EDUCATION COUNCIL
NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Middleton
NZ Teachers Disciplinary Tribunal 2017/36

Repeated failure to report convictions to the Education Council results in teacher being censured.

Registered teacher, Kirsten-Inga Middleton was convicted for drink driving in 2016. The Complaints Assessment Committee (CAC) investigated and referred this conviction to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

Ms Middleton had a previous drink driving conviction from 2007, which she did not report to the Education Council. At that time, the CAC reminded her of her obligation to report.

The Tribunal considered that the circumstances of the conduct which led to the conviction were such that they adversely reflected on her fitness to teach. Ms Middleton had driven after consuming two bottles of wine. "Driving while intoxicated does not mirror the expectation that teachers have to teach and model positive values. The public safety aspect of drink driving offending also brings the teaching profession into disrepute."

The Tribunal noted that Ms Middleton had a relatively high alcohol reading and that her driving was dangerous enough to have caught the attention of members of the public, and that the fact of the previous conviction might suggest that Ms Middleton "may have a harmful relationship with alcohol, poor self-regulation, or both."

In considering penalty, the Tribunal noted that Ms Middleton was cooperative with the CAC in its investigation, that she admitted the conduct in both the criminal proceedings and before the Education Council, and that "her principal states that she has shown genuine remorse for her offending." Furthermore, at the time of the offending she was suffering from a skin condition which, despite treatment, she found uncomfortable. Ms Middleton herself admitted that she drank on that occasion because of the discomfort she experienced from the skin condition.

On that basis, the Tribunal found that Ms Middleton did not have a harmful relationship with alcohol. The Tribunal censured Ms Middleton, and the censure is to be annotated on the register for four years.

NZTDT 2017/36

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of a referral of conviction by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**KIRSTEN-INGA MIDDLETON** Respondent

DECISION OF TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Tangi Utikere
Hearing:	On the papers
Decision:	22 March 2018
Counsel:	J Simpson for the referrer D King for the respondent

Introduction

[1] On 18 October 2016, the respondent, Kirsten-Inga Middleton, pleaded guilty to a charge against s 56(1) of the Land Transport Act 1998 of driving with excess breath alcohol. The evidential breath test conducted by police returned a result of 865 micrograms of alcohol per litre breath, which is twice the adult limit. The maximum penalty for the offence is three months' imprisonment or a fine not exceeding $4,500, and the respondent was sentenced to 100 hours' community work and disqualified for seven months.

[2] The conviction was brought to the Education Council's attention by the Ministry of Justice before Ms Middleton was sentenced.

[3] The Complaints Assessment Committee (the CAC) on 30 October 2017 resolved to refer the conviction to the Tribunal under s 401 of the Education Act 1989 (the Education Act). The CAC asserts that the conduct behind the conviction requires us to reach an adverse finding about the respondent's fitness to teach.

[4] This is not the respondent's first conviction for driving with excess breath alcohol. On 14 March 2007, she pleaded guilty to driving with a breath-alcohol level of 829 micrograms per litre of breath. The respondent appeared before the CAC, and that body on 20 April 2009 resolved not to take any further action. However, the CAC reminded Ms Middleton of her obligation under s 397 of the Education Act to self-report any conviction, which in 2007 she had not, and emphasised that her conviction reflected adversely on the teaching profession.

The evidence produced before the Tribunal

[5] The respondent endorsed an agreed statement of facts that sets out the circumstances of her two convictions.

[6] We were also provided with the police summaries of facts for the 2007 and 2016 offences.

[7] The police summary for the 2016 offence records that on 21 July 2016 police received information that the respondent had just left KFC, having crashed her vehicle into the drive-through. Police located the respondent sitting in her vehicle in her driveway, with the engine still running. Ms

Middleton told police that, prior to driving, she consumed a couple of bottles of wine.

[8] In the agreed summary provided by the parties, it states that Ms Middleton cooperated with the CAC and accepted responsibility for her conduct.

[9] The respondent told the CAC that she had no memory of the offending and the agreed summary refers to the fact that Ms Middleton provided medical evidence "that she was suffering from a skin condition at the time she drove and developed an interaction between her medication and alcohol, developing transient global amnesia".

The relevant law

[10] This case involves the referral to the Tribunal of the fact the respondent has been convicted of a criminal offence. The test that therefore applies is whether the circumstances of the behaviour that resulted in the conviction reflects adversely on the fitness of the respondent to practice as a teacher.[1] It is only by reaching an adverse conclusion that we are empowered to exercise one or more of the powers contained in the Education Act.

[11] The District Court in *CAC v S* made it clear that we are not required to find the respondent guilty of serious misconduct before we can exercise the disciplinary powers available to us in the Education Act.[2] That being said, regardless of whether a matter reaches the Tribunal for adjudication by way of notice of referral, or by notice of charge of serious misconduct, our function is to decide if the behaviour of the teacher concerned reflects adversely on his or her fitness to teach. As we have said previously, this explains why it is helpful to scrutinise the offending against the serious misconduct yardstick.

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[1] *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Judge Sharp, at [47].
[2] At [48]. We also said in *CAC v Campbell* NZTDT2016/35, at [14], that a referral to the Tribunal does not need to be framed as a charge of serious misconduct.

[12] Section 378 of the Education Act defines "serious misconduct" as behaviour by a teacher that has one or more of three specified outcomes.[3] The test under s 378 is conjunctive.[4] 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 are found in the Education Council Rules 2016. Those identified by the CAC are r 9(1)(n), which applies to "any 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", and r 9(1)(o), which encompasses "any act or omission that brings, or is likely to bring, discredit to the profession".

[13] Where a practitioner has been convicted of a criminal offence, it is not the purpose of a professional disciplinary proceeding to punish the teacher a second time for the same offence. Rather, as we emphasised in *CAC v McMillan*,[5] the Tribunal's mandate is 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.

Should we make an adverse finding regarding the respondent's fitness to teach?

[14] The burden rests on the CAC to prove, on the balance of probabilities, that an adverse finding is required. We must keep in mind the consequences for the respondent that will result from an adverse conclusion regarding her fitness to teach.

[15] As we have said, we are not required to make a finding that the respondent's 2016 offence constitutes serious misconduct before we can make an adverse finding. However, using the applicable limbs of the definition of serious misconduct in the Education Act as a reference point, we accept that the respondent's conduct adversely reflects on her fitness to

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[3] 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.
[4] Recently affirmed by the District Court in *Teacher Y v The Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 28 February 2018, at [64].
[5] *CAC v McMillan* NZTDT 2016/52, at [16] to [26]., citing *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) and *Ziderman v General Dental Council* [1976] 1 WLR 330.

teach. Practitioners have an obligation to both teach and model positive values for their students and driving while intoxicated does not mirror that expectation.[6] Second, the respondent's commission of an offence with a public safety focus brings the teaching profession into disrepute when considered against the objective yardstick that applies.[7]

[16] We make the following points about the 2016 conviction and the relevance of Ms Middleton's earlier offence:

a) In *CAC v Campbell*[8] we said that the circumstances of the offending are relevant to the finding we must make, provided we recognise that the purpose of any disciplinary order is not to further punish the practitioner. There are self-evident aggravating features to the 2016 offence. The manner of the respondent's driving was sufficiently poor that it attracted the attention of other road users. It posed an obvious risk to the safety of those members of the public present at the KFC where the crash occurred. It also involved a relatively high breath-alcohol reading.

b) Mirroring what we said in *Campbell*,[9] one conviction for drinking with excess breath alcohol is evidence of poor judgement and disregard for the welfare of other road users. In the criminal context, where an offender goes on to commit a further similar offence, the District Court treats that as an aggravating feature at sentencing. This is because previous convictions may indicate there is a risk of future offending, and therefore a more deterrent response is required. Here, a second conviction for drink-driving suggests that the respondent may have a harmful relationship with alcohol, or poor self-regulation, or both. The 2007 conviction, and the latitude extended to her by the Council, should have been a wakeup call for the respondent. Yet, she went on to commit a further offence.

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[6] This obligation is contained in clause 3(c) of the Code of Ethics for Registered Teachers, which applied when the 2016 offence was committed.
[7] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[8] *CAC v Campbell* NZTDT 2016/35, at [22].
[9] *Campbell*, at [21].

Penalty

[17] 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.[10] 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.[11]

[18] We have said previously that whether we must cancel a teacher's registration tends to turn on the practitioner's degree of insight into the cause of the behaviour concerned, and his or her rehabilitative prospects.[12] Knowing what motivated the misconduct is a way in which to gauge the risk of repetition.[13]

[19] We must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances. With that principle of consistency in mind, in *Campbell* we agreed that a review of previous cases involving convictions for driving with excess breath or blood alcohol shows a theme, which is that cancellation is required in two overlapping situations. These are when:[14]

a) The offending is deemed sufficiently serious that no outcome short of deregistration sufficiently reflects the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession; and

b) Inadequate rehabilitative steps had been taken by the teacher to address his or her issues with alcohol.

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[10] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[11] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[12] *CAC v Lyndon* NZTDT 2016/61, at [18].
[13] Per *CAC v Teacher* NZTDT 2013/9, at 6.
[14] *Campbell*, at [27].

[20] We accept that the respondent is not squarely in either of the categories described above. We accept that:

a) Ms Middleton was cooperative with the CAC throughout its investigation.

b) She accepted responsibility for her actions – both in the District Court and before the Council.

c) Ms Middleton is highly regarded by the principal of the school at which she teaches, where she has been employed for 25 years. Her principal states that the respondent has shown genuine remorse for her offending, and that she has always been open and honest with him. According to her principal, the respondent has elected to abstain from alcohol altogether.

[21] Ms King, in her submissions, states that the gap between the 2007 and 2016 convictions demonstrates that the respondent does not have an ongoing problem with alcohol. Rather, the 2016 offence was:

> Prompted by a medical condition which cause pain and the use of alcohol was an attempt to alleviate that. There is medical evidence regarding transient global amnesia which occurred as a result of the medication.

[22] The CAC in its submissions accepts that it is a mitigating feature that Ms Middleton has sought to address the stress caused to her by the symptoms of her skin condition, and that this was the underlying reason she turned to alcohol on 21 July 2016.

[23] The parties are far apart regarding penalty. The CAC submits that the commensurate penalty is censure and annotation of the register for a period of five years. Mr Simpson submits on behalf of the CAC that the most direct comparator is *CAC v Huntington*.[15] There are parallels between the facts in *Huntington* and those present here. Ms Huntington drove with a breath-alcohol level of 924 micrograms of alcohol per litre breath. She was observed driving erratically and reported by members of the public. Like the respondent, Ms Huntington's previous conviction for drink-driving was entered in 2007. In 2016, her breath-alcohol level was 693 micrograms. Ms

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[15] *CAC v Huntington* NZTDT 2017/13, 16 August 2017.

Huntington failed to report either of her convictions to the Council. The Tribunal in its decision commended Ms Huntington for the steps that she had taken to address the underlying causes of her offending.

[24] In contrast to the CAC, Ms King submits that this is a case where it is open to the Tribunal to impose no penalty at all. She submits that the circumstances of the respondent's case are unusual. This is because, Ms King submits, the respondent does not have an ongoing problem with alcohol.

[25] What are we to make of the evidence that the respondent had an adverse reaction to the combination of alcohol and her medication, and suffered transient global amnesia? Does this mitigate the seriousness of the respondent's behaviour?

[26] We are prepared to accept that the respondent does not at present have a harmful relationship with alcohol. For this reason, we do not intend to impose conditions on her practising certificate. We also accept that Ms Middleton combined alcohol and her prescribed medication on 21 July 2016 because of the discomfort caused by her skin condition. However, that does not detract from the fact that the respondent admitted to police that she had imbibed two bottles of wine shortly before driving. As we see it, any adverse reaction caused by combining prescription medication with a significant volume of alcohol did not justify or excuse Ms Middleton's decision to drive.

[27] We observe that Ms Middleton, in the District Court, did not assert that transient global amnesia provided a defence to the charge. It would have required her to prove that there was an element of involuntariness behind her intoxication. This defence can apply when a person consumes a substance that, without his or her knowledge, contains enough alcohol to produce a prohibited level.[16] However, such a defence cannot succeed where a person knew, or should have known, that he or she was affected by alcohol. In other words, it would have rested on Ms Middleton to prove that there was no lack of care on her part. In light of her guilty plea to the charge, we do not accept that it is open to us to make a finding that the respondent's

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[16] See *O'Neill v Ministry of Transport* [1985] 2 NZLR 513 (HC), which was a case where the appellant had consumed a medicine containing alcohol in addition to wine.

offending was mitigated by an inadvertent reaction to the combination of her medication and alcohol. Nor can we see the relevance of the evidence that Ms Middleton cannot remember her offending. Common sense dictates that the volume of alcohol consumed by Ms Middleton provides an explanation why her memory is flawed. This does not lessen the criminality of the offence.

[28] It follows that we do not accept Ms King's submission regarding penalty. However, we are satisfied that we can discharge our responsibilities to the public and profession by ordering that Ms Middleton's censure remains on the register for a shorter period than that imposed in *Huntington*. This is because, unlike the teacher in that case, there is no suggestion that Ms Middleton failed to report her conviction to the Council.

[29] Unlike in *Huntington*,[17] we intend to place a condition on the respondent's practising certificate requiring her to disclose her conviction and the Tribunal's decision to her employer, and to any prospective employer.

Costs

[30] Section 404(2) of the Education Act provides that a cost order cannot be made where, as here, the hearing arises out of a referral of conviction under s 397.

Orders

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

a) Pursuant to s 404(1)(b), the respondent is censured;

b) The registered is annotated under s 404(1)(e) for four years from the date of this decision; and

c) Under s 404(1)(c), the respondent must immediately provide her employer with a copy of this decision. For a period of 18 months from

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[17] In that decision, the Tribunal did not impose a candour condition because Ms Huntington was self-employed.

this decision, the respondent must inform any prospective employer of her conviction and provide to it a copy of this decision.

Nicholas Chisnall
Deputy Chairperson

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).