

**PERMANENT NON-PUBLICATION
ORDERS at [90]**

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-21

RARO TE MANA O TE
UNDER THE

the Education and Training Act 2020
(**the Act**)

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

RATILAL ANOP
(Authorisation 263788)

Kaiurupare / Respondent

Hearing:
Counsel:

19-21 March 2024, AVL (Teams)
H Steele, Meredith Connell for the CAC
J. Brown, NZEI for the Respondent

DECISION| WHAKATAUNGA

LIABILITY, PENALTY AND NON-PUBLICATION

1 MAY 2024

Tribunal:

C Garvey, (Deputy Chair), Rose McInerney, Lynette Evans
(Members)

Introduction| Whakatakinga

- [1] Mr Ratilal Anop (the respondent) is a provisionally registered teacher. The notice of referral alleges that he used unreasonable force against a learner (Student X) on 26 November 2020 while employed at Ferguson Intermediate; and that he interacted or communicated in an inappropriate manner with his colleagues and family members of two of his colleagues.
- [2] The respondent denied any physical contact with Student X. He did not deny the other conduct outlined in the charge.
- [3] The hearing took place on 19, 20 and 21 March 2024. At the conclusion of the evidence, the Tribunal gave an indication of our liability findings to assist the parties with penalty submissions. The parties filed written submissions by 22 April 2024, and the Tribunal determined penalty on the papers.

The Charge

- [4] Mr Govender, the Principal of Ferguson Intermediate lodged a mandatory report about the respondent dated 10 February 2021. This was referred to a Complaints Assessment Committee (CAC), and following investigation a Notice of Referral (the charge) was laid. The CAC sought leave to amend the charge in February 2024, necessary because of the absence of evidence from two key witnesses, former students of the respondent. The amendment was made by consent on 26 February 2024.
- [5] The charge relies on s 497(4) and s 497(5) of the Education and Training Act 2020 (the Act) and reads as follows:

Section 497(5) Referral-Serious Misconduct

1. Pursuant to section 497(5) of the Act, the CAC charges that RATILAL ANOP has engaged in serious misconduct and/or misconduct otherwise entitling the Disciplinary Tribunal to exercise its powers.

Particulars of the Charge

2. The CAC charges that RATILAL ANOP, registered teacher, of AUCKLAND engaged in inappropriate conduct during a disciplinary investigation when he:

- a. On occasions between November 2020 and February 2021, engaged in inappropriate interactions and/or communications towards David Law by:
 - i. Repetitively phoning David Law's personal cell phone on several occasions;
 - ii. Going to David Law's home address and parking outside, honking his horn and shouting Mr Law's name on at least one Saturday morning and one Sunday;
 - iii. Trying via telephone and in person to convince David Law to amend or recant his statement given to Ferguson Intermediate in respect of an alleged incident involving Mr Anop and a student;
 - b. On an occasion between November 2020 and February 2021 engaged in inappropriate telephone communications with Andrew Law;
 - c. Engaged in inappropriate email communications with Anne Govender on 21 May 2021;
 - d. Engaged in inappropriate email communications with Banapa Avatea on 15 and 19 April 2021;
 - e. Sent an inappropriate all staff email on 21 May 2021.
3. The conduct alleged in paragraph 2, and its subparagraphs, separately or cumulatively, amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and rule 9(1)(k) of the Teaching Council Rules 2016; or, alternatively, amounts to misconduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020.

Section 497(4) – Conduct entitling the Disciplinary Tribunal to exercise its powers

4. Pursuant to section 497(4) of the Act, the CAC has resolved to refer the allegation at paragraph 5 to the Disciplinary Tribunal on the basis that the Disciplinary Tribunal is the most appropriate decision-making body to make a factual finding as to whether the allegation occurred as alleged on the balance of probabilities.
5. It is alleged that on 26 November 2020, at Ferguson Intermediate School, RATILAL ANOP used unreasonable force on a learner [REDACTED]

6. If the Disciplinary Tribunal determines that the allegation outlined at paragraph 5 occurred as alleged, the CAC considers that such conduct would amount to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and rules 9(1)(a) and/or (k) of the Teaching Council Rules 2016; or, alternatively, would amount to misconduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act.

The Witnesses

[6] The CAC filed briefs of evidence from the following witnesses:

- (a) Tyra Basilicata, an investigator for the Teaching Council who took over the CAC investigation in July 2022. Ms Basilicata produced documents from the CAC file including the correspondence on which particulars 2(c), (d) and (e) rely.
- (b) Sathasivan (Ronnie) Govender, Principal at Ferguson Intermediate during the relevant period, and currently.
- (c) David Law, senior teacher and team leader at Ferguson Intermediate during the relevant period, and currently.
- (d) Andrew Law, brother of David Law. Mr Law's brief was produced by consent as he was not required for cross-examination.

[7] The respondent gave evidence himself and called no other witnesses.

Exclusion of Hearsay Evidence

[8] Both parties raised objections to hearsay evidence:

- (a) The respondent objected to:
 - (i) transcript, audio and video of an interview between Student X and a Teaching Council investigator, in or about August 2021.
 - (ii) notes of an interview between Student X and an investigator appointed by the school, in December 2020.
- (b) The CAC objected to:
 - (i) emails/extracts of emails from two former students of the respondent.
 - (ii) notes made by Mr Govender of a meeting with Student X on 1 December 2020.

[9] The hearsay objections were dealt with at a pre-hearing conference. A ruling

was issued on 13 March 2024 and the grounds for that ruling are not repeated here. The hearsay evidence of Student X and the student emails are excluded. Mr Govender's notes are admissible.

Discussion – Liability| Ngā Kōreroero Mo Ngā Kawenga

Particular 5

- [10] It is logical to start with the allegation of unreasonable force against a learner.¹
- [11] The CAC relied squarely on the evidence of David Law. Mr Law has around 30 years' teaching experience, with approximately seven years at Ferguson Intermediate. In 2020 he led a syndicate of four classes, including the respondent's class. Mr Law described a collegial relationship with the respondent. He mentored him in an informal support and guidance programme in latter 2020, which he acknowledged was challenging. From September 2020 Mr Law's classroom shared a wall with the classroom the respondent taught in².
- [12] Mr Law was aware of the respondent's difficulties in managing the behaviour of Student X and said there was a discussion about moving him to another classroom. There was no formal behaviour management plan for Student X and no regular additional support provided in the classroom.
- [13] Mr Law could not recall receiving restraint training prior to November 2020 but said he had "*possibly*" received this after the incident. He could not identify any specific school policies around the use of force or restraint. Mr Law said that on the morning of 26 November 2020 a group of the respondent's students asked him to go to their classroom. He had also heard loud noise through the classroom wall. Mr Law stated:

[2.3] Then I went to Room 10. When I arrived, there were lots of children by the door. I saw Mr Anop in the middle of the room physically grappling with ■. It looked like he was trying to force ■ to leave class. I had not seen what had taken place directly before this. The grappling lasted for about ten seconds. At one stage, Mr Anop had both of his arms around ■ torso and had lifted him off the ground.

¹ Particular 4 – the CAC resolved to refer the allegation at paragraph 5 of the charge to the Tribunal "*on the basis that the Disciplinary Tribunal is the most appropriate decision making body to make a factual finding as to whether the allegation occurred as alleged on the balance of probabilities.*" The CAC could not reach a conclusion despite having Student X's interview.

² The respondent was initially based in a science classroom and moved to Rm 10 next to Mr Law in Rm 9 in about September 2020.

One of his hands was just below the knee and the other was round his waist. His grip was tight, as ■■■ arms were thrashing round, reaching up. It looked like ■■■ was trying to hit him. ■■■ was diagonal to the ground (about 60 degrees), his head was about 20 to 30 centimetres off the ground, and his back was against Mr Anop's front. During an interview with two Teaching Council investigators...on 3 August 2021, I drew a rough diagram of the positions ■■■ and Mr Anop were in, and the layout of the classroom at the time of the incident, a copy of which is attached to this statement as DL-1.³

[14] Mr Law described Student X hitting his temple on a table leg and chair "*hard enough to make me concerned*" and stated:

[2.4] ...While this was happening, Mr Anop was shouting at the top of his voice at ■■■ to get out, and ■■■ was swearing back and threatening to "smash" Mr Anop. ■■■ was furious. Mr Anop also looked very angry, he was very red in the face, and I could instantly tell he was not coping. Other students from the class were there, watching everything unfold. They looked scared.⁴

[15] Under cross-examination, Mr Law said students had also come from other classes. He said there were "*screaming, yelling, crying kids in the class.*"

[16] Mr Law said that he did not witness how Student X came to being held in a downwards, diagonal position but was adamant that this is what he observed. Mr Law drew a diagram for the CAC investigator in August 2021 which depicts (as stick figures) the respondent standing upright and the student being held around the torso, with his head down and 30cm from the floor, and his legs up near Mr Anop's shoulder height⁵, which he said lasted for around ten seconds.

[17] Mr Law described Student X as "*smaller than most children in the class*". He declined to estimate the student's height or weight but rejected the respondent's description of him as "*solidly built*".⁶

[18] Mr Law stated that he assisted Student X to his feet, and told him to "*go, go, go*" to his classroom to calm down while he "*stayed to settle things down in room 10*". He said that Student X did go to his classroom and was calmly watching a screen when he returned. He later discovered the student had wrecked an intercom unit. Mr Law did not know what the respondent did after

³ Brief of evidence of David Law, 30 October 2023 at [2.3].

⁴ n3 at [2.4].

⁵ n3, exhibit DL-1.

⁶ Brief of Evidence Ratilal Anop dated 4 March 2024 at [10].

the incident, as he did not check on him.

- [19] Mr Law said he was unable to speak to Mr Govender on 26 November and he did not text or call his mobile phone. Mr Law was adamant that he could only speak to Mr Govender, so he did not approach another senior member of staff.
- [20] Mr Law did not contact Student X's caregivers about the incident or make a report in the school's PB4L⁷ reporting system, or in Pastoral edge. He acknowledged this system was in place and contained other reports about Student X⁸. He did not check Student X for injuries or ensure that someone else did.
- [21] On the afternoon of Friday 27 November Mr Law spoke to Mr Govender. They then met on Tuesday 1 December to discuss the incident and Mr Law wrote a statement at Mr Govender's request. His statement includes this explanation:

After morning tea I was asked by several students to help Mr Anop with a few students who were misbehaving.

When I entered Room 10 I saw Mr Anop physically 'grappling' ■ as he was trying to force him to leave the class.

This went on for just over ten seconds and at one stage he had both arms around ■ torso and had lifted him off the ground. ■ position was diagonal with his head about 30cm off the ground.

Mr Anop was shouting "Get out of my Room!" and ■ was shouting "Let me fucking go or I'll smash you!"

I helped ■ to his feet and he was still swearing at Mr Anop.

I then told him if he calms down he can come to Rm 9. Mr Anop shouted that he wants ■ sent home. I then took ■ to Rm 9 where it took him just a couple of minutes to settle down.

- [22] Mr Law was asked by Govender to attend a meeting on 2 December 2020 with the respondent. Mr Law recalled that Mr Govender referred to health and safety matters but that they did not discuss the details of the allegation made. Mr Law said he also spoke with the respondent by phone and encouraged him to

⁷ PB4L is Positive Behaviour for Learning.

⁸ Pastoral edge is an electronic system in which a school can record a problem, support or positive report about a student.

explain what had happened:

After a few phone calls, he started denying that anything had happened, and said “I did not touch that boy”. I would respond that he had, and he needed to explain it.⁹

[23] Mr Govender was the CAC’s second witness. He has been employed at Ferguson Intermediate for 26 years, including nearly six years as Principal. At the relevant time the school was supported by a Limited Statutory Manager (LSM) whom Mr Govender relied on for advice to manage the allegation.

[24] Mr Govender acknowledged there was a dispute whether the respondent was employed in a fixed term or permanent position. He said the respondent was reluctant to participate in an informal support and guidance programme and refused to meet with him for mentoring. Mr Govender considered that the respondent did not meet some of the Standards for the Teaching Profession. These matters are not directly relevant to Particular 5 but are included because the respondent ascribes malicious motivation to Mr Govender, and the employment issues provide the context for this.

[25] Mr Govender estimated that Student X weighed around 50 kilograms. With regard to the alleged incident, he states that on 27 November 2020 Mr Law told him:

... that he had seen Mr Anop pick up a student, ██████████, during class the previous day, and that he ██████ had been “horizontal off the floor.”

[26] Mr Govender obtained a written account from Mr Law and contacted the LSM and the New Zealand School Trustees Association, following which he arranged an external investigation by Evaluation Associates. Mr Govender met with Student X on 1 December 2020 and made handwritten notes¹⁰ and a typed summary¹¹ both of which include the following:

When Mr Law gave me his written report I called ██████ in[.] He ██████ said that on Thursday 26/11/20 [h]e was not listening and he was walking around swearing at the teacher Mr Anop grabbed me by the waist and my head was sideways and he said “█████████ throw him out”[.] ██████████ picked me up and pushed me out of the door – that’s when I became cheeky as[.]

⁹ n3 at [3.1].

¹⁰ Bundle p 201

¹¹ p202

I went to Mr Law's class and I told him (Mr Law).

- [27] Under cross-examination Mr Govender acknowledged that these notes were not a verbatim transcription of Student X's words. He could not recall speaking with Student X's parents but said he had been to their home on "*numerous occasions*" previously. He said that the LSM may have made a report to the Ministry of Education about the alleged use of force (Mr Govender did not). There was no evidence of any such report, or of a whānau meeting.
- [28] Mr Govender did not explore the differences between the accounts he was given, for example another student taking Student X out of class, and Student X going to find Mr Law. He said the situation was "*very stressful*" for him and he "*just wanted to hand it over to the Board.*" He agreed that when he met with the respondent, he said no more than he had "*touched* [REDACTED]. The investigation by Evaluation Associates took place over one day within about one week of the allegation being made. Only Student X and another student, [REDACTED], were interviewed.
- [29] The respondent handed a bundle of documents outlining his personal grievance to the Board Chair on 30 November 2020. Mr Govender said he was made aware of this at a Board of Trustees meeting on 16 December 2020, and denied the respondent's allegation that the personal grievance was the impetus for his investigation.
- [30] Under cross-examination, Mr Govender was vague about whether any professional development was provided to the respondent in behaviour management or the use of restraint. Asked about challenges with the respondent, he said his teaching practice was "*not poor but needed support*" and that he was "*not able to manage challenging children.*" Mr Govender agreed there were issues and said "*Yes it would have been easier for the students and for his colleagues*" if the respondent was not at the school.
- [31] Mr Govender confirmed that no complaints were received about the alleged incident from Student X's parents, or any other students or members of the school community.
- [32] Ms Basilicata produced key documentation relating to the CAC's investigation including that which supports particulars 2(b) to (e). She advised that the respondent first gained registration in August 2006, and had his registration

cancelled by the Tribunal in 2011; he then re-registered in 2018. Ms Basilicata discussed the Teaching Council's actions upon receiving the Mandatory Report, the CAC investigation, and her efforts to locate Student X to obtain a witness statement. She confirmed Student X's date of birth as [REDACTED], meaning he was [REDACTED] in November 2020.

- [33] The CAC sought leave for Ms Basilicata to play brief clips of the video interview between Student X and a Teaching Council investigator, recorded over Zoom. Counsel for the respondent objected on the basis that the clips did not allow a relative assessment of the student's size. The Tribunal acknowledged this shortcoming but considered it useful to see Student X; we directed that the video be played on mute and avoid showing any physical actions by Student X other than rising towards a standing position.¹²
- [34] Ms Basilicata explained that she undertook multiple enquiries to obtain a witness statement from Student X but was unable to contact him. She also explained that she requested telephone records from David Law to identify the contact by Mr Anop, but he declined to recover these.¹³
- [35] Andrew Law's brief was produced by consent and outlines the respondent's singular telephone contact with him on a date between November 2020 and February 2021. We discuss this below in relation to particular 2(b).
- [36] Mr Anop provided a written brief addressing particular 5 and his conduct towards David Law as alleged in particulars 2(a)(i), (ii) and (iii). He addressed the other particulars of the charge orally.
- [37] The respondent graduated from the University of Auckland and taught with a tertiary provider before holding several short-term secondary school teaching roles. He explained that the cancellation of his registration in 2011 related to the improper receipt of social welfare assistance. He re-registered in May 2018 and was appointed to Ferguson Intermediate in December 2018, where he said there was a "*dispute about whether my job was fixed term or permanent. My view was that it was permanent. This issue became a source of conflict.*"

¹² Two clips were shown on mute, being the portions of the video from 1 minute 20 seconds to 1 minute 55, with the student seated and Mr Govender entering the shot and sitting down next to the student. The second clip is 11 mins to 11minutes and 3 seconds, showing the student rising to stand.

¹³ Brief of Evidence Tyra Basilicata 19 December 2023 at [6.1].

[38] The respondent received no professional development in student behaviour management, or the use of restraint. He said he was advised by Mr Govender to never intervene in a fight between students.

[39] The respondent denied any physical contact or verbal altercation with Student X on 26 November 2020. He described the events on that morning as follows:

1. ██████ arrived late to class after the first bell rang at 8.50am. I asked ██████ as to the reason why he was late. ██████, as usual made some silly remarks and became cheeky. This is how he behaved daily.
2. Then an argument arose between ██████ and ██████. ██████ started punching ██████. I did not become directly involved in this argument. I was far away from ██████ as I was separated by two rows of desks. ██████ then ran out of class. He was crying at the time. ██████ saw him go past the window on the way to David's class. She asked me if she could follow him, but I told her not to as he was still agitated. From previous experience when ██████ has been upset, he has left the class, walked around the school for a while, calmed himself and returned when he is ready, so I was not concerned about him. Given he was heading towards David's class I was not at all concerned as I knew he would be safe if he went there. I do not remember exactly when he returned to class on that day.
3. David Law was not in my class that morning.¹⁴

[40] The respondent further challenged Mr Law's evidence by stating that he could not have come into the classroom because he kept the door locked, and that the altercation could not have occurred where Mr Law described because of the placement of desks and chairs.

[41] The respondent said that physical fights were relatively common in the school, and he never intervened based on Mr Govender's advice. He emphasised his modest height and slim build, being 5' 6" and approximately 60kgs. He described the student as "*about five foot high and solidly built*" and stated:

I could not have physically picked up ██████ if I wanted to, let alone as David [Law] described.¹⁵

[42] The respondent did not call for assistance, despite his evidence that on other occasions he contacted management and removed Student X from his class.

¹⁴ Brief of Evidence Ratilal Anop 4 March 2024 at [1]–[3].

¹⁵ Brief of evidence of Ratilala Anop at [10].

He knew that incidents were to be recorded in Pastoral edge but did not make an entry. He was unsure if Student X returned to his classroom that day, and did not look for him, ascertain if he had suffered any injuries, or contact his parents. The respondent denied being frustrated or angry with Student X but acknowledged that he “*probably raised [his] voice*”.

- [43] The respondent told the Tribunal that he believes the allegation that he used force was manufactured by Mr Govender in response to his personal grievance.¹⁶ While much of the content is not relevant to our determination, the personal grievance includes a chronology and the final entries dated 26 and 27 November 2020 give some insight into the respondent’s state of mind:

35. Thursday 26 November 2020 – Ronnie sends AMA teaching assistant to deliver a letter to me today at about 3pm. Thus (sic) is disgusting by Ronnie! Targeting, Unprofessional, Unbecoming of a principal, Disrespectful. Bringing teaching into disrepute! Getting pretty boring by a Professional principal to treat a fellow professional like.....Would you like to be treated like this on a continuous basis? I do not think so. However, in Ronnie’s eyes it is OK to belittle a Teacher like this for a long time.

36. Friday 27 November 2020 – Staff meeting Ronnie addressed the issue of misbehaving students, amongst other them were [REDACTED] and [REDACTED] from my class. During the first block “**[REDACTED] jumped through the window. Started running around the class. I told him to stop, [REDACTED] said to me “FXXX’ You old man. You have grey hair. Showed me the middle finger.”** Called Office Mr Govender sent AMA to take [REDACTED] and he refused to go. Called Ms Petone who said sent [REDACTED] to me, Informed my Team Leader David about [REDACTED]. This is the LIMIT!!! Where is our school value of RESPECT!! Mr. Govender spoke about the few boys who are causing issues!! Does Ronnie not have a plan to deal with these students who are continually abuse us teachers? Then Ronnie says it is the teacher’s problem? How can it be?? My health, wellbeing and safety is compromised as Ronnie has not dealt with [REDACTED] from the beginning of the year. [REDACTED] always gets away with bad behavior as Ronnie looks the other way. [REDACTED] sits with Ronnie and gets rewarded, while the teachers have to deal with bad, rude, disrespectful and abusive students! (emphasis as in the original).

¹⁶ This is consistent with Mr Anop’s comments to the Teaching Council alleging Mr Govender is acting in bad faith and “*starting an investigation of a fabricated and dishonest lie against me.*” Exhibit TB-2.

Particulars 2 (a) to (e)

- [44] The respondent accepts that he made several telephone calls to David Law, one call to Andrew Law, and sent emails to his colleagues, Anne Govender and Banapa Avatea as particularised. He disputes the number of calls to David Law, but the fact and the essential purpose of these, being to have Mr Law retract his statement, was not contested.
- [45] On 24 February 2021, Mr Law emailed a Deputy Principal at Ferguson Intermediate to outline concerns with the respondent's conduct, namely that he:
- (a) phoned his mobile "*over seventeen times in a week*".
 - (b) turned up at his house uninvited on a Saturday.
 - (c) went to his house on a Sunday and demanded that Mr Law recant his statement, insisting that Mr Law knew it was wrong.
 - (d) phoned Mr Law's brother without his permission or knowledge and attempted to persuade him to have Mr Law withdraw his statement.
- [46] Mr Law described the respondent sitting in his car outside Mr Law's house twice and sounding his horn repeatedly while calling Mr Law's name. On the first occasion, a Saturday, Mr Law did not show himself to be home and the respondent left. The following day the respondent repeated this behaviour, and Mr Law let him inside his house. He said the respondent was anxious and pacing and demanded that Mr Law recant his statement. The respondent also disclosed that he had been in contact with Mr Law's family, which Mr Law found to be "*completely unacceptable*."
- [47] The respondent did not deny sounding his horn or calling out from his car on a Saturday but denied doing this the following day, and said he was invited by Mr Law to his home. He agreed that they discussed Mr Law's statement and that he denied being forced to write it.
- [48] The respondent also accepted that he telephoned Andrew Law to discuss his concerns about David Law's statement. He had neither a professional nor personal relationship with Andrew Law.
- [49] On or about 15 April 2021, the respondent emailed Mr Avatea, the Principal of a neighbouring primary school and leader of a cluster of schools including Ferguson Intermediate¹⁷. The email refers to his personal grievance and requests Mr Avatea to contact him, writing:

¹⁷ Exhibit TB-13, bundle p156, email subject "kind assistance needed."

Please I am reaching out to you to make sure truth and honesty are the deciding factor and not lies and dishonesty.

[50] On 19 April 2021 the respondent again emailed Mr Avatea, attaching a copy of his personal grievance and asking him to resolve the matter with the Chair of the Board of Ferguson Intermediate.¹⁸ The respondent accepted that Mr Avatea was not involved in his employment matters, but denied that he sent the emails to embarrass or discredit Mr Govender.

[51] On 21 May 2021 the respondent emailed Mr Govender's wife at her workplace (also a school) with the subject line "*Bullying by Ronnie*", writing:

My name is Ratilal Anop and Ronnie used lies and dishonesty to have my full time permanent position terminated.

Karma will catch up with Ronnie.

Today is anti bullying day and Ronnie has been bullying me since September 2019 until 30 November 2020 when I handed a Personal grievance for bullying to Chairwoman Tofa.

[52] The respondent denied that the words "*Karma will catch up with Ronnie*" was intended as a threat towards Mr Govender.

[53] The respondent also sent an all-staff email on 21 May to teaching and support staff at Ferguson Intermediate with the subject line "*Bullying by Tumuaiki*". He did not write any further content but attached a tweet from the Mental Health Foundation about Pink Shirt Day¹⁹ and said he sent this because it was anti-bullying day and "*everyone sends stuff.*" He denied that the email was intended to embarrass or discredit Mr Govender.

[54] In relation to this series of events, the respondent told the Tribunal that he is "sorry", it is "*not going to happen again*" and he has "*learned my lesson.*"

Legal Principles and Liability Findings

[55] Particular 2 and its sub-particulars are referred under s 497(5) which sets out that the CAC must refer any matter if it considers that either of the following powers is likely to be considered, namely:

¹⁸ Exhibit TB-13, bundle p 157, email subject "Konichiwa Bliksem nov.pdf".

¹⁹ Bundle p161.

- (a) the power to suspend a teacher’s practising certificate or authority; or
- (b) the power to cancel a teacher’s registration, authority or practising certificate.

[56] Particulars 4 and 5 rely on s 497(4) which provides that the CAC may at any time refer a matter to the Tribunal for a hearing.

[57] Section 10 of the Act defines “*serious misconduct*” and requires that one of three limbs be met, as well as a breach of r 9 of the Teaching Council Rules 2016. This dual requirement is frequently referred to as the conjunctive test. In the alternative, conduct which ‘otherwise entitles the Tribunal to exercise its powers’ is conduct which meets one or more of the three limbs but does not also constitute a breach of r 9.

[58] Section 10 refers to:

- (a) conduct that affects or is likely to adversely affect one or more students.
- (b) conduct that reflects adversely on the teacher’s fitness to practise as a teacher.
- (c) an act or omission which brings or is likely to bring the profession into disrepute.

[59] The use of physical force for correction or punishment is prohibited under s 98 of the Act. Guidelines issued under s 101 outline safe management of student behaviour, and do not support the use of physical contact to compel, punish or correct ākongā.²⁰

[60] Guidance for professional conduct is also contained in the Code of Professional Responsibility issued by the Ministry of Education, and related guidelines which provide examples of conduct which either meets or does not meet those expectations. The Code expects teachers to behave in a professional manner towards learners, colleagues and the community, to ensure they will:

- (a) maintain public trust and confidence in the teaching profession.
- (b) work in the best interests of learners.
- (c) show commitment to families and whānau.
- (d) show a commitment to society.

²⁰ Ministry of Education – Physical Restraint Guidelines, p17.

[61] More specifically, teachers are required to:

- (a) engage in professional, respectful and collaborative relationships with colleagues: cl 1.2.
- (b) demonstrate a high standard of professional behaviour and integrity: cl 1.3.
- (c) contribute to a professional culture that supports and upholds this Code: cl 1.5.
- (d) engage in relationships with families and whānau that are professional and respectful: cl 3.1.

[62] Credibility is a significant issue in this case. We have considered the evidence including the internal and external consistency of statements, and the manner, demeanour and self-interest of the witnesses. Our role was made difficult in the absence of Student X as a witness, the lack of formal reporting of the alleged incident, and lack of interviews with other students.

[63] Turning to particular 5, counsel for the CAC submitted:

The issue for determination is, principally, whether or not the act(s) complained of occurred. [This] necessarily requires a sequential enquiry:

- (a) Did it happen? Principally in relation to Allegation 1. No room for mistake-lying or it happened.

...

[64] We were very concerned about the alleged events on 26 November 2020 and the response by both Mr Anop and the school. However, for the reasons set out below, we have not found particular 5 is proved to the requisite standard. Mr Law and the respondent presented stark alternative versions of events: either the respondent picked up Student X and held him, thrashing, head towards the ground in front of an audience of screaming and crying students, or he did not touch the student at all.

[65] We share Ms Brown's concern emphasised in closing submissions that it is implausible that Student X was held, for about ten seconds, rotated to be facing head down while thrashing his limbs and hitting his head on furniture. We could not reconcile the account of Mr Law with the notes made by Mr Govender in reliance on Student X's account. Further, the lack of follow up of potential injuries, lack of formal reporting within PB4L or Pastoral edge, and the failure to contact Student X's caregivers do not sit well with the seriousness of the event

described.

[66] As to particulars 2 (a) to (e), we have no hesitation in finding these proved and to reflect adversely on the respondent's fitness. As indicated to the parties we find:

- (a) Particular 2(a) (i), (ii) and (iii): separately each amount to misconduct.
- (b) Particular 2(b): separately amounts to serious misconduct.
- (c) Particular 2(c): separately amounts to serious misconduct.
- (d) Particular 2(d): separately amounts to serious misconduct.
- (e) Particular 2(e): separately amounts to misconduct.

[67] Both parties submitted that the way we view this conduct is dependent on our finding on particular 5. However, we consider that regardless of the respondent's motivation, the tone and content of his communications is highly unprofessional.

[68] That the respondent contacted Andrew Law was in breach of professional boundaries. He did not have David Law's consent and nor was Andrew Law in any way connected to the matters at hand. The emails sent by the respondent were also unprofessional. It is an aggravating feature that the respondent copied his personal grievance to Mr Avatea. The potential to cause harm to Mr Govender's reputation ought to have been obvious to him. The respondent told the Tribunal he was sorry, but he did not show any real insight into the inappropriate content of his emails including the emotive and unprofessional language he used in his personal grievance, and the sharing of harmful allegations against not only colleagues but also identifying and criticising students. This conduct is in breach of the Code, and the clear expectation that teachers will maintain respectful communications and professional relationships.

Discussion – Penalty| Te Hapa Tautuku me ngā utu

[69] Once a charge is found proved the Tribunal may exercise its powers under s 500 of the Act, which provides for penalties ranging from censure to cancellation. The principles of penalty are well established and reflect the main purposes of disciplinary proceedings which are, essentially, to protect the public (particularly learners) and to set and maintain appropriate professional standards and confidence in the teaching profession. The Tribunal should impose the least restrictive penalty that is appropriate in the circumstances

which enables it to meet these purposes.

[70] Counsel for the CAC submitted that:

- (a) the respondent's conduct was serious.
- (b) the unprofessional conduct was persistent and prolonged towards multiple people over time.
- (c) the respondent has not taken any rehabilitative steps which might provide an assurance that there will be no risk of him engaging in similar conduct in the future.

[71] The CAC submit that the appropriate penalties are censure, a three-month suspension, annotation of the register and conditions as follows:

- (a) to provide any current or prospective employer with the Tribunal's liability and penalty decision for a period of two years.
- (b) within one year of the decision, to undergo further professional development in professional ethics, such course to be agreed by the Manager of Professional Responsibility at the Teaching Council.
- (c) upon beginning any new employment, to undergo supervision by a mentor engaged with the new employer, for a period of one year.

[72] The CAC seeks a contribution of 40% towards its costs, less than 50% to reflect that particular 5 was not made out. The CAC's total costs were \$33,014.60.

[73] Counsel for the CAC referred to two cases with similarities to the present. In *CAC v Northwood*²¹ the teacher's registration was cancelled for a course of conduct occurring over six months, in which he provoked and verbally threatened a student with challenging behaviours and used negative language to describe the student. The teacher made allegations against his colleagues, was verbally abusive and showed an absence of insight and remorse.

[74] In *CAC v Rzoska*²² the teacher was found guilty of serious misconduct for unprofessional and aggressive behaviour towards her colleagues, and making inappropriate social media posts about her workplace. A mitigating feature was that the teacher was impaired by poor mental health at the time of the incidents. The Tribunal imposed conditions, censure and annotation of the register.

[75] The respondent filed a Reflective Statement together with counsel's submissions. The respondent is employed in a permanent secondary school position where he says he is in a "*structured environment and feel(s) well supported*" and that his current Principal is aware of the Tribunal's indication of

²¹ *CAC v Northwood* NZTDT 2016/234, 16 January 2017.

²² *CAC v Rzoska* NZTDT 2019/20, 4 November 2020.

its findings.

- [76] In reflecting on his conduct, the respondent identifies his background in South Africa as explaining his instinct to stand back from conflict. He refers to his distress at feeling bullied and arising from the school's management of the investigation into the use of force. He acknowledges he was wrong to attend David Law's home, and to contact Andrew Law, Anne Govender and Banapa Avatea. He acknowledges that he needs to improve his communication skills with students and colleagues.
- [77] In submissions for the respondent, counsel accepts that the persistent and unwanted nature of the respondent's contact with David Law and his contact with Anne Govender, Andrew Law and Banapa Avatea are aggravating features. Mitigating features are submitted to be the shortcomings in the investigation by Ferguson Intermediate and the respondent's desperation because of this, and now his remorse and insight. Counsel referred to the respondent's reflective statement as providing an explanation for his inability to properly manage student behaviour (in relation to particular 5).
- [78] The respondent submits that the appropriate penalties are censure, and, for a period of two years, annotation of the register, a requirement to disclose the Tribunal's decision to an employer, and conditions directed towards addressing communication skills. It is submitted that the respondent "*should be encouraged to continue therapy,*" referring to his evidence that he has attended one counselling session.
- [79] As to costs, the respondent submits that a 40% contribution is excessive, being strongly critical of the CAC's investigation and the focus on particular 5 at the hearing. A contribution of 20% towards costs is proposed.
- [80] The respondent has not filed a statement of financial means however the evidence in his Reflective Statement supports that a costs award will cause financial difficulty. He states that he does not own a home, lives in a fixed term rental, and his recent series of fixed term employment positions has meant periods without income. His wife is unable to work due to her health.
- [81] We do not consider that suspension is warranted. The particulars proved do not relate to the respondent's conduct towards students (although we do consider

the evidence showed areas where professional development is appropriate). We consider his misconduct is best dealt with by conditions addressing the issues that most concerned us. We will impose the following penalties:

- (a) Censure.
- (b) Annotation of the register for two years from the date of this decision.
- (c) Conditions on the respondent's current practising certificate and to be carried across to any subsequent practising certificate (if relevant):
 - (i) that the respondent discloses this decision to his employer and future employer for a period of two years from the date of this decision.
 - (ii) that the respondent enters a mentoring relationship with a senior colleague (from within or independent of his employer) to cover professional boundaries and professional ethics, for a period of one year from the date of this decision.
 - (iii) that the respondent enters a mentoring relationship within his place of employment to cover policies and procedures relating to behaviour management and reporting of behavioural matters for a period of one year from the date of this decision.

[82] We do not consider it necessary or appropriate on the evidence for us to make formal orders requiring the respondent to undertake counselling but agree that the issues raised in the Reflective Statement suggest this could be beneficial.

[83] It is appropriate that the respondent meet some of the costs of the proceedings. We agree that a reduction from the usual starting point of 50% is warranted, given the respondent's acceptance of particular 2 and the fact the bulk of the hearing time was spent addressing particular 5. There is some merit in the respondent's criticism of the adequacy of the CAC investigation, which we note because it impacted on the CAC's ability to prove the charge.

[84] As noted, the costs schedule for the CAC outlines costs totalling \$33,014.60. The costs of the Tribunal are \$27,993.92. Given the respondent was successful in his defence of particular 5, and his acceptance of the remaining particular; his financial position and impact of a costs award we consider that an order of 25% is appropriate. We have considered other costs decisions of this Tribunal and the Practice Note in reaching this decision, and while it is lower than a situation in which the teacher has cooperated with the CAC in an undefended matter, it is consistent with those cases where the CAC has been partially successful and there are genuine financial considerations.²³

²³ Eg *CAC v Teacher F* [2019] NZTDT 54 and *CAC v Teacher C* [2019] NZTDT 57.

Non-publication| Te Whakaputanga

- [85] Ahead of the hearing, interim orders were made in favour of the respondent, the school, the students and the CAC witnesses. The power to make permanent orders arises under s 501 of the Act. The Tribunal must be satisfied that it is “proper” to make an order, taking into account the public interest and the interests of any person.
- [86] The respondent does not seek permanent non-publication orders and supports the orders sought by the CAC in relation to the students.
- [87] The CAC sought permanent orders in respect of the names and identifying particulars of students [REDACTED] and [REDACTED] on the grounds that there is no public interest in their names being known in connection with these proceedings. It is also appropriate that we order non-publication of the names of other students identified in the evidence before the Tribunal. There is no public interest in their names being known.
- [88] No permanent orders were sought for the school or staff, or the CAC witnesses. In written submissions counsel for the CAC recorded that any applications would be confirmed by 12 April 2024²⁴. No further memorandum or application was filed.

Orders

- [89] Accordingly, the Tribunal makes the following orders:
- (a) The respondent is censured pursuant to s 500(1)(b) of the Act.
 - (b) The registration is to be annotated with this disciplinary finding pursuant to s 500(1)(e) of the Act for a period of two years.
 - (c) The following conditions are to be placed on the respondent’s current practising certificate and, if necessary, a future practising certificate pursuant to sections 500(1) (c) and (j) of the Act, that the respondent:
 - (i) discloses this decision to his employer and future employer for a period of two years from the date of this decision.
 - (ii) enters a mentoring relationship with a senior colleague (from within or independent of his employer) to cover professional boundaries and professional ethics, for a period of one year from the date of this decision.

²⁴ At [6.1] and [6.2] of written closing submissions dated 5 April 2024 the CAC sought permanent orders for the names and identifying particulars of [REDACTED] and [REDACTED]. The submissions record that the CAC was “*canvassing the views of its other witnesses*” regarding suppression and if orders were sought, a memorandum would be filed by 12 April 2024.

(iii) enters a mentoring relationship within his place of employment to cover policies and procedures relating to behaviour management and reporting of behavioural matters for a period of one year from the date of this decision.

(d) The respondent is to pay costs in favour of the Complaints Assessment Committee in the sum of \$8253.65 pursuant to s 500(1)(h) of the Act and costs of the Tribunal to the Teaching Council in the sum of \$6998.48 pursuant to s 500(1)(i) of the Act.

[90] The following orders for non-publication are made pursuant to s 501 of the Act:

- (a) The name and birth date and other identifying particulars of [REDACTED]
- (b) The name and identifying particulars of [REDACTED]
- (c) The names of the students identified in the evidence of Tyra Basilicata and the respondent.



C Garvey
Deputy Chair of the New Zealand Teacher's
Disciplinary Tribunal