

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-59

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 **Teacher G**

Respondent

TRIBUNAL DECISION

12 SEPTEMBER 2019

HEARING: Held via Skype on 30 August 2019 (on the papers)

TRIBUNAL: Theo Baker (Chair)
Neta Sadlier, Sue Ngārimu (members)

REPRESENTATION: Ms E Mok for the CAC
Ms D King for the respondent

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers.
2. It is alleged that while on a school camp, in the early hours of 13 February 2019, the respondent let a parent into his room and allowed her to lie on his bed while alone in the room with him.¹
3. The CAC contends that this conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and r 9(1)(k) of the Teaching Council Rules 2016² (**the Rules**) or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

Evidence

4. At a pre-hearing conference on 3 July 2019 the parties advised that they had agreed on the facts and that the matter could be dealt with on the papers. An Agreed Summary of Facts (**ASF**) dated 3 July 2019 signed by Ms Mok and Ms King was filed.
5. The parties also filed submissions in accordance with time-tabling directions. Ms Mok then filed a memorandum in response noting that Ms King's submissions referred to "a number of factual matters that do not form part of, and in some instances are in conflict with, the agreed summary of facts." She said that they were "matters that have not been agreed between the Committee and Teacher G. These factual matters not confined to mitigating factors purely personal to Teacher G." She went on to specify the factual matters that were objected.
6. Ms Mok also objected to Ms King's inclusion of the investigation file in the documents before us.
7. Given that there seemed to be disagreement on the facts, I noted that it appeared that a hearing in person might be required and asked for a response from Ms King. She advised that the respondent does not wish to appear and said that her comments about the evidence were made without instructions from the respondent. Ms King had

¹ The charge was amended twice. Although there is no application to amend the charge before us, we have dealt with the latest version of the charge, dated 3 July 2019, which is consistent with the Agreed Summary of Facts of the same date.

² As amended by on 29 September 2018, by s 12 of the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018(2018 No 35). These amendments apply to conduct after 18 May 2018. See Schedule 1 Part 2.

made some comments about wider implications for teachers and suggested that a practice note is required.

8. Ms King stated that the Tribunal is an investigative body, not an adversarial one. She said that investigative processes are more informal and flexible. She further noted that the Tribunal can set its own procedure and receive whatever evidence is of assistance to it whether or not it is strictly “legal evidence”.
9. Ms King went on to say that it is not necessary that evidence is under oath, and that she has attended hearings where that has not been the case. Evidence that is not part of the ASF cannot be prohibited.
10. Ms King said the respondent cannot predict what the CAC will say in its submissions, and should not be prevented from adducing material that is helpful to the respondent’s position.
11. Ms King went on to say that the Investigator’s report, which she had put before the Tribunal cannot be said to be evidence. At the same time, she has submitted that it is relevant and probative.

Discussion

12. The issue before us does not relate to informality, rules of evidence, or the Tribunal’s investigative powers, but natural justice and adherence to agreed directions. It is not clear specifically what practice requires a practice note. The parties attended a pre-hearing conference at which they advised that the facts were agreed, and timetabling directions were agreed to.
13. Although the Tribunal has some investigative powers under r 32 of the Rules, we do not agree that the Tribunal is an “investigative body.” Whereas a Complaints Assessment Committee may “investigate any report, complaint, or matter referred to it” under s 400, the Tribunal’s powers under s 404 arise after “hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee”.
14. In cases that come before us, the CAC has already conducted an investigation. Our role is to make findings of fact based on the evidence presented to us and decide whether to exercise any of our powers under s 404.
15. The Tribunal process is often called “inquisitorial”. This means that the Tribunal may

enquire into matters that have not been adduced in evidence. We may ask questions on matters that do not arise from any questions that the parties have put to the witnesses. That is not the same as being an investigative body or conducting an investigation into the allegations.

16. The power of the Tribunal to receive evidence that might not be admissible in a court of law,³ does not mean that it must receive any evidence. The issue here is not to do with admissibility under the rules of evidence, but the deviation from agreed facts and procedures.
17. The reason for submitting an agreed summary of facts is to avoid the need for the CAC to call witnesses to prove a charge and to save on costs for the parties. Agreeing on the facts may involve some compromise on the part of either party. The CAC may decide not to pursue some facts and the respondent may decide not to take issue with some facts. That is entirely over to each party to decide. If the discrepancy is of significance to either party, there may be a hearing where the evidence can be tested. The Tribunal may determine the facts. That is one of the functions of the Tribunal: to decide on the balance of probabilities what happened.
18. Sometimes, in the absence of any objection, the Tribunal may ask questions of parties without the need for swearing in a witness. This is usually on uncontested matters. If the topic is contested, the usual process for receiving evidence is followed.
19. Similarly, after agreeing on the facts to be submitted to the Tribunal, neither party is able to produce further evidence in relation to the facts without the agreement of the other party. If there is no agreement to the admissibility of the evidence, then there may need to be a hearing so that we can decide the facts. If the respondent does not agree with the facts contained in the ASF, then he is entitled to be heard in the usual way and have the evidence tested through cross-examination or contradicted through other witnesses.
20. In the present case the CAC does not agree to the further evidence being placed in front of us but the respondent does not wish to be heard on the matters that seem to be in dispute. Therefore the Tribunal has disregarded the investigation file and the evidential matters contained in paragraphs 5,9,10, 15, 16, 18,19, 30 32 of Ms King's submissions dated 20 August 2019 as specified in Ms Mok's memorandum dated 23

³ Rule 31, Teaching Council Rules 2016

August 2019.

21. We have considered the charge of serious misconduct in light of the ASF which was signed by Ms Mok and Ms King and is now set out in full.

AGREED SUMMARY OF FACTS

Background

1. *Teacher G is a registered teacher who holds a full practising certificate.*
2. *At all material times, Teacher G was employed at [College A]. The College is a co-educational school which teaches students in Years 7 to 13.*

Incident at school camp

3. *Teacher G was one of two teachers in charge of a school camp for Year 7 students at the College in February 2019.*
4. *[Ms B] a parent of one of the students who went on the trip, attended the school camp to provide assistance along with other parents.*
5. *On the evening 12 February 2019, Teacher G told the parents at the camp to come and wake him up if there were any concerns or trouble with the students.*
6. *That evening and in the early hours of the morning of 13 February 2019, [Ms B] was woken up by students and other female parents with whom she was sharing a room. In the early hours of the morning of 13 February, frustrated at not being able to sleep properly, [Ms B] went to Teacher G's room to share her concerns.*
7. *Teacher G allowed [Ms B] into his room after she knocked on his door and woke him up. [Ms B] initially sat on a chair in the room, but eventually lay down on Teacher G bed at his suggestion. According to the Teacher G, when [Ms B] lay down on his bed, he was not lying on the bed, but rather was sitting on the corner of the bed.*
8. *[Ms B] subsequently went to retrieve her sleeping bag and pillow from her room. Upon her return, Teacher G allowed [Ms B] to come back inside the room and to lie down on his bed again.*

9. *After a short period, [Ms B] left the room. Shortly after leaving the room, [Ms B] informed two other parents at the camp that something had happened with Teacher G, and presented as distressed and upset.*

School investigation

10. *On 13 February 2019, [Ms B] and another parent helper at the camp reported the incident to the Principal of the College, [Mr C]. [Ms B] alleged that inappropriate sexual conduct had taken place between herself and Teacher G in Teacher G's room.*
11. *On 15 February 2019, [Mr C] informed Teacher G of the allegations and invited him to formally respond. On 18 February 2019, Teacher G provided a response to the allegations. Although Teacher G accepted that he had allowed [Ms B] to be alone in the room with him and had suggested that she lie down on the bed at one stage, he denied that any inappropriate contact had occurred between them.*
12. *On or around 25 February 2019, [Ms B] lodged a complaint with the Police regarding Teacher G. The Police considered that there was insufficient evidence of any criminal conduct and that a Police investigation was not required.*
13. *On 5 March 2019, [Mr C] lodged a mandatory report in relation to the incident with the Teaching Council.*

Teacher's response

14. *Teacher G, in his statement responding to the mandatory report, stated that [Ms B] had made a "barrage" of requests and complaints to the College of a "strange" and "unusual" nature prior to the school camp.*
15. *Teacher G further stated that:*
- When we were at camp it became clear that [Ms B] was not going to be much help and she was quickly evolving into a liability. (I have... some major concerns for her mental health).*
- I did say to [Ms B], if you have any issues come and see me. The incident is included in my report to the Principal. I certainly did not do what she alleged but unfortunately I have made myself vulnerable to accusation by*

letting her come into my room and trying to help her. My main concern for letting her come in my room was to avoid her annoying and burdening other staff and parents...

I am personally upset at being put in this position and deeply regret letting her come into the bedroom. This is a conduct I would never do again and certainly lesson learnt. Unfortunately and somewhat frustrating for me is that [Ms B] has effectively no consequences for making this story up. I cannot fathom why she did this and what she had to gain by it...

22. Based on the evidence contained in the ASF, we are satisfied that in the early hours of 13 February 2019, Teacher G let a parent into his room and allowed her to lie on his bed while alone in the room with him. The factual allegation in the charge is therefore proved.

Serious misconduct

23. We must now decide whether the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).
24. 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.*

25. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC relies on r 9(1)(k):

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:*

...

- (k) *an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

CAC Submissions

26. The CAC's position is that the second two limbs of the definition in s 378 are met. Ms Mok submitted that the respondent's conduct involved a sustained lack of professional judgment and lack of proper regard for maintenance of professional boundaries which reflects adversely on his fitness to be a teacher and for the same reason, risked bringing the teaching profession into disrepute.
27. Ms Mok also submitted that the conduct constituted a breach of the following sections of the Code of Professional Responsibility:
- Clause 1.3, which provides that teachers will maintain public trust and confidence in the teacher profession by demonstrating a high standard of professional behaviour and integrity;
- Clause 3.1, which states that teachers will engage in relationship with families and whānau that are professional and respectful.
28. On the question of bringing the profession into disrepute, Ms Mok referred to the test for bringing discredit to the profession as in *Collie v Nursing Council of New Zealand* [2001] NZAR 74,⁴ and submitted that reasonable members of the public, informed of all the facts and circumstances, could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the behaviour of the respondent.
29. For the respondent, Ms King submits that it is unclear precisely how the conduct is likely to bring discredit to the profession, that allowing a parent entry into a teacher's bedroom on a school camp in the circumstances of this case does not have the sexual connotations of *CAC v Whitwell NZTDT 2011-7*, where the teacher posed for a pornographic photoshoot.
30. Ms King submitted that in suggesting that Ms B lie on the bed, the respondent's conduct was an attempt to be considerate, that it was foolish, but not necessarily unprofessional. No inference should be drawn from the fact that Ms B appeared to be

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

distressed following this encounter and there is no proof of any unwanted sexual advances towards her.

Discussion

31. We consider the respondent's decision to allow a parent into his bedroom in the early hours of the morning was foolish and inappropriate. It reflects poorly on his judgement, but not necessarily on his fitness to be a teacher. We find that reasonable members of the public, informed of the facts outlined in the ASF (which are the only facts and circumstances which they can be fully informed of) would agree with us, but we do not think that they would consider that the reputation of the teaching profession was lowered by the respondent's conduct. Based on the facts presented to us, it is difficult to find a breach of the Code of Professional Conduct and certainly not a "serious breach" as required by r 9. In summary we do not find that the respondent's conduct is of a character and severity which warrants a finding of serious misconduct.
32. We have also considered whether we should exercise our powers under s 404. We do not approve of a teacher allowing a parent into his bedroom on a school trip and we do not think that it is very professional but we are not prepared to impose any of the orders under s 404.
33. There will be no order for costs against either party.

Non-publication

34. The respondent seeks name suppression. The CAC advises that it is likely that identification of the respondent will lead to identification of the parent and in those circumstances, they do not oppose an order for non-publication of name.
35. Therefore we think it is proper to make an order under s 405(6) of the Act for non-publication of the name of the respondent, the parent, the school and the names of any staff member.



Theo Baker
Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).