

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**UNDER** the Education and Training Act 2020

**IN THE MATTER** a charge of serious misconduct referred by the  
Complaints Assessment Committee to the  
New Zealand Teachers Disciplinary Tribunal

**BETWEEN** **THE COMPLAINTS ASSESSMENT  
COMMITTEE**

Referrer

**AND** **MICHAEL PEARCE**

Respondent

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**DECISION OF THE TRIBUNAL**

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Tribunal: Hannah Cheeseman (Deputy Chair)  
Simon Walker and Simon Williams (Members)

Hearing: 21 July 2022

Representation: HM Farquhar/JL Garden for the Referrer  
D King for the Respondent

## Introduction

- [1] The Complaints Assessment Committee ("CAC") has charged the respondent with one charge of engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
- [2] The CAC alleges that the Respondent is a registered teacher, and between 23 February 2021 and 5 March 2021 engaged in inappropriate interactions with a colleague by:
- (a) Asking to see a tattoo on her upper thigh; and/or
  - (b) Touching her leg; and/or
  - (c) Suggesting that she have a threesome with him ; and/or
  - (d) Describing sexual acts to her that he wanted her to engage in and perform with her.

## Procedural History

- [3] The matter was heard on the papers.
- [4] A summary of facts was filed by the CAC and the parties agreed that the matter could be heard on the papers.
- [5] The CAC filed submissions on penalty and costs.
- [6] The Respondent filed submissions on penalty and costs and in support of his application for name suppression.
- [7] The Collage involved filed submissions in support of suppression of its details.
- [8] The CAC opposes the application for name suppression by the respondent, but is neutral on the application by the college.

## Evidence

### *Agreed Summary of Facts (ASoF)*

- [9] The ASoF for the charge is set out in full as it forms the majority of the evidence available to the Tribunal:
1. The respondent, **MICHAEL PEARCE**, is a registered teacher.

### **Circumstances of the offending**

#### *Background*

2. Mr Pearce was first registered as a teacher in 2005. He commenced employment at [REDACTED] in 2014 and, by March 2021, was [REDACTED]  
[REDACTED] [REDACTED]

3. ██████████ holds a provisional practising certificate as a teacher. She was appointed to a one-year fixed term position as ██████████ in 2020 following an interview by a panel which included Mr Pearce. ██████████ was offered a further one-year fixed term teaching position in 2021.
4. At the time of the conduct before the Tribunal, Mr Pearce was 54 years old and ██████████ was ██████████.
5. In February 2021 Mr Pearce agreed ██████████ could occupy a desk space in a room known as the Resource Room. Mr Pearce was the only other teacher who used the Resource Room as a permanent desk space.

*First request to see tattoos*

6. Some time after ██████████ moved into the resource room, Mr Pearce began asking her about personal matters, including her previous relationships. ██████████ initially trusted Mr Pearce and, when asked why she was not in a relationship, explained that she had previously exited an abusive relationship.
7. Mr Pearce asked about a tattoo on ██████████ forearm, and ██████████ explained the tattoo's significance. Mr Pearce asked ██████████ if she had other tattoos, and she said she had others on her wrist, hip and shoulder. Mr Pearce asked to see them. ██████████ felt uncomfortable and was reluctant to show them, as they were in usually hidden parts of her body. Mr Pearce persisted and commented that "we are all adults". ██████████ relented and Mr Pearce locked the room's door to the hallway, and asked ██████████ to step into the doorway alcove, away from the windows. ██████████ stepped into the alcove and lifted her skirt to the upper thigh to show a tattoo of a ██████████ and pulled her shirt up to shoulder height from the back to show another tattoo on her shoulder blade.
8. In the course of their interaction, Mr Pearce also stood in the doorway alcove and lifted his shirt to reveal tattoos on his ribs.
9. ██████████ felt embarrassed and ashamed by what had occurred.

*Second request to see tattoos*

10. A few days later on 3 March 2021, Mr Pearce texted ██████████ at 9:34am "you have fired my imagination [smile emoji]" and "I think u should show me that tattoo again [angel emoji]".
11. Later that morning, both teachers were in the resource room for a mutual non-contact period. Mr Pearce asked to see the ██████████ tattoo again and told ██████████ to lock the alcove door so this could occur. ██████████ grew very uncomfortable, but walked into the alcove and pushed the door closed. She did not lock the door. Noticing this, Mr Pearce remarked that the door had not been locked and then locked it.
12. ██████████ revealed the ██████████ tattoo and Mr Pearce rubbed the back of his hand up and down over the tattoo. ██████████ began to panic and exclaimed "no, I have too much respect for ██████████ In

response, Mr Pearce suggested that [REDACTED] could be involved in a “threesome” with him and [REDACTED].

13. [REDACTED] and Mr Pearce each returned to their desks. Mr Pearce repeated his request for a “threesome”. He described the sexual acts that he wished the three of them to engage in specific and graphic detail, for example that he wanted to have sex [REDACTED] while she “lick[ed] [REDACTED] out” and “played with [REDACTED] tits”. He said he wanted them to have sex at school. He used a gesture to mime himself pushing [REDACTED] head towards his penis.
14. Mr Pearce began asking questions about [REDACTED] sexual history, including when she had last had sex and when she had last masturbated. [REDACTED] invented accounts of previous sexual encounters in order to placate Mr Pearce. Mr Pearce told her to go home that night and masturbate while imagining the “threesome” he had described. The bell rang and the conversation concluded as [REDACTED] went to her next class.
15. The following day, Mr Pearce told [REDACTED] he had spoken to [REDACTED] who was not interested in a “threesome”. He expressed his disappointment.
16. Following a complaint by [REDACTED], the College arranged an investigation by an independent barrister. After considering the investigator’s report, the Board of Trustees summarily dismissed Mr Pearce.

### Teacher’s response

17. In his statement to the independent investigator appointed by the College, Mr Pearce:
  - (a) Accepted that he had asked to see [REDACTED] tattoos on the first occasion, after she had brought up his personal history. This had prompted discussion of her tattoos, after which he asked her to show tattoos on her leg and shoulder blade. [REDACTED] then stood in the alcove and lifted her skirt and top in order to reveal the tattoos.
  - (b) Added that at the end of that interaction, [REDACTED] joked that her previous bad experience with men meant she was thinking of trying women. It was in this context that Mr Pearce suggested she could have a threesome with him [REDACTED]. This remark was banter and not a genuine proposition.
  - (c) Accepted that he sent text messages to [REDACTED] asking to see the tattoo again.
  - (d) Accepted that he had asked to see [REDACTED] [REDACTED] tattoo on the second occasion, and added that this was after he watched a documentary which explained that [REDACTED]  
[REDACTED]  
[REDACTED] The conversation was casual

banter and he thought there was “a meeting of minds” between him and [REDACTED].

- (e) Denied touching [REDACTED] tattoo.
  - (f) Denied that he had at any time talked in a sexual way to [REDACTED] or made a crude gesture indicating oral sex.
18. Mr Pearce also told the independent investigator that, upon reflection, he accepted that:
- (a) The text messages he sent were inappropriate.
  - (b) He made a serious error of judgement in the tattoo interaction and should have known it was inappropriate to ask her to step into the alcove to show him her tattoos.
  - (c) A joke about a threesome was inappropriate given his relationship with [REDACTED] at the time.
19. Following the investigation, and in the course of the Board of Trustees’ disciplinary process, Mr Pearce accepted that his behaviour constituted misconduct and was “really stupid”. He added that it had not happened before and would not again. He expressed regret for any pain or discomfort caused to [REDACTED] which he said was not his intention.

## The Law

[10] Section 10 of the Act defines "Serious misconduct" as behaviour by a teacher that has one or more of three outcomes. Under Section 10(1)(a), it is conduct which:

- (i) Adversely affects, or is likely to adversely affect, the wellbeing or learning of one or more children, or
- (ii) Reflects adversely on the teacher's fitness to be a teacher; or
- (iii) May bring the teaching profession into disrepute.

[11] The Court of Appeal recently affirmed that test for serious misconduct in section 378 of the Education Act<sup>1</sup> is conjunctive.<sup>2</sup> As well as having one or more of the three adverse professional effects or consequences described in section 378(1)(A)(i)-(iii), set out above, the conduct concerns must be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Teaching Council Rules 2016 ("the Rules") describes the types of behaviour that are of a prima facie character and severity that constitutes serious misconduct.<sup>3</sup>

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<sup>1</sup> As it was then. However, s378 of the Education Act defines serious misconduct in the same terms as section 10 of the current Act.

<sup>2</sup> *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

<sup>3</sup> These came into force on 1 July 2016 and had a name change from the Education Council Rules 2016 to the Teaching Council Rules 2016, in September 2018.

- [12] The criteria for reporting serious misconduct are at Rule 9 of the rules. Rule 9 provides that a teacher's employer must report serious breaches of the Code of Professional Responsibility ("the Code"). In the present case the CAC alleges that the Respondent conduct breaches Rule 9(1)(k).
- [13] Rule 9(1)(k) which relates to an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
- [14] In addition to the Rules, the Code sets out the standards of expected conduct, and the criteria in section 10(1)(b) of the Act will be satisfied where the conduct alleged amounts to a serious breach of the Code, irrespective of whether the conduct fits into one of the examples in Rule 9.
- [15] If the test for serious misconduct and section 10 of the Act are not met, it remains open to the Tribunal to find that the conduct alleged amounts to misconduct, provided there has been a breach of accepted professional standards. It is noted that not all departures from accepted professional standards will amount to misconduct.
- [16] In the event of a finding of a serious misconduct or misconduct, the Tribunal may exercise its powers under section 500 of the Act.

## **Submissions**

- [17] CAC submits that the necessary criteria in section 10(1)(a) of the Act are met, and that the definition of serious misconduct is made out.
- [18] In particular, the CAC submits that the Respondent's conduct as outlined in the ASoF, constitutes serious sexual harassment which reflects adversely on his fitness to be as teacher and is likely to bring the profession into disrepute. Accordingly, the CAC submits that it amounts to serious misconduct.
- [19] With respect to the relevant test under section 10(1)(a) of the Act, the CAC submits that when considering whether conduct "reflects adversely on the teacher's' fitness to be a teacher" under section 10(1)(a)(ii), the Tribunal has previously focused on, "... whether the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by the teacher's peers or by the community. the views of the teachers on the panel inform the view taken by the Tribunal.<sup>4</sup>
- [20] The CAC submits that the approach generally taken by the Tribunal to the question of whether the conduct may bring the teaching profession into disrepute in contravention of section 10(1)(a)(iii), is to ask whether, "Reasonable members of the public, informed and with the knowledge of all the factual circumstances, could

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<sup>4</sup> *CAC v Crump*, NZTDT 2019/12 at [42].

conclude that the reputation and good standing of the teaching profession was lowered by the behaviour of the teacher concerned”.<sup>5</sup>

[21] The CAC then addressed the second limb of section 10(1)(b) which includes the Teaching Council’s criteria for reporting serious misconduct, which is set out in Rule 9 of the Rules.

[22] The CAC relies in this case on Rule 9(1)(k), as set out above. The CAC further refers to Rule 9(2), which provides, “Misconduct described in any of the paragraphs (a) to (e) and (k) of subclause (1) may be:

“(a) a single act; or

(b) a number of acts forming part of a pattern of behaviour, even if some of the acts when viewed in isolation are minor or trivial”.

[23] The CAC reminds us, that there is a slight difference in wording between section 10(1)(a)(ii) and Rule 9(1)(k), and notes that the Tribunal has applied a slightly modified form of the same test to that utilised under section 10(1)(a)(ii) when considering whether the criteria in Rule 9(1)(k) is met.

[24] The CAC refers also to the Code which sets out the high standards for ethical behaviour that are expected of every teacher, and states that the teacher must “respect [their] trusted role in society”. Learners, families and whanau, and the wider community place a significant amount of trust in teachers to guide their children and young people on their learning journey, and to keep them safe. The CAC submits that by acting with integrity and professionalism, teachers and the teaching profession maintain this trust and confidence.

[25] In particular, the CAC submits:

“(a) Clause 1.2 of the Code, which provides that teachers will maintain public trust and confidence in the profession by “engaging in professional, respectful, and collaborative relationships with colleagues”; and

(b) Clause 1.3 which provides that teachers will demonstrate “a high standard of professional behaviour and integrity.”

[26] The CAC submits that the Respondent’s conduct amounts to sexual harassment, and accordingly constitutes serious misconduct. The CAC submits that it is on the basis that the Respondent’s conduct reflects adversely on his fitness to be a teacher and/or that it will bring, or at the very least may bring, discredit to the teaching profession.

[27] In supports of its submissions, the CAC referred the Tribunal to a number of cases where similar conduct had been considered with differing levels of seriousness:

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<sup>5</sup> This is the standard stated by the High Court in *Collie v Nursing council of New Zealand* [2001] NZAR74(HC) at [28].

- (a) In *CAC v Singh*<sup>6</sup> the respondent that worked at the same school as the Complainant, a female staff member who he was mentoring. The Respondent sought out the Complainant, described her as “beautiful” and asked her to commence a relationship. He added, “Would you do it if I begged?”. The Tribunal expressed uncertainty about the seriousness of what had occurred, and concluded that the interaction could simply be a “pathetic attempt to ask [the Complainant] out”. The Tribunal declined to make a finding of serious misconduct.
- (b) In *CAC v Teacher M*<sup>7</sup>, the Respondent worked at the same school as the Complainant, who was a 17-year-old trainee teacher. The Respondent was the trainee teacher’s “associate teacher” and had some authority over her continuing training and education. On various occasions in 2017 the Respondent sent the Complainant text messages or Facebook messages that made her feel extremely uncomfortable. These included suggestions that the Complainant owed him a neck massage and that the pair should become drinking buddies.

The Tribunal had “no hesitation” in concluding that the behaviour amounted to serious misconduct. The Tribunal concluded that Teacher M’s poor professional judgment reflected adversely on his fitness to teach, and engaged section 378(1)(a)(ii), which was the section governing serious misconduct at that time. The Tribunal then considered whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession was lowered by Teacher M’s behaviour. The Tribunal bore in mind that intra-profession bullying and harassment have been the subject of intense media scrutiny in New Zealand in recent years, and that context was relevant to the inquiry regarding the behaviour before them. The Tribunal was satisfied that there was a high degree of public awareness, and disquiet, about this issue, which accentuates the reputational risk posed by practitioners who do not uphold the standard of professional integrity established by the teaching profession for itself. On that basis, the Tribunal was satisfied that the Respondent’s behaviour was of a nature that brings the teaching profession as a whole into disrepute when considered against the objective yardstick that applied.

The Tribunal concluded, for the same reasons, that the conduct of Teacher M was of the character and severity that engaged Rule 9(1)(o) of the Act, and therefore brought the conduct within the second stage of the test set out in Rule 378. Accordingly, the Tribunal found that Teacher M had committed serious misconduct.

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<sup>6</sup> *CAC v Singh* NZTDT 2016/48, 29 September 2016.

<sup>7</sup> *CAC v Teacher M* NZTDT 2018/34, 15 February 2019.



- (c) In *CAC v Karini*<sup>8</sup>, the Respondent attended a private party where another teacher from his school was present. He became extremely drunk and began making crude and sexual remarks to her, suggesting they have sex and smacking her buttocks. Later that evening, he drove to the house of a different teacher, propositioned her, and refused to leave despite asking several times. Mr Karini explained his behaviour to the CAC by referring to his poor relationship with alcohol and cannabis. The Tribunal concluded in that case that there was “no question” that serious misconduct was made out and considered his behaviour reflected adversely on his fitness to be a teacher, and was “certainly” capable of bringing the profession into disrepute.

[28] The CAC submits that in *Singh and Teacher M*, the Tribunal identified four factors that would usually be of particular relevance when considering cases in which one teacher makes inappropriate comments to another in the context of a mentoring relationship. While the CAC accepts that the Respondent was not formally the Complainant’s mentor, the CAC submits that these factors remain useful as a framework for assessing the conduct, particularly given that the Respondent was more senior than the Complainant, and he was head of the faculty in which she taught. The CAC submits that the relevant factors are:

- (a) *The nature and reason for the mentoring relationship.* While in this case the contact between the two teachers did not arise from a formal mentoring relationship, the CAC submits that it is analogous in that it arose from a context of significant power disparity. [REDACTED], and was on the interviewing panel that originally employed her. In contrast, the Complainant was a junior teacher in the Respondent’s faculty, who was employed on a fixed term contract.
- (b) *The experience and career stage of the teacher being mentored.* Again, the CAC highlights the disparity which existed between the two teachers’ experience and seniority. The Respondent was first registered in 2005 and had worked at the college for 16 years. [REDACTED]
- (c) *The ages of the respective parties.* The CAC accepts that no material age disparity exists in the present case as the Respondent is [REDACTED] and the Complainant [REDACTED].
- (d) *The context of the comments – what the teacher being mentored said, how the conversation went, where they were sitting or standing at the time, and any other physical interactions.* The CAC submits the context of these

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<sup>8</sup> *CAC v Karini* NZTDT 2018/74, 29 September 2020.

comments placed this example among the more serious examples of sexual harassment for the following reasons:

- (i) The Respondent's comments went well beyond a mere "overtone" of sexuality (as the Tribunal; concluded in *Teacher M*), and extended to highly specific and graphic descriptions of sexual acts that the Respondent wanted to engage in with the Complainant.
- (ii) The comments were preceded by a number of inappropriate interactions where the Respondent made the Complainant uncomfortable by asking to see part of her body that were ordinarily hidden, which extended to unwanted skin on skin contact when the Respondent rubbed the Complainant's thigh.

[29] For those reasons, the CAC submits that the Respondent's conduct is considerably more serious than Teacher M and, accordingly, clearly reflect adversely on his fitness to be a teacher, in terms of section 10(1)(a)(ii) of the definition of "serious misconduct". It is the CAC's submission that the Respondent's conduct constituted a serious departure from the standards of behaviour expected of teachers, and would be viewed with serious disapproval by a teacher's peers and the community. The CAC submits that sexual harassment has no place in the teaching profession, and the Respondent's engagement in such behaviour reflects adversely on his professional judgment, and his fitness to teach.

[30] The CAC submits, for the same reasons given by the Tribunal in *Teacher M*, that the Respondent's conduct clearly brings the teaching profession into disrepute within the meaning of section 10(1)(a)(iii). As the Tribunal observed in *Teacher M*, there is a significant public disquiet about the prevalence of professional sexual harassment, and the severity of the Respondent's conduct is more than capable of undermining the community's expectations of professional behaviour.

[31] Finally, the CAC submits that for the same reasons set out above, the Respondent's conduct is of a character and severity that engages Rule 9(1)(k), and therefore fulfils the second stage of the test set out in section 10 because it involves behaviour that brings, or is likely to bring, discredit to the profession.

[32] It is the CAC's submission that it is clear that sexual harassment constitutes a serious breach of the expectation that teachers maintain "professional, respectful and collaborative relationships" (clause 1.2 of the Code), and the expectations that teachers will demonstrate "a high standard of professional behaviour and integrity" (clause 1.3 of the Code).

[33] Accordingly, the CAC submits that the Respondent's actions amount to serious misconduct.

[34] The Respondent filed submissions in relation to penalty, and in those submissions noted that he accepts that his conduct constitutes serious misconduct.

*Discussion*

[35] While the Respondent did not resist the conclusion that his behaviour amounts to serious misconduct, the Tribunal is required to reach its own view on the gravity of the conduct. That said, in the circumstances of this case, we have no hesitation in accepting that the parties have correctly assessed the gravity of the conduct, and we agree that the CAC's charge is made out.

[36] We have considered the decisions referred to us, and while the present case does not specifically relate to a relationship of mentoring between teachers, we agree that the relationship between the Respondent and the Complainant is analogous. This is because of the power imbalance inherent from [REDACTED]

[REDACTED]  
[REDACTED] Accordingly, we are

assisted by the decisions referred to.

In particular, we are assisted by the decision in *CAC v Singh*, although the Tribunal in that case was not satisfied there was sufficient evidence to reach the conclusion that Mr Singh's behaviour had a sexual element, the four questions posed by the Tribunal and our answers to those, have enabled us to determine "the nature and seriousness of the events".

*The nature and reason for the mentoring relationship*

[37] Again, we accept that this was not a formal mentoring relationship, but we do consider that the conduct in the present case is aggravated by the significant power disparity between the Respondent and the Complainant. [REDACTED]

[REDACTED]

*The experience and career stage of the teacher being mentored*

[38] We note that the Complainant was significantly less experienced as a teacher than the Respondent. The Respondent was first registered as a teacher in 2005 and had worked at the college for 16 years.

. We note also that the Respondent was part of the panel that employed the Complainant, and presumably would have been on the panel considering any future employment of the Complainant at the college.

[REDACTED]  
[REDACTED]  
[REDACTED]

*The ages of the respective parties*

[39] We agree with the CAC that there is no material age disparity between the Respondent and the Complainant.

*The context of the comments*

[40] We accept the CAC's submission that the context in which the comments made by the Respondent places this case amongst the more serious examples of sexual harassment.

[41] In particular, we agree that the Respondent's comments went well beyond "a mere overtone" of sexuality and extended to specific and detailed descriptions of sexual acts that the Respondent wanted to engage in with the Complainant. We also accept that the comments were preceded by inappropriate interactions where the Respondent made the Complainant uncomfortable by asking to see parts of her body that were ordinarily covered, and that extended to unwanted skin on skin contact. We note also the locking of the door prior to these incidences, the relatively prolonged discussions, and the repeated nature of the behaviour.

[42] We agree that the conduct breaches clause 1.2 of the Code, which relates to teachers "engaging in professional, respectful and collaborative relationships with colleagues", and also clause 1.3 which provides that teachers will demonstrate "a high standard of professional behaviour and integrity".

[43] Accordingly, we are satisfied that the Respondent's conduct is in breach of section 10(1)(a)(ii) of the Act in that it reflects adversely on his fitness to teach.

[44] When considering section 10(1)(a)(iii) of the Act, which is whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the Respondent's behaviour, we bear in mind the media scrutiny surrounding intra-profession bullying and harassment in New Zealand in recent years<sup>9</sup>. This is contextually relevant to our inquiry regarding whether the Respondent's behaviour, seen through the eyes of reasonable members of the community, risks damage to the teaching profession's reputation. We are satisfied that there is a high degree of public awareness about the issue of sexual harassment in the workplace, and that accentuates the reputational risk posed by practitioners who do not uphold the standards of personal integrity established by the teaching profession for itself.

[45] Accordingly, we conclude that the Respondent's behaviour is of a nature that brings the teaching profession as a whole into disrepute when considered against the objective yardstick that applies.

[46] For the same reasons, we are also satisfied that the Respondent's conduct is of a character and severity that engages Rule 1(k) of the rules, and therefore fulfils the second stage of the test in section 10, because it involves behaviour that brings or is likely to bring discredit to the profession.

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<sup>9</sup> Particularly in respect to the legal profession.

[47] We find that the Respondent committed serious misconduct.

## **PENALTY**

[48] Having determined that this case is one in which we consider exercising our powers, we must now turn to consider what is an appropriate penalty in the circumstances.

### **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 section 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.*

- [49] To assist the Tribunal in determining penalty, the CAC referred to the penalty imposed in *CAC v Teacher M* and *CAC v Karini*, set out above:
- (a) In *Teacher M* the Tribunal accepted that suspension was a means by which a personal and general deterrence and denunciation of a teacher's conduct could be achieved. In that case, the teacher had previously been censured twice for less serious conduct, and accordingly a more serious penalty, namely suspension, was warranted, although the duration of suspension was shortened to take into account mitigating factors.
  - (b) In *Karini*, the CAC sought cancellation of the teacher's registration. The Tribunal was "concerned" by the "predatory nature" of the teacher's conduct and noted that he was both drunk and high on cannabis at the time of the offending. However, the Tribunal acknowledged the role played by Mr Karini's depression and the extent to which he was relying on alcohol and cannabis as a form of self-medication. By a very narrow margin, the Tribunal fell short of cancellation and, largely because of the evidence available, on which they were satisfied that Mr Karini was an experienced and highly regarded teacher, and there were no concerns for the safety of children in his care. The Respondent's personal circumstances and mental health were taken into account, together with the rehabilitative steps taken by the him.
- [50] In the present case, the CAC confirms its submission that the Respondent's conduct is more serious than that in *Teacher M*, but accepts that it does not share some of the more alarming features of the behaviour in *Karini*, including the decision to drive, under the influence of alcohol, to a colleague's house and then refuse to leave. The CAC submits however that the Respondent's actions do not appear to be linked to substance abuse, which could partially explain, although not justify, his conduct. Further, the CAC submits that in the present case the Respondent's harassment took place on school grounds, during school hours, and is therefore inextricably linked to his professional relationships.
- [51] Taking into account the degree of explicit sexual aggression and the presence of unwanted touching, both in the context of the power relationship over the Complainant, makes this a serious case of sexual harassment. In those circumstances the CAC submits that the appropriate starting point is cancellation.
- [52] The CAC accepts however that the acceptance of responsibility for what has occurred may lead the Tribunal to reach a point where a combination of 6 months' suspension, censure, annotation and conditions as an appropriate penalty.
- [53] The Respondent submits that a period of suspension is appropriate, although submits that the period of suspension should be three months rather than the six months suggested by the CAC. The Respondent accepts that he should be censured and that he should undertake a course on workplace relationships. Further, the Respondent agrees to supply a copy of the decision to his next

employer, and the Respondent submits that annotation should be for a period of one year.

### *Discussion*

[54] We agree that the start point for this type of conduct must be cancellation. We then consider the decision in *CAC v Fuli-Makaua*<sup>10</sup>, where the Tribunal said that cancellation is generally required in two over situations, which are:

- (a) Where the seriousness of the conduct is such that no outcome short of deregistration will sufficiently reflect its adverse effects on the teacher's fitness to teach, and/or its tendency to lower the reputation of the profession; and
- (b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.

[55] In determining penalty, the Tribunal must ensure that three overlapping principles are met, namely the protection of the public through the provision of a safe learning environment for students and the maintenance of both professional standards and public's confidence in the profession<sup>11</sup>. We also refer to the decisions of the superior courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may well have that effect.<sup>12</sup>

[56] In *Mackey* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding to exercise its power, and noted that they include:

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

[57] We do not intend to repeat what we said in those decisions other than to note that we have turned our mind to these principles in reaching our decision on penalty.

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<sup>10</sup> *CAC v Fuli-Makaua* NZTDT 2017/40, 5 June 2018.

<sup>11</sup> *CAC v McMillan* NZTDT 2016/52.

<sup>12</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1NZLR 1 at [97]; in *re A Medical Practitioner* [1959] NZLR 784 at para [800] (CA).

- [58] We do agree with the submission from the CAC that the starting point for offending as serious as this must be one of cancellation.
- [59] That said, we also agree that the conduct is mitigated by the acceptance of responsibility and the lack of disciplinary history of this type.
- [60] Accordingly, we are persuaded to stop short of cancellation and impose a combined penalty of suspension, censure, annotation of the register and the imposition of conditions. However, we emphasise that the respondent will place his registration in serious jeopardy of cancellation should there be any repetition of the type of behaviour that undermines the obligations he has to others in the profession.

## **COSTS**

- [61] The CAC seeks an order for costs against the Respondent towards the CAC's actual and reasonable costs incurred in undertaking its investigative and prosecutorial functions.
- [62] The CAC submits that the starting point, in accordance with Tribunal's practise note of 17 June 2010, is an award of 50% of the cost of investigation, the hearing, and the Tribunal's costs.
- [63] Taking into account that the Respondent has accepted responsibility and has agreed to proceed with the hearing on the papers, with the benefit of an agreed summary of facts, the CAC submits that a reduction in the costs award is warranted, and the CAC seeks a reduced costs award of 40% of actual costs.
- [64] We see no reason that the award of costs should be reduced, and order costs of 40%.

## **NON-PUBLICATION**

- [65] The Respondent seeks name suppression on the basis that publication of his name would risk identifying the Complainant. The Respondent notes that the incidents which led to this charge were of a personal and embarrassing nature, and that it would be detrimental to his colleague if people were able to ascertain that she had been involved in the incidents.
- [66] The Respondent submits that the Tribunal needs to balance the interests of the Complainant against the public interest considerations, such as openness, transparency, and accountability of the disciplinary proceedings and process, and the need for the public to know who has been charged. It is the Respondent's view that non-publication of his name would be a proper order in this case.
- [67] In his Affidavit, the Respondent notes that he is no longer employed as a teacher and further notes that [REDACTED] is a small community with only one secondary school. He notes that from that the naming of the Respondent would be detrimental



to the \_\_\_\_\_, and  
damaging to the college community, together with the Complainant.

[68] The College seeks suppression of its name, the area of \_\_\_\_\_ where the incident occurred, and the names of other persons which may lead to identification of the college or the individuals involved. The College notes that the incident occurred relatively recently so there is a real risk that the Complainant would be identified and this would cause further mental and emotional distress. Further, that the college is situated in a small community, and the naming of the Respondent and/or the college is likely to identify and have a detrimental impact on the \_\_\_\_\_, as she is likely to be unfairly associated with the actions of the Respondent due to their relationship. The College submits that it would be unjust that she be subjected to adverse public attention from both the media and the small rural community.

[69] The College submits \_\_\_\_\_, together with the interests of the Complainant outweighs the public interest considerations at stake and displaces the primary presumption in favour of publication of the name and identifying details of the Respondent.

[70] The College, further notes that a local media outlet has previously responded to complaints concerning the College with harassment of relevant parties to the complaint, and though are incorrect and unsubstantiated publication of information and articles concerning the College and College staff. Accordingly, the College is concerned that that media outlet could harass the \_\_\_\_\_

[71] The College is also concerned that naming the Respondent and/or the College may have a detrimental effect on student enrolment rates, and/or parental confidence in the College. An Affidavit was sworn by the principal in support of the application and confirming the grounds on which non-publication is sought.

[72] The CAC seeks an order for non-publication on behalf of the Complainant, noting that section 501(6) of the Act provides that the Tribunal may have regard to “the interests of any person (including, without limitation, the privacy of the Complainant (if any)) and the public interest” before making a non-publication order. Rule 34(2)(c) requires the Tribunal to consider making an order prohibiting publication of the name of a person whose evidence relates to some intimate or distressing matter. The CAC submits that while the Complainant did not give evidence before the Tribunal in the formal sense, her statements to the school investigator have formed the basis of the agreed ASoF.

[73] The CAC submits that the Complainant, has a clear privacy interest in ensuring that the details of the harassment are not associated with her, and she is not identified in any media attention or other publication that may follow from the Tribunal’s decision.

- [74] The application for suppression of the Complainant's name is not opposed.
- [75] The CAC opposes the Respondent's application for non-publication and takes a neutral position in relation to the College's application for non-publication.
- [76] The CAC submits that the starting point is the principle of open justice, and notes that section 501(3) of the Act sets out the presumption that Tribunal hearings be held in public. The principle of open justice in disciplinary context is maintaining public confidence in the profession through the transparent administration of the law<sup>13</sup>, although the CAC also acknowledges that section 501(6) of the Act gives the Tribunal power to make one or more orders for non-publication if it is of the opinion that it is proper to do so, having regard to the interest of any person and to the public interest.
- [77] The CAC opposes the application made by the Respondent on the basis that, in relation to the risk of identifying the Complainant, the Complainant's view should be given appropriate weight. The CAC filed an Affidavit from the Complainant with her views in relation to suppression. In short, the Complainant opposes name suppression for the Respondent. She is of the view that the Respondent must "own his actions", noting that he has "had a significant impact on my life over the last year which I have not had the option to ignore". The Complainant acknowledges that people at the college and people who know her may make the connection between the Respondent's name and her situation, but she notes she is no longer part of that community, and she is not concerned that this knowledge will be detrimental to either her or her reputation.
- [78] Accordingly, the CAC submits that the risk of naming the Respondent and any harm caused to the Complainant, should be put to one side.
- [79] In relation to the risk of harm to \_\_\_\_\_, the CAC accepts that this is a relevant factor in determining whether to order non-publication. However, the CAC submits that the Respondent must show a real risk that publication will affect them or their family "in a serious way, beyond the ordinary embarrassment, distress, anxiety and shame which will afflict any teacher who is the subject of published disciplinary actions".<sup>14</sup>
- [80] The CAC referred the Tribunal to the decision of *CAC v Teacher*<sup>15</sup> where the Respondent pointed to the hardship suffered by her husband in support of her application for suppression. In that case, as in the present, both partners worked at the same school. The Respondent had forged documents and signatures relating to NCEA assessment and awarded credits to students where he had not undertaken assessment. The Tribunal concluded serious misconduct was established and cancelled her registration. The Respondent sought non-publication on the basis of her own pre-existing mental health conditions, of which there was evidence from her GP, together with the likelihood that publication would

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<sup>13</sup> *CAC v Teacher* NZTDT 2016/27 at [66].

<sup>14</sup> *CAC v Teacher M* NZTDT 2018/126, 10 June 2020 at [66].

<sup>15</sup> *CAC v Teacher* NZTDT 2016/27, 25 October 2016.

cause “extreme stress” to her husband, who was a teacher at the same school. The husband “described the fact the Respondent’s misconduct has made relationships with colleagues awkward, and he considered that relations would worsen if suppression is not ordered”.<sup>16</sup> In that case the Tribunal considered that the application for non-publication was “relatively finely balanced”, and concluded, “We however recognise that teaching is a profession where practitioners rely upon a reputation for integrity and honesty, and, on balance, consider that there was a genuine risk [the Respondent’s husband’s] ability to discharge his duties at the same school at which the Respondent taught may be affected if suppression is not ordered”. The Tribunal ultimately considered that this interest, combined with the risk posed to the Respondent’s mental health, was sufficient to displace the interest in open reporting.

- [81] In the present case, the CAC acknowledges that the fact that [REDACTED] means that it is likely publication of his name will cause her some degree of hardship. However, the CAC notes that, at the time of filing those submissions, no Affidavit or letter had been provided from [REDACTED]. In addition, unlike *CAC v Teacher*, this is not a case where a casual reader of the decision is likely to assume the [REDACTED]. To the contrary, most readers are, in the CAC’s submission, likely to infer that the Respondent’s approaches to another woman were made without his [REDACTED], an assumption that is borne out by the evidence.
- [82] The CAC submits that the size of the area and the college is not unusual and does not provide weigh to the application, considering how often schools are located within small communities.
- [83] Again, the CAC submits that the view of the Complainant is a relevant consideration when considering whether it is proper to order non-publication. The impact on the Complainant was significant and she “left the school without explanation” as a result. The CAC accordingly submits that any hardship that may arise from the naming of the Respondent is insufficient to displace the principle of open justice in this case.
- [84] As noted, the CAC does not oppose the College’s application for non-publication, although notes that the explanation from the College principal that those involved have “moved forward from the matter” and consequently “there would seem to be no basis to publicise a matter that has been appropriately dealt with”, is not generally a factor weighing in support of a permanent non-publication order, as the principle of open justice establishes the presumption that matters in the Tribunal may be published whether or not they have been satisfactorily resolved prior to the Tribunal proceedings.

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<sup>16</sup> *CAC v Teacher* at [56(A)].

[85]

### *Discussion*

[86] The principles relating to name suppression were summarised in *CAC v Teacher*<sup>17</sup> as follows:

- (a) There is a presumption in favour of openness and therefore the starting point is that all names should be published.
- (b) There is no onus on the Applicant and the question is simply whether the circumstances justify an exception to the fundamental principle.
- (c) The correct approach is to strike a balance between the open justice considerations and the interests of the party who seeks suppression.
- (d) In exercising its discretion, the Tribunal may have regard to the interests of any person, then decide if it is “proper” to award a non-publication of any aspect of the evidence.
- (e) “Proper” is not as high a threshold as “exceptional”.

We also consider the decision of the Tribunal in *CAC v Jenkinson*<sup>18</sup>, where a two-step process was adopted:

- (a) Step 1: “The threshold question”. The Tribunal must decide if it is satisfied that the consequences relied on 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 consequences would occur on the basis of the evidence before it.
- (b) 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 in the interests of the party who seeks suppression.

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<sup>17</sup> *CAC v Teacher* NZTDT 2016/27.

<sup>18</sup> *CAC v Jenkinson* NZTDT 2018/14, 17 September 2018. This approach was affirmed more recently in *CAC v Tamaki* NZTDT 1019/128, 19 February 2021.

- [87] We accept the CAC submission that the Complainant's name and any identifying details should be the subject of a non-publication order.
- [88] We further accept that the name and identifying details of the , and the name and identifying details of the College, should be subject to an order for non-publication. We are satisfied that these orders are proper for the reasons set out in submissions.
- [89] In relation to the Complainant, there is a clear privacy interest to protect on her behalf, taking into account the nature of the conduct we have considered.
- [90] In relation to , these applications essentially go hand in hand. The naming of either the would make it entirely likely that the other party would be named. We accept that the community in which the college is located is a relatively small one, and we accept that there is a legitimate interest in minimising the impact of publication of the Respondent's name on and .
- [91] In relation to the non-publication order sought by the Respondent, by a narrow margin we consider this application is not made out. A strong argument for non-publication would be protection of the Complainant, and ensuring that she is not identified within the College community or the area in which the College is located. However, we note that the Complainant indicates she no longer resides in that location, and we do put considerable weight on the Complainant's view that non-publication would not be proper in these circumstances. In our view it would be inappropriate for the Respondent to benefit from a non-publication order ostensibly made to protect the Complainant when the Complainant herself does not seek such an order.

## ORDERS

- [92] The Tribunal's formal orders under the Education and Training Act 2020, are as follows:
- a) The Respondent's registration is suspended for a period of six months from the date of this decision pursuant to section 500(1)(d).
  - b) The Respondent is censured for his misconduct pursuant to section 500(1)(b).
  - c) The following conditions are imposed on the Respondent's practising certificate pursuant to section 500(1)(c):
    - a. To complete a workplace relationship counselling programme approved by the Teaching Council.
    - b. The Respondent is to provide his employer and any prospective employer with a copy of this decision.

- d) The register is to be annotated for a period of 2 years pursuant to section 500(1)(e)
- e) Pursuant to section 501(6)(c) and Rule 34 of the Education Council Rules 2016, there is an order permanently suppressing the name and identifying particulars of the Complainant.
- f) Under section 501(6)(c),  
are permanently suppressed.
- g) The Respondent is to pay 40% of the costs shown in the CAC's Schedule filed pursuant to section 500(1)(h); and
- h) The Respondent is also ordered to pay 40% of the Tribunal's costs pursuant to section 500(1)(i).



Hannah Cheeseman

Deputy Chairperson

## NOTICE

1. A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 500 of the Education and Training Act 2020 may appeal against that decision to the District Court (section 504(1)).
2. The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 500 (section 504(2)).
3. An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.
4. Clause 5(2) to (6) of Schedule 3 to the Education and Training Act 2020 applies to every appeal under section 504 as if it were an appeal under clause 5(1) of Schedule 3