BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

I TE RŌPŪ WHAKARAUPAPA O AOTEAROA **NZTDT 2022/29**

UNDER | WĀHANGA	the Education and Training Act 2020 (**the Act**)
IN THE MATTER | MŌ TE TAKE	of a charge referred to the Tribunal
BETWEEN | I WAENGA I A	**COMPLAINTS ASSESSMENT COMMITTEE (CAC)** Kaiwhiu | Prosecutor
AND | ME	**BRUCE BLACKBURN** (Registration 242452) Kaiurupare | Respondent

---

TE WHAKATAUNGA Ā TARAIPIUNARA
DECISION OF TRIBUNAL ON CHARGES
29 o Mei 2023 – 29 May 2023

NOHOANGA - HEARING: 6 April 2023 on the papers via MS Teams

TARAIPIUNARA - TRIBUNAL: B R Arapere (Deputy Chair), D Spraggs and C Harrington (Members)

HEI MĀNGAI - REPRESENTATION: E McCaughan, Kayes Fletcher Walker for the CAC
J Brown, NZEI Te Riu Roa for the Respondent

Hei Tīmatanga Kōrero – Introduction

[1] Pursuant to s 497 of the Education and Training Act 2020 (the Act) the Complaints Assessment Committee (CAC) charges that the respondent, a teacher[1] of Christchurch, has engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.

[2] The CAC charges that the respondent:

a. Between 19 January 2019 and 20 January 2021, failed to disclose a CAC investigation and censure to his employer.

b. Between 4 November 2020 and 18 January 2021, swore and used inappropriate language towards and around learners.

c. Between 25 May 2020 and 18 January 2021, inappropriately handled learners.

[3] The CAC alleges that the conduct in the charge separately or cumulatively amount to serious misconduct pursuant to section 10 of the Act and Rule 9(1)(g) and/or (k) of the Teaching Council Rules 2016 (the Rules) or alternatively amounts to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to s 500 of the Act.

Ko te Hātepe Ture o tono nei – Procedural History

[4] A pre-hearing conference (PHC) was held on 24 November 2022 before the Chairperson of the Tribunal at which the CAC sought interim non-publication orders for the names and identifying details of the Early Childhood Centre (the ECE centre) and of any staff, child or parent involved. The respondent also sought interim non-publication orders of his name on medical grounds.

[5] Interim non-publication orders were made in respect of the respondent, the ECE centre and staff at the ECE centre involved in the case, the names of children (involved in the case) and their parents and any identifying details.

[6] Various timetabling directions were also made at the PHC.

Kōrero Taunaki - Evidence

Agreed Summary of Facts (ASoF)

[7] The ASoF is set out in full below:

[1] As set out in the Agreed Statement of Facts the respondent's registration expired on 9 July 2022.

"Introduction

1 Mr Blackburn was first registered as a teacher on 20 August 2003. His practising certificate (which is subject to confirmation) expires on 9 July 2022.

2 At the time of the incidents discussed below, Mr Blackburn was working as a teacher at Three Trees Learning Centre (TTLC), an early childhood education facility located in Rolleston, Christchurch.

Allegation One: That Mr Blackburn, between 4 November 2020 and 18 January 2021, swore and used inappropriate language towards and around learners

3 On 4 November 2020, a parent reported seeing Mr Blackburn telling children to "fuck off" while Mr Blackburn was tending to another child who had hurt himself. The parent was approximately one metre away when this happened, and considered that Mr Blackburn's tone and body language showed that he was angry with the children.

4 Following this, TTLC conducted an investigation and interviewed Mr Blackburn's colleagues.

5 One teacher advised on 11 November 2020 that she had not heard Mr Blackburn say "fuck off" to the children, but that she had heard him say "shit" and "bloody hell" in front of the children.

6 On 27 November 2020, a disciplinary meeting was held. At this meeting, Mr Blackburn said that there was a low level of bad language at the Centre. He said that he would use "shit" and "bloody" outside on the deck of TTLC, but did not consider that the children would have heard this. He denied using the word "fuck".

7 Following this meeting, Mr Blackburn received a written warning for his use of language on 4 December 2020.

8 On 1 June 2021 Mr Blackburn's representative advised the CAC:

(a) Mr Blackburn denied swearing at a child or children.

(b) Mr Blackburn accepted that he sometimes would use swearwords such as 'shit' and 'bloody' when talking with his colleagues away from children.

Allegation Two: That Mr Blackburn, between 25 May 2020 and 18 January 2021, inappropriately handled learners

9 On 25 May 2020, TTLC received a complaint from a parent, after her daughter disclosed that Mr Blackburn had smacked her bottom while she was laying across his lap. An investigation was conducted, where Mr Blackburn said that he tapped the girl on the bottom in order to get her and other children to move themselves off him so that he could begin a story.

10 In a letter dated 8 June 2020, the Centre Manager advised Mr Blackburn:

"In our ECE sector and Three Trees Learning Centre we all follow the same set of rules. When it relates to touching a child, you can rest your hand on their shoulder when softly communicating with them, however you cannot simply touch a child's bottom area for any reason (other than supporting with toileting, nappy changing). This action would place yourself and/or the child in a vulnerable position and one in which it can be hard to determine how and why it has occurred."

11 On 20 October 2020 the Centre Manager observed Mr Blackburn tapping a child on the bottom whilst the child was lying on his lap. The Centre Manager advised Mr Blackburn that he was not to place children over his knees ever again.

12 On 22 December 2020 another parent spoke with the Centre Manager on the phone about an incident which occurred on approximately 15 December 2022 when the parent had

witnessed Mr Blackburn massaging a child's back whilst he was sitting in a chair and they were over his lap. Mr Blackburn was telling other children that they could be next for a "massage". The parent felt "extremely uncomfortable" watching this.

13 *On 14 January 2021, Mr Blackburn's team leader observed Mr Blackburn playing with children by placing them over his lap on their fronts and gently patting their backs. About five children were gathered around Mr Blackburn and were excitedly saying "Me next". Mr Blackburn told them that they had to wait their turn. The team leader observed a child over Mr Blackburn's lap and he was playing pat-a-cake on their back. Mr Blackburn was gently patting the child's back and the child was giggling.*

14 *The team leader spoke with Mr Blackburn about this, to which he responded that "[The Centre Manager] said it's okay as long as I'm not touching their bottom". The team leader told Mr Blackburn to end the game, and take his break.*

15 *Despite the fact that the children were giggling, the team leader felt uncomfortable about the behaviour because she was aware of the 25 May 2020 incident, and did not want a parent to become upset if their child went home and talked about this "play".*

16 *On 16 January 2021, the team leader emailed the Centre Owner setting out her concerns.*

17 *On 17 January 2021, the parent who had spoken with the Centre Manager on 22 December 2020 about Mr Blackburn massaging children emailed the Centre Manager, putting the concerns that they had raised on 22 December 2020 in writing.*

18 *On 25 January 2021 Mr Blackburn and his representative attended a disciplinary meeting with the Centre Owner and the Centre Manager. Mr Blackburn said that he recalled a conversation with the Centre Manager, from which he understood that he could have children over his knee, but that he was not to touch or tap their bottoms. The Centre Manager said that this was not accurate.*

19 *Following this meeting, Mr Blackburn resigned on 29 January 2021.*

20 *On 1 June 2021 Mr Blackburn's representative advised the CAC that:*

(a) Mr Blackburn was told not to have children on his lap and tap them playfully on their bottom as part of the game 'Pat a cake pat a cake bakers man'.

(b) He stopped doing this and understood he was able to continue massaging them on their backs and tapping them on their backs in fun.

Allegation Three: That Mr Blackburn, between 19 January 2019 and 20 January 2021, failed to disclose a CAC investigation and censure to his employer

Censure agreement

21 *On 16 October 2014 Mr Blackburn was convicted and sentenced in relation to four charges of "breach of protection order", relating to a protection order which had been issued in favour of his ex-partner. On 5 March 2015 Mr Blackburn was convicted and sentenced for a further charge of breach of protection order and a charge of obstructing Police.*

22 *All of these convictions were considered by the CAC, which referred the matter to the Tribunal on 17 September 2015.*

23 *On 21 April 2016, the Tribunal considered the convictions and made the following orders:*

(a) Censure.

(b) Annotation of the Register.

(c) At his own cost, Mr Blackburn was to complete an anger management course (as approved by the Teaching Council's Manager Teacher Practice) by 21 October 2016.

24 On 6 June 2018, the Teaching Council commenced an "own motion" investigation for a breach of the Tribunal's conditions, namely a failure to complete the anger management course within the required timeframe, and a failure to have the course approved by the Teaching Council's Manager Teacher Practice.

25 The matter was referred to the CAC. On 5 November 2019 the CAC censured Mr Blackburn for misconduct, and imposed a condition on his practising certificate requiring him "to show this censure agreement to employers for a period of 24 months, from 5 November 2019".

26 After further correspondence between the CAC and Mr Blackburn, Mr Blackburn signed the censure agreement on 25 May 2020.

Failure to show censure agreement to TTLC

27 Mr Blackburn was first interviewed by TTLC on 19 January 2019, by the previous centre manager who left the centre in June 2019. TTLC received a Police vetting report on 27 February 2019. Mr Blackburn was offered a relieving position on 19 September 2019, which he accepted on 25 September 2019.

28 On 28 January 2020 the Centre Manager became aware that Mr Blackburn had "results" on his Police vetting report. On 29 January 2020 Mr Blackburn advised the Centre Manager that:

(a) The matter occurred a long time ago, and involved an ex-partner.

(b) He was "done for assault" and "had to go to anger management courses".

(c) He had finished those courses (which he considered to be a joke).

29 Mr Blackburn did not disclose the existence of the censure agreement to the Centre Manager at that time. TTLC has no record of Mr Blackburn ever advising anyone at TTLC about the existence of the censure agreement, or providing them with a copy.

30 Mr Blackburn became a permanent employee on 11 May 2020.

31 The existence of the censure agreement came to the attention of the Centre Manager on 20 January 2021, after a CAC investigator spoke with the Centre Manager on the phone following receipt of the mandatory report for Allegations One and Two.

32 Mr Blackburn's failure to provide the censure agreement to TTLC was raised at a disciplinary meeting on 25 January 2021. Mr Blackburn said that he had spoken with a previous manager at TTLC (who no longer worked at TTLC) about "being sanctioned" for two years. Mr Blackburn acknowledged that he had not shown the censure agreement to the previous manager. Mr Blackburn's representative said that:

(a) Because of his work location in Ashburton it was hard to get to any anger management course.

(b) There was a course between 10am and 3pm in Ashburton but he could not get there in time when he was working.

(c) When he returned to Rolleston he did a 16 week course in about 2018 - 2019.

33 On 2 June 2021 Mr Blackburn's representative advised the CAC that Mr Blackburn believed that he had told the Centre Manager at TTLC about the CAC's decision.

Mandatory reports

34 On 19 January 2021 the Centre Manager filed a mandatory report in relation to Mr Blackburn Regarding Allegations One and Two.

35 On 1 February 2021 the Centre Manager filed another mandatory report in relation to Mr Blackburn regarding Allegation Three.

CAC meeting

36 The CAC met to consider the allegations on 26 May 2022. Mr Blackburn attended the meeting, along with his representative.

Allegation One - Using inappropriate language

37 Mr Blackburn again denied that he had said "fuck off" to the children, and repeated that all of the staff would use the bad language when away from children.

Allegation Two - Inappropriate handling of learners

38 Mr Blackburn stated that he treated the children like he would his grandchildren, and would rub or pat their backs. He was asked about whether, when he was patting the children, it would extend to their bottoms. Mr Blackburn responded that he would not, but he would sometimes gently guide them with his hand in an "off you go" manner.

39 Mr Blackburn also said that he struggled with the boundary between being a grandparent and being a teacher, but he did treat the children as he believed all children should be treated. The CAC asked Mr Blackburn whether his physical interactions with children would be different if he had training in an early childhood context, to which Mr Blackburn replied that they may have been. When he had trained as a primary school teacher, he had done a placement and had a mentor teacher, but this was not his experience when he moved to early childhood.

Allegation Three - Failure to show censure agreement to TTLC

40 Mr Blackburn said that he believed that he disclosed the CAC censure, or at least, that he did not deliberately hide it from management. He noted that due to his memory, he could not prove it, though said that the TTLC could not disprove it either."

Te Ture – Legal Principles

[8] Section 10 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] As confirmed by the Court of Appeal, the test under s 10 is conjunctive. In other words, if any of the criteria under s 10(1)(a) are satisfied, but the criteria under s 10(1)(b) is not satisfied, then the conduct will amount to "misconduct" rather than "serious misconduct".[2]

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

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

> 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 reasonably conclude that the reputation and standing of the profession was lowered by the respondent's behaviour.[3]

[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.[4]

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 combined conduct amounts to serious misconduct.
b. The appropriate penalty orders are:
    i. Censure.
    ii. Annotation of the Register.
    iii. Conditions (to apply for 2 years to any subsequent practising certificate issued to the respondent):
        1. To provide a copy of the Tribunal's decision to any current or potential teaching employers.
        2. To undertake any programme required by the Teaching Council relating to either behavioural management or appropriate physical contact with learners.

[14] The CAC submits that the most serious aspect of the respondent's conduct is his failure to disclose the Censure Agreement to his employer as he was required to.

[15] The CAC says that the respondent started working as a reliever at the ECE centre on

[3] *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZDT 2016/43, 24 March 2017.
[4] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

25 September 2019. When questioned about the results of his Police vetting report the CAC submits that the respondent gave inaccurate information regarding the nature of his convictions and what he was required to do as a result. He did not disclose the Tribunal's decision and he did not disclose that he was being investigated by the CAC for failing to adhere to the Tribunal's conditions. Despite being expressly required to do so under the Censure Agreement, at no stage after 25 May 2020, did the respondent ensure that the ECE centre was aware of the existence of the Censure Agreement.

[16] The CAC further submits that the respondent's failure to provide the Censure Agreement meant that the ECE centre was not aware of the Tribunal's decision in relation to the respondent's convictions and that he had not complied with the Tribunal's direction that he complete an anger management programme within the required timeframe. The programme that the respondent did undertake was not approved by the Teaching Council and the Teaching Council censured the respondent for this.

[17] The CAC submits that by failing to disclose the Censure Agreement to the ECE centre, the respondent subverted the Teaching Council's intention that the respondent start the conversation with future employers to ensure that he would receive the supports he required. It says that the respondent's failure to disclose may also have impacted on the way that that ECE centre responded to the incident on 4 November 2020 when Mr Blackburn was reported as getting angry and swearing at some learners.

Respondent Submissions

[18] The respondent, through his representative:

a. accepts that he failed to disclose the Censure Agreement to his employer after he signed it on 25 May 2020[5] and that this amounts to serious misconduct;
b. accepts that he swore in the vicinity of learners and that this is likely to amount to misconduct; and
c. says that he touched children gently and playfully and that this touch was not of a sexual character, nor was it for the purpose of correction or to hurt.

[19] The respondent says the Tribunal's obligations to the profession and the public could be fulfilled by censuring Mr Blackburn and for two years:

a. Requiring him to disclose the decision to future employers; and

[5] The Tribunal notes the respondent submissions at [2] state that the Censure Agreement was signed on 5 May 2020. The Tribunal has assumed this is a clerical error. The ASoF at [26] states that the respondent signed the Censure Agreement on 25 May 2020.

b. Annotating the register.

[20] In relation to the part of the charge concerning inappropriate touching the respondent says that there is no evidence of any harm caused or adverse effects to the learners involved. The respondent says that the conduct was not of the character or severity to be serious misconduct and while "disapproved of by some" is also unlikely to be misconduct.

Kupu Whakatau – Decision

[21] The Tribunal finds the particular charges set out in the notice of charge are established to the requisite standard.

[22] 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).

[23] The Tribunal addresses the three charges in turn.

[24] On the charge of failure to provide the Censure Agreement to his employer, the Tribunal considers the respondent's failure to disclose the agreement to his employer as he was required to was completely unacceptable. It adversely reflects on the respondent's fitness to be a teacher and shows a lack of judgment and insight into his own behaviour. Further, it shows a lack of respect by the respondent for his professional obligations. To an objective observer it appears that the respondent has not reflected on and taken seriously the censure issued to him. The Tribunal finds the conduct is of a character and severity that meets the criteria for serious misconduct.

[25] As set out in the ASoF the respondent gave his employer inaccurate information regarding the nature of his convictions and what he was required to do as a result and

he did not disclose the Tribunal's decision. He did not disclose that he was being investigated by the CAC for failing to adhere to the Tribunal's condition that he complete an anger management course approved by the Education Council's Manager Teacher practice within 6 months. Moreover, despite being expressly required to do so the respondent did not ensure his employer was aware of the existence of the Censure Agreement

[26] The Tribunal considers its decision on this charge is consistent with other similar decisions dealing with comparable conduct.

[27] In *CAC v Sands* the teacher failed to alert two employers that she was subject to competence conditions and failed to provide them with a copy of those conditions.[6] The Tribunal found that the teacher had breached her conditions and that her conduct clearly adversely reflected on her fitness to be a teacher. Accordingly, the Tribunal found the conduct to be serious misconduct.

[28] In *CAC v Tepania* the teacher failed to comply with the conditions imposed by the Teaching Council and failed almost completely to engage with the disciplinary process. The Tribunal considered that all limbs of the test for serious misconduct were met.[7]

[29] Accordingly, on this charge and consistent with earlier cases, 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, swearing and using inappropriate language toward and around learners, the Tribunal regards the respondent's conduct again to be unacceptable and unprofessional. The Tribunal considers swearing and the use of inappropriate language towards and around learners reflects adversely on the respondent's fitness to teach and may bring the teaching profession into disrepute. The children involved were pre-schoolers (under the age of 5 years). There was no and could be no justifiable provocation for use of such language towards or around children of that age. Further, the Tribunal considers that this conduct was likely to have caused harm to learners.

[31] The Tribunal agrees with the CAC that on its own this charge would meet the threshold for misconduct. The CAC submits that the respondent's conduct was marginally more serious than the teacher in the decision of *CAC v Teacher N*.[8] In that

[6] *CAC v Sands*, NZTDT 2020/53 and 2021/16.
[7] *CAC v Tepania,* NZTDT 2020/4.
[8] *CAC v Teacher N,* NZTDT 2018/90.

case the teacher swore at intermediate school students by saying “Why do you treat me like shit?” repeatedly. The Tribunal in that case considered the swearing was towards the lower end but acknowledged that swearing at learners was never acceptable.

[32] The Tribunal considers its decision to be consistent with the *Teacher N* case and by a very slim margin finds the respondent’s conduct amounts to misconduct rather than serious misconduct. However, the Tribunal notes there was no justification for the behaviour demonstrated by the respondent and his casual approach to swearing toward or around pre-school aged learners illustrates extremely poor role modelling and a lack of awareness of appropriate behaviour.

[33] On the final charge, inappropriate handling of learners, the Tribunal regards the conduct as meeting the threshold for misconduct. Touching children in a “pat-a-cake” game by patting their back or bottom while the child lies across a teacher’s lap is not appropriate behaviour. In this case, parents and other employees of the ECE centre observed the respondent touching learners in this way. Despite the Centre Manager speaking to the respondent about the inappropriateness of the behaviour it happened again on at least two further occasions.

[34] The respondent cited *CAC v Treanor* as an example of a case involving inappropriate touching by a teacher of two learners where the teacher pushed the learners’ heads to invigorate their haka. The touching was used for correction but was not delivered with anger or retaliation and the level of force was low. The respondent submits that the conduct in this case was at a lower level to that in *Tregoar* and that it is open to the Tribunal to make a finding that the conduct is not misconduct. The Tribunal disagrees. While the intent of the respondent may have been for the touching to have been fun and playful it was simply not appropriate. It was not appropriate for learners to lay across the respondent’s lap and for their bottom or back to be touched, patted or massaged by the respondent.

[35] The Tribunal considers the conduct meets the threshold for misconduct. The conduct adversely reflects on the respondent’s fitness to be a teacher and it may have brought the profession into disrepute. The respondent was spoken to on more than one occasion about the need to not touch learners’ inappropriately, but he failed to listen, reflect and to change his behaviour maintaining instead that this was appropriate touching in a “grandfatherly” way. The Tribunal does not accept this response.

[36] Overall, the Tribunal considers that the combined conduct of the three charges amounts to serious misconduct. The Tribunal considers the three charges individually and cumulatively reflect poorly on the respondent’s understanding of and respect for

appropriate behaviours and boundaries around learners. The charges also raise concerns about the respondent's respect for the professional standards of the teaching profession. The respondent's conduct shows that he had little insight into the impact of his conduct and when spoken to about behaviours did not reflect on and correct them. The Tribunal does not consider the respondent to be a reflective practitioner.

Utu Whiu – Penalty

[37] 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 404:

> ***404 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 401(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 397 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.*

[38] 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.[9] 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.[10]

[39] 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 powers[11]:

(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.

[40] 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.

[41] In its submissions on penalty, the CAC submits that the respondent has not provided any reflective statement regarding his conduct meaning there is no information before the Tribunal regarding any insight he has into why his conduct was inappropriate; whether he wishes to continue teaching (as set out in the ASoF his practising certificate expired on 9 July 2022); and if he does wish to continue teaching what steps he has taken which give assurance to the Tribunal that such conduct will not occur in future.

[42] The CAC submits that even when viewed in combination the respondent's conduct was not so grave that cancellation of his registration is required and that cases of similar conduct have often been dealt with by way of penalty orders short of cancellation.

[43] The CAC points to the fact the respondent has co-operated with the Tribunal process and reached agreement on the ASoF as factors that show some degree of insight by the respondent that his conduct was unprofessional.

[44] The respondent through his representative admits that an aggravating feature is that the respondent has been before the Tribunal before and did not comply with the previous orders of the Tribunal. In mitigation, the respondent sets out a number of

[9] *CAC v McMillan*, NZTDT 2016/52.
[10] *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).
[11] *CAC v Mackay,* NZTDT 2018-69 at [40]–[62].

factors he considers explain the failure to comply with those orders such as statements about the health of the respondent and his ability to remember what he told his employer about earlier convictions and censures. Unfortunately, the statements made by the respondent's representative are without any supporting medical or other expert evidence and accordingly the Tribunal is unable to accord them much weight.

[45] Ultimately, the respondent accepts the CAC's approach to penalty. The respondent submits that should the Tribunal decide that the touching of learners' charge was inappropriate then some professional development or mentoring could be useful.

[46] The Tribunal has carefully considered both sets of submissions and considered the cases referred to by both parties. The Tribunal, in reaching its penalty decision, has been particularly motivated by the nature of the respondent's conduct, his previous offending, and his apparent lack of insight into his conduct.

[47] We note that if the respondent was still a practicing teacher (and still had a practising certificate) we would be considering a suspension, subject to a more detailed exploration of what rehabilitative steps had or were being taken and what current risk still existed.

[48] 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 404(1) of the Act, we therefore order as follows:

a. Censure under section 404(1)(b) of the Act.
b. Annotation of the Register for a period of 2 years under s 404(1)(e) of the Act.
c. Conditions to apply for 2 years to any subsequent practising certificate issued to the respondent under s 404(1)(c):
    i. To provide a copy of the Tribunal's decision to any current or potential teaching employers.
    ii. To undertake at his own cost any programme required by the Teaching Council relating to either behavioural management or appropriate physical contact with learners.
    iii. To seek and meet regularly with a professional teaching mentor such person to be approved by the Teaching Council.

He Rāhui Tuku Pānui - Non-Publication

Legal principles

[49] 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 section 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.

[50] 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."[12] 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.[13]

[51] In *CAC v Jenkinson* the Tribunal summarised the principles on non-publication.[14] 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".

[52] 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.

[53] This approach was adopted in *CAC v Finch* where the Tribunal noted that the

[12] *CAC v McMillan,* NZTDT 2016/52.
[13] *NZTDT v Teacher,* 2016/27, 26.
[14] *CAC v Jenkinson* (NZTDT 2018-1413).

"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.[15]

[54] 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:[16]

> 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

[55] There was an interim order for non-publication issued at the PHC on 23 November 2022.

[56] The Tribunal now has submissions from the CAC, evidence and submissions from the respondent and an application, related submissions, and evidence in support of permanent non-publication orders from the ECE centre.

Learners and their parents

[57] We consider it proper to make permanent orders prohibiting from publication the names of any learners, their parents, or teachers (apart from the respondent) referred to in this case. 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 the names of those people. The ECE centre raises in its submissions a CAC decision dated 22 June 2022 referring the matter to the Tribunal where some learners and/or parents are named. That decision is not before the Tribunal. The CAC and respondent agree that an order for non-publication of the names of any learners or parents referred to in the ASoF is appropriate. The Tribunal agrees and makes orders accordingly.

The respondent

[58] The respondent seeks a permanent non-publication order. An affidavit from the

[15] *CAC v Finch,* NZTDT 2016/11, at [14] to [18].
[16] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

respondent was filed in support. Various grounds are advanced particularly relating to his background, physical health, and mental health. The respondent's representative acknowledged in the PHC that independent medical evidence was required and would be provided for any application for permanent non-publication orders. Unfortunately, no such independent or expert medical evidence was filed.

[59] The CAC opposes any argument that the respondent's name needs to be suppressed because it might identify the name of the ECE centre, submitting that any concerns are significantly outweighed by the public interest in the respondent's name being published. This is particularly so given the respondent's failure to comply with the earlier Censure Agreement. The CAC also submits that there was insufficient evidence to demonstrate that publication would materially affect the respondent's mental health.

[60] Following the two-step test in *CAC v Jenkinson* the Tribunal finds that there is insufficient evidence to support a finding that there is a real or appreciable risk that the respondent's physical or mental health will be materially impacted if his name is published. Accordingly, the Tribunal finds that this is not a case where it is proper for the principle of open justice to yield. The Tribunal declines to make the permanent non-publication order sought.

The ECE Centre

[61] The ECE centre applies for permanent non-publication of its name. The application is based on alleged failures by the Teaching Council; the adverse consequences of publication; and possible identification of parents and/or learners. An affidavit from the professional services manager of the ECE centre was filed in support.

[62] The ECE centre makes several allegations about the conduct of the Teaching Council including a failure to annotate the Register as required by the Tribunal's 2016 decision and failing to advise the ECE centre of the Censure Agreement of 25 May 2020. In response, the CAC provided a timeline:

a. 21 April 2016 – Tribunal decision released. Teaching Council staff have advised the CAC that the Register was annotated at this time.
b. 6 June 2018 – Teaching Council commenced investigation into the respondent for failing to complete an approved anger management course. Teaching Council staff have advised the CAC that the Register was still annotated at this time.
c. 19 January 2019 – ECE centre first interviews the respondent.
d. 27 February 2019 – ECE centre receives Police vetting results regarding the

respondent.

e. 9 July 2019 – Teaching Council staff have advised the CAC that on this date the annotation was removed, as the respondent provided evidence that he had subsequently completed an anger management course.
f. 13 September 2019 – ECE centre offers a relieving position to the respondent.
g. 28 January 2020 – ECE centre's Centre Manager becomes aware of the respondent's Police vetting results.
h. 11 May 2020 – the respondent becomes a permanent employee at the ECE centre.
i. 25 May 2020 – the respondent signs censure agreement.

[63] Pursuant to s 47(4) of the Rules, the Teaching Council's Chief Executive "may approve the removal of an annotation on the register or list of authorised persons".

[64] The Tribunal notes that the register was not annotated at the date the ECE centre offered the relieving position to the respondent. However, the Tribunal's decision was publicly available via the Teaching Council website and could have been accessed by the ECE centre. Having received the Police vetting results a prudent employer would have made further inquiries into the respondent's background. Further, it was incumbent on the respondent to advise prospective employers of his professional disciplinary history. He failed to do so.

[65] The Tribunal has carefully considered the adverse consequences of publication claimed by the ECE centre which include reputation in the community and with other related centres, concerns of families and staff about safety, queries regarding the Centre's governance process and possible financial consequences. The Tribunal notes that the respondent's conduct that led to the charges occurred between 2 and 3 years ago. Many of the children who attended the ECE centre when the respondent worked there will have moved on to school. Further, the respondent is no longer a registered teacher and resigned from the ECE centre approximately 2 years and 4 months ago.[17] While there may be speculation in the local community for a period after the release of this decision the Tribunal does not consider that to be a factor which weighs in favour of the grant of a permanent order.

[66] However, the Tribunal does accept the ECE centre's submission that had it been aware of the Censure Agreement it would have taken steps regarding the respondent's employment at the ECE centre.

[67] On balance, the Tribunal is not satisfied that the consequences relied upon by the

[17] The respondent resigned on 29 January 2021: ASoF at [19].

ECE centre would be likely to follow if an order prohibiting publication is not made. Following the two-step test in *CAC v Jenkinson* the Tribunal finds that there is insufficient evidence to support a finding that there is a real or appreciable risk to the ECE centre if its name is published. Accordingly, the Tribunal finds that this is not a case where it is proper for the principle of open justice to yield. The Tribunal declines to make the permanent non-publication order sought.

Utu Whakaea – Costs

[68] Pursuant to s 404(1)(h), the CAC seeks a 40% contribution to the CAC's actual and reasonable costs. The CAC's total costs of $6,118.94 were set out in its submissions dated 27 January 2023. Forty percent of the total amount sought is $2,447.58.

[69] 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.

[70] 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

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

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. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).