivation of cannabis.

Ms Kem did not dispute the facts but stated that she now felt confident enough to complete the conditions and noted that she was discharged without conviction in relation to the criminal charge.

In relation to the failure to meet her conditions the Tribunal decided that it reflects adversely on Ms Kem's fitness to teach and reaches the threshold of serious misconduct.

In relation to the criminal offending the Tribunal stated that teachers should not be involved in the use or possession of prohibited drugs as they have an obligation to teach and model positive values. The Tribunal was satisfied that the respondent's criminal offending reflects adversely on her fitness to teach and is of a nature that brings the teaching profession into disrepute. They were satisfied that Ms Kem's conduct reached the threshold of serious misconduct.

The Tribunal decided that an appropriate penalty for both conduct issues would be censure, conditions similar to the original conditions and annotation of the register. Ms Kem is also required to contribute to the CAC and Tribunal's costs.

Ms Kem was reminded that non-adherence with the conditions may result in the matter being referred back to the Tribunal by the CAC.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND **LIANNE KEM**

Respondent

DECISION OF THE TRIBUNAL

Tribunal: Nicholas Chisnall (Deputy Chair), Maria Johnson and Stuart King

Hearing: On the papers

Decision: 19 August 2019

Counsel: A R Davies for the referrer
M Pecotic for the respondent

Introduction

[1] The referrer, the Complaints Assessment Committee (the CAC), charges Lianne Kem with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. Its amended notice of charge dated 10 May 2019 alleges that the respondent:

(a) Breached the conditions imposed on her practising certificate as the result of an agreement entered into with the CAC in May 2013, specifically the conditions that required Ms Kem to:

- i. Provide a plan from her counsellor to the CAC;
- ii. Undertake an assessment before finalising the plan from her counsellor;
- iii. Complete professional development approved by the CAC; and
- iv. Notify the New Zealand Teachers' Council (as it then was) of any new teaching position taken up until released from the conditions imposed by the CAC.

(b) The respondent, on or about 2 April 2013, permitted premises to be used for the cultivation of cannabis, contrary to s 12(1) of the Misuse of Drugs Act 1975, for which the maximum penalty is three years' imprisonment:

- i. A number of cannabis plants were found by police at the respondent's residential address on that date;
- ii. The respondent's young children were present at the address where the cannabis was being cultivated;
- iii. The respondent pleaded guilty to a charge of permitting premises in relation to the conduct; and
- iv. The respondent was subsequently discharged without conviction for the offence pursuant to s 106 of the Sentencing Act 2002.

[2] Ms Kem agreed to this matter being heard on the papers.

The factual background

[3] What follows is the agreed statement of facts presented by the parties:

1. Liane Kem (respondent) is an early childhood teacher with a Subject to Confirmation practising certificate, which expires on 9 March 2021. She is currently employed as a full time teacher at Discoveries Educare Henderson and has been since November 2017.

2. On 3 January 2018, the respondent applied to renew her Subject to Confirmation practising certificate. During the course of that application, the Professional Responsibility team at the Teaching Council (Council) discovered that the respondent had failed to comply with several of the conditions imposed upon her practising certificate during disciplinary proceedings in 2013, prior to a period in which she stopped teaching from 2012 to 2017. A Police vet also revealed that the respondent had previously been charged with two, and subsequently discharged without conviction on, one drug-related offence.

3. On 13 February 2018, the Complaints Assessment Committee (CAC) instigated an own motion investigation into the respondent's conduct.

Allegation 1: respondent's failure to comply with conditions previously imposed on her practising certificate by the CAC

2013 - Disciplinary charges

4. In 2013, the respondent was a registered teacher at [REDACTED] with full registration.

5. In February 2013, the School made a mandatory report in respect of the respondent's behaviour towards students in her care.

6. On 22 May 2013, a CAC found that the respondent had engaged in conduct that was within the definition of serious misconduct. However this conduct was not deemed to warrant referral to the Disciplinary Tribunal on the basis it was possible to resolve the matter by an agreement to conditions.

7. A copy of the CAC decision is appended to this summary of facts and marked "A".

8. In July 2013 the respondent agreed to several conditions being imposed on her practising certificate, including:

3.1: I am to arrange at my cost to see a registered counsellor/psychologist, approved by the CAC, with skills to help me in developing better workplace relationships both with learners and colleagues. This will ideally involve a personality assessment so that I am informed of my strengths and weaknesses and how to work with them in the work place. I agree that someone specialised in cognitive behaviour therapy is likely to have the appropriate skills.

3.2: After assessing my needs, the counsellor is to set out a plan to be approved by the CAC, setting out the intended therapeutic programme.

3.3: I am to undertake professional development to be approved by the CAC on positive management of children of early childcare age, particularly around children's social development.

3.4: The Centre at which I work is aware of these conditions. However, if I change early childhood centres and I am employed for more than 20 half days then I am to inform any future employer of the decision of the CAC and provide that employer with a copy of it and a copy of these conditions.

3.5: Before finalising the plan referred to in paragraph 3.2, I will have the assessment which will then inform the CAC on what should be contained in terms of the conditions.

4: I agree to inform the New Zealand Teachers Council of every teaching position that I take up for over 20 half days until released from these conditions.

9. The conditions are stated to remain in place until the respondent has satisfied all the requirements, completed all professional development, and she has worked for two consecutive years at a learning centre without a repeat of any of the incidents which gave rise to the mandatory report.

2014 – further conditions

10. In 2014, the respondent fulfilled the first condition (3.1) by having her personality assessed by a counsellor.

11. In April 2014, in response to a request from the respondent, the CAC developed a set of proposed amended conditions based on the respondent's counsellor's plan in relation to the identified areas of concern. On 23 April 2014, these proposed amended conditions were communicated to the respondent by email. The proposed amended conditions included that:

2.6: That I will meet my counsellor regularly until I have sufficiently integrated new behaviours towards receiving professional supervision.

2.7: That my counsellor will provide six month reports to the New Zealand Teachers Council of my progress on the mentioned areas for two years or until I am discharged from counselling, whichever comes earlier.

3: That the remaining conditions of agreement signed on May 2013 remain in force and that I am obliged to meet those conditions until I am released from the agreement.

12. The CAC did not receive a response to the proposal for amended conditions, and on 13 June 2014, followed up by email to Ms Kem. The CAC sent the proposed amended conditions

again to Ms Kem on 23 June 2014. Ms Kem was sent a follow up email by the CAC on 24 July 2014.

13. The CAC did not receive a response from the respondent to the proposed amended conditions at any time. As a result the proposed amended conditions were never adopted and the original conditions remained in place.

14. The respondent was dismissed from her position at [REDACTED] in February 2012.

Breach of conditions

15. As set out above, the conditions were to remain in place until the respondent had satisfied all of the requirements, completed all professional development, and worked for two consecutive years at a learning centre without a repeat of any of the incidents which gave rise to the initial mandatory report.

16. The respondent complied with the following conditions:

a. 3.1: arrange at her cost to see a registered counsellor with skills to help in developing better workplace relationships with learners and colleagues, including a personality assessment: and

b. 3.4: if I change early childhood centres and I am employed for more than 20 half days then I am to inform any future employer of the decision of the CAC and provide that employer with a copy of it and a copy of these conditions.

17. However, she failed, within a reasonable period of time, to comply with the following conditions:

a. 3.2: Provide a copy of the personal development plan, developed with her counsellor, to the CAC for its approval;

b. 3.3: Provide details of professional development to the CAC for approval and undertake that professional development;

c. 3.5: Undertake an assessment before finalising the plan from her counsellor; and

d. 4: inform the Council of her teaching position at Discoveries Educare.

18. This plan was not provided to the CAC until 2018.

Withdrawal from teaching and subsequent application for reinstatement

19. The respondent voluntarily withdrew from teaching from 2012-2017.

20. In January 2018, the respondent submitted an application for reinstatement of her practising certificate. The process that followed from that application revealed the respondent's breaches of her previous conditions and the Police matters detailed below.

21. On 21 May 2018, Ms Kem's counsellor confirmed to the Investigator that the respondent has worked through a personal development plan with her.

22. This plan was not provided to the CAC until 2018.

Allegation 2: Criminal charges

23. A mandatory Police vet is a part of the process when a teacher seeks to renew his or her practising certificate.

24. The Police Vet that was undertaken when the respondent sought to renew her practising certificate in January 2018 revealed that in April 2013 the respondent had been charged with:

a. 1 x charge of permitting premises for the manufacture of methamphetamine, pursuant to s 12(1) of the Misuse of Drugs Act 1975.

b. 1 x charge of permitting premises for the cultivation of cannabis, pursuant to s 12(1) of the Misuse of Drugs Act 1975.

25. The summary of facts relating to these charges was a joint summary of facts prepared in relation to the charges against both Ms Kem and her partner. The summary of facts that was agreed for the purposes of sentencing is annexed and marked "B". Ms Kem maintained in her submissions to the Court, and was sentenced on the basis, that she was not aware of anything to do with methamphetamine at the property.

26. In August 2015, the respondent pleaded guilty to the charge of permitting premises for the cultivation of cannabis and was subsequently discharged without conviction pursuant to s 106 of the Sentencing Act 2002 on that charge. The charge of permitting premises for the manufacture of methamphetamine was withdrawn by the Crown.

27. The fact of these charges was not communicated to the Teaching Council at the time they arose or subsequently.

Teacher's response

Failure to comply with conditions

28. In April 2018, the respondent explained in an email to the CAC investigator that:

a. She complied with 3.1, in that she saw a professional counsellor from 2013, and still sees the same counsellor.

b. In regard to the alleged breach of 3.2, the respondent replies that she did have a Personal Development Plan. A copy of this plan was provided to the CAC on 21 May 2018.

c. In response to the alleged breach of 3.3, the respondent claimed that she did make enquiries of the CAC about appropriate professional development on 10 October 2013,

and that neither the CAC nor Council provided adequate direction about providers who would be sufficient in meeting this condition.

- The respondent has since enrolled in “Incredible Years” (as a teacher) starting in July 2018 and has inquired as to whether this would be a course the CAC would find sufficient in meeting the conditions.
- The respondent also had enrolled in “Strengthening Child Protection Practice” offered through the ECE training NZ on 30 May 2018.

d. In response to the alleged breach of 4, the respondent accepts that she failed to inform the CAC of her new full-time employment, however, explains that this is because she was on a probationary period during this time with hopes of full time employment.

e. Discoveries Educare has independently confirmed that the respondent complied with her obligation to inform them of the CAC decision and conditions, in accordance with condition 3.4.

29. On 6 August 2018, in a response to the CAC investigator's inquiries, the respondent explained that she did not respond to the CAC's amended conditions because at that point, she may have overlooked the new conditions the Council had set down and she had lost her passion for teaching and did not desire to continue. As a result, the respondent did not agree to the proposed amended conditions when they were sent to her by the CAC.

30. On 26 April 2018, the respondent stated that she has gained the confidence that she can now meet the conditions that the CAC had set down for her.

Criminal charge

31. On 26 April 2018, in an email to the CAC investigator, the respondent stated that she felt the summary of facts for the criminal charges was sufficient explanation for her.

32. On 6 August 2018, the respondent further responded to the CAC investigator:

- a. Emphasising that she was granted a discharge without conviction for the criminal charges;
- b. advising that at the time she was unable to get a copy of the sentencing notes, or the respondent's lawyers sentencing submissions. She therefore does not have a copy of these to provide to the CAC; and
- c. stating she can provide copies of contemporaneous clean drug testing results, which demonstrate that she was not under the influence of or had not used any drugs at the time of her offending.

The relevant legal framework

[4] Section 378 of the Education Act 1989 defines “serious misconduct” as behaviour by a teacher that has one or more of three outcomes; namely that which:

- (a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or
- (b) Reflects adversely on the teacher’s fitness to be a teacher; and/or
- (c) May bring the teaching profession into disrepute.

[5] The test under s 378 is conjunctive,¹ which means that as well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Teaching Council’s criteria for reporting serious misconduct. The New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (the Rules), which applied during the timeframe with which we are concerned, describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.² Those that are engaged in the respondent’s case are:

- (a) In relation to the first particular, r 9(1)(o), which encompasses “any act or omission that brings, or is likely to bring, discredit to the profession”;³ and
- (b) In relation to the criminal offence, r 9(1)(i), which describes a teacher’s “involvement in the manufacture, cultivation, supply, dealing, or use of controlled drugs”, and also r 9(1)(n), which describes “any

¹*Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

²Which were superseded by the Education Council Rules 2016 (which had a name change to the Teaching Council Rules 2016 in September 2018), which came into force on 1 July 2016.

³In *Teacher Y* above n 1 at [66], the District Court held that r 9(1)(o) is not subject to the ejusdem generis rule, but rather is a “catch all” provision. We addressed the applicability of r 9(1)(o) in NZTDT 2018/41, 17 June 2019 at [65] to [70] and NZTDT 2018/10, 8 July 2019 at [56] to [61].

other 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”.

[6] As will be apparent, there are two distinctly different allegations contained in the notice of charge. Given that fact, we have decided to consider the gravity of the two particulars separately to determine whether each reaches the threshold for serious misconduct.⁴

[7] We have reminded ourselves that the burden rests on the CAC to prove each particular. While the standard to which each must be proved is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be kept in mind.⁵

The first particular: The failure to fulfil the conditions imposed by the CAC

[8] We are satisfied that the conjunctive test for serious misconduct is met in respect to this particular, notwithstanding Ms Kem’s counsel’s submission to the contrary.

[9] The CAC submits that the respondent’s failure to fulfil the conditions imposed in 2013 reflects adversely on her fitness to teach. We agree.

[10] On several occasions we have emphasised the importance of the obligation resting on practitioners to comply with conditions imposed on their practising certificates – either by the CAC or the Tribunal; most recently in *CAC v Ranapia*.⁶ As we explained in NZTDT 2014/20, which is a case bearing some similarities with the present,⁷ the failure to meet conditions imposed to ensure the safety or welfare of students “may bring into question

⁴ Although the CAC invited the Tribunal to assess gravity on a “totality basis”.

⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

⁶ *CAC v Ranapia* NZTDT 2016/53, where we undertook a review of four cases in which it was alleged that the failure to comply with conditions constituted serious misconduct. Ms Ranapia agreed to conditions being imposed on her practising certificate as a consequence of her behaviour towards a student. The respondent was initially compliant but then failed to engage with the Council when it appeared she was not meeting her obligations.

⁷ The conditions imposed were designed to improve the respondent’s understanding of her obligations towards students. Like here, the respondent commenced a new position without disclosing that to the Council. Unlike in Ms Kem’s case, she did not notify her new employer of the conditions to which she was subject.

whether or not [his or her] actions have the potential to adversely affect students”.⁸ We also held that such a failure raises a question about the practitioner’s fitness to teach.

[11] The respondent’s behaviour towards children in her care that triggered the mandatory report made in 2013 appears, on its face, to have been relatively serious; thus raised obvious concerns about Ms Kem’s fitness to teach. The CAC’s agreement with the respondent to impose conditions on her practising certificate, rather than to refer the matter to the Tribunal, worked to Ms Kem’s advantage. It behoved the respondent to cooperate with the CAC, given the latitude it extended her. We acknowledge that the respondent was initially compliant, and she is to be commended for engaging with a counsellor and thereby fulfilling condition 3.1. We also agree that Ms Kem’s candor with her present employer, which met condition 3.4, is a positive factor; albeit she did not meet its companion, 4, which required her to notify the Council of her new employment.

[12] Things went awry after the respondent requested that the conditions be altered. The CAC’s subsequent attempts to formalise the changes, beginning in April 2014, drew no response from Ms Kem. As we appositely said in *Ranapia* in relation to the practitioner’s lack of responsivity:⁹

On the face of it the allegations might not seem to warrant a finding of serious misconduct. However, the respondent was given ample opportunity to either comply with or renegotiate the agreed conditions. Her failure to engage with the CAC in relation to that ... demonstrates a lack of respect for her regulatory body and therefore other teachers. She sets a bad example for her students and has failed to act in a professional and courteous manner.

[13] Counsel for Ms Kem emphasises that the behaviour that was the genesis of the conditions is “significantly historical”. We do not agree with that description. In any event, the fact that time has passed does not justify or excuse the failure to fulfil conditions imposed to address serious concerns about Ms Kem’s behaviour towards children. Nor did the respondent’s voluntary withdrawal from teaching between 2012 and 2017 relieve her of

⁸ At p 9.

⁹ At [49].

the obligation to communicate with the CAC when it sought to vary her conditions.

[14] We are also satisfied that the second limb of the test for serious misconduct is met. This is because the Tribunal has previously held that any discreditable behaviour that is of a severity to engage r 9(1)(o) will amount to behaviour that brings the profession into disrepute under s 378(1)(a)(iii).¹⁰

The second particular: The criminal offending

[15] We unfortunately do not know the District Court Judge's reasons for discharging the respondent without conviction. However, we accept that the Judge, to have discharged Ms Kem, must have been satisfied that the consequences of a conviction would be wholly disproportionate to the seriousness of the offending.¹¹ We accept Ms Pecotic's submission that the consequence upon which Ms Kem relied was the potential loss of her employment as a parent aid, having already had her employment as a teacher terminated as a result of being charged.

[16] We accept that there is no evidence that Ms Kem was herself a user of cannabis. We also accept that Ms Kem's partner was the principal offender, as he was the one growing the cannabis located by police. For these reasons, Ms Pecotic submitted that the respondent's behaviour was not sufficiently grave to meet the definition of serious misconduct.

[17] It is helpful to repeat what we said in *CAC v Diamond*,¹² namely that, "It scarcely needs to be said that teachers should not be involved in the use or possession of prohibited drugs". We said in *CAC v Andrews*¹³ that practitioners have an obligation to both teach and model positive values for their students, and the use of a prohibited drug is the antithesis of the standard expected, irrespective of the setting - personal or professional - in which it occurs.

¹⁰ *CAC v Usufuno* NZTDT 2017/30, at [19].

¹¹ Sentencing Act 2002, s 107.

¹² *CAC v Diamond* NZTDT 2016/41.

¹³ *CAC v Andrews* NZTDT 2016/3, at [21]. *Andrews* was a case dealing with a conviction for possession of a Class A drug, but the proposition applies regardless of the class of drug concerned.

[18] While Ms Kem did not “use” cannabis, she was involved with a prohibited drug – even if only peripherally – by enabling her partner’s cultivation. Ms Pecotic invited us to conclude that the Judge must have held that Ms Kem was “wilfully blind” to her partner’s offending, as the cannabis was grown in a concealed space in the garage. However, that submission does not detract from the fact that, by pleading guilty to the charge, the respondent accepted that she “knowingly” permitted her premises to be used to commit an offence against the Misuse of Drugs Act 1975.

[19] Ms Pecotic compared the facts of this case to those in *CAC v Harrington*,¹⁴ where we found the practitioner guilty of bare misconduct for her admission to her employer to having used cannabis. Ms Pecotic submitted that the respondent’s culpability “is less than that of Ms Harrington” because Ms Kem did not consume the drug. We do not find the comparison particularly helpful. First, it overlooks the fact that permitting premises to be used for the cultivation of cannabis is a more serious type of offence than that which Ms Harrington technically committed by consuming the drug.¹⁵ Second, it is a troubling feature of Ms Kem’s offending that young children were living at the property where the cannabis was being grown.

[20] Ms Pecotic also submitted that Ms Kem’s offending, “did not impact on her role as a teacher at all”. However, we have said many times that there is no bright-line between teachers’ personal and professional lives because of the obligation to both teach and model lawful behaviour.¹⁶

[21] We are satisfied that the respondent’s criminal offending reflects adversely on her fitness to teach and is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies.¹⁷ We are also satisfied that the respondent’s conduct is of a character and severity that engages both rr 9(1)(i) and 9(1)(n) of the Rules, which fulfils the second limb of the test for serious misconduct.

¹⁴ *CAC v Harrington* NZTDT 2016/63.

¹⁵ By way of comparison, the offence with which the respondent was charged under s 12 of the Misuse of Drugs Act carries a maximum penalty of three years’ imprisonment, whereas the maximum penalty for using cannabis, under s 7, is three months’ imprisonment.

¹⁶ This obligation was contained in clause 3(c) of the Code of Ethics for Registered Teachers, which applied at the time the respondent offended.

¹⁷ *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

[22] We are therefore satisfied that the CAC has proved that the second particular constitutes serious misconduct.

Penalty

[23] 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.¹⁸ 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.¹⁹

[24] Whether we must cancel a teacher's registration in order to discharge our disciplinary obligations tends to turn on the practitioner's rehabilitative prospects and the degree of insight into the causes of the behaviour exhibited. We readily accept that this is not a case that falls within either of the two overlapping situations described in *CAC v Fuli-Makaua*²⁰ that would invite cancellation of Ms Kem's registration to teach.

[25] We will deal with the second particular first. While we accept that the respondent was discharged without conviction, we have said on a number of occasions that the outcome in the District Court cannot be a dispositive factor regarding the penalty we impose. This is because different considerations are in play in a disciplinary proceeding.²¹ We are nonetheless satisfied that Ms Kem's criminal offending was borne out of her personal circumstances at the time, and out of character. We accept that she does not have an issue with the use of illicit substances that might

¹⁸ The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.

¹⁹ See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

²⁰ *CAC v Fuli-Makaua* NZTDT 2017/40, at [54]. These are:

(a) Where the conduct is sufficiently serious 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; and

(b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.

²¹ *CAC v Sami* NZTDT 2017/14, at [20].

otherwise require the imposition of a condition designed to reduce relapse. If dealing with this particular in isolation, we would have concluded that censure was the commensurate penalty.

[26] Turning to the first particular, our penalty assessment must bear in mind legislative developments that represent Parliament's commitment to reducing the harm to students posed by those employed or engaged in work that involves regular contact with them. It must also take into account the obligation on the Teaching Council to "ensure" that students are provided with a safe learning environment.²² The specific focus of the Children's Act 2014 (the Act)²³ is on safety, which mirrors a key factor the Tribunal must consider whenever it decides if a teacher who has engaged in behaviour prohibited by the Rules – whether it took place inside or outside the work environment, and whether or not it attracted a criminal conviction – is fit to remain a member of the profession. The Act's introduction reinforces the importance of the Tribunal's obligation to closely scrutinise the fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose an ongoing risk to students.

[27] We are satisfied that the proposal that the Tribunal imposes conditions that mirror those the respondent failed to meet is the appropriate outcome and will "ensure" that those Ms Kem teaches are safe. We have taken into account that Ms Kem, since electing to return to teaching, has worked towards completing the extant conditions. She has provided her personal development plan to the Council and enrolled in professional development programmes. We view these steps as a commitment on the respondent's part to ensure that she will meet her obligations this time.

[28] We remind Ms Kem that non-adherence with our conditions may result in the matter being referred back to the Tribunal by the CAC.

Costs

[29] The CAC seeks a contribution from the respondent towards the costs it incurred undertaking its investigative and prosecutorial functions. We must

²² Section 377 of Part 32 of the Education Act, which came into effect on 1 July 2015, which requires the Teaching Council to "ensure" that students are provided with a safe learning environment.

²³ Previously known as the Vulnerable Children Act 2014.

also consider whether to order the respondent to contribute to the Tribunal's own costs, which is the third category described in our Practice Note.

[30] We have not been provided with a schedule of the CAC's costs. The Tribunal's costs are \$1,145.

[31] Our 2010 Practice Note sought to achieve an "objective and predictable" approach to costs applications. However, we acknowledge that costs must be considered on a case-by-case basis to ensure that a fair result is achieved. In recent times, we have ordered a smaller contribution – 40 instead of the usual 50 per cent – where a practitioner has accepted responsibility for his or her behaviour and agreed to the matter being dealt with on the papers. That is the approach we intend to take here.

[32] We order the respondent to make a 40 per cent contribution towards the costs incurred by the CAC, unless Ms Kem challenges their reasonableness. The CAC is to provide respondent's counsel with a schedule of its costs within 10 days of this decision. Should Ms Kem take issue with the reasonableness of the CAC's costs, then her counsel has 10 working days to file a memorandum, at which point the Deputy Chair will determine the issue.

[33] We order the respondent to make a 40 per cent contribution towards the Tribunal's own costs.

Orders

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

- (a) Pursuant to s 404(1)(b), the respondent is censured.
- (b) Pursuant to s 404(1)(c), we direct that the following conditions be imposed on the respondent's practising certificate:
 - i. The respondent has 12 months from the date of this decision to undergo a professional development course, approved by the Council, directed at expanding her capacity to identify different perspectives, challenging cognitions, thinking patterns, and developing new thinking patterns.
 - ii. The respondent is to continue to see her counsellor for 12 months from the date of this decision for the purpose of developing more

empathetic responses to others' communication. The counsellor is to provide six-monthly progress reports.

iii. The respondent must provide her current employer with this decision and, during the next 12 months, provide it to any prospective employer.

iv. The respondent must inform the Council should she change employer in the 12 months from the date of this decision.

(c) The matters referred to in (a) and (b) will be annotated on the register under s 404(1)(e).

(d) The respondent is to pay 40 per cent of the CAC's costs under s 404(1)(h), unless the respondent disputes their reasonableness, in which case the Deputy Chair will determine the issue afresh.

(e) The respondent is to pay \$458 to the Tribunal pursuant to s 404(1)(i).



Nicholas Chisnall
Deputy Chair