

# TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

## Complaints Assessment Committee (CAC) v Thomas NZ Disciplinary Tribunal Decision 2017/42

Teacher Mitchell Tawhi Thomas came before the New Zealand Teachers Disciplinary Tribunal (Tribunal) for a drink driving conviction received in July 2017. He had previously been convicted of drink driving in July 2012.

In the early morning of 7 July 2017 Mr Thomas was detained by police following a complaint from a member of the public, who was concerned about his driving. Mr Thomas had a high reading (976 micrograms per litre of breath).

Mr Thomas self-reported the incident to the Teaching Council the following day. He had also self-reported the 2012 conviction. His breath alcohol level in 2012 was at a high level (979 micrograms per litre of breath).

At the Tribunal Mr Thomas showed remorse, accepting his conduct and stating that he was “appalled at my dangerous behaviour that showed a complete lapse of judgment and sense of appropriate responsibility.” He stated that he had undertaken five counselling sessions related to his alcohol use. Mr Thomas provided very supportive references to the Tribunal, including from the Head of English and the Principal. The Principal stated that Mr Thomas was “a key member of a group looking at raising Māori achievement.”

The Tribunal recognised that “the evidence of his contribution to the schools in which he has taught, his commitment to and passion for teaching, especially in relation to support for Māori students, is plentiful. His talent and capacity for hard work are reported as extensive. The references were glowing.”

The Tribunal assessed Mr Thomas as “likely to make a very significant contribution to the teaching profession” and that he would be “a great loss.”

The Tribunal took the view that Mr Thomas’ “particular skills and experience mean that with appropriate conditions and support it is definitely in the interests of the education community that he retains registration.”

The Tribunal imposed rehabilitative steps in the expectation that Mr Thomas would work through them and continue to contribute to the teaching profession in a highly positive way.

Mr Thomas was made aware that if he received a further conviction, deregistration will be an almost inevitable outcome.

Mr Thomas was censured, a condition was imposed requiring the completion of drug and alcohol counselling for a minimum of two years, he is required to disclose a copy of the decision to his current employer and for two years to any future employers. The register will also be annotated for two years.



**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2017/42**

**UNDER** the Education Act 1989

**IN THE MATTER** of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal

**BETWEEN** **THE COMPLAINTS ASSESSMENT COMMITTEE**

**AND** **MITCHELL TAWHI THOMAS, registered teacher, teacher registration 336087**

**Respondent**

---

**DECISION OF NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

---

**HEARING:** 17 April 2018

**TRIBUNAL:** John Hannan (Deputy Chair), Stuart King, Patrick Walsh

**DECISION:** 7 August 2018

**COUNSEL:** PK Feltham/A van Echten for Complainant  
Dzintra King for Respondent

## Introduction

1. By a Notice of Referral dated 13 December 2017, the Complaints Assessment Committee (**CAC**) referred the respondent to the Disciplinary Tribunal under section 401 of the Education Act 1989 in relation to a conviction for driving with excess breath alcohol.
2. On 27 July 2017 the respondent was convicted for driving with excess breath alcohol and sentenced to 8 months disqualification from driving, and 60 hours of community work. The level was 976 mcg/l of breath.
3. The Tribunal heard the matter on 17 April 2018. On the same day as hearing this referral, it considered referrals of excess breath alcohol convictions for two other teachers. Two similar referrals were also heard on 23 April 2018. Counsel for the CAC helpfully prepared a thorough review of the Tribunal's decisions on these types of referrals and this was presented for all five hearings. A Deputy Chair presided over the 17 April hearings and the Chair for the 23 April hearings. The two panel members were the same for all five hearings.

## Facts

4. A summary of facts has been agreed.
5. In the early morning of 7 July 2017 the respondent was apprehended by a New Zealand police officer due to a complaint received from a member of the public. McDonald's restaurant staff had become concerned when the respondent was driving through the restaurant's car park drive through at Petone, as he appeared very intoxicated. He was unable to operate the eft-pos device to complete his purchase. He went inside the restaurant to pay and became demanding and confrontational to staff.
6. An evidential breath test was taken giving a reading of 976 µg of alcohol per litre of breath. On being charged with a drink-driving offence the respondent explained that he "drove to McDonald's to get a feed".
7. The next day, 8 July 2017, the respondent self-reported the incident to the Education Council.
8. There was a prior conviction. This first offence was committed five years previously. In July 2012 the respondent was caught and charged with driving with breath alcohol

reading of 979 µg of alcohol per litre of breath. He was convicted in September 2012, fined \$1215, and disqualified from driving for six months.

9. The respondent had also self-reported this first conviction to the New Zealand teachers Council in November 2014. He consequently appeared before the Complaints Assessment Committee on 16 December that year. The CAC decided to take no further action as this was the respondent's first conviction and he showed contrition. However, the CAC issued the respondent with a warning that "any further offence will be likely to be viewed as a serious matter". The CAC also reminded the respondent of the New Zealand Teachers Code of Ethics. The committee pointed out that the Code stresses teacher's commitment to society and their obligation to serve as a role model to their students and community. The respondent said to the CAC that it would never happen again.
10. The respondent filed a brief of evidence. This annexed an extensive suite of references.
11. In his witness statement, and evidence in chief, he noted that he has been teaching since 2012. He holds a BA in theatre studies, a Graduate Diploma in Teaching, and a Professional Diploma in Professional Acting.
12. He is 45 years of age.
13. He expressed significant regret and contrition for his offending. He referred to "the stupendously bad decision" to leave his home and to drive down to a nearby McDonald's for food while intoxicated.
14. He said that he was "appalled at my dangerous behaviour that showed a complete lapse of judgement and sense of appropriate responsibility". He has contacted Care NZ and self-referred to alcohol counselling services.
15. He gave evidence that he is currently attending regular counselling sessions with a focus on managing his personal relationship with alcohol and stress. He says that he has had to face the reality of the consequences of his actions, of reprogramming old patterns of drinking habits and putting forth a strategy that can implement change.
16. Among the letters he provided was a letter from a Care NZ addictions counsellor, Ms E Hurst, dated 1 March 2018, confirming that since self-referring on 20 July 2017 the respondent has attended five appointments. She reported that he has expressed distress, embarrassment and remorse for his actions and has come to an understanding that he may be vulnerable to drinking and driving again in the future if

he does not learn from this and put strategies in place to prevent it. He has asked to be referred to the MAP.

17. In evidence in chief he was asked by his counsel Ms King what had precipitated the incident. He said that it was a "pileup of stress" including his elderly mother being in hospital. He said that friends unexpectedly turned up and a spontaneous drinks session developed.
18. He gave evidence of his professional activities. He said that his focus in what he described as his "passionate teaching" was on Maori succeeding as Maori. He said that he felt that his life as a Maori playwright and his life as a professional teacher was really starting to come together.
19. He said that while the number of counselling sessions had been limited, he could not at present afford the extra costs for privately funded therapists so had to look at only public funded provision.
20. Counsel for the CAC Ms Feltham probed in cross-examination an indication in his brief of evidence that he would refrain from drinking during the school term but might drink during school holidays. He said that did not mean that he planned to binge drink during holidays. She also probed his ability to develop strategies to avoid social situations that could get him into trouble with alcohol. He gave evidence apparently demonstrating that he was reflective and aware of these issues. He said that he had a couple of support people who "are a phone call away".
21. The references the respondent provided were highly supportive. They included references from the Head of English and the Principal of his current employer. It was apparent that he had fully disclosed to his current employer the fact that he had been issued with an EBA charge.
22. The Head of English described him as a "wonderful colleague, a wonderful teacher, and a wonderful contributor to discussion within our school about how we can change to better serve our students."
23. The Principal stated that "I can attest that from the outset Mitchell has impressed me as a dedicated and hard-working teacher who goes above and beyond the call of duty to facilitate the best outcomes for students and for the college". "He has been our spokesman at powhiris, and has also been a key member of a group looking at raising Maori achievement and is a valuable asset to the school, despite only having started here this year. This is testament to the quality of teacher that he is. Parents and students are impressed with his planning and the delivery of his lessons and we

respectfully request that his indiscretion does not impact his future registration status".

24. Another reference was from the teacher in charge of Te Reo Maori at his current employer. This stated "in my role as a new teacher, Mitch's experience, his assistance and his advice has been invaluable to me". The reference went on to describe assistance by the respondent to this colleague with supporting a student to compete in a Maori secondary schools' speech competition. This was work on top of his normal teaching load. The respondent took responsibility for helping the student write the speech and then coached the student on his delivery. This was not the respondent's student. The student went on to win the regional competition. This referee went on to say "he is the kind of teacher I dream of becoming one day".
25. Other references from other teachers who had taught with the respondent in other schools were in similar vein. These included a reference from the Principal of a former employing school stating that "If I could tempt Mitch back... I wouldn't hesitate to have him back".

### **General Legal Principles**

26. The Tribunal had the benefit of comprehensive submissions from the CAC on the general principles that the Tribunal has applied in its approach to referrals of EBA convictions. These were before the Tribunal for all five cases. The submissions are set out in full in another associated decision, *CAC v Fuli-Makaua* NZTDT 2017/40.
27. In *CAC v Bird*, the Tribunal affirmed that a referral to the Tribunal does not need to be framed as a charge of serious misconduct, but that the Tribunal needs to reach an adverse finding as to the respondent's fitness to practise as a teacher before exercising its power to impose orders under s 404 of the Act.<sup>1</sup> In *CAC v Lyndon*,<sup>2</sup> the Tribunal noted that its function is to decide if the conduct reflects adversely on his or her fitness to teach, and so assessment against the "serious misconduct yardstick" may be a useful tool in determining whether an adverse finding is warranted.
28. In NZTDT 2011/16, the Tribunal accepted that, depending on the circumstances of the individual case, even one conviction for a serious driving offence may call into question a professional person's fitness to practise (s 378(a)(ii)), and that a series of

---

<sup>1</sup> *CAC v Bird* 2017-5, 22 June 2017; *CAC v S Auckland DC CIV-2008-00400-1547*, 4 December 2008. See also NZTDT 2005/01, 4 November 2005.

<sup>2</sup> At [18].

convictions will certainly do so.<sup>3</sup> Such conduct may also bring the teaching profession into disrepute (s 378(a)(iii)). Similarly, in *CAC v Reriti*, the Tribunal held that, although a single conviction for a drink driving offence may not justify an adverse finding (though it might, depending on other factors), where the conviction is against a background of a number of previous offences, an adverse conclusion will be warranted.<sup>4</sup>

29. It is also worth restating what was said in *CAC v Fuli-Makaua*, that the purpose of the Tribunal exercising its disciplinary powers in respect of a conviction is not to punish the teacher a second time. Rather, disciplinary proceedings are designed to further the Education Council's overriding purpose of "ensure[ing] safe and high-quality leadership, teaching and learning" through raising the status of the profession.<sup>5</sup> Disciplinary proceedings must further this purpose by protecting the public through the provision of a safe learning environment for students, and maintaining professional standards and the public's confidence in the profession.<sup>6</sup> This, as the Tribunal held in *CAC v Bird*, is achieved through holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the environment when required.<sup>7</sup>

## Submissions

30. For the CAC, Ms Feltham outlined in the general part of her submissions the various factors that would either increase the seriousness of the conduct or provide a level of mitigation. Rather than reproduce those submissions the tribunal will structure its decision around those factors, which have been amply outlined in *CAC v Fuli-Makaua*.
31. Ms Feltham said that as to the circumstances of the offending, the reading of 976 µg of alcohol per litre of breath was very high. She noted that the offending allegedly came to light because McDonald's staff observed the respondent was very intoxicated to the point that he was unable to operate the eft-pos terminal. He went into the restaurant and was demanding and confrontational.

---

<sup>3</sup> NZTDT 2011/16, 21 July 2011.

<sup>4</sup> NZTDT 2014/19, 26 August 2014.

<sup>5</sup> Education Act 1989, s377

<sup>6</sup> *CAC v McMillan* NZTDT 2016/52 23 January 2017 at [23] and *CAC v White* NZTDT 2017/29, 28 November 2017 at [19]; *CAC v Korau* NZTDT 2017/17 26 August 2017 at [13]

<sup>7</sup> *CAC v Bird* NZTDT 2017/5, 3 July 2017 at [32].

32. She noted his prior conviction for driving with excess breath alcohol in 2012. He was warned by the CAC at that time that any further offence would be viewed as a serious matter. The level of alcohol was of a similar level to that in the recent conviction.
33. Ms Feltham noted that the respondent had acknowledged in his statement that he is inclined to "binge" when he does indulge in drinking alcohol.
34. She noted his rehabilitation activities but questioned the depth of his insight into his offending because of his observations that he would abstain from alcohol during the school term and organise any future drinking sessions during the school holidays. She submitted that this plan did little to address the factors he identified as triggering his offending. She noted that he has attended only five appointments since July 2017, and considered that this could not be yet described as having implemented a robust prevention plan. She pointed to the assurances he gave to the CAC in relation to his earlier conviction.
35. Consequently she submitted that he remains at risk of reoffending. Accordingly, she submitted that he should be censured and that conditions should be imposed requiring him to undertake and complete drug and alcohol counselling, together with a requirement of disclosure of the Tribunal's decision to his current employer. She submitted the register should be annotated for two years.
36. Ms King for the respondent submitted that in relation to the circumstances of the offending, the respondent's bank card had a faulty chip and that he had previously, when using it at the McDonald's terminal, had to swipe it several times to obtain a connection.
37. She submitted that he fully admitted and accepted his negative behaviour and is absolutely committed to his prevention plan and ongoing counselling.
38. He said that the aggressive manner he had displayed towards staff at McDonald's is something that he regrets and feels deeply ashamed about but does not reflect an ongoing cycle of alcohol-related aggression or violence in his life. She said that at present he is not in a financial position to attend privately funded therapy or counselling. He is looking for further options beyond care NZ.
39. She noted that there had been no associated offending, a five-year period between the convictions, and no prior traffic history, with no passengers in the vehicle. She submitted that the respondent has taken responsibility for his actions and has insight into his behaviour.

## **Decision**

### ***Circumstances of offending***

40. The mcg/l reading with respect to the 2017 conviction was a relatively high reading. There were no adverse elements to the nature of the driving. There were no passengers. There was no associated offending. The confrontational behaviour to McDonalds staff is a matter of concern, both as to role modelling and as to the need for appropriate preventive and rehabilitative steps.

### ***Prior relevant convictions, incidents***

41. There is one prior relevant conviction, from 5 years ago. The level of breath alcohol was about the same.
42. There is no evidence of an adverse prior traffic history, or other convictions.

### ***Risk***

43. While driving with excess breath alcohol is always a situation creating general risk to the public, there is no evidence of any behaviour by the respondent while affected by alcohol consumption that can be said to have put students at any risk.

### ***Failure to report***

44. The respondent self-reported his apprehension and charge to the Education Council the day after these occurred, even before he had been convicted. This stands to his credit as demonstrating an immediate recognition that his behaviour was a serious breach of professional standards.
45. He also reported the prior conviction.

### ***Mitigating Features: remorse and accountability***

46. The evidence provided both by the respondent himself, and by his referees and from Care NZ, indicates a strong acceptance of accountability for his actions, and clear and full remorse. The very prompt self-reporting of the 2017 incident supports this.

### ***Insight, Prospect of Rehabilitation***

47. The respondent appears to have a good level of insight into his behaviour. He was tested in cross-examination on this point and was articulate in his account of how he

was working through "high-risk situations" and dealing with them. The letter from Care NZ stated that he has "... a large capacity for self-reflection".

48. The respondent has taken proactive rehabilitative steps. While the number of appointments for counselling with Care NZ has so far been limited, the explanation is his limited resources and his need at present to use publicly funded services. Care NZ assessed that he "...has the right attitude and motivation and this bodes well for him working as hard as he can to avoid drinking and driving in the future".

### ***Discussion***

49. As noted above, the purpose of the Tribunal exercising its disciplinary powers in respect of a conviction is not to punish the teacher a second time. Before exercising its disciplinary powers under section 404 of the Education Act 1989 the Tribunal must be satisfied that the circumstances of the behaviour that resulted in the conviction reflects adversely on the fitness of the respondent to practice as a teacher and/or that there is a risk to the public (and more specifically to students) which needs to be dealt with and/or that the profession may be brought into disrepute by the behaviour. Sometimes a rehabilitative result may be driven by one or more of these factors.
50. Clearly the respondent's behaviour reflects adversely on his fitness to teach. Drink driving is a serious matter. Two convictions for drink-driving reflect significantly upon the ability of the respondent to act as an appropriate role model for students. The confrontational behaviour is concerning. There have however been no incidents suggesting that his discharge of his teaching responsibilities other than with regard to role modelling has been adversely affected by the effects of alcohol consumption.
51. Clearly any driving with excess breath alcohol carries a risk to the public generally. There is no evidence of risk to students.
52. The respondent's conduct was well capable of bringing the teaching profession into disrepute. Most members of the public would regard such convictions as poor role modelling by a teacher, and as manifesting unconcern with appropriate role modelling.
53. There is a clear basis for an adverse finding, and a disciplinary outcome must follow.
54. The evidence of the respondent's contribution to the schools in which he has taught, his commitment to and passion for teaching, especially in relation to support for Maori students, is plentiful. His talent and capacity for hard work are reported as extensive. The references were glowing.

55. In the Tribunal's assessment the respondent is likely to make a very significant contribution to the teaching profession and would be a great loss.
56. The contribution that the respondent makes to teaching, and potentially could make in the future, must in this case be given considerable weight. The Tribunal takes the view that the respondent's particular skills and experience mean that with appropriate conditions and support it is definitely in the interests of the education community that he retains registration. We refer to *CAC v Fuli-Makaua* which acknowledged<sup>8</sup> this as a mitigating feature which could result in the retention of registration.
57. The respondent has participated fully with the CAC and the Tribunal process.
58. The Tribunal agrees with the outcomes proposed by the CAC. Submissions from the respondent's counsel indicated that he accepts the conditions proposed by the CAC as being appropriate.
59. It is the Tribunal's hope that the respondent will work his way through the rehabilitative steps required by the conditions we will impose, and continue to contribute to the teaching profession in the highly positive way here so far done.
60. The respondent needs to realise, however, that should there be a further conviction of this or a similar nature, deregistration will be an almost inevitable outcome.

## Orders

61. The Tribunal orders as follows:
  - (a) The respondent is censured;
  - (b) The respondent is to undertake and complete drug and alcohol counselling for a minimum of two years from the date of this decision. He is to satisfy the Manager Professional Responsibility of the Education Council at the end of that time that he has completed such counselling;
  - (c) The respondent is to disclose a copy of this decision to his current employer, and also, for a period of two years from the date of conviction, to any future or prospective employer proposing to engage him as a registered teacher;
  - (d) The register will be annotated for a period of two years;

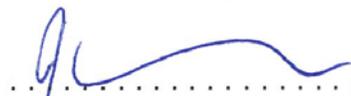
---

<sup>8</sup> At para [72]

**Costs**

62. Section 404(2) provides that no costs order is to be made where, as here, the hearing arises out of a report under section 397. No costs are ordered.

**Date:** 7 August 2018



.....  
**JGH Hannan**  
Deputy Chairperson

**NOTICE - Right of Appeal under section 409 of the Education Act 1989**

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. Subsections (3) – (6) of section 356 apply to every appeal as if it were an appeal under subsection (1) of section 356.