

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2018/67**

**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** **ANGELO BRIAN NAUDE, registered teacher, teacher registration 241913**

**Respondent**

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**DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

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**HEARING:** 22 February 2019 (on the papers)

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

**DECISION:** 9 October 2019

**COUNSEL:** RW Belcher for Complaints Assessment Committee  
No appearance for Respondent

## Introduction

1. By notice of charge dated 28 September 2018 the CAC charges that the respondent engaged in a course of conduct entitling the Disciplinary Tribunal to exercise its powers.
2. The particulars in the notice of charge are that in November 2016 the respondent:
  - (a) failed to ensure that the school he was teaching at was informed he was unable to return to school in the 2016 school year;
  - (b) failed to provide the necessary assessment information requested by the school to enable completion of his end of year reports by others in his team; and
  - (c) failed to engage with the Education Council's disciplinary process.
3. The notice of charge alleges only that this conduct amounts to misconduct entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989. The notice of charge does not allege that the conduct amounts to serious misconduct. While there was some invitation in the CAC submissions that the Tribunal might of its own motion amend the notice of charge to allege serious misconduct, the Tribunal will not do that as, while the Education Council Rules 2016 do not specifically require re-service of an amended notice of charge, it is reluctant to deal with the matter on a basis of which the respondent has had no notice. It is too late for that; Rule 26 states that the Tribunal may before or during the hearing of a charge amend the charge in any way.
4. The respondent has been served with the notice of charge, and other documents, at the email address from which he last communicated to the Education Council (now the Teaching Council). However, he has not communicated with the Teaching Council other than by some emails to the CAC investigator in January and February 2017. He did not appear at the hearing on 22 February 2019. The matter proceeded by way of formal proof, with an affidavit sworn 12 December 2018 from Bruce McLachlan the investigator employed by the council who dealt with this matter.

## Facts

5. The Tribunal finds the following facts established by the investigator's affidavit and other documentation provided to it. What follows is a summary of the facts drawn from the CAC's submissions which are supported, and supplemented as appropriate, by Mr McLachlan's affidavit and elsewhere.
6. The respondent was a teacher employed by Howick Intermediate School. On 11 October 2016 he resigned from the school, effective from the end of the school year, which would have been 16 December 2016.
7. On 14 October 2016 the principal of the school, Ms Franke, responded accepting the resignation and thanking the respondent for his hard work and effort. She reminded him to ensure all school documentation and student information was transferred to the appropriate teacher and all school stationery items were returned to the school.
8. On 2 November 2016 the respondent ruptured his Achilles tendon. He contacted the Deputy principal via text message and advised that his doctor had suggested taking 14 days off work. No further communication from the respondent was received by the school after this date.
9. In communications with the CAC which took place in January and February 2017 the respondent attached various items of medical paperwork confirming that he was diagnosed with a ruptured Achilles tendon on 2 November 2016. He said that while the medical certificate he provided to the school said that he was unfit for work for 14 days this was provisional, until his specialist advised further. He says that on 12 November after he had seen a specialist his ACC case manager had told him he would not be able to work until 2017. He says that he provided his ACC case manager with contact details for the principal and the person in charge of payroll in the school so that ACC could inform them that he was now a long-term client.
10. He says on 18 November his specialist decided that he did not need an operation to correct the injury and provided him with a medical certificate confirming he was not able to work for the rest of the school year. He says this certificate was provided to the school.
11. He says that he was unable to walk. His medical advice was that it would be 6-12 weeks until he could walk and that it would then be 9-12 months until full use of his leg returned.

12. A text sent by the respondent to the school on 3 November 2016 said: "I see a specialist next Thursday to decide if an operation is needed. If not then ACC will organise taxi to work."
13. On 3 November 2016 the deputy principal called the respondent's mobile phone to speak with him regarding a return date. He told the deputy principal that he would be in contact on either 10 or 11 November 2016. But he did not make contact, according to the school.
14. On and after 3 November 2016 the school's principal sent emails to the respondent's school email account asking him to contact her urgently. She also left a voice message and text message for him on his mobile phone.
15. In the days that followed the principal made further attempts to contact the respondent. On 9 November 2016 the principal sent a further email to his school email account detailing attempts to contact him and asking him to confirm receipt of the email within 24 hours. This email also requested class assessment data and student reports which were due to have been completed by 1 November 2016. The content of the email was reproduced in a letter and sent to his home address.
16. The respondent did not return to teach at the school on 16 November.
17. On 18 November 2016 the principal emailed the respondent's school email account again asking him to make contact urgently.
18. On 24 November 2016 the principal emailed the respondent at his school email address detailing the various previous attempts to contact him and stating that 8 days had passed since the expiry of his original medical certificate. The principal stated that she expected the respondent to complete his duties as usual and noted that the school had not received assessment data for his class in order to complete end of years reports. The content of this email was reproduced in a letter sent to the respondent's home address dated the same day.
19. On 29 November 2016, the chairperson of the Board of Trustees sent a letter to the respondent's home address outlining the various attempts to contact him. These had included visiting his home address and leaving a message with his landlord. This letter noted that 13 days had elapsed since his medical certificate had expired and advised that his continued absence from work without explanation would be considered abandonment of employment by the board. The letter requested him to contact the board chairperson within 48 hours.

20. The letter also stated that as a result of assessment data for his class not being provided, significant strain had been placed on the school, and reports for his class had had to be written by other staff with limited information available. The letter further requested that he urgently return his school-issued laptop.
21. On 2 December 2016 the board chair sent a letter to respondent's school email address and his home address terminating his employment and requesting he return all school property. The letter stated that the Board of Trustees "... has resolved that your prolonged unexplained absence from school constitutes a resignation of your employment". It also said, "Your employment at Howick intermediate will be considered terminated, effective from 2 December 2016".
22. While on 8 December 2018 the school made a report of theft to the police regarding the school-issued laptop, on 19 December the principal reported to the Teaching Council that the laptop and keys had been returned to the school by a relative of the respondent. The principal also advised that the respondent had relocated to Brisbane, Australia.
23. On 12 December 2016 the school made a mandatory report to the Teaching Council. The mandatory report stated that the respondent had been dismissed. It also stated that the board of trustees had resolved that the respondent's prolonged unexplained absences constituted a resignation of his employment. It said that the key issues were unauthorised absence and failure to complete work. It noted that communications to the respondent had included several requests to him to for him to provide the necessary assessment data for his class in order to complete the end of year reports, but there was no response to these requests. This put a significant strain on the school. Reports were written with the limited information available by other members of staff.
24. The information included with the mandatory report also stated that prior to the termination of his employment the respondent was being "informally monitored because of a lack of compliance...".
25. In February 2017 the respondent sent an email to the Teaching Council's investigator. It said that all his year-end assessment data was on a Google document with access for his lead teacher. It said that he was on pain medication for his injury which was the reason he was unfit for work, that his condition was such that he had to move in with a relative 2 days after the injury as he could not even complete simple household chores because of pain and fatigue, and that his specialist said this was normal for the severity of his injury. He made the point that the school knew that

he was receiving ACC earnings related compensation and he had provided medical documentation.

26. The school disputes that it received all the medical documentation the respondent claims he sent or caused to be sent.
27. The school confirmed that the respondent did share a Google document with his lead teacher but said the information in the document was not fully adequate for someone else to be able to write his reports for him. The school said it had not received an ACC certificate. It said that while the students had been tested, no information about the tests could be found in the classroom or in a digital form. So, the students had to be re-tested. Other members of the team had to mark the work, enter the assessment data, formulate overall teacher judgements and then complete the end of year reports. The school principal maintained that the students were disadvantaged because they had to re-sit assessments and did not have the benefit of their teacher's input/knowledge of their progress in learning and overall achievement.

### **CAC submissions**

28. The CAC submitted that the appropriate outcome here should be censure and deregistration.
29. The CAC first maintained that the respondent had been properly served with the proceedings on 2 October 2018 by email sent 28 September 2018. Service was effected by email to a yahoo.com email address which the respondent had previously used to respond to queries from the Teaching Council investigator after the mandatory report was received. The Tribunal accepts that this amounts to appropriate service under rule 6 of the Education Council rules 2016.
30. Next, the CAC observed that it had referred the matter to the Tribunal on the basis that the respondent's conduct amounts to misconduct, entitling the Tribunal to exercise its powers under section 404 of the Education Act 1989.
31. The CAC submitted that the respondent's conduct did amount to serious misconduct. It referred to *CAC v Green*<sup>1</sup> where the Tribunal had expressed reservations about whether cases involving unsatisfactory explained absences from work could properly be regarded as a disciplinary matter. But the CAC submitted that the present case involves additional aggravating features which distinguish it from *Green*.

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<sup>1</sup> NZTDT 2015/25

32. The CAC submitted that the respondent's absence from the school was prolonged and coupled with the refusal to communicate with the school. The respondent also provided inadequate assessment information. And, subsequently, the respondent refused to engage in the disciplinary process.
33. The CAC submitted that the respondent's statement in February 2017, noted above, explaining that he had to move in with a relative does not explain why he did not respond to the phone calls and text messages made to his personal mobile phone, and emails sent to his school email account, or the personal messages left with his landlord and medical practitioner.
34. Finally, the CAC submitted that the respondent's failure to engage with the disciplinary process is reflective of his attitude towards professional obligations and mirrored his refusal to communicate with the school.
35. The CAC referred to *CAC v Webster (No 2)*<sup>2</sup> where the Tribunal stated that failure to engage with the disciplinary process may amount to serious misconduct. In *Webster* the Tribunal said; "We confirm that a failure to engage with the CAC's process amounts to serious misconduct. Our decision of 6 April is varied to reflect that. In doing so we send a clear message that a teacher who fails to engage with the investigation arm of its professional and regulatory body risks his or her registration".
36. The CAC accepted that conduct of this nature would ordinarily attract a penalty of censure and/or conditions. It submitted however that given that the respondent now lives in Brisbane, conditions are not appropriate. It referred to a passage in *Webster* at [64] where it was said that a failure to engage with the CAC process might be indicative of indifference or even lack of respect for the profession, and that this led the Tribunal to question the respondent's fitness to practice. The Tribunal said that it had considered suspension but, in the circumstances, found it difficult to order anything other than cancellation.
37. The CAC consequently submitted that the respondent's lack of engagement in the disciplinary process brings into question his fitness to practice and submitted that cancellation is open to the Tribunal.

## Decision

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<sup>2</sup> NZTDT 201 –57–1

38. 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.
39. 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).
40. It is accepted that the respondent suffered a serious and incapacitating injury. It is unfortunate that the respondent has not engaged more extensively with the Teaching Council to provide appropriate evidence about the degree to which he was incapacitated by pain and by pain relief over the relevant period. Even approaching the matter based on the information he provided, he would apparently have been capable of responding to the CAC in an appropriate way at the latest by sometime in January 2017. In the absence of such evidence the Tribunal is entitled to infer that he has at least to some degree acted irresponsibly in failing to engage with the school and in failing to appropriately respond to the CAC investigation. Such irresponsibility does reflect on his fitness to be member of the teaching profession and is capable of bringing the teaching profession into disrepute.
41. Separately from that, the Tribunal also finds that it is established that the respondent left behind inadequate assessment records. But the degree of the inadequacy is less easy to assess, as the school's responses to the CAC investigator's questions on this point are not entirely clear. It is however established that students had to be retested. The Tribunal assesses the requirement for retesting as being capable of adversely affecting or being likely to adversely affect the learning of the students.
42. As to the comments in the *Webster* cases, the Tribunal notes that in *Webster* the primary particulars of charge, other than the failure to engage with the CAC process, were significantly more serious than those involved here, capable of standing alone to amount to serious misconduct. In that case, the main decision<sup>3</sup> records that the teacher was found to have engaged in repetitive serious inappropriate interaction with students by swearing at them and being verbally abusive, to the point where

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<sup>3</sup> NZTDT 2016-57

complaints were received from students and parents. This went the length of the Board of Trustees issuing the respondent with a final warning. Yet further complaints arose after that. At [55] in the main decision the Tribunal said: "We are not satisfied that on its own a failure to respond to the CAC's requests or invitations for a response to a mandatory report are sufficiently serious to meet the test in Collier. However, when viewed as part of the conduct, we find that... cumulatively.... the particulars... amount[s] to serious misconduct."

43. We acknowledge that in the supplementary decision issued in *Webster*, NZTDT 2016-57-1, the Tribunal found clearly that a teacher who fails to engage with the investigation arm of its professional and regulatory body risks his or her registration. However in the present circumstances, where initially the respondent suffered a quite serious injury, was then in fairly short order advised by the school that it had terminated his employment, and then moved overseas (as he had previously planned), we are not confident that the respondent's behaviour can be regarded as a sufficiently flagrant and wilful thumbing of the nose at the regulatory authority so as to by itself warrant deregistration.
44. 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.
45. The Tribunal finds misconduct established. The misconduct borders on or is just over the line of serious misconduct.

### **Outcome and penalty**

46. 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 circumstances. If rehabilitation appears a reasonable possibility that will be a highly relevant consideration.
47. Since the respondent has not engaged with the process, the Tribunal is unable to reach any conclusion about rehabilitation. Notwithstanding that, the absence of evidence about rehabilitative possibilities does not in and of itself result in the conclusion that cancellation of registration is a fair, reasonable and proportionate

response to what occurred here. We are concerned that it would be a step too far to conclude that, at least in the period immediately after his injury, the respondent wilfully or recklessly failed to respond to the school.

48. We are also somewhat concerned that the school may have acted with undue alacrity in dismissing him, since there is a dispute about what, if any, communications were provided to the school on his behalf about his need for time off after the initial medical certificate. Without hearing witnesses, we cannot resolve that dispute. As well, the reasons given by school for dismissing the respondent were not entirely consistent; on the one hand a letter from the school 24 November 2016 said that if he made no contact he would be treated as having abandoned his employment. On the other hand, the termination letter to December says that his unexplained absence constitutes a resignation. The mandatory report form records a "dismissal". An email from the respondent to the CAC records a level of upset at having been hastily dismissed; the respondent's failure to engage may in part have been a reaction to this.
49. On balance we conclude that the least punitive outcome reasonable in the circumstances is censure, annotation and the imposition of appropriate conditions on resumption of teaching practice in New Zealand, should that ever occur.
50. 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 condition is imposed upon on the respondent's practising certificate. For a period of 2 years after the respondent recommences teaching practice in New Zealand, he is to provide a copy of this decision to any prospective employer. Where an employer employs the respondent, the respondent is to provide to the Teaching Council Manager - Professional Responsibility satisfactory written evidence from the employer that it has seen this decision.

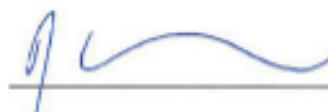
## **Costs**

51. 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 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.

52. The CAC has requested a contribution to costs of 50%. There is no evidence of cooperation by the respondent which could result in a discount for such cooperation.
53. The Tribunal orders that the respondent pay 50% of the CAC's actual and reasonable costs. No costs schedule has yet been received from the CAC. The CAC is to send a copy of its costs schedule to the respondent at his last known email address. The respondent is ordered to pay 50% of the costs shown in the CAC schedule unless the respondent files and serves submissions as to costs within 14 days of the CAC emailing the costs schedule to him. If submissions as to costs are received from the respondent, the Tribunal delegates to the Deputy Chair the task of fixing the amount of the CAC's costs.
54. The respondent is also ordered to pay 50% of the Tribunal's costs. The Tribunal's costs are \$1145. 50% of that amount is \$572.50 and the respondent is ordered to pay that sum.

**Date:** 9 October 2019



John 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.