

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-46

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

[REDACTED]

Kaiurupare | Respondent

Nohoanga | Hearing
Tribunal:
Hei Māngai | Appearance

21 October 2024 (by AVL)
T Mackenzie (Chair), S Walker, K Turketo
H M L Farquhar for the CAC
M McClelland KC & L E Kenner for Respondent

**DECISION OF THE TRIBUNAL ON LIABILITY, PENALTY, COSTS, and
PUBLICATION**

Date of decision: 31 March 2025

Introduction

[1] The respondent is a registered teacher, now retired. This is a Referral of conduct by the Complaints Assessment Committee (CAC). The basis of the Referral is that it is alleged that the respondent has engaged in conduct that entitles the Tribunal to cancel her registration pursuant to s 129 Education Act 1989.

[2] Although the facts and liability are accepted, we conducted a hearing on 21 October 2024 to hear evidence from the respondent personally. This evidence addressed issues relevant to penalty, costs and non-publication.

Referral and facts

[3] A copy of the Referral and the agreed facts is appended to this decision.

[4] In summary, in 1985 the respondent was a 25 year old high school teacher. She entered into brief intimate sexual relationships with two male students. [REDACTED]. There was sexual intercourse, once, with one student. There was intimate activity, once, with another. Both occurred at her residence.

Liability

[5] This Referral falls under section 129(a)&(b) of the Education Act 1989.¹

[6] We are to decide whether the proven facts mean that the respondent is not of good character and/or is not fit to be a teacher. The respondent has accepted that these tests are made out.

[7] The Tribunal has no hesitation in finding that this test is met. A sexual relationship between a teacher and their student will, as a starting point, near always be seen as serious misconduct at a high level.²

[8] In this case there were further professional boundary breaches such as provision of alcohol (to one of the students), and having the students in her private residence on both occasions.

[9] We note that the matters are now historic. That does not change our view. The passage of time might be more relevant to penalty considerations (although here those

¹ See the Tribunal's earlier jurisdiction decision in this case of 13 November 2023.

² See *CAC v Teacher* NZTDT 2018/41, *CAC v Teacher C* NZTDT 2016/40, *Scully v CAC* [2010] DCR 159, *CAC v Brown* NZTDT 2022/35.

considerations are limited).

Penalty

[10] Cancellation is the only statutory option in this case. Even under the 2020 Act, a teacher found liable on a serious misconduct charge for a sexual relationship with a student (or here, students) would face an uphill battle to persuade the Tribunal of a lesser outcome.

[11] The respondent in this case has requested that she be given an opportunity to “retire with dignity”. She asks the Tribunal to effectively issue no penalty. She has requested that she be de-registered by the Teaching Council and would prefer to see that through.

[12] The reason that the de-registration has not occurred already is that the Act does not allow a de-registration request to proceed when a disciplinary investigation or process is already underway. The reason it cannot proceed reflects the legislative intention and regime that disciplinary matters should be completed without being usurped. There is a public interest in professional disciplinary processes being able to be conducted and completed in accordance with law. The credibility of professional discipline would be undermined if this was not so. General deterrence would likewise be eroded.

[13] We are required to hold teachers to account, to uphold and maintain standards, and to fortify general deterrence. The proposal by the respondent undermines these requirements. Indeed if we were to follow it, this Tribunal too would be undermining the very point of the restriction on de-registration.

[14] We consider cancellation is the appropriate outcome for this conduct and we so order.

[15] The respondent also seeks a direction that the Teaching Council remove the respondent from the Register so that the fact of publication is not recorded.

[16] We do not consider that this is within our jurisdiction. Whilst the Tribunal replicates the role of the Registration Board in these historical matters, we consider that this only applies to determinations of liability, penalty, publication and costs. The maintenance of the Register is an executive act for the Teaching Council.

[17] Even if we did have jurisdiction, we would decline to make that order. Notice of

cancellation occurs by design of the Act and applies to all respondents.

Costs

[18] The CAC claims reasonable costs in total of \$16,616.94. This includes legal fees of \$14,998.00. Those fees do not include the earlier jurisdiction issue costs.

[19] This was a matter with agreed liability and facts and was mostly conducted on the papers save for the short online hearing to hear from Ms [REDACTED]. Whilst some of the novel penalty arguments made will have increased time spent, the publication issue is probably the most extensive. The CAC takes a neutral approach to that however so will not have incurred much time in dealing with it.

[20] In these circumstances it is a relatively confined case. We consider that reasonable legal costs are \$10,000. The total reasonable CAC costs including Committee costs are therefore set at \$11618.94.

[21] We agree that a 40% contribution would ordinarily be required.

[22] Ms [REDACTED] has put before us a range of financial capacity information. She is working part time in a modestly remunerated role. She has various debts and obligations. Her financial situation is difficult. Her earning potential into the future is bleak.

[23] We accept that she does not have capacity to meet a significant award. We must balance that however against the need for the entire profession to not have to meet the costs of others transgressions.

[24] We consider that a 20% contribution to costs is appropriate. The CAC costs order will be in round figures and is set at \$2,250.

[25] Tribunal costs are set at \$1500 (they will likely be higher). 20% is also awarded, being \$300 payable to the Teaching Council.

Non-Publication

Principles

[26] The default presumption is that Tribunal hearings are to be conducted in public. This of course is the case for most courts and tribunals in New Zealand.

[27] The Tribunal can only make one or more of the orders for non-publication specified in section 501(6) if we are 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.

[28] The purposes underlying the principle of open justice are well settled. As the Tribunal said in *CAC v McMillan*, the presumption of open reporting “exists regardless of any need to protect the public”.

[29] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. And all the more so when the particular public we are considering are children.

[30] In *CAC v Finch*,³ the Tribunal described a two-step approach to name suppression that mirrors that used in other disciplinary contexts. The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be “likely” to follow if no order was made. The second step is often described as a discretionary exercise after the first threshold has been met.

[31] In terms of what “likely” means, this means that there must be an “appreciable” or “real” risk. Consistent with the approach taken in *CAC v Teacher*,⁴ we have adopted the meaning of “likely” described by the Court of Appeal in *R v W*.⁵ The Court said there that “real”, “appreciable”, “substantial” and “serious” are all qualifying adjectives for “likely”. They bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

[32] In deciding whether there is a real risk, the Tribunal must come to a judicial decision on the evidence before it. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal must determine whether it is proper for the presumption to be displaced. This requires the Tribunal to consider, “the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression”.⁶

³ *CAC v Finch* NZTDT 2016/11, at [14] to [18].

⁴ *CAC v Teacher* NZTDT 2016/68, at [46].

⁵ *R v W* [1998] 1 NZLR 35 (CA).

⁶ *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].

[33] In *NZTDT 2016/27*, the Tribunal acknowledged what the Court of Appeal said in *Y v Attorney-General*.⁷ While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, “[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure”.⁸

[34] The Court of Appeal in *X v Standards Committee (No 1) of the New Zealand Law Society* similarly stated:⁹

The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*.

[35] The High Court in *J v New Zealand Institute of Chartered Accountants Appeals Council* touched on the same point again, in a chartered accountant’s disciplinary decision.¹⁰ Gwynn J stated:

[85] Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interests of any person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.

[86] I do not consider the use of the word “appropriate” in r 13.62 adds content to the test usually applied in the civil jurisdiction or sets a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.

[36] Although teachers do not have “clients” per se, we consider that the principle is of equal application for practitioners in the teaching field given that they are trusted to work closely with children.

[37] We also observe that although the standard in this jurisdiction is (as noted in *Finch*) in statutory terms lower than the standard found in the criminal jurisdiction,¹¹ at the same time the professional jurisdiction differs from the criminal given the extra layer

⁷ *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911, [2016] NZAR 1512, (2016) 23 PRNZ 452.

⁸ At [32].

⁹ *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

¹⁰ *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

¹¹ “Extreme hardship” (to the applicant), per s 200(2)(a) Criminal Procedure Act 2011.

of public interest in open justice for professions and professionals. Hence the “general favouring” of naming practitioners, as noted in the decisions of Y, X and J (above).

[38] We turn now to the publication issues before us.

Students

[39] We consider it proper to make a permanent order for non-publication of the names and any identifying details of the two students who were the subject of this conduct.

[40] To ensure this is not undermined, we extend the order to the name of the school concerned and the year/form that the students were in.

[41] For the avoidance of doubt there would be no issue with any media reference to “a high school in Auckland” and/or that the respondent was a “teacher at a high school in Auckland” and that the students offended against were “students of a high school in Auckland.”

Respondent

[42] The respondent has advanced an application for permanent non-publication. A range of significant health information has been put before us. The CAC takes a neutral approach to this application.

[43] We will not set out the information at length. Due to its nature it would invariably need to itself be the subject of a non-publication order and would then be redacted from the decision. The parties and the Tribunal however are obviously aware of the information before us.

[44] Having considered the information we consider that it is proper to make an order for non-publication of the respondent's name and any identifying details. We consider that this should also extend to the name of respondent's current employer.



Tim Mackenzie

Chair of the New Zealand Teacher's Disciplinary
Tribunal

IN THE MATTER OF the Education and Training Act 2020
AND

IN THE MATTER OF an inquiry by the New Zealand Teachers Disciplinary Tribunal of
the Teaching Council of Aotearoa New Zealand into the conduct
of [REDACTED], of WELLINGTON, Teacher (Registration
Number [REDACTED]).

NOTICE OF REFERRAL

TAKE NOTICE that a Complaints Assessment Committee (CAC) has determined that in accordance with section 497(4) of the Education and Training Act 2020:

- (a) The complaint received from [REDACTED] and the own motion referral of the Teaching Council about the conduct of [REDACTED] should be considered by the Disciplinary Tribunal of the Teaching Council of Aotearoa New Zealand (the **Disciplinary Tribunal**).
- (b) The CAC refers the matter to the Disciplinary Tribunal on the basis that [REDACTED] has engaged in conduct entitling the Disciplinary Tribunal to:
 - a. cancel her registration as a teacher, pursuant to section 129(2)(a) and (b) of the Education Act 1989 on the basis that [REDACTED] is:
 - i. is not (or is no longer) of good character; and/or
 - ii. is not (or is no longer) fit to be a teacher
 - or, in the alternative,
 - b. take action in accordance with sections 135(1), and 158(1)(d) and (g) of the Education Act 1964 on the basis that [REDACTED] is:
 - i. guilty of gross misbehaviour; and/or
 - ii. guilty of conduct unfitting her for employment as a teacher; and/or
 - iii. grossly inefficient or incompetent in the discharge of her professional duties; and/or
 - iv. guilty of conduct in her capacity as a teacher or otherwise which is unbecoming to a member of the teaching service or shows her unfitness to remain in her present position or in the service.

Reasons for Referral

1. The CAC alleges that whilst employed as a teacher at [REDACTED] in 1985, [REDACTED], registered teacher, of [REDACTED]:
 - a. engaged in a sexual relationship with Year [REDACTED] student [REDACTED] at her home on or about November 1985;
and/or
 - b. engaged in intimate physical activity with Year [REDACTED] student [REDACTED] at her home in or around November to December 1985;
2. The conduct in paragraph 1 individually or cumulatively amounts to conduct entitling the Disciplinary Tribunal to exercise its powers pursuant to section 129(2) of the Education Act 1989 and/or sections 135(1), and 159(5) of the Education Act 1964.

Penalties

Your attention is drawn to section 129 of the Education Act 1989 and/or sections 135(1) 159(5) of the Education Act 1964 which sets out the powers of the Tribunal, a copy of which is **attached**.

Practice Note

Your attention is also drawn to the Practice Note that came into force on 1 July 2014 regarding the public hearings of the Tribunal, a copy of which is **attached**.

Dated the 11 day of August 2023



Lynda Harris
Chair, Complaints Assessment Committee

IN THE MATTER OF the Education and Training Act 2020

AND

IN THE MATTER OF an inquiry by the New Zealand Teachers Disciplinary Tribunal of the Teaching Council of Aotearoa New Zealand into the conduct of [REDACTED], of WELLINGTON, Teacher (Registration Number [REDACTED])

SUMMARY OF FACTS

Background

1. The respondent, [REDACTED], is a registered teacher. She first became registered in 1984. Her practicing certificate will expire on 21 November 2024.
2. In 1985, [REDACTED] was employed as a teacher at [REDACTED] College in Auckland (the College).
3. Ms [REDACTED] is not currently employed as a teacher.
4. On 8 March 2022, the Teaching Council (Council) received a complaint from a former student of Ms [REDACTED] (Student A), alleging that Ms [REDACTED] had a sexual relationship with him while he was her student at the College.
5. During the investigation of Student A's complaint, the Council became aware of an allegation that Ms [REDACTED] engaged in physically intimate activity with another student (Student B) at the College.
6. On 13 October 2022, the Council made an own-motion referral in relation to the allegations involving Student B.

The Incidents

Sexual relationship with Student A

7. Student A was in Ms [REDACTED] English class in 1985, which was Student A's [REDACTED] form year. Student A was [REDACTED] old. Ms [REDACTED] was 25 years old.
8. In November 1985, Ms [REDACTED] took Student A's English class to the Auckland art gallery to view an exhibition. Towards the end of the trip, Ms [REDACTED] asked Student A if he would like to come with her to get Student B a present as he was in hospital.
9. Student A got into Ms [REDACTED] car. By that time, the rest of the students had dispersed.
10. Ms [REDACTED] drove to her place to get some money.

11. Student A and Ms [REDACTED] sat outside at a picnic table. Ms [REDACTED] suggested they have some wine. They each had approximately two glasses of wine.
12. While outside at the picnic table, Ms [REDACTED] then told Student A that she wanted to sleep with him. Student A did not say anything. Ms [REDACTED] took Student A's hand and led him to her bedroom.
13. Ms [REDACTED] and Student A both got undressed. Ms [REDACTED] then initiated sexual contact with Student A, and showed him what to do.
14. Student A and Ms [REDACTED] then had penetrative sexual intercourse for a few minutes, before stopping.
15. Student A got out of bed straight afterwards and got dressed.
16. Ms [REDACTED] dropped Student A back to his family home, approximately a 15-20 minute drive from her flat. She said, "That was really nice. We should do it again sometime". Student A got out of the car and walked home.
17. Student A was at Ms [REDACTED] home for approximately one hour.
18. The following day, Student A told Student B what had happened.
19. Ms [REDACTED] and Student A did not engage in any further sexual intimacy.

Intimate physical activity with Student B

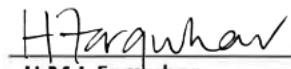
20. Student B was in Ms [REDACTED] class in 1985, which was Student B's [REDACTED] form year. Student B [REDACTED]
21. In late November or early December 1985, Student A had an end-of-year party at his house to celebrate achieving University Entrance. He invited 15-20 boys, including Student B, and a few girls. There was alcohol at the party.
22. Student A had asked Ms [REDACTED] to attend the party. She accepted that invitation and attended the party with her flatmate.
23. At some point in the evening, Ms [REDACTED] kissed Student B while they were at a park next door to Student A's house. They then went to Ms [REDACTED] car and continued kissing. Ms [REDACTED] touched Student B inside his shorts and got him aroused.
24. Ms [REDACTED] and Student B drove back to Ms [REDACTED] flat. On the couch in the lounge, Ms [REDACTED] took her top off and Student B kissed her breasts. Ms [REDACTED] continued to fondle Student B's genitals.
25. Ms [REDACTED] flatmate came home and saw her and Student B on the couch. Ms [REDACTED] suggested they go to her bedroom. Student B said no and that he should get home. Ms [REDACTED] agreed. Student B then left.
26. Mr [REDACTED] never had any further intimate contact with Student B.

Impact of the conduct on Student A

27. Following the conduct, Student A says that he felt unclean, abused, and misused. He felt a sense of shame and loss.
28. Student A had previously been a good student, but the following year (his [REDACTED]) Student A's grades dropped significantly.
29. Student A dropped out of university after his first year. He began abusing drugs and alcohol.

Teacher's Response

30. At the CAC hearing, the CAC asked Ms [REDACTED] whether she engaged in sexual relationships with the two complainants, as alleged in their evidence. She admitted that she did.


H M L Farquhar



Counsel for the CAC
Date: 9 July 2024

Respondent
Date: 5th July 2024