BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-22

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
	MAC TE NGAHUE
	Respondent

TRIBUNAL DECISION
30 SEPTEMBER 2019

HEARING: Held on 19 July 2019 (on the papers)

TRIBUNAL: Theo Baker (Chair)
David Hain and Dave Turnbull (members) (members)

REPRESENTATION: Ms A van Echten for the Complaints Assessment Committee
Mr Te Ngahue represented himself

1. The Complaints Assessment Committee (**CAC**) referred to the Tribunal the respondent's convictions for careless driving and driving with excess breath alcohol (**EBA**) (third or subsequent). According to the referral, the respondent had previously been convicted of EBA driving offences in October 1992, September 2004 and October 2008, and the last of these had come before a (different) CAC in February 2011. The respondent was reminded at that time of his obligations under the Code of Ethics (as it then was). No further action was taken.

2. The most recent convictions have been referred to us as a charge of serious misconduct. It is alleged that the conduct amounts to serious misconduct under section 378 of the Education Act 1989 and rule 9(1)(n) and/or (o) of the Teaching Council Rules 2016 (as drafted prior to the 19 May 2018 amendment), or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

3. A panel of the Tribunal convened on 19 July 2019 and considered the charge based on the papers filed.

Evidence

4. The parties conferred and agreed on a Summary of Facts (**ASF**). We also received the respondent's conviction history and the Police Summary of Facts. The ASF was signed by the respondent and by the CAC's lawyer.

5. By way of background we were told that the respondent first held a Limited Authority to teach (LAT) in February 2008. He has a full Practising Certificate which expires on 3 May 2021.

6. The respondent is 45 years old, and is currently employed at Otago Girls' High School, teaching Social Studies, Te Reo Māori and Māori literacy. He is also in charge of kapa haka.

7. The respondent has three previous EBA convictions from 1992, 2004 and 2008, the last one of those being incurred after he applied for a LAT[1] in 2008. This October 2008 conviction was considered by a CAC in 2011. At that time, although the respondent did not initially engage with that process, he later advised the CAC that he no longer drank and drove. He said he was not afraid for his students to know about

[1] Limited Authority to Teach

the offending and would "try to turn it into a positive". He said he would "tell students not to be stupid and to look at what can happen". He also apologised and said it would not happen again.

8. The CAC decided to take no further action on the 2008 conviction but reminded him of his obligations under the New Zealand Teachers Council Code of Ethics and he was encouraged to take greater care in the future as further offences might not be treated leniently.

2017 Convictions

9. On 28 July 2017 the respondent was convicted in the Dunedin District Court of careless driving and driving with excess breath alcohol (third or subsequent), contrary to sections 37 and 56(1) of the Land Transport Act 1998 respectively. Careless driving carries a maximum penalty of a fine not exceeding $3,000 and driving with excess breath alcohol (third or subsequent) carries a maximum penalty of two years' imprisonment or a fine not exceeding $6,000, and a minimum disqualification for one year.[2]

10. The Summary of Facts which was presented to the Court was set out for us. At about 5.45 pm on Wednesday 26 April 2017 the defendant was involved in an accident where he struck the rear of a stationary vehicle. A breath test procedure returned a positive result of 709 micrograms of alcohol per litre of breath.[3]

11. The respondent was sentenced to three months' community detention, six months' supervision and was disqualified from driving for one year. On the careless driving charge, he was ordered to pay reparation of $941.89.

12. The respondent did not report these convictions to the Teaching Council. They came to light through a police vet that occurred when the respondent submitted an application for a full Practising Certificate.

13. The respondent provided a written response to the Council, stating that he could not believe he made the decision to drive under the influence as he was against that sort of behaviour due to his earlier experiences. The immediate impact of what he had done was unbelievable and he said that the loss of mana has been huge. He also said

[2] The relevance of it being his “third or subsequent” EBA conviction is that the maximum and mandatory penalties under the Land Transport Act 1998 are greater than for the first two offences.
[3] The legal limit under s 56 of the Land Transport Act 1998 is 400 micrograms of alcohol per litre of breath

that he had previously driven through checkpoints twice with the same amount of alcohol in his system and had been under the limit. He also maintains that he did notify the Teaching Council of his convictions.

14. Based on the ASF, the factual allegations in the Notice of Charge are established.

Serious misconduct

15. Section 378 of the Act provides:

> ***serious misconduct*** *means conduct by a teacher—*
>
> *(a) that—*
>
> *(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or*
>
> *(ii) reflects adversely on the teacher's fitness to be a teacher; or*
>
> *(iii) may bring the teaching profession into disrepute; and*
>
> *(b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct*.

16. The criteria for reporting serious misconduct are found in r 9 of the in the Education Council Rules 2016 (**the Rules**).[4] The CAC relied on r 9(1)(n) and (o):

> ***Criteria for reporting serious misconduct***
>
> *(1) The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*
>
> *…*
>
> *(n) any 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:*
>
> *(o) any act or omission that brings, or is likely to bring, discredit to the profession.*

17. We must decide if the respondent's conduct meets both parts of the test for serious misconduct.

CAC Submissions

18. The CAC submitted that the respondent's conduct reflects adversely on his fitness to teach and brings the teaching profession into disrepute, and therefore meets the second and third limbs of the definition of serious misconduct in s 378. As noted in the

[4] The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

agreed facts, the penalty for a third or subsequent EBA conviction is a maximum of two years' imprisonment.

19. The CAC submitted that the respondent's failure to report his convictions in itself is misconduct that may give rise to disciplinary proceedings, and that his most recent conviction shows a disregard for the law, his professional and ethical obligations and the safety of other road users, to the extent that, when considered either separately or cumulatively with his previous convictions amounts to serious misconduct.

Respondent's Submissions

20. The respondent's submissions were aimed at penalty.

Discussion

21. We agree with the CAC submission that the respondent's most recent convictions reflect adversely on his fitness to teach and bring the teaching profession into disrepute. Although two of his drink driving convictions predate his registration with a Limited Authority to Teach, he has now had two further convictions since he became a teacher.

22. We are also satisfied that the most recent convictions are of a character and severity to meet the criteria in Rule 9. In particular, the conviction for excess breath alcohol carries a maximum penalty of three months' imprisonment or more. We therefore find that the criterion in Rule 9(1)(n) is met. We also find that reasonable members of the public, fully informed of the facts and circumstances including a background of previous offending would consider that the standing of the teaching profession is lowered.

Penalty

23. Our powers to impose a penalty are found in s 404 of the Act, which 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.

(2) Despite subsection (1), following a hearing that arises out of a report under section 397 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).

(3) A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.

24. In *CAC v McMillan*[5] we summarised the role of disciplinary proceedings against teachers as:

> *… to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.*

[5] NZTDT 2016/52, 23 January 2017, paragraph 23.

CAC submissions

25. The CAC referred to the following aggravating factors:

    (a) The offending involved a moderately high breath alcohol level of 709 micrograms of alcohol per litre of breath.
    (b) The excess breath alcohol offending was accompanied by a careless driving charge, which resulted in minor damage to both vehicles;
    (c) The respondent has prior relevant convictions.

26. In mitigation the CAC acknowledged that the respondent has expressed remorse and used his mistake as an educational experience for his peers and students.

27. The respondent has taken rehabilitative steps to address the causes of his offending, including referring himself to the community alcohol and drug services programme before his sentencing date.

28. The CAC referred to decision *CAC v White* NZTDT 2017/29, 28 November 2017 where we noted that whether cancellation is required "almost invariably" turns on the teacher's rehabilitative prospects. In *CAC v Fuli-Makaua* we endorsed the point that cancellation is required in two overlapping situations:

    (a) Where the conduct is sufficiently serious that no outcome short of deregistration sufficiently reflects the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession; and/or

    (b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. The apparent ongoing risk in these circumstances leaves us no option but to deregister. We also held in *CAC v Karau* NZTDT 2017/17, 26 August 2017 that even one conviction for a drink driving offence "places a teacher's registration in jeopardy a serious conviction will certainly do so"[6].

29. The CAC submitted that the offending was sufficiently serious so as to place it in the first category of *Fuli-Makaua*, particularly given the repetitive nature of the respondent's conduct in light of his previous assurances that he had learned from his mistakes.

30. Although there is a period of approximately nine years between the last two EBA

[6] NZTDT 209/4 and NZTDT 2011/16 but CF *CAC v Reriti* NZTDT 2014/19, 26 August 2014 at 6

convictions, the respondent's EBA convictions form a pattern.

31. The CAC noted that the respondent provided similar assertions of remorse in 2011, but also acknowledged that he has taken rehabilitative steps on this occasion to address the causes of his offending and appears to have engaged well in the counselling process. It was observed that this appears to be different from the 2008 conviction on that basis.

32. The CAC submitted that should the Tribunal conclude that a penalty short of conviction was available, then an appropriate penalty may be censure, annotation of the register for two years and conditions on the respondent's Practising Certificate as follows:

    (a) To undertake and complete drug and alcohol counselling for a minimum of two years, included developing a prevention plan;

    (b) That the respondent discloses to his current employer and any future or prospective employer a copy of the Tribunal's decision for a period of two years from the date of "conviction".

Respondent's Submissions

33. We considered Ms King's written submissions along with a statement from the respondent, and a letter from his Principal.

34. The respondent said that he was fully aware that when he applied for a LAT that he was warned that he should not drink and drive again. He said that a lot had changed in his life since then. He has completed a degree majoring in Māori studies, and minoring in music. He also described other personal events including the birth of his youngest child, and the deaths of his father and sister.

35. The respondent also explained the implications of this for his own risk of cancer and the major medical procedure he had undergone to minimise this risk. He accepted that he drank and drove, and while there was much going on in his life at the time, he knows that this is not a valid excuse for his lack of judgement.

36. The respondent expressed his shame and acknowledged the impact his actions have had on his family, friends, the school, his colleagues and students. He is aware of the importance of being a good role model to his students and he is continuing to do the mahi to win back the respect of them, their whānau and his colleagues.

37. The respondent said that he had addressed the alcohol issue by attending counselling

at CADS (Community Alcohol and Drug Service) and he does not drink and drive at all. The counselling raised a number of issues for him about how he had used alcohol to deal with situations in his life and has given him the opportunity to address the reasons he was using alcohol. He intends to continue to address this issue through available channels.

38. In her letter of support, the principal of Otago Girls' High School, Ms Linda Miller referred to the respondent's personal circumstances at the time of this offending.

39. Ms Miller then detailed the contribution the respondent has made to the school and to the young people of Otepoti, Dunedin and to their whānau. In particular, she referred to the recent exceptional achievement of Māori students in NCEA which she attributes in large part to the respondent's work, describing him as having built a culture of excellence and an expectation of success among the students. He has also worked with others to develop inclusive practices that allow young Māori to achieve success as Māori.

40. Ms Miller advised that under the respondent's direction the combined Otago Boys' and Otago Girls' kapa haka group (Wairua Puhou) has grown in numbers and in quality, last year winning their way through to the national finals of the New Zealand Secondary Schools Kapa Haka Competition. She outlined the many practices and performances that the respondent has organised, including a noho which involved students staying on site at school from 7.00 pm Friday to 5.00 pm Sunday.

41. Ms Miller described the respondent's active support of the Kahui Korero (the Maori Student Council).

42. Ms Miller was passionate in her support of the respondent, noting that she hoped that she had "conveyed the mana of this man and the contribution he makes to further the educational and life outcomes of all students, but particularly those who identify as Māori".

43. For the respondent, Ms King submitted that the respondent had a period of nine years from a previous conviction,[7] and that this lengthy period is a good indicator that a lesson has been learned. She referred to personal circumstances which led to the

[7] In the submission this was referred to as 2004, but it is in fact nine years since the respondent's previous conviction 2008

EBA and careless driving convictions on this most recent occasion.

44. Following the conviction, the respondent participated in 11 sessions with the community alcohol and drugs programme.

45. Ms King submitted that although there has been a pattern of offending, the accessing of treatment and learning about himself is a good indicator that the pattern is able to be broken. The respondent accepted the proposed penalty in lieu of cancellation, noting that the one rider is that the requirement to inform a future employer be restricted to within the education sector.

Discussion

46. This is the second conviction since the respondent began teaching. Even without the earlier pre-registration convictions, we would view this second post-registration conviction with some concern. We agree that the respondent's list of EBA convictions between 1992 and 2017 puts his latest one into a serious category. If they had all been incurred since the respondent became a teacher, then his registration status would have been in a more precarious position. Most teachers have no convictions at all.

47. We consider the respondent's failure to report his conviction an aggravating feature as was the fact that while under the influence of alcohol he drove into a stationary vehicle as a result of which he was convicted of careless driving.

48. However, we also accept that the respondent has demonstrated some insight and has shown a commitment to address the causes of his drinking. There is some doubt about his ability to refrain from reoffending given his previous expressions of remorse in 2008, but we acknowledge the context of the respondent's personal challenges at that time of this recent offending and the efforts he has made to address his drinking and driving. We trust that the respondent is exploring other choices he can make when managing stress and his difficulties following surgery, which we accept has had a significant impact on his life.

49. We are impressed by the respondent's statement in which he did not attempt to minimise or excuse his behaviour and recognised the negative impact of his actions on those around him. The respondent's Principal advocated strongly for him and described some significant achievements. His contribution to the local education community are admirable, and we encourage him to continue to enhance the learning, identity and self-worth of his students.

50. Without a report from a counsellor or other health provider, we are reluctant to impose a penalty that requires the respondent to undertake and complete over any specified period. That requires an assessment and treatment plan, the goals of which may not sit in a timeframe. We see some benefit in him continuing some form of counselling or support, but we leave that for him to pursue. Obviously, if he is referred to the Tribunal again, his registration will be reconsidered.

51. We impose the following penalty:

(a) Censure under s 404(1)(b);
(b) The register is annotated for two years;
(c) Under s 404(1)(c), for a period of two years from 19 July 2019, there is a condition that the respondent discloses to his current employer and any future or prospective employer a copy of this decision.

Non-publication

52. The respondent sought name suppression for the school on the basis that its teachers, students and the wide community will suffer detriment from his personal mistakes of the past. The CAC opposed on the basis that the detriment asserted is speculative and falls well short of displacing the open just principle.

53. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice, which as we noted in CAC v Jenkinson, is a "fundamental tenet of our legal system."[8] While protection of the public is an important function of open justice, the presumption exists regardless of any need to protect the public.[9] The primary purpose behind the open justice principle in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.[10]

54. Section 405(3) is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

> *(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy*

[8] *CAC v Jenkinson* NZTDT 2018-14 at paragraph 33
[9] *CAC v McMillan* NZTDT 2016/52 at paragraph 45
[10] *CAC v Teacher* NZTDT 2016/27 at paragraph 66

> *of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
>
> *…*
>
> *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

55. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the applicants, as well as the public interest. If we think it is proper, we exercise our discretion to make such an order.

56. The CAC referred to *NZTDT 2016/27,* in which we acknowledged what the Court of Appeal said in *Y v Attorney-General:*

> *While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".*[11]

57. The CAC also noted that in that case we were asked to consider non-publication of a teacher's name in order to protect the school. We noted:

> *... In ordering suppression, we have not placed any reliance on the ground advanced on the School's behalf. When a teacher commits serious misconduct in the course of his or her duties, it is inevitable that there will be a degree of fallout for the school concerned. However, in light of the central role that schools have in disciplinary proceedings, it is safe to assume that their potential to suffer detrimental reputational (and potentially financial) impact through open publication was factored in when Parliament introduced the presumption of open justice. We do not rule out the possibility that in rare cases suppression may be required to protect a learning institution's interests. In the majority of cases, however, the principle of open justice places the interests of the educational community at large ahead of those of an individual school.*

58. We appreciate the respondent's sense of obligation to the school, which is standing by him, that is not a basis for non-publication of the school's name. There are no orders

[11] *Y v Attorney -General* (2011] NZCA 676

for non-publication.

Costs

59. Although this referral has been framed as a charge of serious misconduct, it is understood that it has arisen out of a report under s 397 of the conviction of a teacher. Section 404(2) therefore prevents an order for costs being made.

Theo Baker
Chair