



Complaint about NZTC's investigation into incidents involving Mr A

Ombudsman's opinion

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Agency:	New Zealand Teachers Council
Ombudsman:	Professor Ron Paterson
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Summary

This case concerns an investigation conducted by the New Zealand Teachers Council ('NZTC') Complaints Assessment Committee ('CAC') into conduct issues raised in complaints made against Mr A. The conduct complained about involved incidents of alleged striking of two

primary school students. I have concluded that the NZTC/CAC acted unreasonably when it conducted its investigation. I have found the NZTC/CAC investigative process to be characterised by unreasonable delays, lack of clarity about process and poor communication.

My investigation was concerned solely with the NZTC/CAC investigative processes and not the CAC's decisions arising from its investigation or the incidents leading to it. I accept that it is not a role of the Ombudsman to second-guess the decisions of a regulatory body on issues of professional standards and discipline.

The NZTC's function under section 139A of the Education Act 1989 is to ensure that children in early childhood services and registered schools are safe. I note that at the time the CAC was investigating the complaints against Mr A, there were only two CAC panels operating, which led to inevitable delays. There are now five CAC panels. I am advised that there are over 100,000 registered teachers in New Zealand and, in the 2012/13 financial year, there were 420 complaints against teachers which required investigation. Some complaints, such as those made against Mr A, raise very serious issues of conduct making the investigative process complex and long.

However, I consider that many of the delays in the CAC's investigation of Mr A could have been avoided and that the NZTC's internal and external communication was poor.

The NZTC accepts the findings and criticisms in this report. It recognises that its processes were inadequate but states that changes have been made to reduce delays and improve communication, record keeping and progress of files. As noted, there are now five CAC panels and also a 'case management' system to monitor progress of investigations. The CAC panels are required to work to timeframe targets. These measures should mitigate the poor practices evident in the CAC's investigation into Mr A's conduct.

Mr A's complaints about delay, poor communication and the NZTC/CAC's failure to address concerns when they arose, are all upheld. One ground of complaint not upheld concerns the alleged misunderstanding about Mr A's previous employment.

Background

1. The NZTC's statutory functions include determining standards for teacher registration, the issuing of practising certificates, the handling of reports of possible serious misconduct by teachers and considering complaints of misconduct (Education Act 1989, ss 139AE(a), (h), (i), 139AM, 139AR). NZTC is required to refer complaints and reports relating to teacher conduct to a CAC for investigation (s 139AS). CACs have wide powers to investigate referred complaints or reports (s 139AT).
2. The background events are essentially agreed. In December 2006 Mr A was the subject of a conduct complaint and in January 2007 the NZTC referred the matter to a CAC to investigate. Another complaint about Mr A's conduct (at a second school) was made to the NZTC and referred to a CAC in July 2008. The conduct complained about involved incidents of alleged striking of two primary school students.

3. It is accepted that the NZTC was required to act promptly and set up a CAC in response to the notification of serious concerns about Mr A's inappropriate behaviour as a teacher of young children. As a result of the notifications and CAC investigations, Mr A's registration was suspended and he signed a voluntary agreement that required him to undergo a risk assessment to determine whether he could safely return to the classroom. The ensuing process was complex and protracted.
4. This Ombudsman investigation concerns the process followed by the NZTC and the CAC from December 2006 to October 2011. The focus of this report is the reasonableness of that process, in particular the delays, the communication with Mr A and the conduct of a panel member at a key CAC meeting with Mr A in August 2011.

The complaint

5. Mr A raised the following concerns:
 - a. The CAC took too long to investigate his case which remained, after a five year period, still unresolved;
 - b. The CAC's standard of communication (lack of clear instructions) was unreasonable;
 - c. The CAC failed to take into account Mr A's concerns about the misunderstanding the CAC had about why he left his previous employment;
 - d. The NZTC failed to respond to Mr A's letter of 25 September 2011; and
 - e. At the meeting on 18 August 2011, the conduct of one of the CAC members, Mr D, was unreasonable and intimidating and "hijacked" the meeting.
6. Mr A wanted the NZTC to apologise unconditionally to him and provide him with *"compensation for stress, anxiety and loss of income caused by CAC's treatment of this case (and) its significant delay in reaching closure"*.

NZTC response to investigation

7. In its report of 20 August 2012, the NZTC commented in detail about the periods of delay identified by the complainant. It accepts there were delays and that generally *"the process took a long time in Mr A's case"*, but submits that the delays reflect *"the thoroughness of the investigation and the significant concerns which the CAC continued to have about the physical safety of students around Mr A"*. However, the NZTC also acknowledges that the CAC is aware of the importance in dealing with complaints in a timely manner and that CAC panels *"now have new goals and procedures in place for the purpose of ensuring the timely progress of cases"*.

8. Some of the reasons for delay identified in the NZTC report include:
 - a. Throughout the entire period the CAC panel, which met only monthly, was under pressure to consider other complaints as well as Mr A's (there were only two CAC panels looking into conduct complaints at that time). On many occasions Mr A's case was "held over" for discussion at another monthly meeting and it took time to obtain members' approval when amendments had to be made to correspondence;
 - b. The CAC's Chair changed during the process;
 - c. In 2009 the CAC was "confuse[d] regarding how to make a referral to the Impairment Committee". The CAC required policy direction from NZTC at one point about how to proceed in this respect. The referral was first discussed in August 2009 but not made until February 2010. NZTC states "We have not been able to ascertain why Mr A's case was delayed until February 2010";
 - d. Files "could stay with the Impairment Committee for long periods";
 - e. The entire CAC membership changed towards the end of the process and new members were not familiar with the case;
 - f. Telephone enquiries made by Mr A were not always recorded in the file and the CAC panel members did not always respond to Mr A in a timely manner. NZTC accepts that "Mr A was entitled to correspondence during this time" (January 2010);
 - g. Administrative staff working on Mr A's case changed during the period, which resulted in further delay while the new case manager became familiar with the case.
9. NZTC states that considerable changes have been made to the way in which "conduct complaints" are assessed and processed, which should "ensure that this will not happen again". Overall, NZTC accepts there were "issues for which we accept responsibility and which we have sought to resolve", but states that these issues were only responsible "in part" for the delays Mr A experienced while having his case considered.

Analysis and findings

10. I have upheld Mr A's complaints about the NZTC's processes. The reasons for my decision are as follows.

Delay

11. Clearly, the CAC process in relation to Mr A was extraordinarily protracted, and caused him understandable stress and frustration. NZTC apologises for the delays but claims that the lengthy process "reflects the thoroughness of the investigation". I note that the CAC

chair, Ms G, told Mr A on 6 August 2013 that while the CAC regretted the delays, *“the reality is that all delays have been as a result of trying to find some way to assess risk and manage a situation where [Mr A’s] past conduct shows ...”*. NZTC submits that Mr A’s case was complex and *“without precedent”*.

12. In my opinion the complexity of Mr A’s case does not excuse the extraordinary delays, which could have been avoided if the CAC’s case management procedures had been of an appropriate standard. The delays reflect poorly on NZTC, the CAC panel members and the legal assessors. The internal correspondence indicates that, on many occasions, the CAC was at a loss as to how to proceed, especially with regard to the assessment criteria it required for Mr A and how/when the case should be referred to the newly established Impairment Committee. It is difficult to understand why the CAC was “confused” about that referral or the role of the new committee and why the CAC had to seek a policy direction from the NZTC. Such organisational processes should have been accessible to the CAC at the outset.
13. It is not credible to claim that the lengthy delays reflect the “thoroughness” of the investigation and complexity of the case. It is the role of the CAC panel members to consider “conduct complaints”. The members should have the skills and support to consider any behaviour/conduct brought to members’ attention.
14. It was unfortunate but predictable that the first CAC convenor/chair and later the entire CAC membership changed during the process. The consequence for Mr A was that he had to deal with an entirely new group of CAC panel members at the crucial August 2011 meeting. It is hardly surprising that Mr A found the meeting stressful and that it exacerbated rather than alleviated his concerns. The meeting is discussed in further detail below.
15. I uphold the first ground of complaint.

Standard of communication

16. There are many instances where the CAC’s communication with Mr A was unreasonable. The NZTC states that *“in terms of timing, the case coordinator generally replied to Mr A promptly”*. Although that may have been true, the responses from NZTC case coordinator Ms C were often nothing more than advice that his concerns had been passed on to the CAC members for response.
17. During the period between October 2010 and March 2011, Mr A emailed or telephoned Ms C every few weeks asking about progress in consideration of the assessment reports that the CAC had received in October 2010. Ms C’s email correspondence to the CAC and NZTC legal counsel Ms B is illustrative of the laxity of the process. Ms C asked the CAC convenor Mr F and Ms B on 13 December 2010, *“Could you please advise me what I may advise Mr A”*. A month later on 14 January 2011, Ms C emailed Ms B asking, *“Could you please advise what I may inform [Mr A] or when he may hear from the CAC”*. Ms C was clearly concerned about her inability to provide Mr A with meaningful answers to his

questions. She told an NZTC advisor Ms E in an email dated 21 January 2011 that she did not want Mr A to think that she was *“obstructing the investigation of his file”*. Ms C notes in that email that Ms B had agreed that the CAC’s letter to Mr A *“must be amended to protect [Ms C] and the Council”*. The case coordinator’s record also reported that Ms B believed *“there is no point in hurrying things through”* (getting CAC members to agree to the format of the letter to Mr A). Given the extensive delays that had already occurred by early 2011, this comment suggests a lack of concern about fairness for the affected practitioner, Mr A.

18. The arrangements regarding the assessments Mr A was required to undertake as part of his Agreement also highlight unsatisfactory and unclear communication from the CAC to Mr A. He was advised on 2 April 2009 that he should find an assessor — although the type of assessor was not specified — and that *“when you think you have found a person who could do this assessment, contact the CAC with the details of that person ... for approval by the CAC”*. Mr A promptly found a counsellor and submitted the name to the case coordinator who, in turn, sought advice from Ms B. She advised the case coordinator on 16 April 2009 that following her enquiries with the Medical Council of New Zealand, Mr A would need to undergo psychological and psychiatric assessments and that these would cost around \$7,000.
19. It is unclear why the legal counsel’s enquiries were not made before Ms C wrote to Mr A on 2 April 2009 telling him to find his own assessor. While it is usual practice for teachers to arrange and pay for their assessments, if the CAC and legal assessor had been clear at the outset as to the type of assessor Mr A was required to find, the later delays in progressing the assessments may well have been avoided.
20. On 17 April 2009, the CAC advised Mr A about the type of assessor suitable for the purpose and asked whether he would be *“interested in pursuing an assessment in that form”*. If he was, *“the CAC [would] make further enquiries regarding how this assessment can be facilitated”*. Mr A was not told how much this would cost. It appeared from the 17 April 2009 letter that the CAC would arrange the assessments, subject to his approval.
21. Mr A was understandably confused by this letter, but he readily agreed to the process proposed — although concerned about the cost (as yet unknown to him). He asked that the assessments be arranged before he was due to travel overseas at the beginning of July 2009.
22. I note that the CAC had earlier been willing to consider a “cheaper alternative option” to the two assessments proposed in the 17 April 2009 and 18 June 2009 letters. The CAC’s meeting minutes of 22 May 2009 indicate that the CAC considered two options for the assessments at that time: Mr A was either to have both psychiatric and psychological assessments or, in the alternative, the CAC would be prepared for Mr A to have a psychiatric assessment *“once a practitioner could be identified by the CAC”*. This seems to have been the “cheaper option” referred to in later correspondence to Mr A although, at the time, he was not aware what the “cheaper option” entailed. The CAC told Mr A on 18 June 2009 that if he “preferred” a cheaper option the CAC would pursue this option, but that this would *“inevitably result in further delays”*.

23. Mr A immediately advised the CAC that he preferred a “cheaper option”.
24. Ten months lapsed before the assessment process was initiated. In part this was due to the CAC’s uncertainty about what sort of assessments were required in this case and (as noted at p 13 of the NZTC report), *“there was confusion regarding how to make a referral to the Impairment Committee”*. NZTC also notes that *“the previous chair of the CAC ceased to be involved in this case. This may have caused further delays.”*
25. However, even by 19 February 2010, the CAC was still in doubt as to how to proceed with the assessments. In a letter of that date Ms H, the CAC convenor, asked Ms C *“to provide guidance about a robust process and appropriate persons who could carry out an assessment in accordance with the process agreed. The CAC would be most grateful for any guidance you can give. Any assessment will have to be carried out at the teachers’ expense.”*
26. Remarkably, almost a year after advising Mr A to find his own assessor, the CAC remained unsure who would be a suitable person to conduct the assessments. Throughout this period Mr A was not kept informed as to what the CAC was considering.
27. I note that the Impairment Committee, which was by then considering this case, concluded at its 4 March 2010 meeting that for its purposes members *“did not feel that a psychiatric assessment that cost \$8000 was appropriate in this case, but rather a simple psychological assessment by somebody who can address the concern whether the behaviour was due to cultural differences, mental issues or personality problems”*. This decision should be noted in relation to comments made by the CAC’s Ms G in later correspondence. This is discussed below.
28. Eventually, between May and July 2010, the psychiatric and psychological assessments were conducted and, along with the Impairment Committee’s report, were sent to the CAC panel in October 2010. However, for some reason they were not able to be considered at the October 2010 meeting and were held over until the November 2010 meeting. Even at that meeting, the CAC was unsure how to proceed on Mr A’s case, noting that it needed a *“policy directive from the Council”* regarding management of the next steps. The CAC was also considering some additional information provided to the NZTC regarding another incident involving Mr A. As noted above, during the period October 2010 to March 2011 Mr A was not informed about the CAC’s consideration of the case.
29. With regard to the assessment process itself, the CAC chair Ms G told Mr A in her 6 August 2013 letter that the reason why *“this matter will continue to ‘drag on’”* was because the ‘tool’ proposed by the CAC *“was not available to you or the CAC”*. I refer to Ms G’s 6 August 2013 letter in which she advised Mr A:

“This matter will continue to ‘drag on’ (to use your words) if you wish to continue to teach until the issue of risk can be resolved. Had you been able to afford a robust risk assessment tool that is used by professional bodies, then the process would have reached a conclusion more quickly by either allowing

you to teach or not. Unfortunately, due to the cost of that process, it was not a tool that was available to you or the CAC.”

30. It is difficult to accept Ms G’s reasoning in light of the following factors:
- a. In February 2010 the case was referred to the Impairment Committee and therefore the Committee would be expected to pay for any assessments it required (Ms B’s memo to the CAC dated 12 May 2009);
 - b. The Impairment Committee had decided in March 2010 there was no need for Mr A to undergo an \$8,000 assessment and that all that was required was a *“simple psychological assessment”* (although a psychiatric report would be conducted in the first instance);
 - c. Psychiatric and psychological assessments were undertaken, the latter at Mr A’s initiative. The Impairment Committee arranged the first assessment and presumably approved the second. It is unclear why these assessments were arranged and approved if they were not satisfactory for the purpose. The CAC has never explained what it meant by a *“robust”* assessment;
 - d. In the alternative, if the assessments completed failed to meet the standard required (or envisaged by the original CAC), the CAC’s convenor Mr F was willing to accept them, noting in a letter to Mr A dated 7 April 2011 that the CAC *“nonetheless recognises that weight should be given to the expert opinion of the Impairment Committee and its opinion given effect to”*.
31. It is unclear why the NZTC now claims that Mr A failed to undertake the assessment first suggested by the CAC in the April/June 2009 correspondence.
32. Overall, I consider that the CAC’s communication with Mr A was woefully inadequate.

Misunderstanding of CAC about why Mr A left his previous employment

33. With regard to the reasons why Mr A left his former position, it seems the CAC noted and explained in a subsequent letter to him dated 30 August 2011 that it was concerned about his ability to cope with stress when in a classroom situation, because stress (irrespective of its source) was the reason he had left his former position. I am satisfied that this ground of Mr A’s complaint has been addressed and resolved, and the ground is not upheld.

Mr A’s concerns about failure to respond

34. By letter dated 6 August 2013, the CAC chair, Ms G, sought to address Mr A’s concerns about the CAC processes. However her letter fails to adequately explain the reasons for the extreme delays – reasons which are clearly identified in NZTC’s report to the Ombudsman. Nor was Mr A advised that NZTC has now made at least nine significant changes to the way in which the CACs will operate in future.

35. Mr A has been asking the CAC since early 2009 why his case was taking so much time to progress. His 7 May 2011 letter indicates that he had still not received a *“viable explanation or justification regarding the extraordinarily long time [the CAC has] taken to arrive at this point. The CAC has only given lame excuses. I feel the lack of communication, unclarity of process and the time CAC has taken is of great concern as this has caused considerable anxiety, distress, loss of income and hopelessness. It has greatly affected me and my family. My doctor and psychologist are also of the same view.”* The CAC did not immediately reply to that letter and this led to further communication between Mr A and NZTC over the following two months. Again a letter from the CAC was “promised”, but instead a meeting was arranged for 18 August 2011, after Mr A had indicated that he would be complaining to the Ombudsman.
36. The CAC’s letter to Mr A following the August meeting raised even more issues for him about the CAC’s handling of his case. This led to him writing to the CAC on 25 September 2011. It has taken the CAC two years to respond (by Ms G’s letter of 6 August 2012). As noted in this opinion, that response fails to adequately address key issues raised by Mr A.

August 2011 meeting

37. Mr A was advised by NZTC case coordinator Ms C on 4 August 2011 that the new CAC would be pleased to have a *“face-to-face”* meeting with Mr A and that *“at short notice time has become available at the forthcoming August meeting of the CAC”*. Mr A was told that the meeting *“will be relatively informal and is for the purpose of addressing matters set out in [Mr A’s 21 July 2011] letter to the Director”*. Mr A had advised that matters he wanted the CAC to consider and respond to were the CAC’s *“unjustified delay”, “poor communication”, “lack of proper guidance”* and so on. Mr A did not raise any concerns about the agreement and terms of condition which he had already signed.
38. Mr A found the meeting of 18 August 2011 very unsatisfactory. He felt intimidated, particularly by CAC panel member Mr D, who sat *“too close”* to him, and that he felt the panel failed to understand his concerns about the delays and its handling of his case. He also felt the CAC did not understand his views about why he had left his former position.
39. I have reviewed a transcript of the August 2011 meeting.
40. With regard to Mr A’s concerns about feeling intimidated at the meeting, particularly as a result of Mr D’s line of questioning, the transcript indicates that Mr D focussed on the behaviour that had led to the CAC investigation, rather than Mr A’s concerns about the CAC’s handling of his case. I note the member’s first comment to Mr A:
- “Could I just remind you. I heard your statement but I just want to remind you, you have been before the CAC because of the actions you took, not us.”*
41. The discussion later was as follows:
- Mr D: “And yet you say you’re a great teacher. Well great teachers don’t do what you did to children.”*

Mr A: "Are we here to discuss this?"

Mr D: "Well you made the statement that you're a great teacher."

Mr A: "Yes, I am a great teacher."

Mr D: "Well great teachers don't do what you did to children."

42. At that point, another panel member intervened and directed the discussion back to the reason for the meeting, which was to discuss Mr A's concerns about the handling of his case.
43. Towards the end of the meeting Mr D advised Mr A:
- "I'm still pretty concerned that you do not seem to realise that you appeared before us because you hurt children. That's clear. We didn't ask you to come here because we wanted you here. You carried out the offences. You are the person that's responsible for them. You don't seem to realise or want to remember that."*
44. In my opinion, it was unreasonable of Mr D to concentrate solely on Mr A's conduct when that had not been the focus of the meeting. Mr A had on several occasions apologised to the CAC for his behaviour and had accepted the outcome of the CAC's investigation and the terms of agreement.
45. The CAC chair, Ms G, also seems to have been confused about the purpose of the August 2011 meeting, telling Mr A in her 6 August 2013 letter that although the meeting had been called "*because of your concerns about the process, the meeting was also for the purpose of considering whether the proposed conditions could be relaxed*". Mr A was never told that a secondary purpose of the meeting was to consider the proposed conditions. It is understandable that Mr A felt "defeated" and distressed when he left the meeting. Ms G also advised Mr A in her 30 August 2011 letter after the meeting: "*It is acknowledged that during the meeting there was a tension arising from a discussion where you were challenged that you appeared to be focusing more on the impact on yourself rather than the impacts of your conduct on students.*" Given that Mr A reasonably understood the purpose of the meeting to have been his opportunity to seek a response from the CAC to his concerns, Ms G's comments were unhelpful and, in my view, unreasonable.
46. I uphold Mr A's complaint that the August 2011 meeting failed to achieve what it set out to achieve (address Mr A's concerns about the CAC's handling of the complaint) and that the panel member's interaction with Mr A was unfair.

Response to September 2011 letter

47. In its response to the Ombudsman, the NZTC advises that it was not until preparation of the report on this investigation that it became apparent the CAC had not responded to Mr A's 25 September 2011 letter, in which he had again complained about the process

and delay and also about the August 2011 meeting. In my opinion it was unreasonable for the CAC not to respond to Mr A's September 2011 letter until prompted as a consequence of my investigation. As noted, the latest response from the CAC still does not address all of Mr A's concerns.

Ombudsman's Opinion

48. Professional regulators such as the NZTC face a difficult balance between protection of the public (and upholding of professional standards) and fairness to individual practitioners (where conduct, competence or other concerns are notified to the regulator). The concerns notified to NZTC about Mr A were serious and demanded prompt action to protect pupils and alert any future employing schools.
49. Clearly this was a complex situation. Once Mr A had entered into an agreement with strict conditions on his teaching practice in March 2009, the CAC was required to ensure that the new Impairment process (under the New Zealand Teachers Council (Impairment Process) Rules 2009) was followed and that Mr A had an appropriate psychological assessment. However, none of these factors excuse the CAC's unreasonable delays, lack of clarity about process and poor communication. Mr A's complaints are upheld in relation to those concerns.
50. I note that the NZTC accepts the findings, criticisms and recommendations in this report.

Recommendations

51. I recommend that:
 - a. The NZTC and the CAC formally apologise to Mr A for the considerable delays during its investigation and for its failure to explain the actual reasons for the delays. An explanation about the NZTC's review of and changes to the CAC's practices should also be provided to Mr A;
 - b. The NZTC consider making an ex gratia payment of \$2,000 to Mr A in light of the unreasonably prolonged and inadequately managed CAC handling of Mr A's case, and in recognition of the avoidable stress he has suffered. The payment suggested in no way relates to any decisions made about Mr A's conduct or his suitability to teach.
52. Having concluded my investigation, I have taken these follow-up actions:
 - a. sent a copy of my final report, naming only the NZTC, to the Minister of Education and the Secretary of Education; and

- b. published my final report, naming only the NZTC, on the Ombudsman website, in light of the educational lessons for professional regulators undertaking CAC investigations.