BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/01

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge laid by the Complaints Assessment Committee (**CAC**)
AND	[redacted] registered teacher [redacted] of [redacted]
	Respondent

EVIDENTIAL RULING

Dated 22 September 2022

Hearing of Notice that CAC intends to call hearsay evidence held on Thursday, 15 September 2022 by AVL

Tribunal: Jo Hughson (Deputy Chairperson)

In attendance: Shannon Hullett (Tribunal Coordinator)

Appearances: Stephanie Bishop and Jack Garden, Counsel for the CAC

Janette Brown, NZEI Te Riu Roa, for [redacted]

Background

1. is a registered teacher. The disciplinary charge against her is set down for hearing in on 18 and 19 October 2022.
2. On 26 April 2022 the CAC gave notice that it proposes to offer hearsay evidence from two students relevant to the sole allegation in the charge that on or about 5 June 2020, at , engaged in sexual activity, namely by touching the groin of another teacher where she could be seen by students. The Notice was given in reliance on Rule 31 of the Teaching Council Rules 2016 (the Rules) and also on sections 130 and 18(f) the Evidence Act 2006 (the Evidence Act) and the Tribunal's previous orders admitting hearsay evidence in *CAC v Teacher D*[1] and *CAC v Patel*[2].
3. The proposed hearsay statements are of two 12-year-old boys, and , and are intended to be given in evidence by (father) and (mother), respectively. The hearsay statements are contained in and briefs of evidence and two interview transcripts they intend to produce. I have reviewed those briefs of evidence and the interview transcripts.
4. In summary:
   a) states in his brief of evidence that is currently 12 years old. He refers to a disclosure that his son made to him and his wife (mother) on 5 June 2020 and at a recorded interview that he and his wife attended with on 17 June 2020 with an investigator appointed by the Board of Trustees ( ). account to on 5 June 2020 and in the interview on 17 June 2020 records that he was standing on a grass bank opposite the staffroom on 5 June 2020 with his friend , when he witnessed "touch [another teacher's] privates" in the staffroom. described the touch as "a little bit long".
   b) states in her brief of evidence that is currently aged 12. She refers to a disclosure that her son made to her on 5 June 2020 and at a recorded interview that she and her husband attended with on 17 June 2020 with . account to and in the interview on 17 June 2020 records that he was standing with his friend on the grass bank on 5 June 2020 when he saw touch another

[1] 2019/34 (minute dated 24 September 2019).
[2] 2019/15 (minute dated 20 June 2019).

teacher "in the front kind of area" below the waist for two or three seconds, which made him want to wash his eyes out.

5. At a pre-hearing conference held on 13 May 2022 Ms Brown indicated that she objected to the admission of this hearsay evidence. I directed Ms Brown to file and serve a notice of objection (and any supporting material including submissions). I also directed Counsel for the CAC to file submissions concerning the applicability of the Court of Appeal's decision in *PCC v Health Practitioners Disciplinary Tribunal and W*[3] (the *W* case) to this Tribunal. More is said about this decision below.

6. Counsel for the CAC filed submissions on 27 May 2022. Ms Brown's notice of opposition and submissions were delayed due to a combination of personal circumstances for Ms Brown. Detailed written submissions were filed for ██████ on 18 August 2022.

The law

Evidence Act provisions

7. A hearsay statement is defined by section 16(1) of the Evidence Act as a statement that:
   a) Was made by a person other than a witness; and
   b) Is offered in evidence at the proceeding to prove the truth of its contents.

8. Under the Evidence Act a hearsay statement is admissible in a proceeding only if certain strict criteria are met. A hearsay statement is not admissible unless the circumstances relating to the statement provide reasonable assurance that the statement is reliable (under section 18(1)(a)). The circumstances that are to be considered to assess reliability are set out in section 16(1) and include the nature and contents of the statement, the circumstances that relate to the making of the statement, and any circumstances that relate to the veracity of the person making the statement and any circumstances relevant to the accuracy of the observation of the person.

9. It is noted that a finding that a hearsay statement is reliable for the purposes of determining admissibility does not equate to a finding that it is true; it is not the same as an assessment of credibility and weight to be given to the statement. These are matters to be addressed at the hearing.

10. Even if there is a reasonable assurance that the statement is reliable, section 18(1)(b)(i) requires that the maker of the statement is "unavailable" as a witness. Unavailability is defined in section 16(2). The person must be dead; or beyond New Zealand in circumstances in which is it is not reasonably practicable to be a witness;

[3] *PCC v Health Practitioners Disciplinary Tribunal and W* [2020] NZCA 435.

or unfit because of age or physical or mental condition; or cannot with reasonable diligence be identified or found; or is not compellable to give evidence.

11. Where a witness can be contacted or located but does not wish to give evidence, then to meet the unavailability criteria the person must be "unfit to be a witness because of age or physical or mental condition" (section 16(2)(c)).

12. Section 8(1)(a) of the Evidence Act provides for a general exclusion of evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding. This refers to the proceeding in general including the ability of the prosecution to prove their case, and unfair prejudice to the defendant. The need to consider section 8 arises only if the court determines that the relevant hearsay statements are admissible. A hearsay statement that meets the section 18 test must be excluded if the risk of an unfairly prejudicial effect on the proceedings outweighs its probative value. The interests of both the prosecution and the defence must be considered.

Application of Evidence Act to New Zealand Teachers Disciplinary Tribunal

13. There is no provision in either the Education and Training Act 2020 (the Education and Training Act) and its predecessor the Education Act 1989 (the Education Act) or the Rules that states the Evidence Act applies to the Tribunal.

14. The Education and Training Act and the Education Act do not specifically set out the rules governing the Tribunal's power to admit evidence. While section 501 of the Education and Training Act (and section 405 of the Education Act before it) concerns evidence before the Tribunal, it does not directly deal with admissibility. However:
    a) Pursuant to section 494(7) of the Education and Training Act (and section 398(7) of Education Act), the Tribunal is subject to a general obligation to perform its functions and exercise its powers in accordance with the rules of natural justice; and
    b) Section 486(1)(e) of the Education and Training Act (and section 388(1)(c) of the Education Act) requires the Teaching Council to make rules providing for the practices and procedures of the disciplinary bodies, including the Tribunal.

15. Rule 24(1) of the Rules provides that the Tribunal may, subject to the Education and Training Act and the Rules, regulate its own procedure in relation to hearings as it thinks fit.

16. Rule 31 of the Rules underpins the application to admit the hearsay statements. Rule 31 provides that the Tribunal:

"may receive as evidence any document, record, or other information that may in its opinion assist it to deal effectively with the matter before it, whether or not the document, record, or information would be admissible in a court of law".

The W case

17. *W* is the leading case on the admissibility of hearsay evidence in the Health Practitioners Disciplinary Tribunal (HPDT). The approach in *W* has been adopted and followed by the Social Workers Disciplinary Tribunal which has a clause that defines the powers of the Tribunal in identical terms as the clauses that define the powers of the HPDT. In short, the Court of Appeal held that the HPDT could receive evidence that was not admissible under the Evidence Act, including hearsay statements, provided admission of the evidence did not contravene the "hard limit" of natural justice principles. Those principles involve the right to challenge an accuser, at least when the only evidence comes from that person and he or she was an available witness.

18. W was a judicial review of the HPDT's decision to admit a complainant's evidence of sexual allegations against nurse W, where the complainant was not to be called as a witness. The evidence was in the form of a draft statement prepared by a lawyer who investigated the allegations for the Professional Conduct Committee (PCC) (which was prosecuting the charge), following an interview with the complainant. The complainant did not sign the statement and sought to withdraw it. He declined to attend the hearing stating he "[cannot] ruin [W's] life like this". There was correspondence from the complainant's psychiatrist to the effect that discussing the events in question would cause distress and would not be in the complainant's best interests.

19. The High Court found that the HPDT was required to apply the admissibility provisions of the Evidence Act, and that to do so was consistent with the requirement to follow the rules of natural justice. The High Court decision of Collins J was upheld by the Court of Appeal.

20. In summary, Collins J found:
    a) Denying W the right to directly challenge the complainant under cross examination undermined his ability to present his defence and breached his right to natural justice set out in clause 5 of Schedule 1 of the Health Practitioners Competence Assurance Act 2003, and in the New Zealand Bill of Rights Act 1990 (NZBORA).
    b) All subclauses of Schedule 1 must be given effect to. This means that the Evidence Act must play some role in regulating what evidence the Tribunal can admit. If the provision for the Tribunal to admit all evidence regardless of admissibility was applied as the primary provision, there would be "almost no

role" for the application of the Evidence Act, and this cannot have been what Parliament intended (given the express reference to that Act in clause 5).

c) The Tribunal has a discretion, but this discretion is subject to applying the rules of natural justice, must be grounded in established principles, and exercised judicially, taking into account:

    i. The principles and purpose underlying the empowering Act;

    ii. The particular circumstances presented by the proceeding and the evidence sought to be admitted; and

    iii. The importance of the principles underlying the applicable rule in the Evidence Act.

21. The Court of Appeal in *W* confirmed that the steps to be followed by the Tribunal are:

a) The Tribunal should first consider whether evidence would be admissible under the Evidence Act before considering whether to exercise the discretion under clause 6(1) of Schedule 1 of the Health Practitioners Competence Assurance Act 2003. As had been explained by Collins J at [109] of the High Court decision, this requires the Tribunal to assess the reliability of the statement in question and whether the statement maker is unavailable as a witness within the meaning of section 16 of the Evidence Act. The Tribunal also needs to consider whether the evidence should be excluded under section 8 of the Evidence Act on the grounds that its probative value is outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding. Thereafter the Tribunal must decide pursuant to clause 6(1) whether the PCC should be permitted to adduce the evidence in question.

b) The general admissibility standard is broad and reflects the principal purpose of the empowering Act of protecting the health and safety of members of the public by providing for mechanisms to ensure that health practitioners are competent and fit to practise their professions.

c) The discretion reflected in that standard is limited by the "hard limit" found in clause 5(3) (natural justice). For the discretion to be properly exercised, the Tribunal needs to be aware of, and assess the significance of, the reason clause 5(3) applies. This is the reason for the importance of a question as to the admissibility of a hearsay statement being assessed by reference to the relevant provisions of the Evidence Act, informed by the natural justice interests those provisions reflect, and in the specific context in which the issue arises.[4] This requires consideration of the extent to which the evidence is unreliable,

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[4] *PCC v Health Practitioners Disciplinary Tribunal and W* [2020] NZCA 435 at [39]-[45].

the extent to which any defence the practitioner wishes to advance may be adversely impacted by the absence of the statement maker as a witness, and the importance of prosecuting the charge to protect the health and safety of members of the public

22. In the *W* case the matter was remitted to the HPDT to determine whether the complainant was in fact unavailable to give evidence within the meaning given by the Evidence Act, and only then, if compelling reasons for unavailability were provided would the Tribunal be required to consider whether it should admit the hearsay statement.

23. As noted above, and notwithstanding the *W* case, there is no provision in either the Education and Training Act or the Education Act or the Rules that states the Evidence Act applies to the Tribunal. In this way, the statutory scheme in this matter is unlike the statutory scheme under the Health Practitioners Competence Assurance Act 2003 (Clause 6, Schedule 1) or the Social Workers Registration Act 2003 (Clause 5, Schedule 2).

Key issue

24. The content of the statements made by the two 12-year-old boys, and , is clearly pivotal to the allegation in the charge.

25. In addition to the briefs of evidence of and , the CAC has filed a brief of evidence from the CAC's investigator, Mr Eathorne. It would appear from Mr Eathorne's brief that the CAC did not conduct its own interviews of the two boys. Indeed, it appears that the CAC did not conduct any interviews. Mr Eathorne's brief of evidence is of limited utility on matters of fact apart from confirming that the CAC received written confirmation that and the teacher she is alleged to have engaged in sexual activity with, in the staffroom, ( ) were in a relationship at the time of the alleged conduct. does not dispute this.

26. In this case, apart from the statements of the two students there is no direct substantive corroborating evidence of the allegations. For example, there is no CCTV footage or photographs.

27. Ms Brown has filed a brief of evidence from and one from . I reviewed those briefs when considering the CAC's application. denies the allegation. In his brief of evidence, states that reached out and touched his arm and said "thank you, I'll message you later" as he handed her jacket, but he says she did not touch his groin or him in any way sexually in the staffroom on 5 June 2020.

28. [redacted] and [redacted] briefs of evidence of what their sons said to them about [redacted] are hearsay as are the boys' statements recorded in the transcripts of the interviews they did with the school's investigator.

29. The authorities are clear that the importance of the ability to cross examine increases in significance when the evidence is crucial to the case. There will be obvious limits of cross examination (and/or questioning by the Tribunal) of [redacted] and [redacted] whose own evidence cannot be offered as evidence of the truth of the allegations. Their evidence can only be offered as evidence of what they were told by their sons on 5 June 2020, and in relation to what their sons told the investigator at the interviews on 17 June 2020.

30. In essence, whether the allegation in the charge is established or not will depend on how the Tribunal resolves the conflict between the hearsay statements attributed to the boys and to [redacted] and [redacted] denials. Ms Brown indicated at the hearing that she wishes to cross-examine the two boys, the implication being that she considers she needs the opportunity to directly challenge their statements about what they saw and the circumstances surrounding the interviews of them.

Hearing of application

31. I heard the CAC's application by video conference on Thursday, 15 September 2022. The parties agreed that I had the power to hear and determine the application and a full Tribunal was not required. Counsel for the CAC and Ms Brown on behalf of [redacted] appeared, made oral submissions, and answered questions from me.

Summary of parties' submissions

Matters submitted in the CAC's Notice

32. The CAC submitted that the Tribunal is permitted to receive the hearsay statements of the boys under Rule 31. Reference was made to previous cases where the Tribunal has accepted it is entitled to receive hearsay evidence although the weight attributed to it will be a matter for the Tribunal. Counsel accepted that I am not bound by previous decisions of the Tribunal. In matters such as this, a case-by-case assessment of the evidence and the circumstances is required.

33. It was submitted further that the Tribunal's ability to receive evidence not ordinarily admissible in a criminal context should be informed by the purposes of the Education and Training Act[5] and the Education Act[6], which include to support and contribute to the health, safety, and wellbeing of students.

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[5] Section 4(b) of the Education and Training Act.

[6] Sections 139AA and 377 of the Education Act.

34. In addition, it was submitted that the circumstances relating to the statements provide reasonable assurance that the statements are reliable; the disclosures made to the parents were made on the afternoon of the alleged conduct and the recorded interviews were conducted less than two weeks after the alleged conduct. It was submitted that the statements are "highly contemporaneous" and this provides reasonable assurance as to their reliability. Submissions were made about the robust and careful way the recorded interviews were conducted and that this provides further reassurance as to their reliability.

35. The submission was made that the two boys are "unavailable" to give evidence. As to their unavailability the point was made that the boys are young (12 years-old), and in the interviews conducted by [redacted] for the [redacted] Board of Trustees the parents of the boys disclosed that "events were having a negative impact" on the boys. It was submitted that in those circumstances calling the boys could re-traumatise them by requiring them to recall difficult events that occurred nearly two years ago. In those circumstances, it was submitted that it would be consistent with the purposes of the Education and Training Act (and the Education Act) in particular, supporting and contributing to the health, safety, and wellbeing of students to admit their hearsay statements into evidence.

36. It was submitted for the CAC that no undue prejudice will be caused to [redacted] if the students' hearsay statements are admitted. Further, that both [redacted] and [redacted] would be present and available for cross-examination, including on the circumstances of the disclosures. The submission was made that the fact that the students themselves would not be called to speak to the statements they have previously made should go to the weight given to the statements, not their admissibility.

37. Counsel for the CAC made detailed submissions as to the applicability of the *W* case, and how I should approach my assessment of the CAC's application here should I conclude that the approach in *W* applies.

38. In relation to the applicability of the *W* case, in essence it was submitted for the CAC that:

    a) The Court of Appeal's decision is not directly applicable to the Tribunal's power to admit evidence, given the difference in the relevant legislative provisions under the Health Practitioners Competence Assurance Act 2003 and the Education and Training Act and its predecessor the Education Act.

    b) Notwithstanding, if the Tribunal does determine that the decision in the *W* case is directly applicable to the Tribunal's power to admit evidence, it would be appropriate for the Tribunal to exercise its discretion to admit the children's hearsay statements in this case.

39. It was submitted for the CAC that the hearsay evidence in the statements sought to be admitted is highly relevant to the determination of the proceedings and it is in the interests of justice that it be admitted. Further, that the circumstances relating to the evidence provides a reasonable assurance that it is reliable, and the statement makers are unavailable for the reasons already referred to.

Matters submitted on behalf of [redacted]

40. Ms Brown, in her submissions in opposition, noted that no sworn evidence was produced in support of the CAC's application for the admission of the hearsay statements, for example as to the unavailability of the boys because of their unfitness to be a witness because of age or physical or mental condition. Ms Brown also submitted that the interviews lack rigour and the circumstances in which they were taken point to at least one of the students being coached. Accordingly, she said, it is important the students are available to be questioned.

41. Ms Brown submitted that the two-step process in *W* provides a principled approach for the Tribunal when assessing whether hearsay evidence should be admitted in this Tribunal and should be adopted. Her submission was that the hearsay statements should not be admitted given that the boys are not "unavailable" for the purposes of the Evidence Act test, and there are issues with the reliability of the evidence.

Discussion

Approach adopted

42. The rules relating to hearsay, contained within the Evidence Act, reflect the desire of a trier of fact to be presented with the best evidence possible whilst also recognising that first-hand evidence is not always available and in some situations the trier of fact can be reasonably assured that hearsay statements may be reliable and accurate. Accordingly, in assessing the reliability of any hearsay statement, the circumstances to be considered include the nature and contents of the statement, the circumstances that relate to the making of the statement, any circumstances that relate to the veracity of the person making the statement and any circumstances relevant to the accuracy of the observation of the person.

43. These considerations implicitly recognise the difficulty in challenging the truth of the contents of a statement when the maker of that statement is not a witness. In some situations, the fairness of a proceeding may be compromised as a result allowing hearsay evidence. The admissibility criteria relating to hearsay evidence within the Evidence Act address this by requiring the statement to be both sufficiently reliable to be admissible, and its maker to be "unavailable" as a witness.

44. Acknowledging that there is no provision in either the Education and Training Act or the Education Act or the Rules that states the Evidence Act applies to the Tribunal, and the differences between the statutory scheme that applies here and that applied in the *W* case, I carefully considered the comprehensive and detailed submissions that were made for the parties.

45. I have concluded that the *W* case is a useful guide for the Tribunal when considering whether to exercise the discretion under Rule 31 to admit otherwise inadmissible hearsay statements. However, I stopped short of formally adopting the approach in *W*. I did not consider I needed to in this case as I considered the limit on the Tribunal's discretion under Rule 31, namely natural justice, sufficiently informs my approach in this case.

46. Fundamentally I agree with the sentiment expressed by the Chair of the Tribunal in *CAC v B*[7]. That is, I doubt that the lack of reference to the Evidence Act in the Education and Training Act or the Education Act, or in the Rules gives the Tribunal a wider discretion to admit evidence than other disciplinary Tribunals where the Evidence Act is referred to in the relevant clause about the Tribunal's power to receive evidence. As was identified in the *W case,* natural justice principles underpin the relevant provisions of the Evidence Act. In my view, it follows that a consideration of the admissibility of the evidence sought to be admitted in a court will be required as part of the Tribunal's assessment of whether it will exercise its Rule 31 discretion to receive the evidence sought to be admitted, or not.

47. Accordingly, I analysed the CAC's application to admit the hearsay statements of what the two boys said primarily from the perspective of ensuring the Tribunal can perform its functions and exercise its powers in accordance with the rules of natural justice (and in particular the right to a fair hearing). This analysis is guided by the relevant principles and provisions of the Evidence Act that would apply in a court of law and to some extent, the approach in the *W* case. First, I considered whether the hearsay statements sought to be admitted contain evidence that is relevant to the proceedings, whether the statements are reliable, and whether the witness is unavailable within the meaning given by the Evidence Act. As a second step, if the conclusion I reached was that the hearsay statement would be inadmissible in a court of law, I considered whether to exercise the discretion under Rule 31 by receiving the evidence would likely result in a breach of [redacted] right to natural justice and therefore, a failure by the Tribunal to perform its functions and exercise its powers in accordance with natural justice.

[7] NZTDT 2019/34, Minute dated 24 September 2019.

Analysis of Evidence Act admissibility of hearsay statements

48. I was satisfied that the hearsay statements are relevant to the determination of the charge. The charge particulars rely heavily on the contents of the statements of the two boys.

49. I was reasonably satisfied that the statements made by the two boys satisfy the requirements of reliability, for the reasons submitted by Counsel for the CAC. I accepted Ms Bishop's submissions about that. I noted that Ms Brown's submission was that the interviews lack rigour and the circumstances in which they were taken point to at least one of the students being coached which is why it is important the students are available to be questioned. However, my view is that is a submission that could be made at the hearing as to the weight to be given to the statements, rather than a submission as to their admissibility.

50. Ultimately, however, I was unable to be satisfied that the two boys are "unavailable" in terms of section 18(1) of the Evidence Act. I consider that compelling reasons have not been given to establish that the boys are unfit because of age or physical or mental conditions.

51. No evidence has been advanced that either of the boys is unavailable due to their physical or mental condition.

52. As for age, while I accept that having to give evidence in the Tribunal is unlikely to be a positive experience for the boys, and may cause them to feel uncomfortable, it is not uncommon for children as young as 12 to be called as witnesses in court. This occurs, for example, in the Family Court and in the criminal courts, with various supports provided to them. It has also occurred before this Tribunal. Like in family and criminal court fora, this Tribunal has the power to put procedures in place to accommodate children and vulnerable witnesses; Rule 34 provides special protections for certain witnesses and vulnerable people. That is, the Tribunal can be flexible in its approach to ensure that the voices of children can safely be heard (for example, giving evidence in private, and a discretion to allow the witness to give evidence by AVL or alternative means).

53. The indication that the boys' parents' have genuine concerns about subjecting their children to the Tribunal process does not satisfy the "unavailability" requirements. In cases where allegations involve inappropriate sexual activity by a teacher that has been witnessed by a student, it may be inevitable that child witnesses are likely to experience some distress or discomfort relating to giving evidence. However, these concerns or a parent's unwillingness for their child to be involved cannot on their own be equated with unavailability for the purposes of the Evidence Act test.

54. At the hearing, Counsel for the CAC, Ms Bishop conceded the CAC cannot establish "unavailability" for the purposes of the Evidence Act test and that that meant the parents' hearsay statements (of what the two boys said) would be inadmissible in a court of law.

Discretion under Rule 31

55. Turning to Rule 31 I considered whether to exercise the discretion to admit the statements notwithstanding that they would not be admissible in a court of law. I balanced the principles underpinning the relevant Evidence Act provisions (natural justice considerations) with the protective purposes of the Education and Training Act and the Education Act (including supporting and contributing to the health, safety, and wellbeing of students).

56. It is clear the hearsay statements of what the two students said they saw are pivotal to the particulars of the charge and that if they are not admitted there is a possibility that that CAC will be unable to proceed with the charge (if the boys themselves do not give evidence). The charge is one of serious misconduct and the particular allegation ███ ███████ is facing is serious.

57. ██████████ denies the allegation and intends to give evidence in her own defence. She is calling ██████████ whose evidence will support her own evidence.

58. Ultimately, I considered that the boys would need to be available for cross examination and questioning by Ms Brown on ████████████ behalf (potentially with special protections), for ██████████ to have a fair hearing of the allegation she is facing. I considered that there is an unacceptable risk that ██████████ could not respond to the specific allegation that has been made against her by the CAC otherwise. The crux of the matters in issue are if, how, and where █████████ may have touched ██ ██████ on 5 June 2020. These are not matters on which ███████████ or ██ ████████ can further elucidate (beyond what their respective sons may have told them or said at interview). I do not consider it would be an answer that ██████████ may still make submissions challenging the statements of what the two boys said they saw. In the absence of the two boys being called as witnesses, there could be no meaningful cross examination or questioning by the Tribunal on the question of whether there was sexually inappropriate conduct, in my view. For that reason, I consider that there is a real risk of unfair prejudice for ██████████ were the boys not called to give evidence and be available for cross examination and questioning.

59. The matter of witness availability is a matter of critical importance in proceedings before the Tribunal. In my view, the protective purposes of the Education and Training Act and the Education Act (including supporting and contributing to the health, safety,

and wellbeing of students) can be met in the present circumstances by the Tribunal's power under Rule 34 to provide special protections and to be flexible in its approach to ensure that the voices of children can safely be heard. While the proceedings do not carry the risk of criminal sanction, they do carry a risk of serious adverse consequences to [redacted], her career and reputation if the allegation is found to be true, and the risk of other sanctions such as a fine. It is important therefore that the Tribunal ensures it observes the standards of fairness and scrutinises applications to admit material hearsay evidence closely.

60. I consider that admitting the hearsay statements would undermine [redacted] ability to properly challenge the credibility of the statements of the two boys as to what they saw which would in turn deny her the opportunity to present an effective defence. This is a right in section 25 (e) and (f) of the NZBORA, which affords to a defendant in a criminal trial, the right to present a defence and examine witnesses for the prosecution. I accept that the Tribunal is not a criminal court, and the Act does not afford [redacted] all the protections granted to a defendant in a criminal trial. However, the Supreme Court in *Z v Dental Complaints Assessment Committee*[8] implicitly acknowledged that some criminal law safeguards still apply in the professional disciplinary context. In this case, I consider that the ability of [redacted] (who is facing a serious disciplinary charge) to challenge the complainants engages the right to natural justice and a fair hearing. The stakes are high for her. In the absence of compelling evidence as to why the two boys cannot give evidence as witnesses, I consider there would be a breach of natural justice to proceed in the absence of them.

61. As Collins J noted in the *W* case, the requirement that there be compelling reasons for concluding that a complainant should not be required to give evidence reflects the primacy of natural justice and is consistent with the high threshold in the test for unavailability of a witness applied by the courts under the Evidence Act. Having carefully assessed the facts and circumstances in this case and balanced the importance of protecting the health and safety of the boys with the degree of impact their absence is likely to have on [redacted] ability to advance her defence, my conclusion is that admitting the hearsay statements would be inconsistent with the Tribunal's obligation to perform its functions and exercise its powers in accordance with the rules of natural justice.

[8] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55

Summary

62. In summary, for the reasons outlined above I do not consider it appropriate to exercise the discretion under Rule 31 to admit the hearsay statements of the two boys.

63. On that basis, I order that the proposed hearsay statements of [redacted] and [redacted] contained in the briefs of evidence of [redacted] ([redacted] father) and [redacted] ([redacted] mother), and the two interview transcripts they intend to produce of their sons' statements to the investigator ([redacted]), are inadmissible as evidence.

Dated at Wellington this 22nd day of September 2022.

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Jo Hughson
Deputy Chairperson

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/01

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge laid by the Complaints Assessment Committee (**CAC**)
AND	[redacted] registered teacher [redacted] of [redacted]
	Respondent

MINUTE OF THE TRIBUNAL

Dated 13 October 2022

Application by the Respondent for permanent non-publication orders under section 405(6) of the Education Act 1989 and ORDERS

Hearing:	On the papers
Tribunal:	Jo Hughson (Deputy Chairperson), Simon Walker, Neta Sadlier (registered teachers)
Hearing Officer:	Shannon Hullett (Tribunal Coordinator)
Appearances:	H M L Farquhar and Jack Garden, Counsel for the CAC Janette Brown, NZEI Te Riu Roa, for [redacted]

Application by Respondent for non-publication orders

1. In its decision of 7 October 2022, the Tribunal granted leave to the CAC to withdraw the disciplinary charge against [redacted] and made an order permanently suppressing the names of the two boys who were the complainants. The Tribunal considered that for privacy reasons, it would be proper to permanently suppress from publication the names of the two 12-year-old students. Their privacy interests outweigh the public interest in them being identified in connection with the charge and these proceedings, in the Tribunal's opinion.
2. The Tribunal invited submissions from [redacted] relating to the permanent suppression of her name.
3. By Memorandum dated 6 October 2022, Ms Brown, sought permanent orders under section 405(6) of the Education Act 1989 (now 501(6) of the Education and Training Act 2020) in respect of the names of [redacted], [redacted], and the town referred to in the charge.

4. The grounds on which these orders were sought were:

   a) the allegation in the charge was one of sexual misconduct and has the capacity to stain [redacted] personal and professional reputation even though there has been no finding against her:
   b) The allegation occurred in the context of a small school in a tight-knit rural community. The two students are likely to be identified if [redacted] and [redacted] are named: and
   c) In reliance on several previous decisions of this Tribunal including a case where the CAC had withdrawn a charge which concerned allegations of misuse of force in a kura in a small rural town. In that decision the Tribunal made permanent non-publication orders in respect of the name of the respondent, the students, the kura, and the town in which the kura was located.[1]
5. Ms Brown submitted that as the "extremely serious" allegation here was about conduct that occurred in a small school in a rural community which [redacted] grew up, and as she had attended [redacted] herself and later taught there, if [redacted] were named then it would be inevitable the students would be identified by association. Further, that there has been no finding against [redacted] but if she were named then she would be the subject of "the court of public opinion and there is likely to be a

[1] *CAC v Teacher J* NZTDT 2019/73 at [32].

stain against her name and professional reputation permanently which would be "very unfair". It was to give effect to any orders to be made for the two students and [redacted] that a permanent order was sought for the name of [redacted]. It was submitted that due to [redacted] long association with the school, if the school were identified then inevitably the students and [redacted] would be identified.

6. By Minute dated 12 October 2022 Counsel for the CAC indicated that the CAC adopted a neutral stance on [redacted] application.

Discussion

7. The relevant principles adopted by the Tribunal in relation to non-publication orders are well established and need not be repeated here.

8. The Tribunal accepted that the school, and the community where [redacted] was teaching at the time of the alleged conduct, are small and that there is a risk that were [redacted] and [redacted] to be identified then there is a real risk that the two students would also be identified. The Tribunal's permanent order in respect of the students would then be undermined.

9. On that basis alone, the Tribunal considered that it is proper for the names of [redacted], and the name of the town identified in the charge, to be suppressed permanently.

The Tribunal does not accept that in every case where leave has been granted to the CAC to withdraw a charge it follows that it would be proper to order name suppression for the respondent teacher. As was said by the Tribunal in *CAC v King* [2] with reference to *CAC v MacMillan*[3] "… although the acquittal is a factor to take into account, it is not determinative. "Public interest" is not the same as "Public protection". As we have said previously, the principle of open justice is also part of the public interest". The same can be said in the context of a charge that has been withdrawn, in the Tribunal's view. Ultimately, a case specific assessment of the competing public and private interests will be required.

PERMANENT NON-PUBLICATION ORDERS

10. Satisfied that the orders sought would be proper, the Tribunal decided to exercise its discretion and now orders that the following names are to be permanently suppressed from publication:

    a) [redacted]

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[2] NZTDT2019/21C (costs and name suppression) 11 December 2020.

[3] NZTDT 2016/52, 23 January 2017.

b) [redacted]; and

c) the town referred to in the charge.

11. These orders are made pursuant to section 405(6) of the Education Act 1989.

12. This matter is now at an end. Costs are to lie where they fall.

Dated at Wellington this 13th day of October 2022.

Jo Hughson
Deputy Chairperson