

**BEFORE THE NEW ZEALAND
TEACHERS DISCIPLINARY TRIBUNAL**

NZTDT 2022/08

**COMPLAINTS ASSESSMENT
COMMITTEE
Prosecutor**

V

**KATHERINE KIRK
Respondent**

Hearing 3 March 2023 (on the papers)
Representation E Mok for CAC
No appearance for Ms Kirk
Tribunal T Mackenzie, L Evans, D Spraggs
Date of decision 7 March 2023

**DECISION OF THE TRIBUNAL
7 March 2023**

Introduction

[1] The Complaints Assessment Committee (CAC) has brought the following charge against Ms Kirk:

The CAC charges that Katherine Frances Kirk, registered teacher, of Whanganui, on or around 22 September 2020:

- a. Brought drug paraphernalia, namely a glass pipe, onto the grounds of [REDACTED] and [REDACTED]
- b. Used drugs on the grounds of [REDACTED].

[2] This is the Tribunal's decision on whether the charge is proven, and if so, any orders that follow.

Procedural background

[3] There have been multiple attempts at involving Ms Kirk in this process, as set out in previous Minutes of the Tribunal.

[4] There has been only sporadic communication from Ms Kirk, despite various assistance attempted by the Tribunal Administrator and counsel for the CAC. Ms Kirk has shown a pattern of purporting to show a desire to be involved in the proceedings, near always followed by failures to engage. Similar difficulties occurred during the CAC's own consideration of the matter, prior to laying a charge in the Tribunal.

[5] Since the last Minute of 31 January 2023, the Tribunal has not received any contact from Ms Kirk or any person on her behalf, despite the clear notice in that Minute that a hearing on the papers would be proceeding.

[6] The Notice of Hearing was sent by email to Ms Kirk on 15 February 2023. Follow up emails from the Tribunal Administrator of 21 February 2023 have not been responded to. Ms Kirk's usual email address was used.

[7] The Tribunal considers that Ms Kirk has had ample notice of the proceeding and hearing date. Ms Kirk has consistently not taken steps to adequately engage with the proceeding since its commencement. A professional has a duty to be responsive and communicative when facing disciplinary proceedings. Ms Kirk has failed to adhere to that duty without good reason.

[8] The Tribunal has now proceeded to determine the charge in the absence of Ms Kirk's involvement.

Facts

[9] Evidence has been put before us via affidavits. We have not required any witnesses for questioning. Despite Ms Kirk's lack of involvement, the burden still remains on the CAC to prove the charge. While the standard to which it must be proven is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in

mind.¹

[10] Given the extent of evidence, including Ms Kirk's agreement with much of the narrative, and her dishonesty in some aspects, we have no trouble in accepting what has been said by the witnesses. Below we will summarise the evidence that we have found proven.

[11] Ms Kirk was registered as a teacher in 2008. In 2020 she was a teacher employed at a school (for publication reasons we will refer to this simply as "the school").

[12] During 2020 various staff members at the school observed Ms Kirk exhibiting out of character and at times erratic behaviour. One commented that she appeared to be "on something" and high, as she would be silly and laugh a lot, and erratic. She was described as "up one minute and then down the next".

[13] Another observed that Ms Kirk would often say she had an upset stomach, before going to the bathroom, including on the day the glasses case was found.

[14] Another noticed a few unusual things with Ms Kirk's behaviour – including her cleaning outside of the classroom early in the morning and taking all of her children's tote trays outside to clean them.

[15] Another noticed a change in Ms Kirk's behaviour after she returned from the first Covid-19 lockdown. Ms Kirk was seen as disorganised and forgetful, short tempered, came into school at 6am to clean, yet arrived late to the school on other days.

[16] Another similarly observed a change in behaviour after lockdown – observing that Ms Kirk's behaviour was noticeably inconsistent, changing multiple times throughout the day.

[17] A staff member gives evidence of an incident that took place a few weeks before the charged incident of 22 September 2020. They came across a similar glasses case in a classroom. A student told them that the case belonged to Ms Kirk. The staff member opened the case and saw what they believed to be drug paraphernalia inside – including zip lock bags with white powder in them, and a glass pipe. They did not report the incident at the time to the school. They were a newly employed teacher aid and were afraid of what would happen regarding their job if they reported the incident (if suspicion fell on them).

[18] On 22 September 2020 between 12 pm and 1 pm Ms Kirk was seen to walk through a classroom toward the staff bathrooms. At approximately 1 pm a staff member used the staff bathroom. The bathroom was also used by teacher aides and special needs students. While there, the staff member noticed a glasses case sitting on a stool. The stool was underneath the sink. A picture of this scene is included below:

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



[19] They opened the case. On seeing that the case contained a glass item, instead of glasses, they placed the glasses case back on the stool in its original position. They then notified the Acting Principal about the glasses case.

[20] The Acting Principal took possession of the case and confirmed with [REDACTED] a police officer that the contents of the case were drug paraphernalia. Specifically, it contained a type of glass pipe commonly used to consume methamphetamine, and three "straws" commonly used to scoop methamphetamine. The Acting Principal then reported the matter to the Principal and the Board of Trustees.

[21] Whilst all of this was occurring, Ms Kirk was seen to come into the staff room three times, acting as if she was looking around for something, and appearing stressed.

[22] The school commenced an internal investigation and notified local Police. The school Acting Principal, with the Principal, met with each staff member to ask about the glasses case and its contents. Ms Kirk stated to them that it was not hers and that she did not know anything about it. As will be seen, this was a lie on her part.

[23] Police attended the school on this day and seized the glasses case (and its contents). Staff consented to property searches. A lighter was found in Ms Kirk's jacket. Various staff note she is not a smoker, or at least they have never seen her smoke.

[24] The Principal advised all staff that it was a serious offence and that there would be an investigation. A few minutes later, Ms Kirk arrived unannounced at the Principal's office. The Principal recounts:

She came and sat down and said "I hope you don't think it was me". I said it didn't matter what I thought as there was an investigation underway. I saw that her eyes were bloodshot and red around the rims. She repeated her statement about it not being her. I said I have seen that glasses case before. She said "When? where?" She then said "I have lots of glasses cases." "What would happen in police terms if prints or DNA couldn't be matched? Shouldn't the fingerprint results be back by now?" "Have samples been taken from the

bathroom?" (I said no, it had only had a deep clean). "So you have no evidence that anyone actually smoked it at school? It might have just fallen out of their bag."

[25] Ms Kirk then stated that she would like to speak with an NZEI representative before agreeing to the drug test. All other staff agreed to undertake the test and produced negative results. Ms Kirk never provided consent and was never tested.

[26] On 25 September 2020 the school filed a mandatory report with the Teaching Council.

[27] Police interviewed Ms Kirk on 4 December 2020. When spoken to, Ms Kirk admitted that the glass pipe came from her bag. She claimed that she was holding the pipe for someone else, and had put the pipe in her bag to return it to the owner.

[28] On 3 May 2021 Ms Kirk provided the following response to the Teaching Council:

I am writing to you in the hope that I may retain my teaching certificate and continue to work in the profession I love working in until my retirement.

There is no doubt or denial that a pipe used for smoking methamphetamine was found in the toilet of [REDACTED] and it had fallen out of my backpack when I went to the toilet. I did not know it had fallen out and I had not remembered that it was in that bag. I absolutely did not, have not and would not use any drug while at my workplace or around any children ever.

The pipe was in my bag because I was to return it to its owner that night as it was left at my house and I did not want it in my possession or at my house. When the battery in my car was flat that morning, I took my motorbike which led to me taking the backpack, and in my rush did not remember I had the pipe in it.

It was evident when the Principal, (who was away on sick leave) came in that something had happened.

After school, I was taken into the Principals office and questioned about a pipe and smoking at school. I was a bit shocked as I still never realised it was the same pipe. I denied ever smoking anything at work but a million things were going through my head at that stage.

The Principal was hysterical in her approach and told me she would grind me into the ground and I would never work again, I would lose everything. I was scared.

A meeting was called for all staff and asked if anyone owned it. I never spoke up because I felt I needed to talk to someone about what to do.

We were told everyone was to have a drug test, the police were there to check bags and so it was.

We were informed that we did not have to have the test, we could say no, and that speaking to an NZEI representative would be the next step. I asked again if any of us were to say no to the test then we could speak to a representative. The answer was 'Yes'. That was when I said 'No' I would want to talk to a representative.

I actually thought that I would get to talk to someone before I was singled out from the Principal and it all began the process with the Board and me.

The Principal continued to come into the school in the days following while on sick leave.

██████████ who was our Board Chairperson (not at the time) a very close friend of the Principal *and to my knowledge*, banned from entering our school because of false accusations about a parent at the school, also came in the following day and spent time with the Principal. Principal had mentioned to me, once in her office {prior to this incident} and another time to 2 other staff members that she had been able to check Police records of parents and indicated she had seen mine but did not say this directly.

I dare to say this because over a period of about three years I had begun to feel bullied and treated badly by the Principal which started a spiral of feeling worthless and confusion about my place at ██████████.

Over Lockdown, I didn't cope with how I was feeling about myself and tried some methamphetamine when it was offered. I admit I like how I felt and tried it again when offered. When school resumed, I had a couple of weekends where I smoked marijuana, and meth.

I had had some the weekend before the pipe was found at work, which is why I was reluctant to have a urine test and I wanted to talk to a Rep first.

I am very aware that the responsibility of the pipe is mine. I told the Police that the pipe was mine and I had smoked from it. I was given a warning.

After months of feeling like the worlds worst person and treated like a criminal by ██████████, I have also realised that I didn't get to that place without sinking from the struggles and constant craziness of my workplace.

I am quite willing to say more about this if The Teachers Council would like to know more.

I have been down and out since this incident happened and I have had some very low and sometimes dark thoughts and at times struggle with thoughts. I have had moments of weakness since and have looked for support at Narcotics anonymous meetings.

I am a great teacher; I have a great affiliation with children and have passion for my work. I have not re-applied for my certificate because I felt I did not deserve to. As my life gets brighter and I can see why I ended up where I did, I can feel the passion return and a need to tell my story.

Thank you for the time, I wait anxiously for the next step to take place.

Factual conclusions

Did Ms Kirk bring a pipe on to school grounds?

[29] Ms Kirk accepts that she brought the pipe on to school grounds. Ms Kirk claims however, in her unsworn response, that it was an accident. She would have it that the pipe was a friend's and she had been intending to return it, and it must have fallen out of her bag.

[30] We do not accept this explanation. The glasses case was found resting on a stool under a sink, making it quite improbable that it fell from a backpack and somehow ended up there. If it fell, it would likely have been heard to have hit the floor (putting aside how it then got up on to the stool). When all of the above evidence is considered together, we find it very likely that not only did Ms Kirk knowingly bring the pipe to school, but that she did so for her own methamphetamine consumption at the school (something which we will discuss below).

Did Ms Kirk use drugs – namely methamphetamine – on the school grounds?

[31] Ms Kirk, again in unsworn material, denies this.

[32] We note the following evidence:

- A glasses case said to be hers, containing what appeared to be methamphetamine and a pipe, was found a few weeks earlier.
- A noticeable change in behaviour after a Covid-19 lock-down period.
- Regular erratic behaviour before the incident.
- Regular trips to the bathroom including the need to tell people it was for an "upset stomach", which we consider was an intentional cover story.
- Admission of being a methamphetamine user.
- Initial denial and lies to the school and Police.
- The lighter found in her jacket pocket on the day of the incident, despite not being a smoker.
- Refusing a drug test after the incident.
- Various odd questions of the Acting Principal and Principal which we consider showed a peculiar interest and defensive concern on Ms Kirk's part.

- Her appearance on the day of the incident.
- The location of the glasses case and pipe, which is more consistent with someone putting it down after using it and then forgetting about it, due to the effects of taking methamphetamine.

[33] Tying all of these threads together, we are driven to an inescapable conclusion that it is highly likely that Ms Kirk consumed methamphetamine at the school on several occasions, and certainly did on 22 September 2020.

[34] We therefore find all aspects of the charge factually proven.

Law

[35] Section 10(1)(a) of the Education and Training Act 2020 (the Act) defines “serious misconduct” as conduct by a teacher that either:

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

[36] Regarding the first limb of this test. In *CAC v Marsom* this Tribunal said that the risk or possibility is one that must not be fanciful and cannot be discounted.² The consideration of adverse effects requires an assessment taking into account the entire context of the situation found proven. Direct evidence from a child/student as to affects is not mandatory and indeed is rare. Nor does the ambit of s 10 call for direct evidence. The use of the term “likely” permits the Tribunal to draw reasonable inferences as to affects or likely affects, based on the proven evidence in a case and its own knowledge.

[37] The second limb has been described by the Tribunal as follows:³

We think that the distinction between paragraphs (b) and (c) is that whereas (c) focuses on reputation and community expectation, paragraph (b) concerns whether the teacher’s conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher’s peers or by the community. The views of the teachers on the panel inform the view taken by the Tribunal.

[38] The third limb of the test is assisted by reference to the High Court decision in *Collie v Nursing Council of New Zealand*.⁴ The Court held that a disrepute test is an objective standard for deciding whether certain behaviour brings discredit to a

² *CAC v Marsom* NZTDT 2018/25, referring to *R v W* [1998] 1 NZLR 35.

³ *CAC v Crump* NZTDT 2019-12, 9 April 2020.

⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

profession. The question that must be addressed is whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the conduct of the practitioner.

[39] The Court of Appeal has affirmed that the test for serious misconduct in s 378 of the Education Act 1989 (the equivalent of s 10 of the Act) is conjunctive with the Teaching Council Rules 2016 mandatory reporting criteria (the Rules).⁵ The Rules describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.

[40] Therefore for serious misconduct to be made out, as well as meeting one or more of the three limbs set out above, the conduct concerned must at the same time meet one or more of the Teaching Council's criteria for reporting serious misconduct. These rules make the following behaviour mandatory to report:

9 Criteria for reporting serious misconduct

(1) A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:

- (a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:
- (b) emotional abuse that causes harm or is likely to cause harm to a child or young person:
- (c) neglecting a child or young person:
- (d) failing to protect a child or young person due to negligence or misconduct, not including accidental harm:
- (e) breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher; for example,—
 - (i) engaging in an inappropriate relationship with the child or young person:
 - (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:
- (f) viewing, accessing, creating, sharing, or possessing pornographic material while at a school or an early childhood education service, or while engaging in business relating to a school or an early childhood education service:
- (g) acting dishonestly in relation to the teacher's professional role, or committing theft or fraud:
- (h) being impaired by alcohol, a drug, or another substance while responsible for the care or welfare of a learner or a group of learners:
- (i) permitting or acquiescing in the manufacture, cultivation, supply, offer for supply, administering, or dealing of a controlled drug or psychoactive substance by a child or young person:

⁵ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

- (j) an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:
- (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[41] Here, the CAC relies on (j) and (k).

The charge

[42] Turning to whether the proven facts make out the charge.

[43] It is difficult to say if the conduct was likely to adversely affect a student. It appears her teaching style may have been affected, although that is not the focus of the charge or evidence. Certainly, if a student had laid their hands on the contents of the case, the results could have been quite severe.

[44] In any event, the conduct clearly adversely reflects on Ms Kirk's fitness to be a teacher. Indeed it completely destroys it.

[45] Further, we consider that any reasonable person would conclude that the conduct brings the profession into disrepute.

[46] We also consider that the Criteria for Reporting Serious Misconduct is met, particularly Rule 9(1)(j) and/or (k) of the Teaching Council Rules 2016.

Penalty

[47] Teacher's registrations have been cancelled in less serious cases than the present.⁶

[48] We consider that there is no other option but to cancel Ms Kirk's registration due to the seriousness of her conduct. We also note the lack of engagement from Ms Kirk, leaving us no opportunity to try and explore any rehabilitative steps she may have taken or any positive assurance or confidence she could provide us (and even then, it would be difficult to overcome this conduct).

[49] We therefore make an order cancelling Ms Kirk's registration under s 500(1)(g) of the Act.

[50] We note that even if we had only found the first limb of the charge proven (bringing the pipe to school), we would have found this to be serious misconduct and would have cancelled Ms Kirk's registration in the circumstances of this case.

⁶ See for instance *CAC v Teacher* NZTDT 2012/11, July 2012; *CAC v Williamson* NZTDT 2014/45, 19 November 2014.

Costs

[51] Due to Ms Kirk's lack of engagement, the CAC has incurred the costs of producing a full set of evidence and submissions. This could have been avoided. We consider Ms Kirk should pay 50% of the CAC costs. The CAC costs were \$9503.50, meaning an order for \$4751.75 is now made.

[52] Tribunal costs are \$1455. 50% is ordered, being the sum of \$727.50.

Non-Publication Orders

[53] There has been no application for non-publication by Ms Kirk. We confirm that there are no orders in place regarding her name nor any orders made now.

[54] The evidence has demonstrated to us that this was a very alarming and stressful incident at this small school, and was handled thoroughly and professionally. The various staff involved found it very upsetting. We consider it proper to prohibit from publication any reference to the staff names, and likewise any children's name.

[55] The school concerned has also sought non-publication of its name to shield it from any negativity associated with this case.

[56] The actions of Ms Kirk involve her personal behaviour, albeit whilst at school. There is no issue of it being known about by the school (aside from the limited knowledge of a new teacher aide, who did not inform anyone of what he saw). We do not see any public interest in the school being named. The students of the school, and the staff, should be free to go about their days without the risk of being linked to any publication about such a pernicious drug being used within their school by a teacher.

Summary of orders

[57] To summarise:

- Charge proven.
- Cancellation of Registration ordered.
- No non-publication orders regarding Ms Kirk's name.
- Non-publication of school name, and all teaching staff and students mentioned in any of the evidence, this decision and the summary of facts.
- Costs as above.

Concluding observation

[58] Good teachers are always sorely needed. Ms Kirk has expressed that she enjoyed teaching and wished to continue to do so. It is always a very sad day when a teacher's career is ruined by their actions in falling under the influence of a drug such as methamphetamine. We do hope that Ms Kirk reads this decision and has or will take steps to distance herself from methamphetamine and redeem herself.

A handwritten signature in blue ink, appearing to read "Mackenzie", is enclosed in a thin black rectangular border.

T J Mackenzie

Deputy Chair