BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023/01

KEI RARO I TE MANA O *Under*	the Education Act 1989 (**the Act**)
I TE TAKE O *In the Matter of*	a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
KO *Between*	**COMPLAINTS ASSESSMENT COMMITTEE** *Kaiwhiu* | *Prosecutor/Referrer*
ME *And*	[redacted] *Kaiurupare* | *Respondent*

TE WHAKATAUNGA Ā TE TARAIPIUNARA

DECISION ON PENALTY, LIABILITY, COSTS. AND NAME SUPPRESSION

Dated 7 February 2024

NOHOANGA: *Hearing*	24 October 2023 on the papers via Teams
TE TARAIPIUNARA:	Ian Murray (Tiamana Tuarua)
The Tribunal	Simon Walker raua ko Louise Arndt (Ngā mema o te Taraipiunara)

NGĀ ROIA ME NGĀ KAIAWHINA:
Representation

E Mok and J Ah Koy for Complaints Assessment Committee
J Martin for the Respondent

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The particulars of the charge are that:

    1. The CAC charges that [redacted] registered teacher, of [redacted] between 14 June 2021 and 17 June 2021 (inclusive):

        a. Made attempts to make a copy of copyrighted videos, knowing that she did not have permission to do so.

    2. The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and any or all of rule 9(1)(g) and/or (k) of the Teaching Council Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020.

2. The CAC contends that the Tribunal should find that this conduct amounts to serious misconduct.

Whakarāpopoto o te whakataunga – Summary of decision

3. We concluded that the charge was established, and the conduct amounted to serious misconduct. We censured the respondent, and annotated the register with the decision for 12 months. We imposed conditions on Ms [redacted] practising certificate requiring her to undergo specified professional development and a condition that the respondent notify any future employer of the decision for two years.

4. We ordered Ms [redacted] to pay 40% of the CAC and Tribunal's costs and also granted her an order prohibiting publication of her name and identifying particulars.

Ko te hātepe ture o tono nei – Procedural History

5. The conduct involved in this case occurred in 2021. The school made the mandatory report to the Teachers Council. The matter was referred to the CAC and a charge was filed on 13 February 2023. A teleconference was convened on 21 July 2023

when the matter was set down as a hearing on the papers on 24 October 2023.

Kōrero Taunaki - Evidence

6. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full below:

> **"Background**
>
> 1. The respondent, [redacted] is a fully registered teacher, with a practising certificate valid until November 2023. She was first registered as a teacher in January 2010.
>
> 2. At all material times, M [redacted] worked as a teacher at [redacted], a co- educational secondary school located in [redacted]. Ms [redacted] left [redacted]
>
> 3. As at the date of this summary of facts, Ms [redacted] is not working in the teaching profession.
>
> **Attempts to make copies of copyrighted videos**
>
> 4. [redacted] was hosting the BANFF Film Festival in June 2021 in its [redacted].
>
> 5. On the evening of Friday 11 June 2021, Ms [redacted] called [redacted], and asked if she could take a copy of the videos played at the film festival for her father who was unwell. [redacted] told Ms [redacted] that she would need to obtain permission first from the film festival organiser. Ms [redacted] said she would bring a drive to copy the videos on Monday 14 June 2021, and offered Mr [redacted] a bottle of wine for copying them.

6. The following day on Saturday 12 June, [redacted] asked the film festival organiser if he had been approached by a [redacted] staff member asking to copy the videos. The organiser advised he had not been approached and told [redacted] that copying the videos was not permitted because they were subject to copyright and there were fees associated with screening them.

7. On the morning of Monday 14 June 2021, Ms [redacted] went to see [redacted] asked Ms [redacted] who she had spoken to about copying the videos. She said she had spoken to the MC of the film festival. [redacted] told Ms [redacted] about his conversation with the film festival organiser, and explained that the videos were not allowed to be copied due to copyright restrictions. Ms [redacted] said that she had brought the wine (that she had earlier offered to [redacted] for letting her copy the videos), and would still give it to [redacted] for his help lighting the previous day's dance assessments.

8. On 16 June 2021, Ms [redacted] attempted to copy three of the videos from the film festival onto her hard drive. The video files failed to upload. Ms [redacted] attempted to copy the video files despite knowing that the videos should not be copied (due to copyright restrictions) and despite knowing that she did not have permission to copy them.

9. Later that day, Ms [redacted] borrowed an external hard drive from [redacted], an Assistant Network Manager at [redacted], and mentioned to him that she was copying the videos from the film festival.

10. During lunchtime, [redacted] observed Ms [redacted] with a hard drive nearby the computers at the rear of the theatre. Later in the

afternoon, Ms [redacted] gave [redacted] the bottle of wine and a thank you card.

11. The following day, 17 June 2021, Ms [redacted] again attempted to copy the video files, this time onto the hard drive borrowed from Mr Sutton. [redacted] noticed a disc drive actively copying files of the videos on a computer. [redacted] stopped the video files from being copied and deleted all the video files from the hard drive. He then spoke to Mr [redacted]. Mr [redacted] told Mr [redacted] about Ms [redacted] borrowing the hard drive the day previously and that she had mentioned copying the videos. [redacted] reported the matter to the Associate Principal, [redacted]

12. Later that day, Ms [redacted] called [redacted] and apologised for attempting to copy the videos that day. She also acknowledged having attempted to copy videos the day before. [redacted] told Ms [redacted] that he had reported the matter to [redacted].

School investigation and mandatory report

13. [redacted] commenced a disciplinary process on 18 June 2021.

14. On 22 June 2021, a preliminary meeting was held with Ms [redacted] and her PPTA representative. At the meeting, Ms [redacted] acknowledged having attempted to copy the video files - first onto her hard drive, and then onto a hard drive borrowed from [redacted]. She said that she had intended to copy the videos for her father, who was going through a difficult time, who was unwell. She acknowledged that her actions were an "error of judgement", and that she had made a bad decision. She offered two apology letters to Mr [redacted] and the Associate Principal.

15. A disciplinary meeting was conducted before the [redacted] Board of Trustees' disciplinary sub-committee on 8 July 2021. Ms [redacted]

reiterated the explanation she had previously provided on 22 June 2021. She further acknowledged that she was aware that she did not have permission to copy the videos but did so anyway. She said she was very disappointed in herself and was concerned about damaging her working relationship with [redacted]. She further said that she wanted to own her mistake and sought an opportunity to rebuild the trust[redacted] had in her and to put things right.

16. Ms [redacted] was provided an opportunity to comment on the preliminary outcome of the disciplinary process. The outcome of BHS's disciplinary process was that Ms [redacted] was issued with a final written warning on 30 July 2021.

17. On 25 November 2021,[redacted], the Principal of[redacted] at the time, submitted a mandatory report to the Council.

18. The Council's Triage Committee referred the matter to a CAC to investigate on 23 December 2021.

Teacher's comments

19. In a written response to the mandatory report, Ms [redacted] representative stated that Ms [redacted] acknowledged her actions around the incident demonstrated poor decision-making. The response noted that Ms [redacted] had been working regularly with a counsellor to develop a better understanding of her actions. The response also included the following personal statement from Ms [redacted]

> I had brought tickets to take my father to the BANFF film festival held at [redacted]. On the night, my father was unwell and could not attend. Whilst watching the film, I thought of how much my father would have enjoyed it

> if I could only share it with him to cheer him up, as he loves all things outdoors. I was very worried about his wellbeing. I was solely focussed on how I could share this brilliant film with my father and did not consider the effect my actions could have on others.
>
> I can see my actions were wrong and feel sad for the people I hurt as a result of my actions. I feel embarrassed and have cried a lot of my mistake, I have remorse for what I did, I have apologized to the people involved and worked hard to rebuild the trust I destroyed.
>
> I have learnt from this painful, hard experience. Today was my farewell at [redacted], and [redacted] (the principal) gave me a bunch of flowers and a nice card saying thank you for my contribution to [redacted] and how proud he is of how I have learnt and grown from the incident that happened earlier in the year. I believe that I am making a living amends for my wrongs earlier in the year and am sad to leave [redacted].

20. In her written response to the investigation report prepared as part of the CAC process, Ms [redacted] reiterated her remorse for her actions, stating she was sad and embarrassed for the hurt she had caused. She commented that she had continued to focus on integrity and honesty in her new role (not a teaching role).

21. In a further written response dated 23 November 2021, Ms [redacted] representative advised that Ms [redacted] had been engaging with [redacted], [redacted] after having been [redacted]

[redacted] Ms [redacted] representative said Ms [redacted] had been in the early stages [redacted] when the incident occurred. She indicated that Ms [redacted] regularly attended [redacted] and had developed self-awareness of when she needed support. She had reflected on the incident and on how to prevent any further incidents from happening.

22. At the CAC meeting, Ms [redacted] accepted the incident. Ms [redacted] attributed her actions to "impulsivity", and expressed remorse. She said she was open to teaching again in the future, as she loved [redacted]

7. We must be satisfied on the balance of probabilities that the CAC has proved the particulars of the charge. In this case, the admissions made by the respondent provide an adequate basis to establish the particulars of the charge. Accordingly, we find that the particulars are established.

Serious misconduct

8. Having found the particulars of the charge established we still need to turn to consider whether the proven behaviour amounts to serious misconduct.

9. Serious misconduct is defined in section 10 of the Act as:

> serious misconduct means conduct by a teacher—
>
> (a) that—
> (i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or
> (ii) reflects adversely on the teacher's fitness to be a teacher; or
> (iii) may bring the teaching profession into disrepute; and
> (b) that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

10. In this case the relevant reporting rules alleged to be engaged:

> (g) acting dishonestly in relation to the teacher's professional role, or committing theft or fraud:
> (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

Ngā Kōrero a te Kōmiti – CAC Submissions

11. The CAC argued that Ms [redacted] conduct satisfied the second criteria for serious misconduct that it reflected adversely on her fitness to be a teacher. Her behaviour was a deliberate and sustained effort to try and copy the videos despite knowing that she did not have permission to do that. Such deliberate dishonesty, it was argued, reflected adversely on her teaching practice.

12. Further, the CAC argued that this behaviour also tends to bring the reputation of the teaching profession into disrepute because reasonable members of the public expect teachers to follow reasonable instructions and abide by the law. As a result, her actions lowered the status of the teaching profession generally.

13. Turning to the reporting rules, the CAC argued that her behaviour was dishonest because she knew she did not have permission to copy the video files but nonetheless proceeded to take steps to try and make copies on more than one occasion. It was only through the intervention of a colleague that the copying was prevented from occurring. It was argued that she had used her position as a teacher at the school where the film festival was being held to try and copy the files.

14. The CAC argued that if the Tribunal did not find serious misconduct, nonetheless the behaviour amounted to misconduct because it clearly reflected adversely on her fitness to be a teacher and viewed in its totality her actions warranted an adverse finding. As a result, the Tribunal was justified in exercising its power under the Act because it was such a serious departure from her professional obligations.

Ngā kōrero a te Kaiurupare – Respondent's submissions.

15. The respondent did not dispute that the conduct amounts to either serious misconduct or misconduct.

Kōrerorero – Discussion

16. While ultimately it is a matter for the Tribunal to decide whether or not conduct amounts to serious misconduct, the concession by the respondent in this case was reasonable and appropriate.

17. We agree that the criteria for serious misconduct has been established. It was a serious error of judgement which clearly undermined the respondent's fitness to be a teacher. Such persistent dishonesty in a school environment is completely unacceptable. While the value of the movies sought to be copied may be relatively low, it's the flagrant disregard for the property rights of others and the lengths the respondent went to so that she could try to achieve her aim that is particularly concerning in this case.

18. Further while not finally deciding the matter, we consider that a reasonable member of the community, aware of all the facts of the case, would probably consider that generally the teaching profession was lowered in the eyes of the public by this kind of persistent dishonest behaviour.

19. Turning to the reporting rules, we have concluded that it was clearly behaviour with an element of dishonesty to it that was directly connected with her teaching practice because the film festival was held on school premises. So, this reporting rule is established.

20. For all of those reasons, we find this conduct amounts to serious misconduct.

Whiu – Penalty

21. Turning to the appropriate penalty, the Tribunal summarised the role of disciplinary proceedings against teachers in *CAC v McMillan*,[1] as:

> *"… to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status*

[1] *CAC v McMillan* NZTDT 2016/52, 23 January 2017, at [23].

of the profession is preserved."

22. Our powers on finding serious misconduct are contained in section 500 of the Act:

(a) any of the things that the Complaints Assessment Committee could have done under section 497(2):
(b) censure the teacher:
(c) impose conditions on the teacher's practising certificate or authority for a specified period:
(d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:
(e) annotate the register or the list of authorised persons in a specified manner:
(f) impose a fine on the teacher not exceeding $3,000:
(g) order that the teacher's registration or authority or practising certificate be cancelled:
(h) require any party to the hearing to pay costs to any other party:
(i) require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing:
(j) direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.

Ngā Kōrero a te Kōmiti – CAC Submissions

23. With regard to penalty, the CAC argues that the appropriate penalty in this case should be:

a. Censure;

b. An order imposing the following conditions on Ms [redacted] practising certificate for a period of 12 months:

i) a requirement that she undergo further professional development in ethical practice;

ii) a requirement that she undergo mentoring with a mentor approved by the Teaching Council, with the mentor to provide quarterly reports to the Teaching Council regarding Ms [redacted] progress and to ensure she is supported in her professional practice going forward; and

iii) a requirement that she notify any current or future employers in the education sector about the Tribunal's decision and provide a copy of the decision.

c. Annotation of the register for a period of 12 months.

24. The CAC referred to similar cases and submitted that these cases supported their proposed penalty.

25. The CAC argued that while her intention may have been to give the videos to her

father, nonetheless she acted with clear dishonest intent and her motivation to help her father does not reduce the seriousness of the considered steps she took to copy the video files knowing she did not have permission to do it. It was not impulsive and rather was a sustained effort to obtain what she wanted. Further she would have been successful if her colleagues had not realised what she was doing.

26. Although she did not take items or funds from the school directly, which is a feature of other cases, she only had access to the videos because of her role at the school who was hosting the film festival. The videos were items subject to copyright law with the potential legal implications for the film festival organiser and the school, had she successfully copied the video files. The CAC argued that the offending was moderately serious.

27. The CAC then referred to two previous incidences of misconduct by Ms [redacted] as personal aggravating features. These both involved elements of dishonesty through recording credits for students when they had not undertaken the activities and providing them with answers to questions on one occasion and on a separate occasion misleading the Deputy Principal in respect to a school trip that she was organising.

28. The CAC noted there were mitigating features in that she immediately accepted responsibility for her conduct and apologised, expressed remorse and took responsibility. She had taken steps through [redacted] She was in the early stages of [redacted] However, the CAC noted the relative lack of causal connection between these issues and the offending.

Ngā kōrero a te Kaiurupare – Respondent's submissions.

29. The respondent acknowledged that her conduct was inappropriate and had similarities with the cases identified by the CAC.

30. She accepted that she was the subject of two previous adverse findings involving aspects of dishonest or unprofessional behaviour, however she noted that she had met all the requirements of the conditions set previously by the Tribunal. Further it was argued that this behaviour occurred before the respondent's engagement with

[redacted] and counselling and at a time when she had [redacted].

31. The respondent argued that there were significant mitigating features in that she self-disclosed the conduct to a colleague and apologised, she took responsibility for her conduct and offered apologies, she engaged with the Teaching Council and has expressed remorse, she is in the [redacted] and was not acting or thinking rationally at the time of her behaviour, but since 2019 she has been in a therapeutic relationship with a trained [redacted] and has been honest during her sessions, has developed self-awareness and regularly attends [redacted]

32. The respondent submits that the following orders are appropriate:

a) censure.

b) conditions on the respondent's practising certificate for a period of 12 months requiring her to:

(i) inform any prospective or current employers in the teaching profession of the Tribunal's decision; and

(ii) undergo rehabilitative conditions as deemed appropriate by the Tribunal.

c) Annotation of the register for a period of 12 months.

Kōrerorero – Discussion

33. We see this as a relatively seriously breach of a teacher's fundamental responsibilities. This was calculated and persistent dishonesty by a teacher with a history of behaving in that way. While the value of the movies is modest, the calculated way she went about trying to copy them knowing she was not entitled to do it aggravates the behaviour. Further we were concerned that she attempted to "bribe" her colleague to try and get buy in by him to what she wanted.

34. Ms [redacted] needs to be aware that she has put her ability to teach at serious risk. While individually each of the incidence of misconduct is relatively minor, but the cumulative effect of her persistent dishonesty is concerning. Further incidence of dishonesty will put her at grave risk of deregistration.

35. Turning to the appropriate penalty in this case, the CAC and the respondent are on similar pages as to the appropriate penalty. We largely agree with the CAC's position. We consider the appropriate penalty is:

(a) Censure;

(b) An order imposing the following conditions on Ms [redacted] practising certificate for a period of 12 months from when she commences her next teaching job:

(i) a requirement that she undergo further professional development in ethical practice;
(ii) a requirement that she undergo mentoring with a mentor approved by the Teaching Council, with the mentor to provide quarterly reports to the Teaching Council regarding [redacted] progress and to ensure she is supported in her professional practice going forward; and
(iii) a requirement that she notify any current or future employers in the education sector about the Tribunal's decision and provide a copy of the decision.

(c) Annotation of the register for a period of 12 months.

36. Accordingly, we make orders to that effect.

Utu Whakaea – Costs

37. The CAC sought a contribution of 40% of its costs under s 500(1)(h). The respondent does not dispute that costs at that level are reasonable.

38. The Tribunal has previously indicated that costs of 40% will ordinarily be appropriate in cases determined on the papers. We see no reason to depart from our usual approach.

39. Therefore, the Tribunal orders the respondent to pay 40% of the CAC's actual and reasonable costs under s 500(1)(h) and of the Tribunal's costs under s 500(1)(i).

40. The CAC's costs were $11,230.70. The 40% contribution to those fees is $4,492.28. The Tribunal's costs are $1,455.00 and the 40% contribution to those fees is $582.00. Accordingly, we order costs against the respondent in those sums.

He Rāhui tuku panui – Non-publication

41. Turning to suppression, section 501(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 the whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides a power to make an order prohibiting publication, This subsection 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.*

42. The respondent seeks suppression of both her name and also of her medical conditions on the grounds that:

    a. the potential harm that would occur to Ms [redacted] therapy and [redacted] and [redacted], including the risk of [redacted].

    b. the real risk of self-harm occurring.

Ngā Kōrero a te Kōmiti – CAC Submissions

43. The CAC responsibly does not strongly oppose suppression of the respondent's name and identifying particulars, and the nature of her medical conditions. They accept that the medical evidence in support of suppression could meet the threshold for the granting of such an order.

Ngā kōrero a te Kaiurupare – Respondent's submissions

44. The respondent sets out the legal principles from the legislation and from the relevant Tribunal decisions. The respondent then outlined the basis on which she

is seeking suppression, which is that she had been subject to a diagnosis of [redacted], as well as a [redacted] She referred to the medical evidence in support of these diagnoses and also pointed towards her positive engagement with counselling and treatment in relation to these conditions.

45. Her submissions noted that she had been admitted into [redacted] and was vulnerable to [redacted] with her [redacted]. Her submissions argued there was a real risk that public exposure would lead to harm to the respondent as a result of her underlying [redacted] issues and the risk of [redacted] would be increased if her name was published. As a result, the respondent argues that her name and identifying particulars should be suppressed.

Te Ture - The Law

46. In deciding if it is proper to make an order prohibiting publication, we must consider the relevant individual interests as well as the public interest.

47. As we noted in *CAC v Finch*,[2] we apply a two-stage approach. The first stage involves an assessment of whether the particular consequence is "likely" to follow. This simply means an "appreciable" or "real" risk. If we are so satisfied, our discretion to forbid publication is engaged and we must determine whether it is proper for the presumption in favour of open justice to give way to the personal circumstances on which suppression is sought.

48. There is no onus on the applicant and the question is simply whether the circumstances justify an exception to the fundamental principle.[3] In essence we must strike a balance between the open justice considerations and the interests of the party who seeks suppression.[4]

Kōrerorero – Discussion

49. We will deal with the issue of name suppression relatively succinctly because of the responsible position taken by the CAC and the strong evidence in support of suppression.

50. We agree that there is both a risk of harm to her as a result of the fragile state of

[2] *CAC v Finch* NZTDT 2016/11
[3] *ASB Bank Ltd v AB* [2010] 3 NZLR 427 (HC) at [14]
[4] *Hart v Standards Committee (No. 1) of the New Zealand Law Society* [2012] NZSC4 at [3]

her [redacted] and also a real risk of [redacted] into [redacted] We consider that the evidence is sufficient to demonstrate a potential causative link between publication of her name and these risks. As a result, we consider that this is an appropriate case to order non-publication so that it is proper for us to make such an order.

Ian Murray
Deputy Chair