

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA509/2025
[2026] NZCA 23**

BETWEEN REBECCA TUAMAFILIMALAE
FALEMALI TUPA'I
Appellant

AND THE KING
Respondent

Hearing: 9 February 2026

Court: Palmer, Downs and Harvey JJ

Counsel: J C Harder and N J Wright for Appellant
S M Murphy and A S Karanui for Respondent

Judgment: 17 February 2026 at 4 pm

JUDGMENT OF THE COURT

- A The application to adduce fresh evidence is granted.**
- B The appeal is dismissed.**
-

REASONS OF THE COURT

(Given by Palmer J)

What happened?

[1] Ms Rebecca Tupa'i pleaded guilty to a charge of owning a dog that attacked a person causing serious injury under s 58(a) of the Dog Control Act 1996 (the Act). The offence is punishable by a maximum sentence of three years' imprisonment or a \$20,000 fine, or both, and destruction of the dog. Ms Tupa'i applied for a discharge without conviction. In sentencing her, Judge K G Davenport KC summarised the

offending on 27 October 2023 in New Lynn, Auckland, which caused significant injuries to a 70-year-old woman:¹

[2] The dog was under the care of your son who you have described as being a big young man of 15 (now 17) and obviously a responsible boy. But, unfortunately, Nipsey got away from him that day. He was not able to stop Nipsey from pulling away from him even though he had a lead on. Nipsey went and caused quite a significant injury to the victim who was standing on the pathway, and she suffered an injury that required her to have two nights in hospital to fix it. It was a deep wound, it had stitches, and it looked pretty nasty in the photographs. Because it was an animal bite, she also needed antibiotics and she has a long scar on her arm. She says that she is now afraid of dogs and she gets very frightened of them.

[3] But she does say that you and your son did do a lot for her on that day. You were out with one of your other children. You came back promptly (I know this is hard for you, Mrs Tupai'i) and you did everything that you could to help her. You drove her to hospital. Then I think you took her to North Shore Hospital and you hung around with her until you knew that she was going to have surgery.

[2] Ms Tupa'i subsequently referred Nipsey to Animal Control and the family euthanised Nipsey at home.²

[3] The Judge considered the facts were quite similar to another case, *Solicitor-General v Maipi*, where there was an absence of fault by the person who owned the dog, the starting point was six months' imprisonment, and the end sentence was 400 hours of community work, reparation to the victim and an order for the destruction of the dog.³ Here, the Judge set a starting point of six months' imprisonment, at the lower end of a range of six to nine months, because of Ms Tupa'i's unblemished record.⁴ She adjusted that downwards by 10 per cent for the guilty plea and another 15 per cent for remorse and steps taken to assist the victim.⁵ That resulted in a sentence of 70 hours' community work and a \$500 payment of emotional harm reparation.⁶ In declining the application for discharge without conviction, the Judge:

¹ *R v Tupa'i* [2025] NZDC 18271 [judgment under appeal].

² At [4].

³ At [7], citing *Solicitor-General v Maipi* [2021] NZHC 2434. See [29] and [50].

⁴ At [10].

⁵ At [11].

⁶ At [21].

- (a) considered the offending was at a medium level of gravity because the wound was deep, it required days in hospital and Ms Tupa'i had already had a previous experience of another one of her dogs attacking someone;⁷
- (b) acknowledged that, with Ms Tupa'i's excellent work in the community and as a teacher, she was a model citizen with no previous convictions;⁸ but
- (c) the consequences of conviction did not outweigh the seriousness of the charge because the Judge did not consider Ms Tupa'i's teaching career was likely to be adversely affected by a conviction and while the conviction would have to be disclosed when travelling, it did not reflect adversely on her character.⁹

[4] Ms Tupa'i appeals the refusal to grant a discharge without conviction. She applies to adduce fresh evidence by way of affidavits from herself and her son. Mr Harder, for Ms Tupa'i, submits the further evidence is important context to understand the effect of the conviction on the family and particularly on her son. The Crown opposes the appeal and the application. By a fine margin, we admit and consider the affidavits, due to their potential relevance to the primary focus of the appeal.

Submissions

[5] Mr Harder submits the Judge erred in finding the gravity of the offending was medium and in assessing the severity of the consequences of conviction. The gravity of the offending was relatively low given Ms Tupa'i's actual degree of culpability fell only just short of engaging the defence of total absence of fault and her good character was a mitigating feature of the offending. The previous incident referred to involved Rocky, another of the family's Rottweilers, biting a young person while being walked by Ms Tupa'i's sister on a leash and resulted in diversion and the charge being

⁷ At [12].

⁸ At [13]–[14].

⁹ At [16]–[18].

dismissed. The Judge did not consider the risk of Ms Tupa'i being disqualified from owning a dog under s 25 of the Act, which would lead to the loss of Rocky, now 13 years old, and have consequent effects on the mental health of Ms Tupa'i's responsible teenage son, which is the primary focus of the appeal. Ms Tupa'i also travels out of necessity due to her role with a charitable trust and would need to seek a visa if she has a conviction, meaning she would travel on a separate basis to the children she oversees. And she would have to go through the process of the conviction being considered by the Teaching Council.

[6] Ms Murphy, for the Crown, submits the Judge correctly assessed the gravity of the offending, had due regard to the severity of the injury, the treatment involved, and the degree of fault, which was not totally absent here. She also correctly assessed the consequences of conviction as ordinary and not out of all proportion to the gravity of the offending. None of the sentences reviewed in *Shepherd v Auckland Council* regarding dog attacks resulted in a discharge without conviction.¹⁰

Should Ms Tupa'i be discharged without conviction?

[7] An appeal of a decision about whether to discharge without conviction should be treated as a composite appeal against conviction and sentence.¹¹ Under s 232(2) of the Criminal Procedure Act 2011, we must allow the appeal if satisfied a miscarriage of justice has occurred by virtue of a material error in entering the conviction or in applying s 107 of the Sentencing Act 2002.¹² Otherwise, we must dismiss the appeal. In essence, we need to decide whether we consider the District Court's decision was wrong.¹³

[8] Section 107 of the Sentencing Act requires that the Court must not discharge an offender without conviction "unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence". This involves establishing the gravity of the offending, the consequences of

¹⁰ *Shepherd v Auckland Council* [2017] NZHC 1660.

¹¹ *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [16].

¹² At [12].

¹³ *R v Rajamani* [2007] NZSC 68, [2008] 1 NZLR 723 at [5], as cited in *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [11]. See also *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

conviction and whether the latter are out of all proportion to the former.¹⁴ It remains open to the Court to decline to exercise its discretion to grant a discharge even if that test is satisfied.¹⁵

[9] We do not consider the Judge erred in assessing the gravity of the offending as medium. Ms Tupa'i had previously had the experience of owning a dog which attacked someone, understood the implications, and had arranged for the family to have training in handling their dogs. Yet the dog here, of the same breed, was not muzzled, was walked by a teenager in an urban area with people around and was able to viciously attack a person. Furthermore, the injuries caused were serious, causing a 10 to 15 cm wound where flesh was torn away, keeping the victim in hospital for two days, requiring surgery under a general anaesthetic and leaving her with an abiding fear of dogs. It is to Ms Tupa'i's credit that she and her son provided significant assistance to the victim after the attack and self-reported the dog to Animal Control. But the gravity of the offending was not as minimal as Mr Harder submits. Having regard to Ms Tupa'i's prior knowledge of the risk of an attack and the victim impact, we consider the offending was fairly assessed as being of medium gravity.

[10] As to the discharge without conviction, we do not consider that the consequences of a conviction for Ms Tupa'i's visa-free travel or exposure to the Teaching Council's process for review of her registration are out of proportion to the gravity of the offending, either as individual factors or together with the other effects. We accept Ms Tupa'i may travel overseas in association with her charitable work, although there is no evidence before us of any particular trip in prospect. We agree with the Judge that this sort of conviction is not likely to impact on assessments of Ms Tupa'i's character. There is no evidence that either foreign governments or the Teaching Council will consider it as doing so. In any case, those are their decisions to make. The administrative inconvenience of such processes alone is not a disproportionate effect of a conviction.

¹⁴ R v Hughes, above n 13, at [16]–[17], referring to *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 241–242.

¹⁵ At [10] and [12].

[11] Mr Harder emphasised the effects of Ms Tupa'i's conviction on her teenage son as the primary focus of the appeal, including the further effect on him of her being temporarily disqualified from owning a dog and having to rehome Rocky. But the paragraphs of the affidavits to which he points do not provide evidence of a disproportionate effect of the conviction. In his affidavit, Ms Tupa'i's son is naturally unhappy at his mother's conviction, blames himself, and notes the process has been challenging but mainly for the effect on his mother and the family as a whole. Ms Tupa'i has also clearly been affected by the whole experience and worries for her son. But their supportive resolve as a family to deal with the situation do the whole family credit. And the disqualification occurs by mandatory operation of law. These are difficult and upsetting effects of the conviction, but they are not disproportionate to what happened.

Result

[12] The application to adduce fresh evidence is granted.

[13] The appeal is dismissed.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent