

**BEFORE THE NEW ZEALAND
TEACHERS DISCIPLINARY TRIBUNAL**

NZTDT 2022/21

**COMPLAINTS ASSESSMENT
COMMITTEE
Prosecutor**

V

**█
Respondent**

Date of hearing 13 March 2023
Counsel E Mok for CAC
█ self-represented
Tribunal T Mackenzie, L Arndt, L Evans
Date of Decision 23 March 2023

**Decision of the Tribunal on charge, penalty,
publication and costs**

Introduction

[1] ██████████ has been charged with Serious Misconduct by the Complaints Assessment Committee (CAC) as follows:

1. The CAC charges that ██████████, former holder of a Limited Authority to Teach, of ██████████, engaged in the following conduct:

- a. On or about 13 July 2018, verbally threatened to kill or cause grievous bodily harm to ██████████
- b. On or about 13 July 2018, manually assaulted ██████████

2. The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 378 of the Education Act 1989 and Rule 9(1)(j) and (k) of the Teaching Council Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

[2] ██████████ has accepted that this is serious misconduct. The parties have directed their submissions towards the appropriate outcomes.

Facts

[3] The parties have reached an agreed position on the facts. The agreed facts are:

Background

1. The respondent, ██████████ is a qualified ██████████ who held a limited authority to teach (LAT) between ██████████ and ██████████. The respondent's LAT expired on ██████████ and has not been renewed since.
2. At the relevant time, the respondent was employed as a teacher at ██████████ a co-educational secondary school ██████████ (School).
3. The respondent is still currently employed as an ██████████ at the School (despite not having a valid LAT).

Criminal proceedings

4. On 21 February 2019, the respondent appeared before Judge Saunders in the ██████████ District Court and pleaded guilty to one charge of threatening to kill pursuant to s 3016(1)(b) of the Crimes Act 1961 which attracts a maximum penalty of 2 years' imprisonment, and one charge of male assaults female pursuant to s 194(b) of the Crimes Act 1961 which attracts a maximum penalty of 7 years' imprisonment. The offending related to ██████████. The respondent was granted a discharge without conviction under s 106 of the Sentencing Act 2002.
5. The Police summary of facts in relation to the offending, which the respondent accepted when he pleaded guilty to the offending, is attached at **Tab 1** and forms part of this summary of facts.
6. A certified copy of the court record (recording the respondent's guilty pleas) is attached at **Tab 2** and the sentencing notes of Judge Saunders are attached as **Tab 3**. These documents also form part of this summary of facts.

Mandatory report

7. On 1 May 2019, the Teaching Council received a Police vetting report dated 25 April 2019. The report identified that the respondent had been granted a discharge without conviction in respect of his offending. On 3 May 2019, the Teaching Council referred the matter to a Complaints Assessment Committee (**Committee**) for investigation.

Teachers response

8. In a written response provided during the Committee's process, the respondent expressed remorse for his offending and stated that he would not repeat his conduct.
9. The respondent stated that, after being charged with the above offending, he had self-referred himself to the [REDACTED] Course and [REDACTED] [REDACTED] which he had successfully completed.
10. At a meeting with the Committee, the respondent stated that alcohol consumption at the time of the incident had exacerbated the situation and that he had stopped drinking alcohol since the offending. He expressed remorse for his offending and stated that he had learnt a lot from the anger management and drug and alcohol programmes he had completed since the incident. He also expressed his desire to continue teaching (in particular, he indicated he wished to complete a teaching degree through a Maori focused programme), and working with troubled youth in the community.

[4] The agreed facts in this case also attaches the summary of facts from the Police prosecution of [REDACTED] in the District Court. This reads as follows:

INTRODUCTION

The defendant [REDACTED] and the victim in the matter [REDACTED]
[REDACTED]

CIRCUMSTANCES

On Friday 13 July 2018 at about 1 pm the defendant and victim were both at [REDACTED]
[REDACTED]

The defendant was sitting in his green utility vehicle in the driveway at the address and the victim approached the passenger's window to talk with him.

An aggressive verbal argument ensued with the defendant yelling abuse and swearing at the victim.

The defendant pulled the victim's arm and upper body through the passenger's window and punched her in the face under her right eye.

The victim broke free from the defendant hold and went back to her vehicle.

The defendant exited his vehicle and attempted to chase the victim while being held back by his sister.

The defendant called the victim on her cell phone and left a voicemail message directed at her.

The voice message stated (See appendix A)

INJURIES TO VICTIM

As a result of the punch to the face the victim received a slight bruise and swelling on her right cheek.

ORDERS

Orders are requested for the defendant to attend an Alcohol Rehabilitation programme and an Anger Management programme upon sentencing.

DEFENDANT COMMENTS

In explanation the defendant stated that he was sorry and ashamed for the assault and that he doesn't even remember leaving the voice message.

The defendant has previously appeared before the Court.

Appendix

A- The voice message stated "Fuck you bitch I'm gonna stab you, you fucking stupid slut. I'm gonna fucking kill you and that mother fucker".

The message further stated "I'll show you how the fuck it goes you stupid bitch" and "I'm gonna drag that cunt and choke him and fucking bring him to your house and fucking bash him in front of you fucking stupid cunt".

Legal principles

[5] As we have noted, ██████████ accepts that his conduct meets the test for serious misconduct. We will however consider the charge for ourselves as well.

[6] Section 378 of the Education Act 1989 (the Act) defines serious misconduct as follows:

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 Teaching Council's criteria for reporting serious misconduct

[7] We need not consider the first limb in a case such as this.

[8] The second limb (fitness) has been described by the Tribunal as follows:¹

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.

[9] The third limb of the test (disrepute) is assisted by reference to the High Court decision in *Collie v Nursing Council of New Zealand*.² The Court held that a disrepute test is an objective standard for deciding whether certain behaviour brings discredit to a profession. The question that must be addressed is whether reasonable members

¹ *CAC v Crump* NZTDT 2019-12, 9 April 2020.

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

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.

[10] Part (b) of the serious misconduct test requires that the conduct be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct. This criteria is found in the Teaching Council Rules 2016.

[11] The Court of Appeal has affirmed that the test for serious misconduct is conjunctive with paragraph (b) of the section 378 test.³ Therefore for serious misconduct to be made out, as well as meeting one or more of the three limbs set out above (in (a)), the conduct concerned must at the same time meet one or more of the Teaching Council's criteria for reporting serious misconduct (as per (b)).

[12] The Tribunal therefore will approach its task by first considering the tests in part (a) of the test. If met, misconduct is made out. If misconduct is made out the Tribunal will then consider part (b) to determine if serious misconduct is made out.

[13] The criteria to consider for part (b) are the Teaching Council Rules 2016. These 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,

³ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

offer for supply, administering, or dealing of a controlled drug or psychoactive substance by a child or young person:

(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.

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

[15] The burden rests on the CAC to prove the charge (although we again note it is accepted). While the standard to which it must be proved 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.

[16] Conduct of a teacher outside of the classroom can expose a teacher to professional conduct issues. As was observed by the Tribunal in the decision of *CAC v Teacher*:⁴

The legislation is simply not structured in such a way as to draw a line between a teacher's private and professional life. The principal question is never whether some incident took place in a teacher's private or professional capacity. The principal question is always whether the teacher's actions, wherever and whenever they took place, reflect adversely on his or her fitness to be a teacher.

Discussion

[17] This conduct, being the assault and the related threats, are in combination at such a level that we consider they reflect adversely on [REDACTED] fitness as a teacher. The offences are serious, with maximum penalties of two and seven years respectively. A prosecution occurred by Police in the District Court. This was not low level offending.

[18] We also consider that the conduct brings the profession into disrepute.

[19] We are aware that in the District Court that [REDACTED] was discharged without conviction. Part of the reason for that was the consequences for [REDACTED] in his teaching career. We record that that decision is not relevant to our consideration of the Serious Misconduct test. It involved a different body (the District Court) applying a different test (section 106 Sentencing Act 2002). One basis for the discharge appeared to be that a conviction could affect [REDACTED] teaching prospects. If that is the case then it may seem a misplaced concern. We would point out that a discharge without conviction simply means that the charged criminal conduct comes to us as a Serious Misconduct charge, whereas on a conviction it would have come as a referral. The difference is mostly academic save for costs not being awarded on referrals.

Penalty

[20] On penalty, we take into account the steps [REDACTED] has taken. He has obtained personal assistance with counselling for alcohol and violence issues. He is remorseful. He is well supported in other community work that he does, and is spoken of highly (we will go into this further below when considering publication). He has

⁴ *CAC v Teacher* NZTDT 2009/05.

engaged cooperatively and responsibly in this disciplinary process.

[21] As noted by the CAC, ██████████ is not a registered teacher and does not hold a current LAT. This reduces the options available under the Act to a censure and a fine. If the other options in the Act had been available to us, we would have likely ordered annotation of the Register and a condition that this decision be provided to any future school employers over the next 18 months.

[22] We consider first that a censure is appropriate under s 404(1)(b) of the Act. This marks the Tribunal's disapproval of a teacher acting in this way and notes the standards that teachers will be held to.

[23] The CAC also suggests a fine. This is in our view something of a makeweight due to the inability to impose more meaningful penalties.

[24] Fines may rarely be imposed in this Tribunal, although that is probably due to the usual ability to impose various other penalties. Where a fine is imposed however, it is usually to deter some form of positive act or omission carried out within the context of the professional's role. For instance the Tribunal has in a previous case imposed a fine where there has been a failure to discharge the statutory obligation to report criminal convictions to the Teaching Council.⁵ Other disciplinary Tribunals have imposed a fine in cases involving the dishonest completion of documents submitted to the professional regulator. For example, in *Forum Patel* the Health Practitioners Disciplinary Tribunal ordered a censure and fine of \$5000 against an optometrist who had completed an incorrect declaration of an annual practising certificate application form concerning his employment for the three previous years.⁶

[25] Here, a fine by this Tribunal for conduct occasioned by criminal offending occurring nearly five years ago, which has been prosecuted in the District Court, lends itself to plain punishment for the sake of it. We consider it does not add value to the professional disciplinary purpose of this regime in the circumstances of this case. If the drafting of the Act has left a shortfall for situations such as the present, then that is not something we can make up for on a principled basis.

Costs

[26] The CAC seek a costs order of \$2691, being 40% of their costs. We consider that this is a reasonable and indeed economic costs claim. We order payment of \$2691 in costs.

[27] ██████████ has asked about time to pay. The Teaching Council will no doubt be able to discuss that with ██████████

[28] Tribunal costs are certified at \$1455. 40% is \$582, which we now order.

⁵ *CAC v Ngata* NZTDT 202/50.

⁶ *Forum Patel* HPDT 392/Opt11/177P.

Publication

[29] ██████ seeks non publication of his name, the victim's name and the school's name where he works. The CAC is neutral on the application although notes that naming the school might undermine any other orders.

[30] First, we consider it proper to suppress the name of the victim and her relationship to ██████. We see little or no public interest in this being subject to open justice.

[31] The next two aspects – the school and ██████ – are intertwined. We note the commendable work with troubled and challenged youth that ██████ is undertaking via the school, a council and a youth trust. This work involves youth who are falling outside of the school system, from backgrounds of poverty, gangs, drugs & alcohol issues, and abuse in homes. Several credible and cogent letters speak highly of ██████ work, and share their concerns for him being able to continue to do this work if his name and this conduct finding was able to be publicized.

[32] We also take into account that ██████ is not a registered teacher and does not currently hold a LAT. And we take into account that this conduct appears to have been a one off, with no further incidents known in nearly five years now. We agree that it would be unfortunate for there to be publicity of ██████ name given the sensitive work he is doing with troubled rangatahi.

[33] We consider that in these circumstances there is great public interest in ██████ being given the best opportunity to continue to carry out the work he is doing. We consider that these interests displace the principle of open justice.

[34] Although not determinative, we note that naming ██████ would also have risked undermining the non-publication order for the victim.

[35] We therefore make the following orders per section 405(6) of the Act:

- Non publication of the name of the victim and ██████ relationship to her.
- Non publication of ██████ name and any identifying particulars including what town he lives in.
- Non publication of the name of the school and the town of the school.



T J Mackenzie
Deputy Chair

