

NZTDT 2013/29

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER

the Education Act 1989

IN THE MATTER


of disciplinary proceedings commenced
by the Complaints Assessment
Committee of the New Zealand
Teachers Council

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE**

Complainant

AND


Respondent

DECISION OF TRIBUNAL

Tribunal:

Kenneth Johnston (Chair), Megan
Cassidy, Sheila Grainger, David
Turnbull, and Patrick Walsh

Hearing:

On the papers

Decision:

12 June 2013

Counsel:

Stefan Kaminski (by written
submission) for Complainant

No participation by or for Respondent

Introduction

By Notice of Charge and Referral dated [REDACTED], the New Zealand Teachers Council's Complaints Assessment Committee charges the Respondent with serious misconduct, the particulars of the charge being that on [REDACTED] the Respondent was convicted on two counts of indecent assault on a female under the age of 12, contrary to s.132(1) of the Crimes Act 1961.

The Chairman convened a pre-hearing telephone conference on 26 February 2013. Mr Kaminski participated in the conference for the Complainant. The Respondent took no part. At the conclusion of the conference, the Chairman set the matter down for hearing at 10am on 21 May 2013, and made directions in relation to the filing of evidence and submissions.

At the commencement of the hearing, the case was called. The Respondent did not appear.

Evidence

The Complainant's evidence was in the form of an affirmation made by one of the New Zealand Teachers Council's Case Co-Ordinators, Neha Goyal.

Having described her position and authority to give evidence, Ms Goyal explained why this matter (which relates back to events in early 2007) had taken so long to reach the Tribunal. We do not need to summarise that explanation here.

Ms Goyal indicated that the Respondent's registration and practising certificate had both expired.

She then provided some details of the criminal proceeding. As to this, apparently, the Police charged the Respondent on or about [REDACTED] with two counts of indecent assault on a female under 12. Subsequently, on [REDACTED], the Respondent's former employer reported the charges to the Council. The charges eventually came on for hearing in the District Court. They were defended. The Respondent was convicted on both charges. Ms Goyal was able to produce the District Court Judge's sentencing notes dated [REDACTED] and a certified copy of Entry of Criminal Record.

She also confirmed that the District Court Judge sentenced the Respondent to eight months imprisonment.

She explained that, following the Respondent's release, the Complainant had some difficulty locating him and in the end had to engage the services of a private investigator in order to do so. But the Respondent did eventually attend a meeting of the Complaints Assessment Committee on 27 April 2012 at which he maintained his innocence. The Complaints Assessment Committee, of course, was unable to look beyond the convictions and in the end resolved to refer the matter to the Tribunal.

As to the factual background, the only evidence which the Tribunal has before it is the District Court Judge's sentencing notes, and we quote the relevant section of the same:

- “1., you are for sentence today on two counts of indecent assault on a child under the age of 12 years, you having been found guilty after trial by your jury.
2. The facts that I sentence you on are that at all relevant times you were a primary school teacher at what was referred to during the trial as the ...; in fact I understand that the proper name is The victim was a pupil at the school. It seems that from time to time you would have children, quite often members of your whanau, stay with you in the flat that is above the school. I understand that you lived there and you, in part at least, acted as a caretaker to ensure that the grounds were not vandalised at night and during the weekend.
3. It is clear that on at least two occasions the complainant came to stay with you in that flat. On both occasions it would seem that there was at least one other girl present.
4. Although the exact date was never established, we know that sometime between 1 February 2007 and 1 June 2007 the complainant came to stay at your flat. This was the second time that she had been there. You had been out at a party and the children had come with you but you had returned home and upon return they were woken up, because they were asleep in the back of the truck, and they went upstairs to bed.
5. Their bed was mattresses that were placed in the lounge of your dwelling. There was a television and, for a short period of time at least, it would seem that the girls and you watched television but then they went to sleep. You made yourself a

coffee and then when you started to feel tired you also lay down on a mattress on the floor. You were lying next to the complainant. She was asleep and whilst she slept you placed your hand on her breast area. I accept it was over her t-shirt; she described it as a rubbing motion and her reaction was to elbow you and her evidence was that she did that quite hard; she was angry. She then lay awake for a period of time before drifting back to sleep. She awoke again to find your hands on her breast area again. On this occasion she struggled to hold her t-shirt down to prevent you from lifting it. I accept on the evidence that again you were touching her on the outside of her t-shirt. Her reaction was again to move but on that occasion nothing further occurred until you woke the next morning and you delivered her to a netball game."

The certified copy of the Entry of Criminal Record confirms the convictions and the sentence of eight months imprisonment.

Submissions

Mr Kaminski's submissions for the Complainant were short and to the point. After an introductory section, and a repetition of the factual background as taken from the District Court Judge's sentencing notes, he moved directly to penalty. He referred to an earlier Tribunal decision in NZTDT 2013/4 for authority for the proposition that "*...indecent assaults do not have to be at the serious end of the scale to merit cancellation (when registered).*"

He concluded his submission in the following terms:

“There seems little merit in my belabouring the point. [The Respondent] may still deny his guilt, but there is nothing “extraordinary” in so doing, and the Tribunal cannot go behind his convictions and even if they be the result of a re-trial. If [the Respondent] were registered, in my submission he would inevitably face cancellation, the highest of the sanctions under section 139AW. In consequence of its unavailability [because his registration has already expired], he should incur the highest of the sanctions which remain in the Tribunal’s armoury: a censure.”

As already recorded, the Respondent took no part in this disciplinary proceeding.

Discussion

There is little room for debate in this case. The Tribunal has no difficulty in concluding that the Complainant has made out its case of serious misconduct. As Mr Kaminski submits, in the case of a teacher, indecent assaults, even at the lower end, invariably lead to de-registration (although of course the Tribunal remains obliged to consider the purposes of professional disciplinary proceedings and identify the least punitive outcome consistent with those).

In a case where the Respondent has not troubled himself to take any part in the proceeding before the Tribunal, de-registration is virtually inevitable.

Where, as here, the Respondent is not registered, then, as Mr Kaminski says, the only option available to the Tribunal is a censure.

We would however observe that whilst it is not for us to tell the Council how to deal with any future application, we would be very surprised if any application by this Respondent for re-registration at any time in the future were considered favourably.

Conclusion

In the circumstances, the Tribunal censures the Respondent for his serious misconduct pursuant to s.139AW(1)(b) of the Education Act 1989.

No formal application has been made for costs, and accordingly costs are reserved.

Kenneth Johnston
Chairman

NOTICE

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 139AU (2) or 139AW 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) – (7) of section 126 apply to every appeal as if it were an appeal under subsection (1) of section 126.