



**EDUCATION COUNCIL**  
NEW ZEALAND | Matatū Aotearoa

## **Complaints Assessment Committee (CAC) v Fuli-Makaua**

NZ Disciplinary Tribunal Decision 2017/40

Teachers are role models for students and have considerable influence in and beyond the learning environment. In this case, a teacher has had her registration cancelled after multiple convictions for drink driving and failing to show insight into an issue with alcohol.

In February 2017, the Education Council was notified by the District Court of Ms Lucy Fuli-Makaua's conviction for drink driving in December 2016. She had been sentenced to 80 hours community work, six months' supervision, and was disqualified from driving for seven months.

During the investigation into this conviction, the Council was notified by the Court that Ms Fuli-Makaua had received two more driving related convictions in August 2017. The convictions were for driving with excess breath alcohol, and for driving while disqualified in May 2017.

Ms Fuli-Makaua had previously been convicted for drink driving in 1995 and 2015.

The Education Council's Complaints Assessment Committee (CAC) investigated and referred the matter to the New Zealand Teachers Disciplinary Tribunal (Tribunal).

At the Tribunal, Ms Fuli-Makaua explained that she was suffering from family stress at the time of her offending. She had some support from the principal of the school at which she was teaching, and she had undertaken a drink driving programme.

In its decision, the Tribunal set out what it considered to be factors which aggravate conduct, and therefore justify a higher penalty. The factors included whether there were passengers, and if the drink driving was accompanied by other offending; also, if there was any evidence of a harmful relationship with alcohol; whether students have been put at risk; and if she reported the conviction to the Council.

The Tribunal also set out what it considered to be mitigating factors which might lessen the seriousness of the penalty in drink driving cases. This includes factors such as whether a teacher demonstrates genuine accountability or remorse; if they demonstrate insight into their behaviour, and if there is evidence of any rehabilitative steps the teacher has taken.

Drawing on these factors, the Tribunal considered the number of convictions referred to it and Ms Fuli-Makaua's history of other convictions. The Tribunal also noted the concerns that Ms Fuli-Makaua appears to be managing her stress with alcohol, and a lack of evidence that Ms Fuli-Makaua recognised and showed insight into a harmful relationship with alcohol.

The Tribunal censured Ms Fuli-Makaua and cancelled her registration.

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2017/40**

**IN THE MATTER** of the Education Act 1989

**AND**

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

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

**AND** **LUCY FULI-MAKAUA**

**Respondent**

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**TRIBUNAL DECISION**

**5 JUNE 2018**

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**HEARING:** Held on 23 April 2018

**TRIBUNAL:** Theo Baker (Chair)  
Patrick Walsh and Stuart King (members)

**REPRESENTATION:** Ms K Feltham for the Complaints Assessment Committee  
Mr G Ogilvie for the respondent

## Introduction

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal the respondent's two convictions for driving with excess breath alcohol ("**EBA convictions**") against a background of two previous similar convictions.
2. The Tribunal heard the matter on 23 April 2018. We deliberated and delivered an oral decision. We advised the parties that the penalty was censure and cancellation of registration. There are no orders for non-publication. The reasons for our determinations are found towards the end of this written decision.
3. In a Notice of Referral dated 13 December 2017, the reasons for referral are:
  1. *On 17 February 2017, the teacher was convicted for driving with excess breath alcohol (3rd or subsequent) and sentenced to 80 hours of Community Work, 6 months Supervision and was disqualified from driving for 7 months; and*
  2. *On 2 August 2017, the teacher was convicted for driving with excess breath alcohol (3rd or subsequent) and driving while disqualified.*
  3. *The teacher has previously been convicted for driving with excess breath alcohol on or about 30 October 2015, a matter which was dealt with by the CAC by way of no further action.*
  4. *The teacher has previously been convicted for driving with excess breath alcohol on or about 9 June 1995, a matter which was dealt with by the New Zealand Teachers Council when it granted the teacher her registration.*
  5. *The CAC considers that the 2017 convictions warrant action by the Disciplinary Tribunal of the Education Council of New Zealand.*
4. On the same day as hearing this referral, we considered another referral of an EBA conviction. Three similar referrals were also heard on 17 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.
5. Before the hearing of the present charge, the parties filed:
  - The notice of charge
  - An agreed summary of facts, signed by Counsel for the CAC and the respondent herself
  - Police Summary of Facts
  - Sentencing Notes dated 17 February 2017 of Judge J A R Johnston

- CAC submissions to Tribunal
- Respondent statement and submissions

6. At the hearing we also received:

- a copy of the sentencing notes dated 2 August 2017
- a letter of support from the Principal of Mahinawa Specialist School (**the School**)
- a letter seeking name suppression of the School

### **Evidence**

7. The evidence in support of the charge was contained in an Agreed Summary of Facts (ASF). Ms Fuli-Makaua also submitted a statement and was available for questions from the CAC and Tribunal.

#### *Agreed facts*

8. In the ASF, we were told that on 23 February 2017, the Education Council (**the Council**) received a notice of conviction from the Porirua District Court regarding the respondent's conviction for driving with excess breath alcohol (3rd or subsequent). The conviction was dated 17 February 2017 and related to her drink-driving on 16 December 2016. The respondent returned an excess breath alcohol level of 513 mcg/l of breath.<sup>1</sup>
9. According to the Police Summary of Facts, on 16 December 2016 the respondent was stopped at a Police Checkpoint for a compulsory breath test. In response to the evidential breath test reading, the respondent admitted that she had been drinking before driving.
10. The respondent pleaded guilty to driving with excess breath alcohol (3rd or subsequent) and was sentenced to 80 hours' Community Work, 6 months' Supervision and disqualified from driving for 7 months. Judge Johnston noted that there was nothing (untoward) in the manner of the respondent's driving. A brief drug and alcohol assessment recommended assistance for the repeat drink/driver's programme, and the supervision for six months had a special condition that she was to undertake such assessment, counselling, courses, treatment and training, particularly the repeat drink/driver's programme, as directed by and to the satisfaction of her probation officer. She was also subject to s 65B of the Land Transport Act 1998, which meant that when

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<sup>1</sup> Since 1 December 2014, the legal limit has been 250mcg of alcohol per litre of breath (s 11(a) Land Transport Act 1998; s 4(1) Land Transport Amendment Act (No 2) 2014)

her disqualification had expired, she could apply for a “zero alcohol” licence. This licence lasts for three years.

11. On 17 August 2017, while investigating and gathering information on this conviction, the Council received two further notices of conviction for driving related offences dated 2 August 2017. These convictions were for driving with excess breath alcohol, and for driving while disqualified (both offences occurring on 9 May 2017).
12. The respondent had been stopped at a routine traffic stop and 10.10pm on Tuesday 9 May 2017. An evidential breath test gave a reading of 939 mcg of alcohol per litre of breath. She stated to the Police Officer at the time that she “had consumed 4 x glasses of red wine prior to driving”. She acknowledged to the Police Officer that she “was aware of her disqualification status.”
13. The respondent has also accepted that she had previously been convicted of a further driving with excess breath alcohol on or about 9 June 1995. This matter was dealt with by the New Zealand Teachers Council when it granted her registration. Further, she has been convicted of driving with excess breath alcohol on or about 30 October 2015. She appeared before the CAC in relation to this 2015 offence. Although the CAC decided to take no further action in that case, (as it believed it to be the respondent’s first conviction) it noted the respondent’s reference to and reflections on the Code of Ethics; her explanation that under the Code certified teachers must “*Model* positive values which are widely accepted in society and encourage learners to apply them and critically appreciate their significance”; and her acknowledgement that she was ashamed of her conviction. The CAC reminded the respondent of the legal requirement to self-report any such convictions to the Education Council in the future. She was encouraged to exercise greater care in the future as although the CAC had dealt with the matter leniently “any further offence will be likely to be viewed as a serious matter.”
14. The respondent agreed that she has failed to self-report any of her convictions to either the New Zealand Teachers Council or the Education Council (respectively).

*The respondent’s evidence*

15. In a prepared statement, the respondent said that she regrets her actions. She apologised to the Council and her Principal for failing to notify them of the 2017 convictions. She did not realise how serious those omissions were, but she now does. She sincerely undertakes to always notify any matters in the future, and will ensure that

she has no need to report any such matters in the future.

16. The respondent has undertaken a programme with Drink Driving Intervention Trust and she has attended some counselling.
17. The respondent did not want to make any excuses for her behaviour but set out some family circumstances which she now realises might have been a contributing factor to the pressure she has been under. In particular she said that her 2017 offences occurred only because she was so desperate to help her daughter.
18. The respondent was very grateful for the support of Principal at Mahinawa Specialist School where she is a relief teacher.

*Oral evidence*

19. Ms Feltham asked the respondent about her driving in May 2017. Her explanation was that she had driven to help her daughter and had drunk alcohol at her daughter's. She said that at the time she had not thought through the consequences. She acknowledged that she thought it was unlikely she would get caught.
20. In answer to Ms Feltham, the respondent said that she drinks alcohol every two weeks on the weekends. When she drinks she would drink about three glasses of red wine. She said that her drinking now is no different from her drinking then (in May 2017).
21. The respondent denied that she had a harmful relationship with alcohol or needed any ongoing counselling for alcohol.
22. Of the "MAP"<sup>2</sup> drink driving programme, the respondent said that she learned about the consequences of drink driving. It gave her historical understandings of why the law has changed and it deepened her awareness.
23. The respondent's explanation for why the offending occurred was because of her inability to be aware of what is right what is wrong.
24. The respondent confirmed that in 2015 the CAC had reminded her of the need to self-report any further convictions and that she knew she needed to report them. When asked why she did not report them, she replied, "I knew I should have".
25. In response to questions from the Tribunal, the respondent acknowledged that drink driving is a serious matter for a teacher. She said that we don't want to have negative role

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<sup>2</sup> Make a Plan Programme offered by the Drink Driving Intervention Trust

- models. However she did not accept that it had any impact on her role in the class room.
26. We asked the respondent about her current teaching role. She has been relieving at the School for four years now and teaches about 80% of the school year. Before that, she was a lecturer at Whitireia. She prefers relief teaching (to permanent roles or lecturing) because she does not have a lot of paper work.
  27. The respondent also referred to finding it very stressful in 2017 having the Council contacting her about her convictions.
  28. The respondent acknowledged drinking more than three glasses of wine in May, when her breath alcohol reading was 939mcg.
  29. We put to the respondent that she goes through life with blinkers on, in denial, hoping that she doesn't get caught and avoiding dealing with matters. She denied this. We asked how she could assure us that we would not see her back before the Tribunal. She said that she now has a plan with her family that she will not drive. When asked for details of the plan, she could not elaborate.

### **General legal principles**

30. On behalf of the CAC, Ms Feltham presented comprehensive submissions on the general principles that the Tribunal as applied in its approach to referrals of EBA convictions. These were before the Tribunal for all five cases. We have set these out in full in this decision.
31. The CAC reminded us that all convictions punishable by three months' imprisonment or more must be reported to the Education Council, both by the teacher under s 397 of the Education Act 1989 (the Act) and by the employer.<sup>3</sup>
32. The CAC submitted that these requirements are consistent with the commitments made under the former Code of Ethics for Registered Teachers and its replacement, the Code of Professional Responsibility. In the former, teacher commitment to Society including to "teach and model those positive values that are widely accepted in society and encourage learners to apply them and critically appreciate their significance." Under the new Code, teachers make a commitment to the teaching profession: to "maintain public trust and confidence in the teaching profession by demonstrating a high standard of

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<sup>3</sup> Rule 9(1)(n) of the Education Council Rules 2016 requires an employer to report 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.

professional behaviour and integrity”.

33. In the CAC’s submission, teachers are role models for learners and have considerable influence in and beyond the learning environment.
34. The CAC observed that at one end of the spectrum EBA convictions may be dealt with by the CAC by agreement<sup>4</sup> including, for example, first convictions where the level of alcohol is small and there are significant mitigating features. At the other end are convictions that are dealt with by the Tribunal and where cancellation is the only available outcome.
35. Although some EBA convictions form the basis for a charge of serious misconduct, most come before the Tribunal by way of notice of referral.<sup>5</sup> As the Tribunal has repeatedly confirmed, where this occurs, there is no need for it to find the respondent guilty of serious misconduct.<sup>6</sup> Rather, to exercise its disciplinary powers, the Tribunal must make an adverse finding as to the practitioner’s fitness to teach.
36. In the CAC’s submission, the starting point with respect to all convictions for driving with excess blood alcohol is that even one conviction may result in an adverse finding.<sup>7</sup> As the Tribunal held in *CAC v Korau*, even one conviction for a drink driving offence “places a teacher’s registration in jeopardy”.<sup>8</sup> A series of convictions will certainly do so.<sup>9</sup> Notwithstanding the fact that it is a traffic offence it is, as the Tribunal held in *NZDT2009/4* a “very serious one” and “not behaviour which our society is prepared to tolerate”.<sup>10</sup> Driving while intoxicated poses danger to the public.<sup>11</sup> And, as the Tribunal held in *CAC v White*, “[p]ractitioners have an obligation to both teach and model positive values for their students, and driving while intoxicated does not mirror that expectation”.<sup>12</sup> Such conduct undermines a teacher’s professional commitment to “respect [their] trusted role in society” by “fostering learners to be active participants in

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<sup>4</sup> Education Act 1989, s 401(2)(d).

<sup>5</sup> Education Act 1989, s 401(3). Albeit some are also charged as serious misconduct pursuant to s 401(2).

<sup>6</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [17] citing *Complaints Assessment Committee v S DC Auckland CIV2008004001547*, 4 December 2008 at [47].

<sup>7</sup> *NZDT2009/4* and *NZDT2011/16*.

<sup>8</sup> *CAC v Korau* NZTDT2017/17 26 August 2017 at [23] citing *CAC v Teacher* NZDT2014/1 21 January 2014) at 7.

<sup>9</sup> *NZDT2009/4* and *NZDT2011/16*

<sup>10</sup> *NZTDT2009/11* May 2009.

<sup>11</sup> *CAC v Korau* NZTDT2017/17, 26 August 2017 at [14].

<sup>12</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [22].

community life...”<sup>13</sup>

37. The purpose of the Tribunal exercising its disciplinary powers in respect of a conviction is, of course, not to punish the teacher a second time.<sup>14</sup> 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>15</sup> Disciplinary proceedings 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>16</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 teaching environment when required.<sup>17</sup>

### **Factors increasing seriousness of conduct**

38. The CAC submitted that it would be useful for the Tribunal to set out factors that tend to “aggravate” the conduct or otherwise suggest that a higher penalty is required. We agree that it is timely to set out the aggravating and mitigating factors derived from previous decisions and we hope that the teaching profession and their legal advisers will find them helpful in understanding how these matters are viewed. We do not want to create an impression that we will simply follow a formula. As Ms Feltham noted, the Tribunal will ultimately exercise its discretion, carefully weighing all the evidence, and taking into account the factors that we find relevant in the circumstances of each teacher. These may include issues that have not been pertinent in previous cases.

### *Circumstances of offending itself*

39. As the Tribunal held in *CAC v Campbell*, the circumstances of the offending are relevant, provided that the Tribunal is careful not to further punish the teacher.<sup>18</sup> Factors that go towards the seriousness of the offending include:

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<sup>13</sup> Our Code Our Standards: Code of Professional Responsibility and Standards for the Teaching Profession.

<sup>14</sup> *Ziderman v General Dental Council* [1976] 1 WLR 330; *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 ; *CAC v Campbell* at [15]; *CAC v White* NZTDT2017/29, 28 November 2017 at [19]; *CAC v Korau* NZTDT2017/17 26 August 2017 at [13].

<sup>15</sup> Education Act 1989, s 377.

<sup>16</sup> *CAC v McMillan* at [23] and *CAC v White* at [19]; *CAC v Korau* NZTDT2017/17 26 August 2017 at [13].

<sup>17</sup> *CAC v Bird* NZTDT2017/5, 3 July 2017 at [32].

<sup>18</sup> *CAC v Campbell* NZDT 2016/35 at [22] as cited in *CAC v White* NZTDT2017/29, 28 November 2017 at [23].

- a) **The level of alcohol involved:** for example, other factors being equal, a lower reading of alcohol renders a situation less serious than a very high reading.<sup>19</sup>
- b) **The nature of the driving:** the nature of the driving itself is also relevant to assessment of the conduct. The teacher's conduct will be viewed more seriously if his or her driving was unsafe such that it attracted attention.<sup>20</sup> This occurred, for example, in *CAC v Campbell* where the teacher mounted the kerb, hit large rocks, crossed the centre lane and almost collided with the kerb in the opposite lane.<sup>21</sup>
- c) **Passengers:** in the CAC's submission, the teacher's conduct will be more disquieting when he or she has driven passengers despite having excess blood alcohol. That is because, in doing so, the teacher has put more people at risk.
- d) **Timing:** the CAC submits that, in some circumstances, timing may also be relevant. For example, where the circumstances of the conviction disclose that the practitioner was intoxicated in the early hours of a school night, questions will be raised as to the teacher's judgement and ability to perform his or her role appropriately.
- e) **Associated offending:** it will also be particularly aggravating where the drink driving has been accompanied by other offences. For example, where the teacher is also driving while disqualified, this will be indicative poor judgement and a disregard for the law. Other relevant offences may include refusing to give blood, careless driving, or assault on a police officer.

#### *Prior relevant convictions*

40. The CAC submits that prior convictions for driving with excess blood alcohol or other driving offences are relevant to assessment of the teacher's conduct. As the Tribunal said in *Campbell*, one conviction for driving with excess blood alcohol is evidence of poor judgement and disregard for the welfare of other road users.<sup>22</sup> But just one additional prior for driving with excess blood alcohol may make the situation "much graver".<sup>23</sup> Such convictions suggest that there may be a risk of future offending, a harmful relationship with alcohol and/or poor self-regulation.<sup>24</sup> They may also

<sup>19</sup> See for example *CAC v White* NZTDT2017/29, 28 November 2017 at [23](a).

<sup>20</sup> See for example *CAC v White* NZTDT2017/29, 28 November 2017 at [23](a).

<sup>21</sup> *CAC v Campbell* NZDT 2016/35 at [7].

<sup>22</sup> *CAC v Campbell* NZDT 2016/35 at [22] as cited by *CAC v White* NZTDT2017/29, 28 November 2017 at [23].

<sup>23</sup> At [12].

<sup>24</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [23](b).

demonstrate a disregard for the law and other road users.<sup>25</sup>

41. In assessing the weight of prior convictions, it will be relevant to consider both the time that has elapsed between convictions<sup>26</sup> and how long ago the convictions occurred. Where the conviction is preceded by a similar one just two years earlier the situation will be much “graver” and will be evidence of the respondent’s relationship with alcohol.<sup>27</sup> By contrast, if the convictions are stale, for example over 40 years ago, they may be of no more than “historical interest”.<sup>28</sup> However, even “fairly old” convictions, accumulated over a period of some years, may give rise to “real concern”.<sup>29</sup>
42. In the CAC’s submission, other drug-related convictions will also be relevant to the overall assessment. For example, in *White* the Tribunal considered that the respondent’s conviction for cultivating cannabis tended to “affirm that ... [the respondent had] an issue regarding the use of harmful substances.”<sup>30</sup>
43. Other convictions, unrelated to drugs or driving, may also be relevant to the overall assessment. In the CAC’s submission, such convictions may provide a backdrop that is strongly suggestive of a flagrant disregard for the law. Where there is evidence of such an attitude the teacher’s ability to role model appropriate behaviour is, at best, questionable.

#### *Prior traffic history*

44. In the CAC’s submission, a respondent’s prior traffic history may also elevate the seriousness of the conduct. For example, in *CAC v Whauwhau*,<sup>31</sup> although not placing “significant” weight on it, the Tribunal considered the respondent’s traffic history demonstrated a lack of care and responsibility.<sup>32</sup> Prior traffic history may also demonstrate that the teacher has a flagrant disregard for the law. For example, in *CAC v Bird* the Tribunal held that the respondent’s previous history of two driving offences and 19 speeding infringements made the matter “more serious”.<sup>33</sup> This history demonstrated

<sup>25</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [23](b).

<sup>26</sup> See for example *NZDT2014/24* at 6 where the Tribunal considered a four-year gap between convictions of a similar nature.

<sup>27</sup> *CAC v Campbell* NZDT 2016/35 at [21].

<sup>28</sup> *CAC v Reriti* NZTDT2014/19 26 August 2014 at 6.

<sup>29</sup> *CAC v Potaka-Osborne* NZDT2014/31, 3 October 2014 at 8.

<sup>30</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [23](c).

<sup>31</sup> Which concerned driving while disqualified after two prior drink driving convictions.

<sup>32</sup> *CAC v Whauwhau* NZTDT2016/8 19 December 2016 at [22]. The relevant history being exceeding the speed limit on eleven separate occasions and operating an unlicensed motor vehicle. See [19].

<sup>33</sup> *CAC v Bird* NZTDT2017/5, 3 July 2017 at [33].

the respondent had “continued to flout the law and put the safety of others at risk”.<sup>34</sup> Although that case involved a referral for driving at dangerous speed, the CAC submits that the same principles apply to the drink driving context.

*Other evidence of harmful relationship with alcohol*

45. The CAC further submits that any other evidence that the practitioner has a harmful relationship with alcohol will also be relevant to penalty, albeit care must be taken to impose a penalty in respect of convictions rather than punish for individual incidents that are evidence of alcoholism.<sup>35</sup> However, the extent of the practitioner’s harmful relationship with alcohol is relevant to an assessment of the risk that the teacher poses. For example, in *Campbell* the Tribunal considered that a positive breath test administered at school as a condition of employment was relevant regardless of the fact that the reading was not over the legal limit.<sup>36</sup> The reading was evidence of the respondent’s relationship with alcohol<sup>37</sup> and the “extent of [the respondent’s] problem”<sup>38</sup>. Similarly, in *CAC v Teacher*<sup>39</sup> the Impairment Committee’s conclusion that the respondent was impaired by her alcohol use was apparently taken into account.

*Whether students have been put at risk*

46. The conduct will be much more serious if it has put, or risks putting, the safety of students at risk.<sup>40</sup>

*Failure to report conviction(s)*

47. Pursuant to s 397 of the Act, teachers must report qualifying convictions to the Education Council. Failure to do is, in and of itself, “misconduct that may give rise to disciplinary proceedings”.<sup>41</sup> This factor may be more or less aggravating depending on

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<sup>34</sup> *CAC v Bird* NZTDT2017/5, 3 July 2017 at [34].

<sup>35</sup> *CAC v Campbell* NZDT 2016/35 at [24].

<sup>36</sup> *CAC v Campbell* NZDT 2016/35 at [23].

<sup>37</sup> At [23].

<sup>38</sup> At [24].

<sup>39</sup> *CAC v Teacher* NZTDT2013/46, 19 September 2013.

<sup>40</sup> See for example *CAC v Korau* NZTDT2017/17 26 August 2017 at [23] where the Tribunal considered it relevant that the evidence did not disclose that the respondent posed a risk to the safety of his students. See also *CAC v Campbell* NZDT 2016/at [31] where the Tribunal noted that it was relevant there was no evidence students had been placed at risk because of the respondent’s conduct; see also *CAC v Whauwhau* NZTDT2016/8 19 December 2016 at [26].

<sup>41</sup> Education Act 1989, s 397(2).

the particular circumstances.<sup>42</sup> For example, at the bottom end of the scale is a teacher who is unaware of his or her obligation to report relevant convictions. This is still an aggravating feature: as the Tribunal held in *CAC v Korau*, it is “incumbent on members of the profession to be cognisant of the requirement that rests on every holder of a practicing certificate who is convicted of an offence punishable by imprisonment ... to report.”<sup>43</sup>

48. At the other end of the scale is a teacher who is dismissive of his or her obligation or who repeatedly or purposefully avoids reporting relevant convictions. The CAC referred to the example of *CAC v White* where the respondent failed to report his conviction on three separate occasions. The Tribunal considered the respondent “dismissive” of, or “indifferent”<sup>44</sup> to, his obligation to report the convictions. This indifference “[lent] weight to the gravity of the misconduct”<sup>45</sup> and, in combination with the convictions themselves, was “indicative of an inherent disrespect for the law, which does not reflect well on the profession”.<sup>46</sup> The Tribunal considered that the “existence of [this] tendency” did not provide any surety that the respondent appreciated “his responsibility to model lawful behaviour for those he teaches”.<sup>47</sup>
49. The CAC submitted that it is particularly serious if a teacher receives, and fails to disclose, further convictions while disciplinary proceedings relating to other convictions are already afoot. As the Tribunal held in *CAC v Thomson*, for a “teacher to act with such flagrant lack of candour in dealing with her professional disciplinary body is simply unacceptable”, constitutes a failure to discharge professional responsibilities<sup>48</sup> and “raises ... real doubt about that teacher’s suitability to hold a practicing certificate”.<sup>49</sup> In that case, the respondent had appeared before the Tribunal in respect of traffic offences, including a drink driving offence.<sup>50</sup> After engaging with the CAC, but before the Tribunal hearing, the respondent was again convicted of driving with excess blood alcohol.

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<sup>42</sup> See *CAC v Bird* NZTDT2017/5, 3 July 2017 at [51] where the Tribunal described failure to report as an “aggravating feature”.

<sup>43</sup> *CAC v Korau* NZTDT2017/17 26 August 2017 at [9].

<sup>44</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [21].

<sup>45</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [21].

<sup>46</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [23](f).

<sup>47</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [23](f).

<sup>48</sup> *CAC v Thomson* NZTDT2014/57, 3 October 2014 at 7.

<sup>49</sup> *CAC v Thomson* NZTDT2014/57, 3 October 2014 at 8.

<sup>50</sup> *CAC v Thomson* NZTDT2014/57, 3 October 2014 at 2. The other convictions being for careless driving and failing to stop.

Ultimately the Tribunal regarded the case “so seriously”<sup>51</sup> that it determined deregistration the only available option.

### Mitigating features

50. The CAC acknowledged that there may be any number of mitigating factors but for cases involving drink driving convictions, the most significant mitigating factor will be a teacher’s potential for, and established commitment to, rehabilitation.<sup>52</sup> In the CAC’s submission, the following factors are relevant to an assessment of the teacher’s rehabilitative prospects:

- a) **Accountability and remorse:** The CAC submitted that it is not enough for a practitioner to pay lip service to the concept of remorse. In *White* where the teacher claimed to be remorseful but, at odds with this, maintained he drove home “carefully and safely”, the Tribunal found that he presented an “entirely unconvincing explanation” for his driving which, in the Tribunal’s view, made his “contrition ring false”.<sup>53</sup>
- b) **Insight into behaviour:** The practitioner’s degree of insight into the cause of behaviour will be important in assessing their rehabilitation potential.<sup>54</sup> Knowing what motivated the conduct is a way to gauge the risk of repetition.<sup>55</sup> The CAC submitted that cancellation will be less likely to be required where the practitioner understands what led them to offend and is taking, or has taken, meaningful steps to reduce the risk of it happening again.
- c) **Evidence of rehabilitative steps:** The Tribunal held in *White*, whether cancellation is required “almost inevitably” turns on, *inter alia*, the practitioner’s rehabilitative prospects.<sup>56</sup> For this to be a weighty factor there should, in the CAC’s submission, generally be independent evidence of the concrete steps the practitioner has *already* taken to rehabilitate him or herself. Claims that the practitioner will attend a course in the future should, in the CAC’s submission, ordinarily be viewed dimly. The teacher will have had an opportunity to embark on rehabilitation at any stage throughout the Court or CAC proceedings. The CAC submitted that rehabilitative measures could

<sup>51</sup> *CAC v Thomson* NZTDT2014/57, 3 October 2014 at 8.

<sup>52</sup> See for example *CAC v White* NZTDT2017/29, 28 November 2017; *CAC v Campbell* NZDT 2016/35.

<sup>53</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [28](a).

<sup>54</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [26] citing *CAC v Lyndon* NZTDT 2016/61 at [18].

<sup>55</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [26].

<sup>56</sup> See also *CAC v Lyndon* NZTDT2016/61 at [28].

include, for example, attendance at drug and alcohol courses or sessions with a drug and alcohol counsellor.

## Penalties

51. Ms Feltham referred to the three overlapping purposes of penalty in this jurisdiction: protecting the public through the provision of a safe learning environment, maintaining professional standards and maintaining public confidence in the profession.<sup>57</sup> In imposing a penalty, the Tribunal must arrive at an outcome that is fair, reasonable and proportionate in the circumstances.<sup>58</sup> The Tribunal will also seek to ensure that any penalty is comparable to those imposed on teachers in similar circumstances.<sup>59</sup>
52. The penalties imposed in cases involving drink driving convictions vary widely from censure right through to cancellation. In any given case, the appropriate outcome is fact dependent and must take into account not only the conduct underlying the conviction, but also the practitioner's prospects of rehabilitation. In the CAC's submission this, coupled with the differing purposes of penalties in a disciplinary context, mean it is not possible to set out "bands" of offending like in the Court of Appeal guideline decisions in the criminal context.
53. However, it was noted that the cases demonstrate that the appropriate penalty will often be censure, coupled with conditions and annotation. The following examples were provided:
  - 1) **Korau:** the respondent had been convicted for driving with excess blood alcohol and, six months later, was convicted of driving while disqualified.<sup>60</sup> He did not report either of the convictions. The Tribunal considered censure the appropriate penalty because the offending occurred over three years before the date of the hearing, there was no risk of harm to students, and no suggestion of ongoing issues with alcohol. The Tribunal also placed one condition on the respondent's registration for a period of two years requiring him to advise any employers of the Tribunal's decision. The register was also annotated.

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<sup>57</sup> *CAC v McMillan* NZTDT 2016/52 as cited in *CAC v White* NZTDT2017/29, 28 November 2017 at [24].

<sup>58</sup> *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [51]; *CAC v Korau* NZTDT2017/17 26 August 2017 at [22],

<sup>59</sup> *CAC v White* NZTDT2017/29, 28 November 2017 at [27]; *CAC v Lyndon* NZTDT2016/61 at [26].

<sup>60</sup> There were also other matters but the Tribunal did not consider these warranted a more severe disciplinary response.

- 2) **NZTDT2015/44:** In this case the teacher had come to the attention of the Teachers Council (as it then was) as a result of being under the influence of alcohol at work and subsequently being convicted for driving while disqualified and driving with an excess breath alcohol reading of 1,472 micrograms per litre of breath.

The Tribunal noted the significant rehabilitative steps taken – in particular the previous completion of a residential program and then (following a relapse) a significant period of abstinence through the CAC and Tribunal process. The Tribunal found that the matter had been properly referred to it, censured the teacher, ordered that the register be annotated to refer to the decision, and from the date of three years from the issue of a new practising certificate the teacher was to advise any prospective employer of the Tribunal’s decision and to submit to requested blood testing for alcohol at any school which employed her.

- 3) **Campbell:** the respondent was charged with serious misconduct in respect of two convictions; one of driving with excess blood alcohol and one of driving while suspended. In that case, it was the respondent’s unsafe driving that attracted Police attention. The respondent had one prior conviction for driving with excess blood alcohol two years prior. Before the Tribunal, the respondent admitted she was an alcoholic and advised she now attended weekly AA meetings, had referred herself to the 13 week Drive SOBA course, attended weekly counselling sessions with a DHB Drug and Alcohol counsellor and was taking Antabuse.<sup>61</sup>

The Tribunal considered the convictions “serious matters” but, given the respondent was engaging (seemingly for the first time) in a rehabilitation programme, believed she should have the ability to continue.<sup>62</sup> As such, the Tribunal censured the respondent and placed various conditions on her practicing certificate for three years, including that she inform any employer of the disciplinary proceeding, submit to any breath testing required by her employer and provide monthly reports to the Education Council from an alcohol and drug counsellor. The register was also annotated to that effect.

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<sup>61</sup> At [6].

<sup>62</sup> At [31].

### *Cancellation*

54. The CAC referred to *Campbell*, where we noted cancellation is required in two overlapping situations:<sup>63</sup>
- 1) The offending is 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
  - 2) The teacher has not taken adequate rehabilitative steps to address his or her issues with alcohol. This may indicate a level of apparent ongoing risk that leaves no option but to deregister.<sup>64</sup>
55. The CAC referred to *CAC v Teacher*<sup>65</sup> as an example of a case falling into the former category. In that case, the respondent was referred to the Tribunal on the basis of two charges of driving with excess blood alcohol within a 12-month period and three subsequent convictions for breaching the corresponding sentence of home detention. She had two prior convictions for driving with excess blood alcohol three years earlier. Although the Tribunal was prepared to accept the respondent had taken steps to 'face up' to her problem, it nevertheless considered the convictions so serious that the "only appropriate outcome" was censure and deregistration.
56. The CAC further submitted that *Thomson* is also a case falling into the former category. The respondent had appeared before the Tribunal in respect of traffic offences, including a drink driving offence.<sup>66</sup> After engaging with the CAC, but before the Tribunal hearing, the respondent was again convicted of driving with excess blood alcohol. She did not disclose the recent conviction to the Tribunal. In those circumstances, given her flagrant failure to discharge her professional responsibilities and lack of candour, the Tribunal regarded the case "so seriously"<sup>67</sup> that it determined deregistration the only available option.
57. *White* is a recent example falling into the latter category. In that case, the CAC referred

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<sup>63</sup> *CAC v Campbell* NZDT 2016/35 at [27] as cited in *CAC v White* NZTDT2017/29, 28 November 2017 at [23].

<sup>64</sup> See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].

<sup>65</sup> *CAC v Teacher* NZTDT2011/16, 24 June 2011.

<sup>66</sup> *CAC v Thomson* NZTDT2014/57, 3 October 2014 at 2. The other convictions being for careless driving and failing to stop.

<sup>67</sup> *CAC v Thomson* NZTDT2014/57, 3 October 2014 at 8.

the teacher's conviction for excess blood alcohol to the Tribunal. He did not report the conviction to the Education Council as he was required to do. Nor was this his first conviction; he had one prior conviction for driving with excess blood alcohol four years earlier and one two years prior for cultivating cannabis. In that case, the Tribunal considered that the respondent had taken inadequate steps to address his alcohol issues. In essence, this was because he did not take full responsibility for his behaviour, denied having a harmful relationship with alcohol despite evidence to the contrary and, importantly, lacked any insight into what led him to drive and had not taken any meaningful steps to address the risk of it happening again.

## **The present case**

### *CAC submissions*

58. The CAC submitted that the respondent's three recent convictions undoubtedly adversely reflect on her fitness to practice as a teacher, particularly when viewed in light of her two prior convictions and failure to report the three convictions. The only available outcome is cancellation of her registration given both the nature of the conduct and the (almost) complete absence of any evidence of rehabilitation.
59. The CAC submitted that the following factors were relevant to assessment of penalty:
- **Circumstances of offending:** The CAC has referred three convictions. The first, which was for drink driving, occurred on 16 December 2016 where the respondent returned a moderate excess breath alcohol level of 513 micrograms per litre of breath. But just six months later, she again drove with excess blood alcohol; this time with a significantly higher reading of 939 micrograms per litre of breath – nearly four times the legal limit.<sup>68</sup> As well, the respondent acknowledged that she knew full well that she was disqualified from driving, but chose to do so anyway.
  - **Prior convictions:** The respondent has two previous convictions for driving with excess blood alcohol; one in 1995 and one in 2015. Ms Feltham observed that with the previous conviction in 2015, the respondent has a conviction for drink driving in three consecutive years (2015, 2016 and 2017). In the CAC's submission, the fact that there are three drink driving convictions within such a short space indicates that the respondent has a problematic relationship with alcohol. This is

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<sup>68</sup> Sentencing notes at [2].

particularly so given that she was unable to refrain from drink driving despite having been warned in October 2015 that any further offence would be viewed as a serious matter.

- **Failure to report convictions:** The respondent failed to report any of her three convictions. This is despite the fact that, in 2015, the CAC reminded her of her legal obligation to self-report such convictions. In the CAC's submission this fact, together with her decision to drive despite knowing she was disqualified, indicates a flagrant disregard for the law.
- **Other evidence of harmful relationship with alcohol:** the sentencing notes (relating to the 2016 offence) record that, following a brief drug and alcohol assessment, it was recommended that the respondent attend a repeat drink/driver's programme. The learned District Court Judge considered that Ms Fuli-Makaua "obviously" had "drink/driving issues".<sup>69</sup>

60. The CAC submitted that despite the strong evidence that the respondent has a problematic relationship with alcohol, this case is characterised by an almost complete lack of evidence as to insight or rehabilitation. In the CAC's submission, the MAP course alone is inadequate to meet the risk posed by the respondent; there is no evidence she is remorseful, has taken full responsibility for her actions, has any meaningful insight into her behaviour or a plan to address the risk of reoccurrence. In the CAC's submission, she still presents a real risk to the public. The respondent has also demonstrated a cavalier attitude towards the law, both by failing to report her convictions and by driving while disqualified. There is no evidence that the respondent understands that breaking the law like this is a serious matter and calls into question her ability to model appropriate behaviour to her students. In those circumstances, there must be grave concerns about her fitness to practise. Therefore the only proper outcome is cancellation of her registration.
61. As for mitigating factors, Ms Feltham invited us to consider whether we accepted that the respondent has genuine insight into her behaviour, has accepted responsibility for her actions and is committed to change.

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<sup>69</sup> At [5].

*Respondent's submissions*

62. For the respondent, Mr Ogilvie referred to the CAC's submissions, observing:
- There has been no issue with the manner of the respondent's driving
  - There were no passengers
  - 2017 was clearly a bad year for the respondent. This is not offered as an excuse, but her stressful time might have contributed to her bad decisions
  - There is no evidence of a bad driving history.
  - There has been no risk to student and no negative impact for the school. The Principal is keen to have the respondent back as a reliever teacher and supports her return to work once re-registration is resolved.
63. Mr Ogilvie submitted that the respondent has now come to realise the importance of this matter in a way that she had not previously. He said that her realisation of the need to get legal advice, and her attendance in person at the hearing are strong indicators that she takes the matter seriously.
64. Mr Ogilvie submitted these are matters which happened outside the respondent's work as a teacher. He added that the respondent's actions are borne out of stupidity rather than illness.
65. Mr Ogilvie made some comparisons with other cases, where the Tribunal did not deregister the teacher. He noted that in NZTDT 2013-56, the offending was at a much higher level and the respondent had misled the CAC; in NZTDT 2014-55, the teacher had seven previous convictions, there were background causes of stress, and the teacher did not report convictions; and in NZTDT 2013-46 there were four convictions.
66. In response, Ms Feltham submitted that all three were cases where the teachers acknowledged alcoholism and had support in place.

## DECISION

67. We are grateful for the full submissions provided by the CAC. As noted above at paragraph 37, the purpose of the Tribunal exercising its disciplinary powers in respect of a conviction is, of course, not to punish the teacher a second time.<sup>70</sup>
68. Disciplinary proceedings 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>71</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 teaching environment when required.<sup>72</sup>
69. As noted above at paragraph 35, before exercising our disciplinary powers under s 404 of the Education Act (**the Act**), we must be satisfied that the circumstances of the behaviour that resulted in the conviction results adversely on the fitness of the respondent to practise as a teacher.
70. The respondent's submissions were directed at penalty and no issue was taken with the CAC's submission that this behaviour reflects adversely on the respondent's fitness to teach. The respondent accepted that the Education Council views drink driving as a serious matter because we do not want to have negative role models as teachers.
71. The respondent now has four convictions for drink driving. The 1995 conviction is over 20 years old and does not concern us as much as her recent offending. We are satisfied that her three convictions for drink driving between 2015 and 2017 and for driving whilst disqualified in 2017 reflect adversely on her fitness to practise as a teacher. She has repeatedly shown herself unwilling or unable to comply with the law.
72. In considering penalty, whether for EBA convictions or other matters, there is a further factor that the Tribunal considers relevant and that is the contribution the respondent makes to teaching. There may be circumstances in which a teacher's particular skills and experience mean that with appropriate conditions and support, it is considered in the interests of the education community that the person retains registration. In the present

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<sup>70</sup> *Ziderman v General Dental Council* [1976] 1 WLR 330; *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 ; *CAC v Campbell* at [15]; *CAC v White* NZTDT2017/29, 28 November 2017 at [19]; *CAC v Korau* NZTDT2017/17 26 August 2017 at [13].

<sup>71</sup> *CAC v McMillan* at [23] and *CAC v White* at [19]; *CAC v Korau* NZTDT2017/17 26 August 2017 at [13].

<sup>72</sup> *CAC v Bird* NZTDT2017/5, 3 July 2017 at [32].

case, we acknowledge the respondent's work with students with special needs. Not all teachers are suited to this area.

73. In our view the mitigating factors for the respondent are that the respondent has participated fully with the CAC and Tribunal process. We accept that it was not the manner of the respondent's driving which drew her to the attention of the police, but do not find that a neutral rather than a mitigating factor, poor driving being an aggravating factor. We acknowledge the desire to show accountability by attending the hearing in person.
74. However, we are not satisfied that the respondent truly understands the factors that have led to her offending or that she has a real plan to avoid driving during her period of disqualification or under the influence of alcohol.
75. We are surprised that a registered teacher would need to do a MAP course in order to understand the potential impacts of driving while under the influence of alcohol. We would expect any responsible adult to understand the public safety reasons for our driving laws.
76. In our view, one EBA conviction is evidence of very poor judgement. A second EBA conviction raises questions about the teacher's use of alcohol. The respondent has four such convictions, three in the last three years. She has attributed her poor decisions to stress arising from her family circumstances. Her decision to drive to her daughter's in May 2017, when she was disqualified might be attributed to her family demands. Her decision to drink before she drove cannot. We would be surprised if three glasses of wine would produce a reading of nearly four times the legal limit.
77. If the respondent's consumption of alcohol arises from her stress, then it would seem that she is using alcohol to manage her stress. In our mind it seems that she does not have control over when and how much alcohol she consumes. We do not know whether this was the only occasion on which the respondent drove while disqualified from driving. It reflects either a flagrant disregard for the law, or impaired decision-making owing to alcohol consumption. At least four of her five convictions involve the use of alcohol. This indicates to us that alcohol is a problem in her life, but she does not agree with our assessment.
78. If a young man appeared in court three times in three years, accumulating three convictions for drink driving, and one for driving whilst disqualified, many members of

society would think that person was destined for further driving offences, probably had a problem with alcohol, had shown a disregard for the law and posed a risk to society. This is not the sort of person that we expect to be a role model for children and students.

79. Unlike other cases involving drink driving, there was nothing in the respondent's evidence that persuaded us that her attitude has changed as a result of this offending. She has failed to advise the Council of any of her convictions. She cannot elaborate on her plan to avoid driving. If she has any insight into the factors that led to these convictions, it is not evident in her answers to the Tribunal. It is therefore difficult for us to have any confidence that she has commenced rehabilitation and that she will not appear before the Tribunal again. For that reason we have censured her under s 404(1)(b) and cancelled her registration pursuant to s 404(1)(g).

### **Non-publication orders**

80. In a letter dated 4 April 2018, the Principal of the School made an application for name suppression. This was on the grounds that suppression was required to maintain the school's reputation, and publication would cause unfair and unnecessary distress.

81. Section 405(3) provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

*(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*

*(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*

*(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*

*(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

82. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the school, as well as the public interest. If we think it is proper, we may make such an order. There is no onus on the school and the question is

simply whether the circumstances justify an exception to the fundamental principle.<sup>73</sup>

83. We are not persuaded that the interests of the school outweigh the public interest. We do not find that non-publication of any detail of this decision is proper.
84. Although we find that the respondent's conduct reflects adversely on her fitness to teach, we have not seen evidence of direct harm to any student as a result of her conduct. It was reasonable that the school was open to supporting the respondent to continue teaching, but we have decided for the reasons outlined above, that she is not fit to teach at present. We do not consider this finding reflects adversely on the school.

### **Costs**

85. Section 404(2) provides that no cost orders may be made where, as here, the hearing arises out of a report under s 397. Therefore no costs are ordered.



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Theo Baker  
Chair

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<sup>73</sup> *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14]

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).