

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2024-08

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]
(Authorisation **[REDACTED]**)
Kaiurupare | Respondent

TE WHAKATAUNGA Ā TARAIPUNARA
DECISION OF TRIBUNAL ON CHARGES
23 September 2024

NOHOANGA - HEARING:

Held on 1 August 2024 (on the papers)

TARAIPUNARA - TRIBUNAL:

B R Arapere (Deputy Chair), K Turketo and T
Rifle (Members)

HEI MĀNGAI - REPRESENTATION:

M Shaw and JG Avia, Luke Cunningham
Clere for CAC
R Zhao, Richard Zhao Lawyers Ltd for
Respondent

[REDACTED] **[REDACTED]**
[REDACTED]

Hei Tīmatanga Kōrero – Introduction

- [1] Pursuant to s 497 of the Education and Training Act 2020 (the Act) the Complaints Assessment Committee (CAC) has referred a charge of serious misconduct or misconduct to the Tribunal.
- [2] The particulars of the charge include allegations that, while employed as a teacher at [REDACTED] College, the respondent:
- (a) Between [REDACTED] formed an inappropriate relationship with a student (Student A).
 - (b) Between [REDACTED] engaged in inappropriate communications with a student (Student A) over the "[REDACTED]" instant messaging platform, including by, for example:
 - (i) Discussing his marital life with Student A, and/or;
 - (ii) Telling Student A that he was going to hug her at school, and/or;
 - (iii) Telling Student A about his fantasies (women in office attire), and/or;
 - (iv) Complementing Student A on her cleavage and on her body, and/or;
 - (v) Requesting clothed photographs of Student A, and/or;
 - (vi) Asking Student A to meet with him outside of school hours, and/or;
 - (vii) Becoming upset with Student A once she stopped engaging with him.
 - (c) Between [REDACTED] formed an inappropriate relationship with a student (Student B).
 - (d) Between [REDACTED] engaged in inappropriate communications with a student (Student B) over the "[REDACTED]" instant messaging platform, including by, for example:
 - (i) Speaking to Student B about her personal life, and/or;
 - (ii) Complementing Student B on her appearance, and/or;
 - (iii) Requesting clothed photographs of Student B, and/or;

- (iv) Telling Student B about how he felt about her using different pronouns, and/or;
- (v) Becoming upset with Student B once she stopped engaging with him.

Ko te Hātepe Ture o tono nei – Procedural History

- [3] A pre-hearing conference (PHC) was held on 20 May 2024 before the Deputy Chairperson of the Tribunal at which interim non-publication orders were made for the names and identifying details of the respondent and Students A and B. Various timetabling orders were also made including as to a hearing on the papers.
- [4] On 29 July 2024 [REDACTED] College (the school) applied for permanent non-publication orders prohibiting the publication of the school's name and any identifying particulars. That application is addressed by the Tribunal below.
- [5] A papers hearing was held on 1 August 2024.

Kōrero Taunaki - Evidence

Agreed Summary of Facts (ASoF)

- [6] The ASoF is set out below:

1. The respondent, [REDACTED] is a registered teacher first registered on [REDACTED] His full practising certificate expires on [REDACTED].
2. At the time of the conduct set out below, [REDACTED] worked as a teacher at [REDACTED] College, a co-educational secondary school in East Auckland (the School).
3. On [REDACTED] the School received two written complaints from Student A and Student B about Mr [REDACTED] inappropriate messaging and conduct. Both students were leaders in Mr [REDACTED]'s [REDACTED] and [REDACTED] clubs. The [REDACTED] programme was run online, and Mr [REDACTED] used the instant messaging application [REDACTED] to communicate with the students.
4. The School met with Mr [REDACTED] on [REDACTED] to discuss the allegations. Mr [REDACTED] resigned from the School on [REDACTED].

Relationship with Student A

5. In [REDACTED], Student A was Year 11 student at the School aged [REDACTED].
6. Student A was a part of Mr [REDACTED] [REDACTED] programme and had a [REDACTED] account to communicate with Mr [REDACTED].

7. From [REDACTED], Mr [REDACTED] discussed inappropriate, non-education related topics with Student A over [REDACTED]. Their contact was almost daily and frequently occurred outside of school hours, late at night. Their contact included the following topics of conversation:

7.1 Mr [REDACTED] venting to Student A about intimate details of personal life, about his relationship with his wife, and about his son. Mr [REDACTED] told Student A, "I do feel very safe telling u this sort of stuff I guess that goes both ways". He told Student A [REDACTED] was "trustworthy" and a "great listener". Mr [REDACTED] on one occasion told Student A about his wife getting "hyped" after watching a sex scene.

7.2 Mr [REDACTED] telling Student A he was going to hug [REDACTED] at school and that [REDACTED] should not run away. When Student A did not hug Mr [REDACTED] at School, Mr [REDACTED] messaged Student A saying "WHERE WAS MY HUG" and "I will catch u one day And squeeze u so hard". Mr [REDACTED] messages were sent to Student A at 12:53am

7.3 Mr [REDACTED] telling Student A about his fantasies and attraction to women. This included sending Student A photo of a woman in office attire that he thought was "hot" and telling Student A he was not an "ass guy" and liked an "even distribution". Mr [REDACTED] tried to learn more about Student A's fantasies and asked her "who is hot in ur eyes". These conversations all occurred after 11pm.

7.4 Mr [REDACTED] asking Student A to send photos of herself to him so he could choose [REDACTED] outfits. On one outfit Student A sent him he commented that the dress did not suit Student A as it was clearly for "teens" and [REDACTED] needed something more mature. Student A reminded Mr [REDACTED] that [REDACTED] was a "teen".

7.5 Mr [REDACTED] commenting on Student A's physical appearance including making comments on her cleavage and how Student A had a body that most girls would want.

7.6 Mr [REDACTED] making comments to Student A with sexual undertones including telling Student A [REDACTED] was going to be a "sex addict", replying to [REDACTED] comment about being single by saying "we can change that".

7.7 Mr [REDACTED] inviting Student [REDACTED] to meet up with him outside of school hours on several occasions, including inviting [REDACTED] to the gym, inviting [REDACTED] to go swim and inviting [REDACTED] to go bowling. Student A declined these invitations.

8. On occasion Mr [REDACTED] gave Student A and another female student rides home after-school. One time Mr [REDACTED] gave Student A ride home when she was alone in his car.

9. Some of Mr [REDACTED] messages to Student A involved encouraging Student A to keep their relationship a secret. Mr [REDACTED] offered a ride to Student A and told [REDACTED] to say she took the bus. He told Student A not to tell counsellors about their private conversations. Student A noted times where [REDACTED] felt [REDACTED] needed to lie about her interactions with Mr [REDACTED].

10. When the relationship between Mr [REDACTED] and Student A broke down, Mr [REDACTED] sent a number of emotionally charged messages to Student A and a group chat. Mr [REDACTED] told the group chat that he could not sleep at night and that ignoring him was "beyond fked up".

11. Student A made a formal complaint to the School in May 2023. [REDACTED] had thought about [REDACTED] interactions with Mr [REDACTED] for a long time. She felt highly stressed, anxious, creeped out and disgusted. [REDACTED] also felt a level of guilt and self-blame.

Relationship with Student B

12. In [REDACTED], Student B was a Year 11 student at the School aged [REDACTED]

13. From [REDACTED] Mr [REDACTED] discussed inappropriate, non-education related topics with Student B over [REDACTED]. Their contact was regular and frequently outside of school hours, late at night. Their contact included the following topics of conversation:

13.1 Mr [REDACTED] talking to Student B about their personal life. Mr [REDACTED] told Student B that anyone would be extremely lucky to date Student B. He sent those messages around 10pm. Mr [REDACTED] said if he were Student B's age he would date Student B.

13.2 Mr [REDACTED] commenting on Student B's physical appearance and asking if Student B was wearing makeup to try and seduce someone. This conversation occurred around 9pm.

13.3 Mr [REDACTED] asking Student B to send photos of Student B in a ball dress. Student B was uncomfortable but agreed to send Mr [REDACTED] a photo.

13.4 Mr [REDACTED] discussing Student B's use of pronouns and name change. Mr [REDACTED] said that him and others would think Student B is an amazing [REDACTED] and wonder why they are ditching that identity.

14. On 25 January 2023, Mr [REDACTED] and his son met Student B and four other Year 13 School students for a picnic dinner. Student B's mum was surprised when she came to pick up Student B and asked Student B about this on the way home. Student B started to wonder about whether their relationship with Mr [REDACTED] was okay.

15. Mr [REDACTED] positioned himself a support person for Student B. Mr [REDACTED] told Student B that Student B could talk to him about anything. He told Student B "we don[']t keep secrets" and that they could come to his class at lunchtime and that he would keep Student B company.

16. As with Student A, when the relationship between Mr [REDACTED] and Student B broke down, Mr [REDACTED] sent emotionally charged group messages to Student B. When Student B and the others did not reply, Mr [REDACTED] changed his [REDACTED] status to "my fault for actually cares".

17. Student B felt pressured to tell Mr [REDACTED] everything and he became a trusted adult to confide in and be supported by. Some of Mr [REDACTED]'s messages made Student B feel sexualised.

Teacher's response

18. Following the relationship breakdown with Student A and B, Mr [REDACTED] deleted the [REDACTED] server and unfriended the students on [REDACTED].

19. Mr [REDACTED] accepted that some messages he sent the students were inappropriate. He acknowledged that he should have put more boundaries in place and left any counselling issues to professionals. Mr [REDACTED] told the CAC that he was under a great deal of personal stress stemming from his family relationships.

Te Ture – Legal Principles

[7] The respondent has been charged by the CAC with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers.

[8] Section 10(1) of the Act defines “serious misconduct”:

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.

[9] The test for serious misconduct is conjunctive.¹ That is, as well as being conduct that has one or more of the adverse professional effects or consequences described in subsection (a)(i)-(iii) the conduct must also be of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct. In other words, if any of the criteria under s 10(1)(a)-(c) are satisfied, but the criteria under s 10(1)(b) is not satisfied, then the conduct will amount to “misconduct” rather than “serious misconduct”.

[10] The criteria for reporting serious misconduct are found in Part 3 of the Teaching Council Rules 2016. The Tribunal accepts that, if established, the respondent’s conduct would fall within the following sub-rule of Rule 9(1):

Rule 9(1)(e) breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher’s position as a teacher; for example,—

(i) engaging in an inappropriate relationship with the child or young person:

(ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:

Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.

[11] The Tribunal also accepts that the test under Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could

¹ *Evans v Complaints Assessment Committee* [2021] NZCA 66.

reasonably conclude that the reputation and standing of the profession was lowered by the respondent's behaviour.²

- [12] The burden rests on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in mind.³

Ngā Kōrero a te Kōmiti me te Kaiurupare – Submissions of the CAC and the Respondent

CAC Submissions

- [13] In summary, the CAC submits:

- (a) The respondent's conduct constitutes serious misconduct;
- (b) The appropriate penalty orders are:
 - (i) Cancellation and censure; or
 - (ii) Suspension, rehabilitation to the extent that the Teaching Council is satisfied that the respondent is not at risk of transgressing professional boundaries with students again; conditions on any future practicing certificate including disclosure of the Tribunal's decision to any employer seeking to employ or contract with the respondent as a registered teacher; and annotation of the register to record the Tribunal's findings if the respondent successfully reregisters.

- [14] The CAC refers to the Code of Professional Responsibility (the Code) and in particular the high standards for ethical behaviour expected of every teacher as well as their trusted role in society. The Code provides examples of behaviours that may breach professional boundaries including fostering online connections with a learner outside the teaching context, encouraging a learner to develop an inappropriate emotional dependency, communicating with them about very personal and/or sexual matters without a valid context and making jokes or innuendo of a sexual nature towards a learner, or making inappropriate comments about their physical appearance.⁴

² *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZDT 2016/43, 24 March 2017.

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

⁴ *The Code of Professional Responsibility, Examples in Practice* (Education Council, Wellington, June 2017) atcls 2.2 and 1.3.

- [15] The CAC says that the first limb of the test for serious misconduct is met because the respondent's conduct affected the well-being and learning of Student A and B, given the position of trust he had as their teacher, and the inappropriateness of his communication with them. Student A detailed how her interactions with the respondent made her feel highly stressed, creeped out and disgusted. She also felt guilt and blamed herself for what transpired. Student B said she felt sexualised by the respondent's messaging.
- [16] The CAC submits that the respondent's conduct with Student A (exchanging sexualised messages, giving Student A rides in his car, telling Student A their communications should be kept secret, tell Student A his personal issues, attempting to hug Student A and commenting on Student A's body) and his conduct with Student B (commenting on Student B's attractiveness, their body, and meeting them outside of school time) reflect adversely on his fitness to be a teacher. The CAC submits the respondent overstepped the boundaries that govern a teacher's interactions with their students and the Tribunal should have little difficulty in concluding that the respondent's conduct reflects adversely on his fitness to be a teacher.
- [17] The CAC further submits that reasonable members of the public, armed with knowledge of the relevant circumstances, would conclude that the reputation of the teaching profession may be lowered by Mr [REDACTED] conduct.
- [18] Similarly, the CAC submits the requirements of Rules 9(1)(e) and (k) of the Rules are made out and that the conduct meets the second limb of the s 10 test for serious misconduct. Further, the respondent failed to demonstrate a high level of professional behaviour and integrity and failed to maintain public trust and confidence in the teaching profession.
- [19] In terms of penalty the CAC submits that the extent of the conduct involving two students and spanning two years as well as the nature of the conduct (for example, involving conversations about the respondent's sexual fantasies, asking the students to send him photos of themselves, talking about hugging the students and meeting the students outside school and offering them rides) are aggravating factors. Students A and B outlined that they had been severely impacted by the respondent's actions, blamed themselves for what had occurred and felt pressure to confide in him. The CAC submits the vulnerability of the students and the respondent's efforts to evade detection are also factors that go to penalty.

- [20] In terms of mitigating factors the CAC noted the respondent had some limited acceptance that his conduct was inappropriate and had no previous disciplinary history.
- [21] The CAC submits that cancellation is usually the penalty in cases with a sexual element involving a student. It submits that cancellation is the appropriate penalty in this case. The CAC submits that an inappropriate bond was formed with Student A and Student B. Even though the respondent expressed some insight into his behaviour, and subsequently agreed to a summary of facts, the CAC submits this is not enough to constitute meaningful rehabilitative prospects. The CAC submits that there remains an ongoing risk that leaves no alternative to deregistration. The CAC says that in the event the Tribunal finds that a penalty short of cancellation is the least punitive outcome appropriate in the circumstances, the CAC submits it would be appropriate to suspend Mr [REDACTED] practicing certificate and impose censure, conditions, and annotation of the register.

Respondent Submissions

- [22] In summary, the respondent through his representative submits:
- (a) Although the respondent has agreed to the ASoF it is open to the Tribunal to find, based on the facts of the case, that the conduct does not meet the definition of serious misconduct in s 10 of the Act.
 - (b) The respondent is willing to make good his wrongdoing by his resignation and “self-suspension” since the investigation into his conduct started; by acquiring a mentor or supervision for future teaching; and participating in a “professional boundary course.”⁵
- [23] The respondent notes that he has fully cooperated with the CAC in the investigation of the charges and has no prior disciplinary history. He submits that he is genuinely remorseful. In written submissions the respondent referred to a number of criminal cases that discussed discounts in sentences where a defendant expressed remorse. While noting that this is a disciplinary proceeding the respondent submits that because the respondent has accepted full responsibility for his actions and displayed remorse if he is given the opportunity to resume his teaching position he is amenable to any conditions to be imposed by the Tribunal. The respondent also submits that credit should be given in recognition of his remorse. The respondent’s submissions

⁵ Respondent’s Submissions dated 11 July 2024 at [13].

also refer to the principle of totality of the respondent's communications with Student A and Student B over two years and that no complaint was lodged until the respondent's "excessive reaction" after he found out that the students no longer wished to be friends with him.⁶ The respondent says this case involved no "sexual exploitation" but it was due to his own family issues that the respondent "wrongfully crossed his professional boundaries by trying to form excessive friendship [sic] with his students..."⁷

- [24] As to penalty the respondent submits that he does not agree that cancellation is the appropriate penalty because in his submission in the two years of communication "only a very small proportion involved elements remotely touching sexuality" but that was not the focus or predominant purpose of the communications. Accordingly, the respondent submits that suspension is the appropriate punishment and that the periods of the respondent's "self-suspension" from the date of his resignation should be taken into account.⁸ The respondent also notes he is willing to meet any fine or his part of a costs order and is amenable to other conditions being imposed.

Kupu Whakatau – Decision

- [25] The Tribunal finds the particular charges set out in the notice of charge are established to the requisite standard.
- [26] The Tribunal considers that, cumulatively and for the reasons discussed below with respect to the legal position, the established particulars amount to serious misconduct pursuant to section 10 of the Act and Rule 9 of the Rules. The Tribunal considers that the respondent's conduct:
- a. Adversely affected, or was likely to adversely affect, the well-being or learning of the children involved (s 10 definition);
 - b. Reflects adversely on his fitness to be a teacher (s 10 definition);
 - c. May bring the teaching profession into disrepute (s 10 definition and Rule 9); and
 - d. Is of a character or severity that meets the criteria for reporting serious misconduct (s 10 definition).
- [27] On the charge of forming an inappropriate relationship and engaging in inappropriate communications with Student A from [REDACTED] 1 to [REDACTED] the Tribunal considers

⁶ Respondent's Submissions dated 11 July 2024 at [24].

⁷ Respondent's Submissions dated 11 July 2024 at [24].

⁸ Respondent's Submissions dated 11 July 2024 at [29]-[30].

the respondent's conduct was unacceptable. His behaviour over two years and the nature and content of the communications with Student A reflect poorly on the respondent's fitness to be a teacher. They show a lack of judgement and insight into his own behaviour. Further, they show a lack of respect by the respondent for his professional obligations. The Tribunal finds the conduct is of a character and severity that meets the criteria for serious misconduct. The Tribunal considers its decision on this charge is consistent with other similar decisions dealing with comparable conduct.⁹

- [28] The Tribunal notes that various legal principles and references to the Sentencing Act 2002 cited by the respondent do not have any direct application in these proceedings which are disciplinary in nature and governed by the Education and Training Act 2020. Factors such as the respondent's claim to have placed himself under a period of "self-suspension" are also not relevant to the Tribunal's task here. The respondent resigned his teaching position after the school advised that its preliminary decision was to dismiss him. Further, the respondent's claim that only a small part of his conversations with Student A and Student B related to sexual matters also does not assist him. None of his communications with Student A and Student B should have been of a sexual or intimate nature.
- [29] Accordingly, the Tribunal considers that this conduct alone was sufficient to amount to serious misconduct and is conduct likely to bring the profession into disrepute.
- [30] On the next charge of forming an inappropriate relationship with and engaging in inappropriate communications with Student B from [REDACTED] to [REDACTED] the Tribunal considers the respondent's conduct again was unacceptable and unprofessional. His behaviour over twenty months and the nature and content of the communications with Student B again reflect poorly on the respondent's fitness to be a teacher. They show a lack of judgement and insight into his own behaviour and a lack of respect by the respondent for his professional obligations. Again, the Tribunal finds the conduct is of a character and severity that meets the criteria for serious misconduct.
- [31] Overall, the Tribunal considers that the charges separately and cumulatively amount to serious misconduct. The Tribunal considers the charges reflect on the respondent's poor understanding of and respect for appropriate behaviours and boundaries with students. The charges also raise concerns about the respondent's

⁹ CAC v Shah NZDT 2021/25, CAC v Teague NZTDT 2020/11, CAC v Hunter NZTDT 2021/112.

respect for the standards of the teaching profession. The respondent's conduct shows that he had little insight into the impact of his conduct on vulnerable students.

Utu Whiu – Penalty

- [32] Having determined that this case is one in which we consider serious misconduct to be established, the Tribunal must now consider what an appropriate penalty is in the circumstances, pursuant to s 500:

500 Powers of Disciplinary Tribunal

(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:

- (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 Education Council in respect of the costs of conducting the hearing:*
- (j) direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*

(2) Despite subsection (1), following a hearing that arises out of a report under 493 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).

(3) A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.

- [33] In determining penalty, the Tribunal must ensure that three overlapping principles are met, that is, protection of the public through the provision of a safe learning environment for students, maintenance of professional standards, and the public's

confidence in the profession.¹⁰ We note also decisions of the superior Courts which have emphasised that the purpose of professional disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect.¹¹

[34] In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers¹²:

- (a) Protecting the public;
- (b) Setting the standards for the profession;
- (c) Punishment;
- (d) Rehabilitation;
- (e) Consistency;
- (f) The range of sentencing options;
- (g) Least restrictive;
- (h) Fair, reasonable, and proportionate.

[35] The Tribunal does not repeat what it said in that decision, but notes that we have turned our mind to these principles in reaching our decision on penalty.

[36] The CAC submits that cancellation accompanied by censure is the appropriate penalty in this case. The CAC says that in the event the Tribunal find that a penalty short of cancellation is the least punitive outcome appropriate in the circumstances, the CAC submits it would be appropriate to suspend Mr [REDACTED] practicing certificate until he engages in rehabilitation to the extent that the Teaching Council is satisfied that he is not at risk of transgressing professional boundaries with students again. Should Mr [REDACTED] return to teaching, conditions on his practicing certificate would be appropriate namely the respondent must disclose the Tribunal's decision to any employer seeking to employ or contract with him as a registered teacher. The register should also be annotated to record the Tribunal's findings if Mr [REDACTED] successfully reregisters.

[37] As we said in *Fuli-Makaua*¹³, a practitioner's degree of insight into the cause of behaviour will be important when assessing his or her rehabilitative potential. Knowing what motivated the conduct is a way to gauge the risk of repetition.

¹⁰ *CAC v McMillan*, NZTDT 2016/52.

¹¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

¹² *CAC v Mackay*, NZTDT 2018-69 at [40]–[62].

¹³ *CAC v Fuli-Makaua* NZTDT 2017/4.

Cancellation is less likely to be required where the practitioner understands what led him or her to commit serious misconduct and is taking, or has taken, meaningful steps to reduce the risk of it happening again. The respondent in this case has some insight and has agreed that his conduct was inappropriate and that he needs training on maintaining professional boundaries.

- [38] The respondent has also had no prior misconduct since obtaining provisional registration as a teacher in 2011 and we accept he was under some personal stress at the time of the conduct. However, the strain he may have been under does not excuse or justify the respondent's conduct.
- [39] It is not in dispute that some form of penalty is warranted. Cancellation is the most serious of available penalties. On balance and by a very fine margin, we have decided that suspension, in combination with censure and professional development conditions, is the least restrictive way in which to maintain professional standards and the public's confidence in the profession in this case.¹⁴ It is necessary that the respondent's penalty highlights the standard of appropriate behaviour teachers are required to meet and the consequences of the failure to do so. We are satisfied that suspension will achieve this, while also providing the respondent with the opportunity to remain in the profession.
- [40] Having considered similar cases and bearing in mind the above, as well as the obligation on the Tribunal to impose the least restrictive penalty in the circumstances, pursuant to section 500(1) of the Act, we order as follows:
- (a) Censure of the respondent (under s 500(1)(b));
 - (b) Suspension (under section 500(1)(d) of the Act) of the respondent's practising certificate for 12 months from the issuing of this decision;
 - (c) Annotation of the Register referring to this decision, the censure and the conditions imposed for two years after he resumes teaching (under s 500(1)(e) of the Act);
 - (d) Conditions to apply for 2 years to any subsequent practising certificate issued to the respondent (under s 500(1)(j)):
 - (i) To provide a copy of the Tribunal's decision to any current or potential teaching employers.
 - (ii) To undertake any professional development programmes directed at

¹⁴ *CAC v Teacher* NZTDT 2019-19; *CAC v Shah* NZTDT 2021/25;

professional and ethical boundaries of teachers in relation to students to be approved by the Manager of Teaching Practice of the Teaching Council.

- (iii) To practise under the guidance of a mentor approved by the Manager of Teaching Practice of the Teaching Council for 1 year, who may also stipulate the form of mentorship and the provision of mentorship reports or updates

He Rāhui Tuku Pānui - Non-Publication

Legal principles

- [41] The default position is that Tribunal hearings are to be conducted in public. Consequently, the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication specified in s 501 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.
- [42] 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.”¹⁵ Nevertheless, protection of the public is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In *NZTDT v Teacher* the Tribunal described the fact that the transparent administration of the law also serves the important purpose of maintaining the public’s confidence in the profession.¹⁶
- [43] In *CAC v Jenkinson* the Tribunal summarised the principles on non-publication.¹⁷ The Tribunal referred to *CAC v Teacher* NZTDT 2016-27, where it acknowledged what the Court of Appeal had said in *Y v Attorney-General* [2016] NZCA 474: 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”.

¹⁵ *CAC v McMillan*, NZTDT 2016/52.

¹⁶ *NZTDT v Teacher*, 2016/27, 26.

¹⁷ *CAC v Jenkinson* (NZTDT 2018-1413).

- [44] In considering whether to grant such orders, the Tribunal in *CAC v Jenkinson* adopted a two-step process:

Step 1: "the threshold question". The Tribunal must decide if it is satisfied that the consequences relied upon would be likely to follow if an order prohibiting publication was not made. This simply means that there must be an "appreciable" or "real" risk that the asserted consequence would occur based on the evidence before it.

Step 2: If so satisfied, the Tribunal must determine whether it is proper for the presumption in favour of open justice to yield. This step requires that the Tribunal consider the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression.

- [45] This approach was adopted in *CAC v Finch* where the Tribunal noted that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, the Tribunal confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term "proper" that imports the standard that must be met in the criminal context.¹⁸

- [46] The Court of Appeal in *Y* referred to its decision *X v Standards Committee (No 1) of the New Zealand Law Society*, where the Court stated:¹⁹

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*.

Applications for non-publication

- [47] There was an interim order for non-publication issued at the PHC on 20 May 2024 in relation to Student A, Student B, and the respondent. The Tribunal must now deal with permanent orders.

Student A and Student B

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

¹⁹ *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

- [48] The CAC notes in its submissions that Student A and B's names are unlikely to be referred to in the Tribunal's decision or in other documents. However, out of an abundance of caution, the CAC seeks permanent a non-publication orders for Student A and Student B's names and identifying details.
- [49] Given the nature of the charges and the vulnerability and well-being of the students we consider it appropriate to make permanent orders prohibiting from publication the names of Student A, Student B, their parents, or teachers (apart from the respondent) and any identifying particulars referred to in this case.
- [50] The ASOF does not contain any names of the learners, parents or other teachers involved in any of the incidents and it appears to be an extremely low risk that there would be an inadvertent publication of their names. However, the Tribunal considers that an order for non-publication of the names of Student A, Student B, their parents or teachers (apart from the respondent) and any identifying particulars referred to in the ASoF is appropriate and makes orders accordingly.

The School

- [51] On 29 July 2024 the school applied for permanent non-publication orders prohibiting publication of the school's name and any identifying particulars of the school. Submissions and an affidavit in support were filed with the application.
- [52] In summary, the application is based on the following:
- (a) The risk that publication of the school's name will result in the identification of Student A and Student B;
 - (b) Publication may adversely impact on Student A and Student B in particular their mental health and wellbeing;
 - (c) Publication may adversely impact on the school staff who will be the subject of speculation and scrutiny.
- [53] The school submits that the lower threshold for a connected party (as opposed to a respondent) applies here where there is evidence of a real risk that publication will cause adverse effects which are more than speculative.²⁰ The school considers there are genuine and significant risks arising particularly for other staff at the school who may be the subject of media and social media speculation if the school or respondent

²⁰ CAC v Taylor [2019] NZTDT 2019/92 at [25]-[29].

are named. With respect to publication of the names of Student A and B the school filed an affidavit outlining very serious mental health and wellbeing concerns if the school or respondent's names are published as that will risk identification of Student A and Student B.

- [54] With respect to naming the school, the Tribunal is satisfied that the consequences relied upon may follow if an order prohibiting publication is not made. Following the two-step test in *CAC v Jenkinson* the Tribunal finds that there is sufficient evidence to support a finding that there is a real or appreciable risk to the school if its name is published. Accordingly, the Tribunal finds that this is a case where it is proper for the principle of open justice to yield. The Tribunal makes the permanent non-publication order sought by the school.

The Respondent

- [55] The respondent seeks permanent orders prohibiting publication of his name on the grounds that:
- (a) It would cause undue hardship to the respondent's family, including his mother who has cancer and his father who is well known in parts of the community; and
 - (b) It may identify Student A and Student B.
- [56] In support of his application the respondent filed an affidavit detailing matters related to his mother's illness, his father's work and position in the community, his relationship with his wife and financial situation. The respondent annexed letters of support from his wife, other teachers at the school as well as a letter from a teacher at another school offering to mentor the respondent as part of his rehabilitation.
- [57] The respondent deposes in his affidavit that during the period of conduct leading to the charges he had ongoing relationship problems with his wife and he was suffering from a lack of sleep, anxiety, and stress, and felt he had no one to talk to. He acknowledges that he turned to his students as he felt that they were his friends and says that there was no sexual motivation but rather he wanted someone to talk to and share his feelings with. The respondent admits in the affidavit his lack of understanding of how to keep professional boundaries and claims that the schools he has been employed in as a teacher never conducted training on professional boundaries. He notes his intention to enrol in a professional boundaries course as part of his rehabilitation and education.

- [58] In addition, the respondent annexed to his affidavit apology letters to Student A and Student B, named the students in those letters, and sought the Tribunal's assistance to have the letters delivered to Student A and Student B. The Tribunal does not consider it appropriate for it to be involved in coordinating or conveying letters of apology from the respondent to Student A and B and queries the appropriateness of the letters, of the respondent having named the students in the letters, and indeed whether the letters may actually cause more stress and trauma to Student A and Student B. The Tribunal makes no further comment and leaves the matter with the Teaching Council to discuss with the respondent.
- [59] As set out above, public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges. Disciplinary proceedings will often have a negative impact on family members of a respondent and cause stress or shame. These are ordinary hardships resulting from publication and referred to in the case law cited above. The greater concern for this Tribunal, however, is the wellbeing and mental health of Student A and B should the respondent's name not be suppressed and should their identities become known. Evidence was filed by the school as to the mental health and wellbeing of Student A and B as well as the timing of the conduct in question, the ages of the students at the time of the conduct, and actions taken by one of the students when the respondent left the school.
- [60] It is in order to protect the identities of Student A and B that this Tribunal orders permanent name suppression for the respondent. The Tribunal finds that this is a case where it is proper for the principle of open justice to yield. The Tribunal makes the permanent non-publication order sought by the respondent.
- [61] The Tribunal makes a further order requiring redaction of all details in the ASoF that may potentially identify Student A and Student B including the years the respondent worked at the school, the years the conduct occurred, the name of the messaging platform the respondent used, and the extra-curricular group the respondent was responsible for and Student A and Student B were members of at the school. This decision is to be redacted accordingly before publication.

Utu Whakaea – Costs

- [62] Ordinarily where there is a finding of serious misconduct, the Tribunal will order the payment of costs which would be in the region of 40% of the actual costs.

- [63] Pursuant to s 500(1)(h), the CAC seeks a 40% contribution to the CAC's actual and reasonable costs. The CAC's total costs of \$8094.20 were set out in its Costs Schedule dated 24 July 2024. Forty percent of the total amount sought is \$3,237.68.
- [64] The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC. If there is any objection to the Costs Schedule filed by the CAC such objection is to be filed and served within a further 7 days from receipt of this decision.
- [65] The respondent is also ordered to pay 40% of the Tribunal's costs of \$1455 amounting to \$582.



Mokotā - B R Arapere

Deputy Chair of the New Zealand Teacher's
Disciplinary Tribunal

Date of decision: 23 September 2024

NOTICE - Right of Appeal under Section 504 of the Education and Training Act 2020

1. This decision may be appealed by the teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Clause 5(2) to (6) of Schedule 3 applies to an appeal under this section as if it were an appeal under clause 5(1) of Schedule 3.