

INTERIM NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-12

RARO TE MANA O TE
UNDER THE

the Education and Training Act 2020
(**the Act**)

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

[REDACTED]
(Authorisation **[REDACTED]**)

Kaiurupare | Respondent

DECISION OF THE TRIBUNAL ON CHARGE LIABILITY

4 March 2024

Hearing | Te Rongonga

13 February 2024

Representation | Hei Māngai

E Mok for the CAC
G Elwell for the Respondent

Tribunal panel | Pae Taraipiunara

T J Mackenzie (Deputy Chair), Rose McInerney
Nichola Coe

Introduction

[1] The respondent has been referred to the Tribunal by the Complaints Assessment Committee (CAC) on the basis that his case should be determined by the Tribunal.

[2] The Referral provides as follows:

- (a) On 1 December 2022, the CAC considered a complaint from Ms R, former student that in or around 2006 to 2007 at St Cuthbert's College, ██████████ ██████████, registered teacher, engaged in inappropriate communication with Ms R (aged 14-15 years old at the time) by:
 - (i) Asking her if she wanted to kiss;
 - (ii) Asking her about sexual activity;
 - (iii) Asking her about physical intimacy.
- (b) The CAC has referred this matter to the Disciplinary Tribunal without making a factual finding in respect of the allegation outlined at paragraph 1 (including its subparagraphs), on the basis that the Disciplinary Tribunal is the most appropriate decision-making body to make factual findings as to whether the allegations at paragraph 1 (and its subparagraphs) occurred as alleged on the balance of probabilities.

[3] The Tribunal convened a hearing in person on 13 February 2024. Evidence was heard from the complainant Ms R, from a Teaching Council investigator, and from ██████████ ██████████. ██████████ had intended to attend in person but missed his flight. He attended remotely. Ms R also gave evidence remotely.

[4] Fortunately we were afforded with a large screen and there were no technical difficulties, so we were able to see and hear from both Ms R and the respondent well.

Evidence

[5] Below we will summarise the evidence and challenges.

Ms R

[6] We first heard from Ms R. Prior to the hearing we had considered her brief of evidence and other related documents including further responses she had given to queries from the Teaching Council investigator.

[7] Ms R read her brief and was led through further evidence. She was then cross examined by counsel for the respondent.

[8] The first challenge to Ms R came from the contents of emails she had exchanged with a former school friend, who had been the complainant in a previous disciplinary matter with the respondent which was determined by the CAC. We will discuss that finding later in this decision. In those emails Ms R and the earlier complainant discussed the respondent, the outcome of the earlier complaint, and Ms R's complaint.

[9] It was put to Ms R that she may have held some resentment against the respondent for not being appropriately punished in relation to that previous disciplinary issue. Ms R accepted that she considered he had not been dealt with appropriately, however this was more in relation to his fitness to teach given the conduct she was also alleging. It was likewise put to Ms R that she had a general dislike or mistrust of men in "authority positions".

[10] Whilst the case was not put as forcefully as a straight allegation of dishonesty, it was put that any misgivings in reliability of memory were being filled in out of a sense of loyalty to the former complainant and a desire for the respondent to face consequences. These particular challenges saw various reliability issues put. This included the length of time that had passed since the alleged conduct, and the complaint not having been made for several years. It was also put to Ms R that she may have confused the respondent with other people, or simply had incorrect memories of who had said what and when.

[11] There was discussion about what could or couldn't be seen from the classroom, regarding an incident where the respondent had allegedly seen Ms R and questioned her about it later. It was also raised with Ms R why she had earlier stated in an email to a friend that "I only remember one or two specific occasions", when in her evidence there was a more firm account of three alleged incidents.

[12] Throughout this questioning Ms R remained steadfast that she had accurately described what had occurred with the respondent.

The respondent

[13] The Tribunal then heard evidence from the respondent. The respondent had provided lengthy written accounts to the Teaching Council and CAC, and again to the Tribunal. He had also provided a brief of evidence for this hearing.

[14] We pause to note that the CAC had taken objection to several paragraphs of the respondent's brief, on the basis that they contained speculation, opinion, and

submission style argument. Those paragraphs are fairly meaningless to us, and we have focused on the evidence of factual matters only. We also note that Ms R's brief had some similar evidence that we have also ignored.¹

[15] The respondent read his brief and was cross examined at length. The Tribunal also had the opportunity to ask him some questions.

[16] The respondent maintained his position that these incidents did not occur as alleged. He accepted that he had some discussions with Ms R when she was a student but only at an innocuous level. He denied that intimate or sexual matters were discussed or acted on.

[17] Evidence was also produced to us of a previous CAC finding concerning the respondent and another female student (the friend that is mentioned above). The finding was that the respondent in or around 2007 was "overly familiar" in emails with that student. The CAC noted that there was nothing of an explicitly sexually predatory nature. This previous issue also included the respondent having provided his email account to the student, and having had an intoxicated phone call with her. The CAC described the actions as most unwise, which the respondent agreed with. The respondent was censured and the register annotated with a condition requiring notification of employers for three years.

[18] The decision suggests to us that the respondent has had some issues with boundaries in the past. Overall however the nature of the decision does not provide a particularly clear or compelling set of factual findings that relate to any particular tendencies to act in particular ways that we could then apply against the alleged conduct now at issue.

Our findings

[19] The Tribunal has spent some time deliberating over its findings. We have carefully considered all of the evidence. We must decide whether after considering all of the evidence that we find these allegations proven on the balance of probabilities.

[20] We find ourselves in a position where we are left sufficiently uncertain so as to find the charge has not been proven. We do not reject either set of evidence. But we cannot say that we sufficiently prefer one account over the other. We are asked to make

¹ Most of the last two paragraphs on page 15 of the bundle.

a quite serious set of findings. There are no other witnesses and no extraneous evidence. Such evidence is not a presumption or requirement, but the reality is that the CAC case is not strong without more. The allegations being recounted are now around 16 to 17 years old. Ms R herself had a more limited recall in her email to her friend mentioned above. We are aware that memories can sometimes be unreliable and we are cautious as to how much weight we can place on Ms R's account.

[21] We are at pains to point out that we are not finding Ms R's account incredible. Nor are we finding that the respondent has left us completely persuaded that he is correct. This process is limited to whether we find the charge proven or not based on all of the evidence, which we do not.

Next steps

[22] Any application for permanent non publication will need to be made by the respondent if sought. Likewise any costs applications. The respondent should make any applications within 15 working days. The CAC should respond within 10 further working days. The respondent should be aware however that costs do not always follow the event in this jurisdiction, and at present we detect nothing inappropriate in this case having been brought.



T J Mackenzie
Deputy-Chair of the New Zealand Teacher's
Disciplinary Tribunal

FINAL NON-PUBLICATION ORDERS

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2023-12

RARO TE MANA O TE
UNDER THE

the Education and Training Act 2020
(**the Act**)

MŌ TE TAKE
IN THE MATTER OF

of a charge referred to the Tribunal

I WAENGA I A
BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC)**

Kaiwhiu | Prosecutor

ME
AND

[REDACTED]
(Authorisation **[REDACTED]**)

Kaiurupare | Respondent

DECISION OF THE TRIBUNAL ON COSTS AND NON PUBLICATION

15 April 2024

Hearing | Te Rongonga

On the papers

Representation | Hei Māngai

H Mok for the CAC
G Elwell for the Respondent

Tribunal panel | Pae Taraipiunara

T J Mackenzie (Deputy Chair), Rose McInerney
Nichola Coe

Introduction

[1] Following our liability decision, the respondent has sought costs and a final order for non-publication of his name. The CAC opposes the costs application and is neutral on the publication issue.

Costs

[2] This Tribunal stated in *CAC v Stairmand*:¹

[43] Costs considerations in professional conduct jurisdictions are a more nuanced exercise than in traditional civil courts (or even criminal courts). We distil the following principles from the authorities:

- a) Unlike traditional civil courts, costs do not follow the event.²
- b) Professional conduct bodies carry out an important public function, being the maintenance of public confidence in the particular profession through enforcement of professional standards of conduct.³ Or in other words, whereas civil litigation will often only serve the interests of the private parties engaged in it, professional conduct litigation will serve the wider public interest.
- c) A strict ‘costs will follow the event’ rule risks undermining that function.⁴
- d) That said, the public interest function is not determinative and something “extraordinary” is not required as a precondition to establishing a right to costs.⁵
- e) There should be no distinction in principle in the respective approach to the costs discretion across different professions.⁶
- f) There is a wide discretion available to a professional conduct tribunal in considering costs, including the power to award costs against a respondent despite the charges not being proven.⁷
- g) Ultimately an evaluative exercise of the discretion is required.⁸

[44] To those we would also add that part of the evaluative exercise will also include considering whether the respondent, despite the charge being dismissed, acted in a way to bring the charge on their own head or otherwise should carry some responsibility. With those principles in mind we now turn to the grounds advanced.

[3] ██████████ claims that the prosecution case was weak to a point it should not have

¹ *CAC v Stairmand* NZTDT 2022-37, 28 March 2023.

² *Lagolago v Wellington Standards Committee 2* (2017) 24 PRNZ 753 (HC).

³ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2014] NZCA 141, (2014) 21 PRNZ 753.

⁴ *Lagolago v Wellington Standards Committee 2* [2018] NZCA 406(2018) 24 PRNZ 76.

⁵ *Lagolago* (HC).

⁶ *Roberts*.

⁷ *Lagolago* (CA), citing *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850. (HC); and *Simes v Canterbury-Westland Standards Committee 2 of the New Zealand Law Society* [2013] NZHC 1501.

⁸ *Lagolago* (HC).

been brought. Consequently he considers that the circumstances fall into the area of cases where costs should now be ordered against the CAC.

- [4] The CAC opposes the costs application and submits that there was nothing untoward or improper in the prosecution being brought.
- [5] In our view, the arguments for ██████████ are simply a re-litigation of substantive points. The argument essentially boils down to one of the prosecution case not being strong enough to make out the charge.
- [6] As we noted in our liability decision:⁹ *“The respondent should be aware however that costs do not always follow the event in this jurisdiction, and at present we detect nothing inappropriate in this case having been brought.”*
- [7] We remain of that view. The case was reasonably brought by the CAC. There were no alarm bells or warnings of a flawed case before or during the matter. It is simply the reality that sometimes a case might not persuade a tribunal of fact, and other times it might.
- [8] We decline to make a costs order.

Non Publication

- [9] We consider it proper to make final non publication orders for the names of:
- The complainant (referred to currently as Mr R); and
 - Any other student, friend or teacher named by the complainant in evidence or in our liability decision.
- [10] The Respondent also seeks a final order for non-publication of his name.
- [11] We note that the public interest in open justice for professionals who have engaged in professional misconduct is often seen as diminished where a charge has not been made out. This is because there is less for the public to know – there is no proven issue which they should be able to take into account in making informed choices. But, the dismissal of a charge in and of itself does not create a presumption that non publication will be ordered.¹⁰

⁹ At [9].

¹⁰ See for example *Stairmand* where non publication was declined despite the charge not being proven.

- [12] ██████████ refers to effects that any publication might have. Generally, we can accept that publication of his name and these allegations will likely tarnish his reputation and cause some shame and embarrassment. Putting aside the earlier CAC finding (which as noted was difficult to apply in our liability decision), ██████████ has otherwise led a significant teaching career. A number of insightful references from former students were provided.
- [13] We are also concerned that potential publishing of ██████████ name might risk undermining the non-publication order regarding Ms R, particularly as the school has not sought a non-publication order (and has actually encouraged publication of their name).
- [14] In all of the circumstances we consider it proper to order a final non publication order in favour of ██████████ and any details that might lead to his identification. For the avoidance of doubt this does not restrict publication of the name of the school or the years that ██████████ taught there.



T J Mackenzie
Deputy-Chair of the New Zealand Teacher's
Disciplinary Tribunal