EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Harrington:
NZ Disciplinary Tribunal Decision 2016/63

This case concerns a teacher who admitted to her manager that she occasionally used cannabis recreationally, and subsequently refused to undertake a drug test in accordance with her employer's drug and alcohol policy.

Following an investigation, the Complaints Assessment Committee (CAC) of the Education Council referred the matter to the New Zealand Teachers Disciplinary Tribunal (the Tribunal) and was charged with serious misconduct, as per section 378 of the Education Act.

Before the Tribunal met, however, the parties agreed that the teacher's actions amounted to misconduct, rather than serious misconduct.

Although the teacher had admitted to behaviour in contravention of the Misuse of Drugs Act 1975, there was no way of knowing precisely when the teacher's admitted drug use occurred, and whether it was a one-off lapse in judgement or a regular habit.

The Tribunal did note that the teacher's refusal to agree to take a drug test *"…raised legitimate concerns about her fitness to teach."*

All parties agreed it was appropriate, therefore, for the Tribunal annotate the Teachers register and impose the following conditions on the teacher's practising certificate:

i. Undertake drug testing every three months, for a period of one year;
ii. Provide her current employer with a copy of this decision; and
iii. Advise prospective employers of this decision and provide a copy of it to any such prospective employer.

The parties and the Tribunal agreed that censure was not required and no suppression orders were sought by the parties.

NZTDT 2016/63

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	a charge of serious misconduct referred by a Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**BOBBETTE HANNA HARRINGTON** Respondent

DECISION OF TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Patrick Walsh
Hearing:	On the papers
Decision:	6 April 2017
Counsel:	I S Auld and L C Hann for the Referrer Respondent in person

Introduction

[1] The Complaints Assessment Committee (the CAC) charges Ms Harrington with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC's notice of charge is dated 9 November 2016 and alleges that the respondent, while she was teaching at Kreative Kidz Childcare Centre in Rotorua (the Centre):[1]

(a) Admitted to the Centre's manager that she occasionally used cannabis recreationally; and

(b) Subsequently refused to undertake a drug test in accordance with the Centre's drug and alcohol policy.

[2] While the CAC asserted in its notice of charge that the allegations individually or cumulatively amount to "serious misconduct" as that term is defined in section 378 of the Education Act 1989 (the Education Act), the parties have reached the shared viewpoint that the respondent's actions fall short of that threshold and therefore comprise misconduct.

[3] The parties were content for us to deal with this matter on the papers. While the Tribunal is required to reach its own view, we are satisfied that the parties' assessment of the gravity of the respondent's behaviour is correct.

The factual background

[4] What follows is taken from the agreed summary of facts filed by the parties.

Initial disclosure of drug use

[5] In early September 2015, the respondent disclosed her previous recreational drug use to the Centre's manager, Debbie Nelson (the Manager), admitting that she had smoked marijuana in the past.

[6] On 11 September 2015, the Manager held a meeting with the respondent. The Manager advised the respondent of her concerns with the

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[1] There was also an allegation that the respondent repeated her admission that she used cannabis to the CAC, but this was not addressed in the agreed summary of facts, and for this reason we have put it to one side. It would not have changed the outcome, however, if we had found it proved.

respondent using marijuana, and informed the respondent that drug screening may be introduced in the future and that a positive test could have disciplinary consequences, and may result in a mandatory report to the Education Council.

Implementation of Drug and Alcohol Policy

[7] On 19 February 2016, the Manager advised staff that a drug and alcohol policy, which included drug testing, would be introduced. The draft policy was put out for review and feedback was requested.

[8] Following this, at a staff meeting, it was confirmed that the alcohol and drug policy was in place, and random drug testing would begin soon.

[9] On 10 March 2016, the Manager received confirmation that all staff had read and agreed to the alcohol and drug policy.

[10] On 14 April 2016, an external drug testing company randomly selected the respondent for testing. The respondent questioned the selection process, as she felt targeted by the Manager.

Refusal to undergo drug testing

[11] The Manager informed the respondent that she was required to undergo a drug test. The respondent asked what would happen if she refused to do the test, and the Manager informed her that this could result in dismissal. The respondent then advised the Manager she would resign.

[12] On 15 April 2016, the respondent resigned.

[13] On 26 April 2016, the Manager filed a mandatory report with the Education Council raising the issue of the respondent's potential drug use and her refusal to undergo a compulsory drug test upon request.

The respondent's current employment

[14] The respondent has been working as a registered teacher at Te Whare Whitinga o te Rā since 20 May 2016. The respondent informed Te Whare Whitinga o te Rā of the current matter during the recruitment process.

[15] In a letter to the Education Council, the Centre Manager of Te Whare Whitinga o te Rā provided a positive employee reference for the respondent, expressing her total support for her.

Our findings

[16] Section 378 of the Education Act defines "serious misconduct" as behaviour by a teacher that has one or more of three specified outcomes.[2] The test under s 378 is conjunctive. As such, as well as having one or more of the adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Education Council's criteria for reporting serious misconduct, which, for the purposes of this proceeding, are those found in the New Zealand Teachers Council (Making Rules and Complaints) Rules 2004 (the Rules). That which specifically applies in the respondent's case is r 9(1)(i), which talks about "involvement in the manufacture, cultivation, supply, dealing, or use of controlled drugs".

[17] In terms of the first stage of the test, we are satisfied that the respondent's conduct reflects adversely on her fitness to teach (criterion (b)), and is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies ((c)).[3]

[18] Turning to the second stage of the test, it is helpful to repeat what we said in *CAC v Diamond*,[4] namely that, "It scarcely needs to be said that teachers should not be involved in the use or possession of prohibited drugs". We said in *CAC v Andrews*[5] that practitioners have an obligation to both teach and model positive values for their students, and the use of a prohibited drug is the antithesis of the standard expected, irrespective of the setting, personal or professional, in which it occurs.

[19] As we have already stated, we agree with the parties that the respondent's behaviour falls just short of comprising serious misconduct. First off, we have no way of knowing, based on the information provided, when in time the respondent's admitted drug use occurred, and whether it was a one-off lapse in judgement or a regular habit. That being said, the

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[2] Behaviour that: adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; or that reflects adversely on the teacher's fitness to be a teacher; or that may bring the teaching profession into disrepute.
[3] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[4] *CAC v Diamond* NZTDT 2016/41.
[5] *CAC v Andrews* NZTDT 2016/3, at [21]. Which was a case dealing with a conviction for possession of a Class A drug, but the proposition applies regardless of the class of drug concerned.

respondent admitted to behaviour that contravenes the Misuse of Drugs Act 1975.[6]

[20] We are sympathetic to the position the Centre found itself in given Ms Harrington's admission she had used cannabis. Notwithstanding the respondent's concern about being targeted, her refusal to acquiesce raised legitimate concerns about her fitness to teach and invited suspicion that she was under the influence of a drug. However, material to the assessment we must make is that there is no evidence that the respondent's performance was impaired by her use of cannabis. This distinguishes her situation from *CAC v McMillan*,[7] where the practitioner admitted to using cannabis while still subject to a condition imposed by the Education Council that required him to submit to routine drug testing. The condition was imposed following a finding that Mr McMillan's performance had been impaired by drug use. That feature is absent here.

Penalties

[21] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[8] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[9]

[22] We agree with the parties' assessment regarding penalty. They proposed that we adopt a similar approach to that in *McMillan* where we imposed a condition requiring the practitioner to undergo drug testing every three months. Doing so will mitigate the risk that the Centre's drug testing policy was meant to achieve, and will meet the public protection objective we

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[6] See r 9(1)(n) of the Rules, which talks about "any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more".
[7] *CAC v McMillan* NZTDT 2016/52.
[8] The primary considerations regarding penalty were recently discussed in *McMillan*.
[9] As the High Court said in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

have outlined. For completeness, we record that the respondent provided us with the result from a test she recently undertook, which is negative.

[23] We agree with the parties that censure is not required. However, we will impose the proposed condition that she is to inform her current employer of this decision, and any prospective employer should she seek to change employment.[10]

Costs

[24] The starting point is for the Tribunal to make an award in favour of the successful party reflecting 50 per cent of its, his or her actual and reasonable costs. Here that it is the CAC. We are also entitled to consider the Tribunal's own costs.

[25] We agree with the parties that it is appropriate to order a smaller contribution by the respondent – 40 instead of 50 per cent. This is consistent with several our recent decisions,[11] and takes account of the respondent's acceptance of responsibility and agreement to the matter being dealt with on the papers.

Orders

[26] The Tribunal's formal orders under the Education Act are as follows:

(a) Pursuant to s 404(1)(c), we direct that a condition be imposed on the respondent's practicing certificate that she is to undertake drug testing every three months, for a period of one year from the date of this decision.

(b) The respondent is to provide her current employer with a copy of this decision.

(c) We impose a condition on the respondent's practicing certificate under s 404(1)(c) that, should she apply for a position that requires her to hold registration and a practicing certificate as a teacher, she is to advise prospective employers of this decision and

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[10] While the parties proposed that this condition remain in place for two years, we have tempered its length, as two years was adopted in *McMillan*, which involved graver misconduct.
[11] See, for example, *CAC v Teacher* NZTDT 2016/12, 10 August 2016.

provide a copy of it to any such prospective employer. This condition will expire in one year's time.

(d) The three conditions referred to above are to be annotated on the register under s 404(1)(e), and can be removed upon their expiry.

(e) The respondent is ordered to pay a 40 per cent contribution towards the CAC's costs pursuant to s 404(1)(h) in the amount of $1565.

(f) The respondent is ordered to pay a 40 per cent contribution towards the Tribunal's costs pursuant to s 404(1)(i).

Nicholas Chisnall
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).