

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023/23

KEI RARO I TE MANA O <i>Under</i>	of the Education Act 1989 (the Act)
I TE TAKE O <i>In the Matter of</i>	a conviction referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
KO <i>Between</i>	COMPLAINTS ASSESSMENT COMMITTEE <i>Kaiwhiu Prosecutor/Referrer</i>
ME <i>And</i>	ADRIAN FIRTH (Authorisation 164728) <i>Kaiurupare Respondent</i>

TE WHAKATAUNGA Ā TE TARAIPUNARA
DECISION ON PENALTY, LIABILITY AND COSTS
Dated 6 November 2023

NOHOANGA: <i>Hearing</i>	25 September 2023 on the papers via Teams
TE TARAIPUNARA: <i>The Tribunal</i>	Ian Murray (Tiamana Tuarua) Rose McInerney raua ko Will Flavell (Ngā mema o te Taraipunara)
NGĀ ROIA ME NGĀ KAIARAHINA: <i>Representation</i>	E Mok for Complaints Assessment Committee Respondent- self represented

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee (**CAC**) has referred the respondent to the New Zealand Teachers Disciplinary Tribunal (the Tribunal).
2. By Notice dated 3 April 2023, the CAC referred the respondent's conviction for failing to carry out obligations in relation to computer search 4 May 2021 (the conviction).¹
3. The CAC contends that the Tribunal should make an adverse finding which then entitles us to exercise our powers under s 500 of the Education and Training Act 2020 (the Act).

Whakarāpopoto o te whakataunga – Summary of decision

4. We make an adverse finding against Mr Firth. We order that he be censured and direct that the Teaching Council impose a condition that he notify his employer of this decision and the outcome of this disciplinary proceedings on any subsequent practising certificate issued to him. While we consider it arguable that we could order costs, given that this case involved the referral of a conviction to us and the respondent is no longer teaching, in accordance with our usual practice we make no order for costs.

Ko te hātepe ture o tono nei – Procedural History

5. The respondent was charged with the offence in question after the search warrant was executed. He was convicted and discharged when he pleaded guilty to this charge. He did not report the conviction as he was required to do by the Education and Training Act 2020.
6. Eventually, the respondent's school found out and notified the Teaching Council, who made inquiries and ascertained that the respondent had been convicted of the conviction. Later, it was referred to the CAC who then referred the conviction to the Teaching Council Disciplinary Tribunal.
7. A pre-hearing conference was convened on 18 July 2023, when the matter was set

¹ Pursuant to section 178 of the Search and Surveillance Act 2012

down for a hearing on the papers. The hearing took place on 25 September 2023.

Kōrero Taunaki - Evidence

8. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full below:

1. The respondent, Adrian Peter Firth (**Mr Firth**), was previously a fully registered teacher. He was first registered as a teacher in 1991.
2. Mr Firth previously worked as a teacher at Northcote College, a co-educational secondary school located in Northcote, Auckland.
3. As at the date of this summary of facts, Mr Firth is no longer working in the teaching profession. In June 2022, he voluntarily deregistered as a teacher.

Criminal proceedings

4. On 4 May 2021, Mr Firth appeared at the North Shore District Court and pleaded guilty to one charge of failing to carry out obligations in relation to a computer search, an offence under s 178 of the Search and Surveillance Act 2012. This offence has a maximum penalty of 3 months' imprisonment. Mr Firth was convicted and discharged for this offending.
5. The Police summary of facts in relation to the offending, which Mr Firth accepted when he pleaded guilty to the offending, is attached at **Tab 1** and forms part of this summary of facts. The offending related to Mr Firth's actions in the course of a search warrant being executed at his home address on 4 January 2021, at a time when he was still a registered teacher.

Reporting of offending

6. On 13 May 2021, the Teaching Council's contact centre received a phone call from Vicki Barrie, Principal of Northcote College, advising that Mr Firth had resigned, and that he possibly had a Police matter before the Courts. Mr Firth resigned from Northcote College on 5 January 2021, a day after a search warrant was executed at his home address.
7. The matter was brought before the Council's Triage Committee in May 2021 and a decision about how it should be addressed was deferred to allow for information to be obtained from the Police and the Courts.
8. Information was obtained from the Police and from the Court file in September 2021.
9. On 8 November 2021, Mr Firth informed the Teaching Council that he was going to voluntarily deregister as a teacher. In this correspondence, he also stated that he had permanently left teaching and had no intention of returning to it.

Own motion referral

10. Mr Firth's request for voluntary deregistration was approved on 13 June 2022.
11. The matter was brought back before the Triage Committee on 22 July 2022. By its own motion, the Teaching Council referred the matter to a Complaints Assessment Committee (**Committee**) for investigation, which in turn referred it to the Tribunal.

Teacher's response

12. On 16 December 2022, Mr Firth provided his response to the draft investigation report. Mr Firth stated that he did not wish to comment and reiterated that he had no intention of returning to teaching. He indicated he did not want to attend the Committee meeting.

POL 262 08/20

NZ Police

SUMMARY OF FACTS

POLICE Adrian Peter FIRTH DOB 01/06/1968 PRN 10689773

CHARGE Fail to Carry Out Obligations in Relation to Computer Search

Search and Surveillance Act 2012 Section 178 Penalty: 3 Months

Imprisonment

CIRCUMSTANCES

On Monday 4 January 2021 a search warrant was executed at the defendant Adrian FIRTH's home address of [REDACTED], Auckland.

The subject of the search warrant was any electronic devices capable of accessing, storing or distributing publications, images or videos including but not limited to, cell phones, laptops, computers, portable digital media players, gaming consoles.

During the search the defendant's cell phone was seized from his person. He was subsequently requested to provide the access code to allow Police to access and examine his cell phone.

Despite multiple opportunities, the defendant refused to supply the access code to his phone restricting Constable Samuel SWEETMAN's access to further evidential material.

DEFENDANT COMMENTS

In explanation the defendant stated that he just had personal stuff on his phone.

Adverse finding

9. In cases involving the referral of a conviction to the Tribunal by the CAC, we are not required to make a finding of serious misconduct, but simply have to make an adverse finding against the teacher. To make an adverse finding we need to be satisfied that the conduct reflects adversely on the respondent's fitness to be a teacher.²
10. While we are not required to make a formal finding of serious misconduct, the threshold for making such a finding will help inform our decision as to whether to make the adverse finding.
11. Serious misconduct is defined in section 10 of the Act as:

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

² *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Sharp J, at [47].

- (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.

12. In this case the relevant reporting rules alleged to be engaged:

- (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.

CAC submissions

- 13. The CAC submit that the underlying conduct is of a nature that requires an adverse finding to be made against him and warrants the exercising of disciplinary powers.
- 14. The CAC noted that the "serious misconduct yardstick" maybe a useful tool in determining whether to make an adverse finding. In this case, the CAC argue that the respondent's non-compliance with the Police impeded their investigation of unspecified alleged offending for which a search warrant had been issued, and that refusal to comply with the law reflected adversely on his fitness to teach. They noted that this was at odds with the Code of Professional Responsibility for Teachers.
- 15. They referred to the test for bringing the teaching profession into disrepute and submit that the behaviour here met the threshold for bringing the teaching profession into disrepute.
- 16. They noted that the offence involved carried a relatively low maximum penalty but that reasonable members of the public would expect the respondent to comply with his legal obligations and by not doing that, he brought the profession into disrepute.
- 17. They noted that the behaviour involved an offence punishable by a term of imprisonment of three months and as such met the threshold for the reporting rules and also again submitted that it was likely to bring the teaching profession into disrepute.

18. For those reasons, the CAC argued that the serious misconduct yardstick had been met.

Respondent's submissions

19. The respondent set out the background for why he did not comply with the Police request for the passcode to his phone. He argued it was a naïve attempt to protect his privacy and that he regrets his actions but is unable to walk it back. He claimed that he spoke to a lawyer to advise he was willing to supply the code to the phone after the charge was filed but was told it was too late. He did not specifically address the criteria for finding serious misconduct.

Analysis

20. In order to decide whether to make an adverse finding we will assess the behaviour against the test for serious misconduct in s 10 and the reporting criteria in rule 9.3 (the serious misconduct yardstick.
21. As the behaviour occurred outside the classroom and had no impact on students, we do not need to consider the first criteria.
22. Turning to the effect of the behaviour on the respondent's fitness to be a teacher, we ultimately concluded that this adversely affected the respondent's fitness to be a teacher. While we take on board the respondent's explanation for why he did what he did, nonetheless he deliberately defied a Police officer's lawful request for the passcode to his phone.
23. We do not know what the offending alleged in the search warrant was, but the respondent's refusal to provide the passcode to the Police raises the suspicion that there was something on the phone that he did not want the Police to see. It is difficult to accept his explanation that he was simply protecting his privacy when he had provided passcodes to other devices.
24. Ultimately, we conclude that the deliberate defiance of a lawful request by a Police

³ See analysis in *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141 at [64].

officer clearly adversely affects his fitness to be a teacher. It is contrary to his professional obligations and shows extremely poor judgement.

25. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is set out by the Court in *Collie v Nursing Council of New Zealand*.⁴ It is an objective test and requires consideration of 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 respondent's actions.
26. We consider that that type of behaviour undoubtedly has the tendency to bring the teaching profession into disrepute. Members of the public can rightly expect that teachers will comply with the law and the refusal to do that is clearly a serious breach of a teacher's professional obligations and has the tendency to bring the profession down in the eyes of reasonable members of the public.
27. Turning to the reporting rules, we have already concluded that this behaviour had the tendency to bring the profession into disrepute. Also, the offence was clearly within the threshold of the type of offence in the reporting rules so that criteria was also engaged.
28. So, for all these reasons we conclude that the serious misconduct yardstick is made out, and that this is an appropriate case to make an adverse finding against the respondent.

Whiu – Penalty

29. In *CAC v McMillan*,⁵ we summarised the role of disciplinary proceedings against teachers as:

“... to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards

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

⁵ *CAC v McMillan* NZTDT 2016/52, 23 January 2017, at [23].

is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.”

30. Our powers on making an adverse finding) are contained in section 500 of the Act which provides:
- (a) any of the things that the Complaints Assessment Committee could have done under section 497(2):
 - (b) censure the teacher:
 - (c) impose conditions on the teacher's practising certificate or authority for a specified period:
 - (d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:
 - (e) annotate the register or the list of authorised persons in a specified manner:
 - (f) impose a fine on the teacher not exceeding \$3,000:
 - (g) order that the teacher's registration or authority or practising certificate be cancelled:
 - (h) require any party to the hearing to pay costs to any other party:
 - (i) require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing:
 - (j) direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.

Ngā Kōrero a te Kōmiti – CAC Submissions

31. The CAC noted that because the respondent was no longer registered, the disciplinary options for the Tribunal were limited.
32. The CAC noted that the offending involved repeated refusal to comply with a Police request. Despite the respondent being told that not complying with the request was a criminal offence he still chose not to cooperate. That was aggravated by the fact that he did not report his conviction to the Council as he was required.
33. The CAC did note mitigating features of the guilty plea to the offence and the acceptance of his conviction for the purposes of these proceedings. Further, he has no previous disciplinary history and cooperated in the process. The CAC argued that there was no evidence of remorse.
34. Given the limited options, the Committee submitted that censure was the appropriate outcome and that given the respondent is no longer registered as a teacher and indicated that did not seek to re-register in the future, the CAC sought

no other orders.

Ngā kōrero a te Kaiurupare – Respondent's submissions.

35. The respondent noted that the cases provided by the CAC involved teachers with more problematic histories of repeated unacceptable behaviour which was at odds with his case.
36. He also argued that this was not a repeated refusal to comply with the request, as it was only made at the time of the search and there were no further requests afterwards, so it should be seen as a single incident of refusal in a situation where he was largely cooperating but was scared and in shock.
37. The respondent argued that he was remorseful and wished he had acted differently. He argued that remorse was demonstrated by his immediate resignation to prevent potential embarrassment to his previous employer and also to avoid bringing the profession into disrepute. He said he is devastated by the incident and that it has impacted on his relationship with colleagues. He argued that he is insightful and is undergoing psychological counselling to find out what went wrong and to find a positive way forward.

Kōrerorero – Discussion

38. Given the fact that the respondent is no longer teaching, the ascertaining of the correct penalty is not an easy one. We agree that given that this was deliberate defiance of a lawful request by a Police officer, it undoubtedly warrants a censure. However, we were troubled by simply leaving it at that because we consider this is the type of behaviour that a future employer should know about.
39. While we acknowledge that the respondent indicated that he does not want to teach again in the future, experience has shown that people can change their minds on things like that. On that basis, we direct that the Teaching Council impose a condition that he notify his employer of this decision and the outcome of this disciplinary proceedings on any subsequent practising certificate issued to him. This condition may prove to be unnecessary if the employer does a criminal check on the respondent but we still consider it an important safeguard.

Utu Whakaea – Costs

40. The issue of costs is not without its complications in this case. Ordinarily in cases where a conviction is referred to the Tribunal and the respondent has complied with his obligations to report that conviction, no order for costs can be made. In this case, the CAC argue that because he did not report his conviction in this case, costs can still be awarded and seek the ordinary costs order of 40%.
41. While we accept that the CAC's position is certainly arguable, in the end we have decided that this is not an appropriate case for costs. First, because the usual rule in cases of conviction of referral is that no costs order is made and ultimately we do not see any reason to depart from that usual rule. In this case, the respondent is no longer teaching and has cooperated with the CAC and Tribunal process so that we do not consider it appropriate or necessary to award costs against him.



Ian Murray
Deputy Chair