

**NOTE: FINAL NON-PUBLICATION ORDERS**

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2022/57**

**UNDER | WĀHANGA**

the Education and Training Act  
2020 (**the Act**)

**IN THE MATTER | MŌ TE TAKE**

of a charge referred to the  
Tribunal

**BETWEEN | I WAENGA I A**

**COMPLAINTS ASSESSMENT  
COMMITTEE (CAC)**  
Kaiwhiu | Prosecutor

**AND | ME**

**TEACHER B**  
Kaiurupare | Respondent

Hearing | Te Rongonga

AVL, 11 September 2023 – on the papers

Representation | Hei Māngai

Ms Rebecca Scott for the CAC  
Respondent in person

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**DECISION OF THE TRIBUNAL**

4 October 2023

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Tribunal

James Gurnick (Deputy Chair)  
Simon Walker  
Louise Arndt

## Introduction

[1] The Complaints Assessment Committee (**CAC**) in accordance with the mandatory direction in s 497(5) of the Education and Training Act 2020 (**the Act**) referred this matter to the Tribunal on the basis that Teacher B's convictions for driving a motor vehicle with excess breath alcohol,<sup>1</sup> and operating a vehicle carelessly,<sup>2</sup> meet the criteria for reporting serious misconduct.<sup>3</sup>

[2] Teacher B has a history of two previous disciplinary issues referred to the Teaching Council arising from underlying health issues with alcohol misuse.

[3] During the CAC's investigation and when the notice of conviction was referred to the Tribunal, Teacher B indicated that she would have voluntarily cancelled her registration if that option had been available to her. Teacher B has indicated that she does not wish to return to teaching and requests that the outcome of this process is that her registration is cancelled.

## The Tribunal's disciplinary function

[4] Under s 497(4) of the Act, the CAC may, at any time, refer a matter to the Disciplinary Tribunal for hearing. Section 479(1)(m) of the Act requires the Teaching Council to perform the disciplinary functions set out in the Act relating to teacher misconduct and reports of teachers' convictions.<sup>4</sup>

[5] On referral of a conviction, the Tribunal is not required to make a finding of serious misconduct. Nevertheless, the Tribunal has had regard to the threshold for serious misconduct as a "useful yardstick" when considering other convictions for driving with excess breath alcohol,<sup>5</sup> and to scrutinise whether the offending engages one or more of the three professional consequences described in the definition of serious misconduct in the Act. The District Court recently endorsed the utility of this approach.<sup>6</sup>

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<sup>1</sup> Pursuant to s 56(1) of the Land Transport Act 1998.

<sup>2</sup> Pursuant to s 37(1) of the Land Transport Act 1998.

<sup>3</sup> Teaching Council Rules 2016, r 9(1)(j).

<sup>4</sup> Under the equivalent provisions contained in the Education Act 1989, the Tribunal held in *CAC v Hyland* NZTDT 2020/38 (14 December 2020) at [12], citing *CAC v Bird* NZTDT 2017/5 (3 July 2017), that it "needs to decide whether the circumstances of the behaviour that resulted in the conviction reflect adversely on the teacher's fitness to practise as a teacher".

<sup>5</sup> *CAC v Young* NZTDT 2019/121 (19 August 2021) at [12].

<sup>6</sup> *Rachelle v Teachers Disciplinary Tribunal* [2020] NZDC 23118 at [20]–[21] and [41].

[6] Section 10(1)(a) of the Act defines “serious misconduct” as conduct by a teacher that either:

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

[7] For serious misconduct to be made out, as well as meeting one or more of the three limbs set out above, the conduct 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.

[8] Rule 9 of the Teaching Council Rules 2016 requires a teacher’s employer to report serious breaches of the Code of Professional Responsibility (**Code**). Those serious breaches relevantly include:

- (a) r 9(1)(j) – an act or omission that may be the subject of prosecution for an offence punishable by imprisonment for a term of three months or more;<sup>7</sup>
- (b) r 9(1)(k) – an act or omission that brings, or is likely to bring, the teaching profession into disrepute.<sup>8</sup>

[9] Where the conduct is likely to bring the teaching profession into disrepute turns on whether “reasonable members of the public, informed and with knowledge of all of the factual circumstances, could reasonably conclude that the reputation and good standing” of the teaching profession was lowered by the behaviour of the teacher concerned.<sup>9</sup>

[10] If the Tribunal does not consider the conduct meets the test for serious misconduct, it may exercise its disciplinary powers under s 500 of the Act. Section 500(1) lists the powers that the Tribunal may exercise following “a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the CAC”.

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<sup>7</sup> Teaching Council Rules 2016, r 9(1)(j).

<sup>8</sup> Teaching Council Rules 2016, r 9(1)(k).

<sup>9</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; applied by the Teachers Disciplinary Tribunal in *CAC v Teacher C NZTDT 2020/32* at [39].

[11] The standards of behaviour expected of registered teachers are contained in the Code. The relevant provisions of the Code are:

- (a) clause 1.3, which provides that teachers will maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity; and
- (b) clause 1.5, requiring the maintenance of public trust and confidence in the teaching profession by contributing to a professional culture that supports and upholds the Code.

[12] In *CAC v Ngata*, the Tribunal observed that:<sup>10</sup>

Driving while intoxicated poses a danger to the public and such conduct by a teacher may undermine a teacher's professional commitment (in the Code) to maintain public trust and confidence in the profession.

[13] The Tribunal must assess the circumstances that led to the conviction and the seriousness of the offending. The Tribunal's assessment is an objective one based on the accepted professional standards that apply to all teachers.<sup>11</sup>

[14] In *CAC v Fuli-Makaua*, the Tribunal heard five cases involving the referral of convictions for driving with excess breath alcohol or excess blood alcohol and conducted a thorough review of the Tribunal's decisions on these types of referrals.<sup>12</sup> The applicable principles were approved by the District Court as follows:<sup>13</sup>

- (a) Teachers are role models for learners and have considerable influence in and beyond the learning environment. Under the now-replaced Code of Ethics for Registered Teachers, practitioners made a commitment to the community to "teach and model those positive values that are widely accepted in society and encourage learners to apply them and critically appreciate their significance". Under the current Code of Professional Responsibility, teachers are obliged to "maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity".
- (b) There is a spectrum of disciplinary responses by the CAC and the Tribunal to EBA convictions. At one end, the CAC can deal with an EBA conviction by way of agreement under s 401(2) of the Education Act. In cases that fall into this category, a practitioner has usually returned a relatively modest breath or blood alcohol reading, and there is the presence of "significant mitigating features". However, "at the other end are

<sup>10</sup> *CAC v Ngata* NZTDT 2020/50 (16 April 2021) at [13].

<sup>11</sup> *CAC v Ngata*, above n 10, at [14].

<sup>12</sup> *CAC v Fuli-Makaua* NZTDT 2017/40 (5 June 2018).

<sup>13</sup> *Rachelle v Teachers Disciplinary Tribunal*, above n 6, at [20]–[21] and [41].

convictions that are dealt with by the Tribunal and where cancellation is the only available outcome”.

- (c) The starting point with respect to EBA offending is that even one conviction “places a teacher’s registration in jeopardy”. A series of convictions “will certainly do so”. Notwithstanding the fact that it is a traffic offence, it is, as the Tribunal said in 2009, “a very serious one and not behaviour which our society is prepared to tolerate”. Driving whilst intoxicated poses a danger to the public and does not mirror the expectation of practitioners “to both teach and model positive values for their students”. Doing so undermines teachers’ “trusted role in society”.
- (d) The Tribunal set out the factors that “tend to aggravate the conduct or otherwise suggest that a higher penalty is required” and said that, “We agree that it is timely to set out the aggravating and mitigating factors derived from previous decisions and we hope that the teaching profession and their legal advisers will find them helpful in understanding how these matters are viewed; albeit “we do not want to create an impression that we will simply follow a formula”.

[15] The following criteria that are relevant to the assessment of the seriousness of the conduct for driving with excess breath alcohol are:

- (a) The circumstances of the conviction which include:
  - (i) The level of alcohol involved (if other factors are neutral, a lower reading of alcohol renders a situation less serious than a very high reading).
  - (ii) The nature of the driving itself and the risk to the public. The teacher’s conduct will be viewed more seriously if the driving was so unsafe as to have attracted attention.<sup>14</sup>
  - (iii) Whether any passengers were in the car which would have placed more people at risk. The timing of the conduct, such as whether it occurred in the early hours of a school night, because this raises questions about the teacher’s judgement and ability to perform his or her role appropriately.
  - (iv) Whether there was other associated offending, such as driving while disqualified, refusing to give a blood sample, careless driving or assault on a Police officer.
  - (v) Whether students were put at risk. Conduct will be much more serious if it has put the safety of students at risk or had the potential to do so.

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<sup>14</sup> CAC v *White* NZTDT 2017/29 (28 November 2017).

[16] Personal aggravating factors include the presence of prior relevant convictions, including:

- (a) Whether prior convictions for driving with excess breath alcohol might signal a risk of future offending or a harmful relationship with alcohol and/or poor self-regulation. Prior convictions may also demonstrate a disregard for the law and other road users.
- (b) The time that has elapsed between convictions.
- (c) Whether there are any other drug-related convictions.
- (d) Whether there are any other convictions unrelated to drugs or driving that might indicate a flagrant disregard for the law and which might demonstrate a questionable ability to role model appropriate behaviour.
- (e) Whether there is a prior traffic history not resulting in convictions (such as traffic infringements) which may demonstrate a lack of care and responsibility or a further flagrant disregard for the law.
- (f) Whether there is evidence of a harmful relationship with alcohol relevant to assessing the risk that the teacher may pose (while noting that care must be taken not to punish for individual incidents that are evidence of alcoholism but rather to impose a penalty in respect of the conviction). The extent of a teacher's harmful relationship with alcohol is relevant to the assessment of the risk that he or she poses.
- (g) Whether students have been put at risk in any way.
- (h) Whether there was a failure to report the conviction as required under the Act.

[17] Mitigating features, the most significant of which is the teacher's "potential for and established commitment to rehabilitation". This requires an assessment of:

- (a) The level of accountability and remorse demonstrated by the teacher.
- (b) The teacher's level of insight into the cause of his or her behaviour is important to the assessment of rehabilitation potential and the risk of repetition. Analysis of this factor requires consideration of what meaningful steps have been taken to reduce the risk of the conduct recurring.

- (c) Independent evidence of concrete rehabilitative steps that the teacher has taken. While claims by a teacher to attend future rehabilitative steps will be viewed less favourably, positive concrete steps will include attendance at drug and alcohol courses or sessions with a drug and alcohol counsellor.

[18] When cancellation is the commensurate outcome, the Tribunal's review of previous cases involving convictions for driving with excess breath alcohol identified that cancellation is required in two overlapping situations:

- (a) when the offending is so serious that no outcome short of de-registration will sufficiently reflect the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession; and/or
- (b) if inadequate rehabilitative steps have been taken by the teacher to address his or her issues with alcohol.<sup>15</sup>

### **CAC's submissions**

[19] The CAC submits that the Tribunal is entitled to make an adverse finding as to Teacher B's fitness to be a teacher for the following reasons:

- (a) The quantity of alcohol recorded in the conviction for driving with excess breath alcohol was very high. Teacher B's reading was 942 micrograms per litre of breath.
- (b) Teacher B's driving was erratic to the point that she crashed into another vehicle, resulting in a separate charge of careless driving.
- (c) The conduct occurred in the middle of the afternoon on a week day, which is indicative of a problematic relationship with alcohol.

[20] Although Teacher B does not have previous convictions for driving with excess breath alcohol, there is evidence of a harmful relationship with alcohol as demonstrated by the previous conduct matters in 2018 and 2020 and the referral to the Tribunal in 2020. The CAC submits that, in combination, Teacher B's actions undermine the Code's expectation that teachers maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity and contributing to a professional culture that supports and upholds the Code.

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<sup>15</sup> *CAC v Teacher P* NZTDT 2018/63 at [11].

[21] As to mitigating factors, the CAC acknowledges that Teacher B suffers from a health condition of alcoholism that underpins the conduct. She has communicated her remorse to the CAC and paid reparation of \$5,960 to the driver of the other vehicle. It is also acknowledged that the incident took place during a time of personal difficulty for Teacher B which appears to have triggered a relapse of her alcoholism. The CAC recognises that Teacher B has taken significant rehabilitative steps over the last two years to address her alcohol issue, including attendance at individual counselling sessions and participation in a number of group sessions. She has obtained support from CADS, Mahi Marumarū and AA and works in a role that supports her ongoing recovery. The CAC does not allege that Teacher B put students at risk as a result of the conduct which led to the two convictions, although the conduct did pose a risk to the general public.

[22] The CAC acknowledges that Teacher B does not intend to return to teaching and she wishes to move forward without disrupting her rehabilitative progress. Teacher B is employed at a private addiction rehabilitation service which serves the dual purpose of supporting her own recovery while also providing support to others who experience problems with alcohol.

### **Teacher B's submissions**

[23] Teacher B did not have any substantive submissions in response to those made by the CAC and requested that the Tribunal cancel her registration.

### **Decision**

[24] The purpose of the exercise of the Tribunal's disciplinary powers is to protect the public and maintain professional standards and the public's confidence in the profession. This purpose is achieved by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required.

[25] In *CAC v Fuli-Makaua*<sup>16</sup> the Tribunal observed that its role in imposing a penalty is to achieve an outcome that is fair, reasonable, and proportionate in the circumstances. We accept the following additional factors are relevant to the determination of penalty:

- (a) what penalty most appropriately protects the public;
- (b) the important role of setting professional standards;
- (c) the exercise of the Tribunal's punitive function;

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<sup>16</sup> *CAC v Fuli-Makaua* NZTDT 2017/40 (5 June 2018).



- (d) the rehabilitation of the teacher;
- (e) the imposition of a penalty that is comparable to those imposed on other teachers in similar circumstances;
- (f) the assessment of the teacher's behaviour against the spectrum of options available with a view to ensuring that the maximum penalties are reserved for the most serious conduct; and
- (g) the imposition of the least restrictive penalty that can reasonably be imposed in the circumstances.

[26] The Tribunal has considered it appropriate to cancel a teacher's registration in many cases involving convictions for excess breath alcohol.<sup>17</sup> However, in *CAC v Teacher*, the Tribunal observed the range of outcomes available in cases involving referral of convictions for driving with excess breath alcohol and emphasised that each outcome is "heavily contextual."<sup>18</sup>

[27] Section 500(2) of the Act applies to the present case which arises from the referral of a report of a conviction. The Tribunal is therefore unable to impose a fine, or costs. Because Teacher B does not currently hold a practising certificate and has not done so since 2021, the options of suspending the practising certificate are unavailable to the Tribunal. The Tribunal could, however, impose conditions on any future practising certificate.

[28] On the other hand, the CAC acknowledges that the circumstances of the two convictions in this case would not automatically warrant cancellation, which we accept. We agree with the CAC that insight, remorse, and the significant rehabilitative steps that Teacher B has taken, had Teacher B wished to return to teaching, the convictions would not necessarily

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<sup>17</sup> See above. Where the teacher was referred to the Tribunal after being convicted twice within six months of driving with excess breath alcohol and on one charge of driving while disqualified. The teacher also had two prior convictions for driving with excess breath alcohol, one of which was over 20 years old. The teacher failed to notify the Teaching Council of her convictions. In cancelling the teacher's registration, the Tribunal noted that the teacher could not "elaborate on her plan to avoid driving" and she had not demonstrated any insight into the factors that led to the convictions. In *CAC v Spedding* NZTDT 2020/27 (6 August 2021), the Tribunal cancelled the registration of a teacher who was referred for two convictions for excess breath alcohol which arose within two years. The teacher had one prior conviction for excess breath alcohol. Other concerns about the teacher's conduct arose which included that she had left the school when she was teaching, that she displayed obvious signs of alcohol consumption at school, and that she left students unattended at times. In *CAC v Thomson* NZTDT 2014/57 (3 October 2014), a teacher who had previously appeared before the Tribunal because of a referral for a drink driving conviction had failed to inform that earlier Tribunal of further convictions for driving with excess breath alcohol, careless driving, and failing to stop. The latter Tribunal resolved that cancellation was the "only option" because of the teacher's "flagrant lack of candour" with the earlier Tribunal.

<sup>18</sup> *CAC v Teacher* NZTDT 2021/61 at [11].

attract the penalty of cancellation. There is no evidence that Teacher B's conduct put the welfare of students at risk, and there is evidence demonstrating Teacher B's ongoing efforts to address the risk of relapse.

[29] For the reasons set out above, we accept the two convictions and the evidence of a long-standing problematic relationship with alcohol support a finding of an adverse inference that undermines the Code's expectation that teachers maintain public trust and confidence in the profession by demonstrating a high standard of professional behaviour and integrity and contributing to a professional culture that supports and upholds the Code.

[30] On that basis and taking the context into account, including Teacher B's repeated requests to cancel her registration, we agree that cancellation is the appropriate outcome in this case.

### **Costs**

[31] The CAC, in accordance with s 500(2) of the Act, does not seek a contribution to its costs from Teacher B. On that basis, the Tribunal makes no order for costs in favour of the CAC.

[32] As a result of the lack of financial means, remorse and the fact that Teacher B paid considerable reparation amounts to the driver involved in the accident (\$5,960), the Tribunal considers that this is one of those relatively rare cases where we do not impose an order for the Tribunal's costs, either. Ordinarily in a case like this (dealt with on the papers), we would order 40 per cent of the Tribunal's costs be paid by the teacher.

### **Non-publication orders**

[33] Teacher B has applied for a permanent non-publication order.

[34] The Tribunal's jurisdiction to make non-publication orders is provided for in s 501(6) of the Act. The starting point in cases such as this is the principle of open justice. Open justice is paramount to maintain public confidence in the teaching profession through the transparent administration of justice.<sup>19</sup> In considering whether to make non-publication orders, we have considered whether publication of Teacher B's name is likely to have an adverse effect on Teacher B's rehabilitation, and the need to strike a balance between open justice considerations and the interests of the party who seeks suppression.

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<sup>19</sup> *CAC v Pilgrim* NZTDT 2021/35 (30 March 2022) at [88].

[35] The CAC does not oppose the application for non-publication orders and abides the Tribunal's decision.

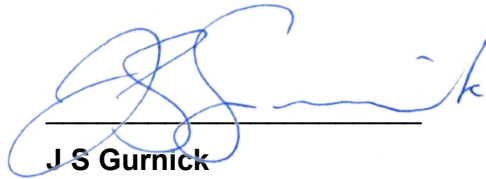
[36] Having considered the information before us, the application for permanent non-publication orders is granted on the basis that publication of Teacher B's name would likely undermine and risk her ongoing efforts to maintain her sobriety. It is clear that Teacher B has taken significant steps to address her alcoholism, having attended many counselling sessions in recent years. Publication of her name would not serve the interests of justice if Teacher B's efforts were derailed for that reason.

### **Conclusion**

[37] For the reasons set out above, we make the following orders:

- (a) an order cancelling Teacher B's registration;
- (b) an order for permanent non-publication of any details identifying Teacher B.

[38] There are no orders as to costs.



**J S Gurnick**

Deputy Chair of the New Zealand Teacher's  
Disciplinary Tribunal