BEFORE THE NEW ZEALAND
TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/35

COMPLAINTS ASSESSMENT COMMITTEE

V

JULIA BROWN
Respondent

Hearing:	On the papers
Appearances:	R Belcher for the CAC
	G Densey for the respondent
Date of Decision:	14 February 2023
Tribunal:	T J Mackenzie

DECISION OF THE TRIBUNAL REGARDING JURISDICTION

Introduction and background

[1] Can the Tribunal deal with alleged conduct that occurred at a time prior to the Tribunal's existence?

[2] This issue arises as follows. Before the Tribunal is a referral of conduct (inappropriate relationships) alleged to have occurred between [redacted] – [redacted]. The Notice of Referral is brought by the Complaints Assessment Committee (CAC) under s 497(4) of the Education and Training Act 2020 ("the 2020 Act"). However, the alleged conduct occurred during the reign of the Education Act 1989 ("the 1989 Act"). The CAC and this Tribunal did not exist until a 2001 amendment to the 1989 Act ("the 2001 Amendment Act").

[3] Instead, s 129(2) of the 1989 Act was the operative disciplinary provision at the time of the alleged conduct. That section provided for the "Teacher Registration Board" (TRB) to cancel a teacher's registration if satisfied of one or more of various criteria.[1] Section 129 also provided for orthodox natural justice – notice of the allegations and a right to be heard.

[4] And so the issue that arises is that this Tribunal is asked to do something that it was not empowered to do – cancel registration under s 129 of the 1989 Act (as it was at the time of the alleged conduct).

[5] At an earlier conference the Chair of the Tribunal queried the jurisdictional issue. The Tribunal directed that it be considered as a preliminary issue. The CAC has since filed submissions on the issue. The respondent does not wish to be heard.

Discussion

[6] Two issues emerge. One is whether the Tribunal can retrospectively apply itself and its procedures to conduct that occurred before its existence. The second is whether the repealed disciplinary provision – s 129 of the 1989 Act – remains enforceable.

[7] The reason that the first point is an issue is due to the fundamental rule against retrospective application of legislation, found at s 12 Legislation Act 2019. This states:

> Legislation does not have retrospective effect.

[8] Common law has however maintained that this provision (and it's predecessors) is a presumption, not an immutable rule. As Dobson J explained in *Todd Pohokura Ltd v Shell Exploration Ltd*:[2]

[1] Character, fitness, not a satisfactory teacher, or unfamiliarity with curricula and procedures.
[2] *Todd Pohokura Ltd v Shell Exploration NZ Ltd* (2008) 18 PRNZ 1026 (HC) at [76]-[77].

> [86] I consider apposite the approach to retrospectivity in *Maxwell on the Interpretation of Statutes* (12th ed), London, Sweet & Maxwell, 1969, as cited by Burrows at p 407:
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> > The rule [against retrospective construction] has been applied chiefly in cases in which the statute in question, if it operated retrospectively, would prejudicially affect vested rights or the legality of past transactions, or impair contracts, or would impose new duties or attach new disabilities in respect of past transactions … The presumption … has no application to enactments which affect only the procedure and practice of the Courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being.
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> [87] Accordingly, the presumption against retrospective construction does apply to substantive provisions …. The procedure-substance distinction was commented on by the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833. As per Lord Brightman at 836:
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> > Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

[9] The CAC also points to s 77(3) of the 2001 Act as providing jurisdiction for the Tribunal to deal with the matter under its current provisions. This provides:

> After the disciplinary bodies of the Teachers Council are established, those bodies must deal with any matter arising under any of sections 139AK to 139AP, section 139AR, or section 139AZC of the principal Act in accordance with the relevant rules.

[10] That does appear to be a strong signal that the Tribunal is to deal with *any* matter arising – there are no exceptions or qualifiers. And at the time of drafting, it could not be said that the legislature was blind to the reality of historical cases coming along from time to time. However, the sections mentioned within s 77(3) above are of course from the 1989 Act, which is now repealed. Fortunately that problem is then remedied before it causes any difficulty, by the transitional provisions of the 2020 Act. These provide that references to the 1989 Act are to be read as a reference to the 2020 Act.[3] So applying that, s 77(3) essentially says that the Tribunal must deal with any matter arising (under the equivalent sections of the 2020 Act i.e. the present referral).

[3] At schedule 1 clause 3.

[11] But yet a further problem exists. Section 77(3) of the 2001 Act is repealed. Can that be cured? The CAC says it can and relies on s 34 Legislation Act 2019, which provides:

> **34 Effect of repeal or amendment on prior offences and breaches of legislation**
> (1) The repeal or amendment of legislation does not affect a liability to a penalty or any other remedy or relief, or to an order or a direction, for an offence or for a breach of any legislation committed before the repeal or amendment.
> (2) Repealed or amended legislation continues to have effect as if it had not been repealed or amended for the purpose of—
> (a) investigating the offence or breach:
> (b) commencing or completing a proceeding for the offence or breach:
> (c) imposing a penalty, or any other remedy or relief, or making or giving an order or a direction, for the offence or breach.

[12] Section 34 carries on the law as found in the former s 19 Interpretation Act 1989. Section 34 was for instance considered recently by Palmer J in *Commerce Commission v Objective Corporation Ltd*, where the maximum penalty had increased after the penalised conduct.[4] In an orthodox application of s 34, Palmer J applied the repealed penalty provision.[5] This case also shows the breadth of s 34 – it not just confined to criminal proceedings.

[13] Section 34 (above) and its predecessors (s 19 Interpretation Act 1989 and s 20(h) of the Acts Interpretation Act 1924) are typically applied in a substantive sense (e.g. applying repealed penalties, as see in the Commerce Commission decision cited above). But its utility is not limited to just that. Section 34(2) shows an intention to capture a range of associated legislation: if the (repealed) legislations purpose relates to investigating (the offence or breach), commencing or completing proceedings, or imposing a penalty. Whilst most cases applying it have used the latter purpose, it also enables the application of repealed legislation in relation to investigations and commencement of matters.

[14] In my view s 77 of the 2001 amendment Act relates to the commencement of a proceeding. Section 34(2)(b) therefore applies. The result of this is that the Tribunal must determine the matter before it.

[15] I also take support in that finding from the approach of the High Court in *McKay v Hawkes Bay Lawyers Standards Committee*.[6] Mr McKay's conduct occurred during the reign of the Law Practitioners Act 1982. Appeals against disciplinary findings were, under that Act, to be heard by a full Court. The replacement Act, the Lawyers and Conveyancers Act 2006, did not have such a requirement. Mr McKay

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[4] *Commerce Commission v Objective Corporation Ltd* [2022] NZHC 1864
[5] At [8].
[6] *McKay v Hawkes Bay Lawyers Standards Committee* [2015] NZHC 464.

sought a full bench for his appeal, arguing the former Act applied because that is when his conduct occurred.

[16] Brewer J rejected that argument, finding that the disciplinary and appeal proceedings were being conducted under the newer Act. The Judge stated:

> [11] It follows that I do not accept Mr Pyke's submission that because the charge against Mr McKay found proved by the Tribunal was a charge alleging an offence against s 112 of the LPA that the Tribunal's decision was, for the purposes of s 360 of the LCA, an "order or decision made under Part 7 of the Law Practitioners Act 1982 or under s 58 of that Act". There is a distinction between process and outcome.
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> [12] The complaint was made to the Complaints Service established under s 121(1) of the LCA by the New Zealand Law Society. The procedures laid down, or authorised, by the LCA were then followed. Because the complaint related to conduct which occurred before the LCA came into force, the charge had to be a LPA charge and, once proved, the penalty had to be an appropriate LPA penalty. But the Tribunal made no order or decision under the LPA. It exercised its jurisdiction under the LCA.
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> [13] In my view, s 360 of the LCA applies to complaints that were live under the LPA. Such complaints are heard as though the LPA had not been repealed, and s 360 preserves the s 118 LPA appeal right.

[17] The Tribunal has found that the procedures under the 2020 Act apply, and that the Tribunal is the body to deal with the matter. That leaves the second issue of whether the Tribunal can apply the law as it stood at the time of the conduct – i.e. the test at s 129 of the 1989 Act.

[18] As counsel for the CAC notes, the transitional provisions of the 2020 Act were not afforded with the more expressive instructions that some regimes have seen, which could have provided a simpler answer to this jurisdiction quandary (by clearly requiring the Tribunal to apply the s 129 test to historical conduct such as this).

[19] There are two answers to this. First is again s 34 (above), which enables the Tribunal to apply the substantive test from s 129. Second, Courts have had to grapple with this sort of transitional drafting economy before without too much difficultly. The common law supports an approach which avoids the absurd situation of alleged offences being immune from any proceedings due to legislative updates. The Court of Appeal decision in *Black v Fulche*r is apposite.[7] At page 419 Cooke P delivering the judgment of the Court said:

> It is highly likely that in enacting the Acts Interpretation Act the legislature intended that an offence committed under replaced regulations should still be open to prosecution, subject to any time bar. And even if there are no replacing regulations, in principle Parliament would hardly wish that the consequences

[7] *Black v Fulcher* [1988] 1 NZLR 417.

> of, for instance, a flagrant breach of statutory regulations should be seen to have been eliminated once those regulations cease to be in force. It would be a poor example of the rule of law.

[20] In *Comptroller of Customs v McHannigan* Salmon J considered the effect of s 20(h) (of the 1999 Interpretation Act) and after considering *Black v Fulcher* (above) stated (at 8):[8]

> The same can be said with equal force of a repealed Act. It is clear that the new Act makes no provision for the continuation of the investigation and the ultimate prosecution of offences committed under the old Act. It would be absurd if there were no way of continuing such matters. A statutory lacuna would exist. It can hardly have been Parliament's intention that upon the enactment of the Customs and Excise Act all investigations into offences under the replaced Act would cease.
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> In my view paragraphs (g) and (h) of s 20 of the Acts Interpretation Act taken in combination have the effect of ensuring that this absurdity does not result.

[21] To my mind the same approach applies here. In the absence of a clear direction that the Tribunal should apply the s 129 test (which strictly speaking was for the TRB to apply), the Tribunal must avoid absurdity and presume that the legislature intended that should the present situation arise, that it could be dealt with by the Tribunal standing in the shoes of the TRB. There are strong public policy reasons – namely the ability to detect and deal with conduct issues – which desire for this to be so.

Decision

[22] The Tribunal is empowered to apply procedures from the 2020 Act to alleged conduct which predates it, subject to applying the substantive provisions in force at the time of the conduct, including for present purposes the tests and powers at s 129 of the Act. The Tribunal will apply the test that the TRB would have but for the passage of time.

T J Mackenzie

Deputy Chair

[8] *Comptroller of Customs v McHannigan* HC Auckland M697/97, 25 September 1997.