


BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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 

Respondent

DECISION OF THE TRIBUNAL

Tribunal: Hannah Cheeseman (Deputy Chair)
Will Flavell and Neta Sadlier (Members)

Hearing: 12 July 2022

Decision: 29 August 2022

Representation: C Paterson and J Ah Koy 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 that in or around December 2019 sent sexually explicit messages to a 14-year-old female student at the school where he was teaching and/or had recently taught.

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. The summary of facts is not signed by the Respondent, however the material provided on the CAC investigation file indicates that the summary is not in any significant way, objected to by the Respondent. Certainly, the material provided by the Respondent did not contest the summary of facts and in material way.
- [5] The CAC filed submissions on penalty and costs.
- [6] The Respondent filed submissions in support of his application for name suppression.
- [7] The CAC opposes the application for name suppression.

Evidence

Summaries of Fact (SoF)

- [8] The SoF for the charge is set out in full as it forms the majority of the evidence available to the Tribunal:

Introduction

1. At the relevant time, [REDACTED] was a registered teacher with a full practising certificate (registration [REDACTED]).
2. [REDACTED] was employed by [REDACTED] in [REDACTED] as a [REDACTED] [REDACTED] on a fixed term contract from 28 January 2019 until 27 January 2020.
3. In February 2020, [REDACTED] commenced a fixed term contract at [REDACTED] [REDACTED]. On 20 February 2020 [REDACTED] signed a voluntary

agreement not to teach. [REDACTED] practising certificate expired on 18 October 2021.

Conduct

4. The last day of term was 10 December 2019.
5. On or about 16 December 2019, a female student from [REDACTED] (**Student X**) who was about to finish her Year 10 year, found [REDACTED] on Instagram and “followed” him. Student X explained that [REDACTED] had asked her to find him on Instagram. [REDACTED] “followed” her back.
6. On 16 December 2019 and 25 December 2019, while [REDACTED] was on the payroll at [REDACTED] but term had finished, and before he commenced his employment at [REDACTED], [REDACTED] exchanged a number of private Instagram messages with Student X.
7. In the course of messaging Student X, [REDACTED] made a number of inappropriate and sexually explicit comments.
8. Screenshots of excerpts from the Instagram conversation are set out in **Appendix 1** to this summary of facts.

Kinks

9. [REDACTED] said “Btw don’t have to pull out the sir anymore, I’m no longer your teacher haha”, then asks “is sir one of your kinks or something?” before saying “Oh fuuuuuu... why did I just say that”.

Asking whether students had a crush on him

10. [REDACTED] asked Student X “So what I’ve heard, and you can confirm this, is that you and [another student] have or did have a crush on me”.
11. Another example is that [REDACTED] said “Now this stays between you and me... But there are only a few people that as a human being, not a teacher I find ‘pretty’ or ‘beautiful’ in your year... [including] yourself ...”.
12. [REDACTED] then said “But you can’t be telling anybody this cause that’s when I get arrested and thrown in jail”.

Comments about Student Y being out of Student X’s league

13. [REDACTED] asked Student X “Hahah so you and [a male student, Student Y] did what?” “Don’t answer that”. Student X replied “Nothing” and “Ok I did not answer”. [REDACTED] then said “Haha or did you” “Well technically you did

and it was not controversial at all unfortunately haah". Student X said "[For real] we just kissed".

14. [REDACTED] and Student X discuss Student Y and whether he is dating other female students. In the course of that discussion, [REDACTED] said "much like you she could do better". [REDACTED] described Student X as being "out of [Student Y's] league" meaning that he considered Student X to be too good to date Student Y.

Nude photos and masturbation

15. [REDACTED] said to Student X that "girls love confidence and straight forward ness haha" and goes on to say "Like the whole nudes thing, girls play into the guys hands really easy with those". [REDACTED] asked "sent a few [nudes] in your time" to which Student X responded "NO I'M A GOOD GIRL". [REDACTED] then responded "Haha liar". [REDACTED] said that "...yeah na there's a lot for you to work with down there" and "much like a girls parts having a lot for us to work with".
16. [REDACTED] referred to masturbation when saying to Student X "I can't believe I'm gonna ask this but you seriously haven't given yourself any fun" and said "that question right there gets me life in prison". When Student X responded that she has not, [REDACTED] says "Hahaha it's a natural human instinct but defs no judgement".
17. Following some more conversation, [REDACTED] returned to the topic of masturbation, saying "Also just to go back to my weird comment/question before.. you can't expect a guy/girl to get you off if you don't know how to do it yourself to begin with".
18. Soon after [REDACTED] said "If you need a hand just ask.. JOKES!!".

Mandatory report

19. On 5 February 2020, Student X showed the Instagram messages to another teacher at the College. Student X reported she had been feeling uncomfortable about the conversation since it had happened. The teacher received screenshots of the conversation from Student X and informed the Deputy Principal.
20. On 13 February 2020, a mandatory report was filed with the Teaching Council by the Principal of the College, [REDACTED].
21. On 20 February 2020, [REDACTED] signed a voluntary Undertaking Not To Teach.

22. On 4 March 2020, Police issued [REDACTED] a formal warning for Indecent Communication with a Female Under 16 Years of Age.
23. Student X required ongoing counselling and support.

Previous conduct

24. On 3 April 2019, [REDACTED] was sent a disciplinary letter by [REDACTED], the Deputy Principal at the College.
 - a. In late March 2019, a student expressed a concern to a staff member about the way in which [REDACTED] was speaking with some Year 12 female students. It was described by student as “inappropriate, unprofessional” and “like a teenager”. [REDACTED] informally spoke with [REDACTED] about this matter and asked that [REDACTED] acted more professionally and in a more formal and appropriate manner.
 - b. In early April 2019, [REDACTED] was witnessed by another staff member allowing a student to handle a water bottle and squirt him. [REDACTED] acknowledged that his inaction in permitting this to occur could be seen as unprofessional.
25. A copy of this letter is attached to this summary of facts and marked **Appendix 2**.

Teacher’s response

26. [REDACTED] provided a written response to the allegations during the Teaching Council’s investigation.
27. [REDACTED] did not deny that he had engaged in the Instagram conversation with Student X.
28. [REDACTED] also provided a response to the Committee’s investigation report. [REDACTED] stated that in terms of context as to what was happening in his life when this event occurred:
 - a. His partner had been diagnosed in 2019 as a type 1 diabetic and has suffered ongoing mental health issues because of that diagnoses;
 - b. This was a very difficult time for his family and [REDACTED] understands now that he was not managing that well;
29. [REDACTED] accepted that this was a profound error in judgement. [REDACTED] stated it is an error that will not be repeated as he never wants to teach again.

The Complaints Assessment Committee (CAC)

30. As a result of the Investigation into the allegation, the matter was referred to the CAC for consideration.
31. The CAC met on 14 October 2021. The respondent was invited to but did not attend the CAC meeting.
32. The CAC considered that the conduct may constitute serious misconduct and referred the matter to the Tribunal pursuant to s 497(5) of the Education and Training Act 2020.

[9] In response to the investigation and/or mandatory report, the Respondent submitted that the following matters were not correct:

- (a) That school finished for the year on 8 December, not 16 December.
- (b) That he did not “challenge” any one to find him on social media.
- (c) That the initial conversation with the deputy principal was to inform him of the “potential” to have an inappropriate conversation. The Respondent notes that there was no evidence provided to support the allegation he had said what was claimed, and he notes that the letter from [REDACTED] dated 3 April 2019 recorded a conversation with regards to “expected professionalism”.
- (d) He disputes the allegation in the mandatory report that he had engaged in unprofessional behaviour by “squirting water over a female student”. He explained that he was not in possession of the bottle, he was helping a student with an assignment at the time and when he realised what was happening, he grabbed the bottle back as he did not want to be claimed for damage to a student’s laptop. The Respondent disputed trying to start a water fight at any point.

[10] Importantly, the Respondent disputes that there was a pattern of behaviour, as implied by the CAC on the basis of the prior incidents referred to.

[11] [REDACTED] response also provided some context as to what was happening in his personal life when these events occurred. He noted that his partner had been diagnosed in 2019 as a type 1 diabetic, and medical reports were attached confirming this diagnosis. The Respondent noted that his partner had suffered ongoing mental health issues as a result of the diagnosis, creating a very difficult time for the family. The Respondent noted that he understands that he was not managing well, and that his conduct on this occasion was a profound error in judgment.

The Law

- [12] 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.
- [13] The Court of Appeal recently affirmed that test for serious misconduct in section 378 of the Education Act¹ is conjunctive.² 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.³
- [14] 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)(b), and/or 9(1)(e) and/or 9(1)(k) and/or 9(1)(j).
- [15] Rule 9(1)(b) relates to emotional abuse that causes harm or is likely to cause harm to a child or young person.
- [16] Rule 9(1)(e) relates to breaching professional boundaries in respect of a child or young person with whom the teacher is, or was, in contact with as a result of the teacher's position as a teacher, for example – engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person.
- [17] Rule 9(1)(k) which relates to an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
- [18] Rule 9(1)(j) which relates to an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of three months or more.
- [19] 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

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

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

³ 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.

amounts to a serious breach of the Code, irrespective of whether the conduct fits into one of the examples in Rule 9.

- [20] 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.
- [21] 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

- [22] 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.
- [23] In particular the CAC submits that the Respondent's conduct is likely to adversely affect the wellbeing of student X, it adversely reflects on the Respondent's fitness to be a teacher, and it may bring the teaching profession into disrepute. The CAC further submits that the offending is of such a character or severity that it meets the Teaching Council's criteria for reporting of serious misconduct.
- [24] The CAC alleges that the relevant rules for the present case are, as set out above, Rule 9(1)(b), 9(1)(e), 9(1)(k) and 9(1)(j). The CAC further submits that the "discredit" test referred to in Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the Respondent's behaviour.⁴
- [25] In relation to Rule 9(1)(b), the CAC acknowledged the Tribunal's findings previously that the fact a student or learner has been distressed by a teacher's conduct does not mean that the conduct is properly classified as emotional abuse.⁵ In that decision, the Tribunal said:

The fact that students were upset by this physical act does not mean that the conduct amounts to emotional abuse. There is merit in [the] submission that emotional abuse is designed to humiliate, degrade, undermine and control, which is absent in this case. In our view, the reason for the inclusion of Rule (1)(b) is to cover situations that do not involve physical force. In many cases the conduct will be verbal, or it may involve a student being singled out in some way.

- [26] The CAC submits that the Respondent did single out student X and engaged in this conversation with her privately on Instagram. The conduct occurred in private,

⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43 24 March 2017.

⁵ *CAC v Teacher* NZTDT 2019 - 693

and the CAC submits that at several points during the conversation, the Respondent emphasised that student X needed to keep the conversation a secret.

- [27] The CAC submits that this demonstrates that the Respondent was attempting to influence or control student X and play upon her emotions to ensure that he was protected, while engaging in communications that he knew were inappropriate, if not illegal. It is the CAC's submission that this conduct is of the sort intended to be covered by Rule 9(1)(b).
- [28] In relation to Rule 9(1)(e), the CAC submits that the Respondent's conversation with student X clearly breached professional boundaries. The CAC referred us to previous cases considered by the Tribunal where a teacher developed friendships with students outside of school hours. The Tribunal has repeatedly emphasised that a teacher's professional obligations to his or her students do not end outside the classroom, and it is crucial that teachers respect and maintain professional boundaries placed between them and their charges.⁶ The CAC submits that the onus is strictly on the teacher to ensure that they do not become involved in potentially inappropriate situations. The CAC submits that where a teacher is engaged in social media conversations with students, even where that is not personal or predatory, the risk of professional boundaries becoming blurred is high.
- [29] The CAC submits that the Respondent ought not to have messaged a student on Instagram at all. The CAC's position is that the Respondent should have removed himself from the conversation if it was instigated by the student. This submission is made on the basis that the conversation was outside of school time and served no educational purpose. More importantly, the CAC emphasises that sexual comments and discussions were engaged in by the Respondent and were wholly inappropriate and in clear breach of professional boundaries.
- [30] The CAC further submits that the Respondent knew the conversation was inappropriate taking into account several comments he made in the course of the conversation. These were set out in the CAC's submissions, and we do not repeat them here.
- [31] The CAC submits that the comments quoted make it clear that the Respondent was conscious that the conversation was inappropriate. The CAC submits there is a pattern of the Respondent making a comment that was objectively inappropriate or over the line, and if or when student X did not respond in kind, he would back away from the comment by saying something along the lines of, "jokes" or blaming his comment on impulse or alcohol. In the CAC's submission this establishes a clear pattern of knowingly breaching professional boundaries and this is an aggravating feature of the conduct.
- [32] The CAC submits that on review of the conversation, it was clear that it was the Respondent initiating the discussion of inappropriate topics and not student X.

⁶ *CAC v Teacher NZTDT 2016/64*.

- [33] On that basis, the CAC submits that the Respondent's conduct is in breach of the professional boundaries obligations set out in Rule 9(1)(e) of the rule. They note the topics discussed were inappropriate as between a teacher and student, and the tenor of the conversation indicates an attempt on the Respondent's behalf to elevate the conversation into increasingly inappropriate topics.
- [34] In relation to Rule 9(1)(j), indecent communication with a young person under 16 years old is an offence pursuant to section 124A of the Crimes Act 1961 and carries a maximum sentence of three years imprisonment.
- [35] Indecent communication with a young person under 16 is a specified offence under Schedule 2 of the Children's Act 2014. The CAC submits that had the Respondent been charged and convicted of this offence, he would no longer meet the criteria for registration as a teacher.
- [36] On that basis the CAC submits that the Respondent's conduct meets the criteria under Rule 9(1)(j).
- [37] In relation to Rule 9(1)(k), the CAC refers to its previous submissions and submits that taken as a whole, the Respondent's conduct is likely to bring the profession into disrepute, and that the conduct accordingly meets the criteria under Rule 9(1)(k).
- [38] The CAC submits that the Tribunal has previously stated that any breaches of the Education Council's Code of Ethics for certified teachers (which has now been replaced by the Code of Professional Responsibility) will be highly relevant to consideration of whether the conduct amounts to serious misconduct. The CAC submits, as set out above, that the Respondent's conduct breaches the Code.
- [39] The CAC further submits that each limb of the test for serious misconduct is made out, noting that the conduct adversely impacted on the wellbeing of student X, reflects adversely on the Respondent's fitness to be a teacher, and may bring the teaching profession into disrepute. It is the CAC's submission that the conduct is of such a level that it meets the criteria for reporting under the rules.
- [40] In relation to penalty, the CAC referred us to two decisions, namely *CAC v Pim*⁷ and *CAC v Coad*⁸.
- [41] In *CAC v Pim*, Mr Pim engaged in inappropriate correspondence with two female 16-year-old students. This involved extensive email communication about personal matters, including Mr Pim encouraging student A to confide in him about personal and highly sensitive information. Mr Pim disclosed his own personal mental health issues and alcohol use, and student A supported him. Mr Pim engaged in similar conduct with student B. In that case, the Tribunal found the conduct clearly amounted to serious misconduct. The Tribunal noted, "The maintenance of appropriate professional boundaries is fundamental as a skill, obligation, and professional discipline for all teachers". Further, "It should not take any reflection

⁷ *CAC v Pim* NZTDT 2019/9.

⁸ *CAC v Coad* NZTDT 2020/18.

for a teacher to know that engaging in email or text messaging with a student on topics such as those involved in this case, is highly inappropriate, in particular if it happens late at night and/or under the influence of alcohol. But it would be highly inappropriate even if those factors were not present”.

- [42] In imposing a penalty less than cancellation, namely censure, suspension for a period, and the imposition of appropriate conditions, the Tribunal took into account that there was no suggestion of any sexual or romantic motive or aspect to Mr Pin’s conduct, and that Mr Pim was suffering from a significant episode of impaired mental state, he had expressed insight into his condition and remorse, and had taken steps to undergo appropriate counselling and rehabilitation.
- [43] In *CAC v Coad*, Dr Coad engaged in and encouraged inappropriate communication with his former Year 12 students by sending and/or receiving text and photo messages on Instagram in a group message, where the subject of the conversation included references to sex and/or prostitution and/or alcohol and/or drugs. These communications occurred after Dr Coad had left the school he had been teaching at.
- [44] In that case, the Tribunal considered the conduct was extremely silly and the tone of the conversation was unforgiveable in terms of Dr Coad’s duty to maintain a professional relationship with his students. The Tribunal considered it was incumbent on Dr Coad to resist all attempts to engage in a group chat and to shut the chat down when the topics became lewd. The Tribunal noted that, “The role of the teacher in maintaining appropriate standards and boundaries does not end when he or she leaves the school”.
- [45] When considering penalty, the Tribunal took into account that Dr Coad had not been teaching at that point for a period of 12 months, and the delay in coming to a hearing. Absent those factors, the Tribunal would have ordered suspension. The Tribunal further noted that Dr Coad’s conduct was not directed at one student but was part of a group conversation and did not involve him forming an inappropriate relationship with a single student. Considering those circumstances, the Tribunal ordered censure, strict conditions, and annotation for three years.
- [46] The CAC submits that the conduct in the present case is more serious than each of the two quoted above. The CAC submits that in *Pim* the teacher crossed professional boundaries by confiding in and being a confidante of students. Like Mr Pim, it appears that the Respondent in this case was under the influence of alcohol in some of the communications. It is the CAC’s submission that this is highly inappropriate. Further, the CAC submits that unlike in *Pim*, there is a clear undercurrent of sexual or romantic motivation on the Respondent’s behalf in this conversation. This leads the CAC to the submission that this is a more serious breach of professional boundaries.
- [47] The CAC submits that this matter is more serious than *Coad*, it is similar insofar as the Respondent had left the school at the time of the conversation, however the conversation with student X was not merely silly or lewd, it was overtly sexual and

can be characterised as probing a 14-year-old female student about sex, sexuality, and masturbation.

- [48] The CAC submits that the aggravating features of the Respondent's conduct are:
- (a) The Respondent engaged in a private Instagram conversation with a student.
 - (b) The conversation occurred out of school time and in fact outside the school term.
 - (c) The Respondent asked the student personal questions, and raised topics of a sexual nature including student relationships, masturbation, sexual organs and sex.
 - (d) It was the Respondent who initiated the discussion rather than student X. The Respondent took active steps to encourage the student to disclose information of a romantic or sexual nature to him.
 - (e) Student X was particularly vulnerable, being a 14-year-old female student at [REDACTED].
 - (f) The conversation adversely affected the student, who felt uncomfortable about the messages for a couple of months before disclosing the messages to another teacher.
 - (g) The Respondent was on notice about the importance of maintaining professional boundaries. He had been subject to a warning earlier in 2019 for engaging in conduct that was "inappropriate", "unprofessional" and "like a teenager" with some Year 12 female students.
- [49] The CAC acknowledges the following mitigating features in this case:
- (a) The Respondent has no previous disciplinary history before the Tribunal. The CAC notes that the Respondent is relatively new to teaching having been first registered on a Provisional Practising Certificate on 7 March 2016, which was superseded by a Full Practising Certificate on 18 October 2018.
 - (b) The Respondent acknowledged his actions in the course of the committee investigation. The CAC submits however that the Respondent has not demonstrated any insight or remorse into his conduct, outside of accepting that it occurred.
 - (c) It appears that the Respondent faced some issues in his personal life including that his wife had been diagnosed with diabetes. The CAC submits that this does not mitigate the conduct, as there is no evidence of the impact of the diagnosis on the Respondent available to the Tribunal.
- [50] The CAC submits that to meet the purposes and principles of disciplinary proceedings, in particular the maintenance of proper professional standards, the starting point for the Tribunal must be one of cancellation.

[51] The CAC submits that cancellation of the Respondent's registration reflects that the conduct is of a serious gravity, involving inappropriate communication with students that is sexualised. The CAC notes that this is particularly so in cases such as this where the conduct involves the sexualisation of students of a younger age.

[52] The CAC submits that for the Tribunal to impose a penalty short of cancellation, there would need to be strong personal factors demonstrated by the Respondent together with steps demonstrating insight and remorse for his conduct, along with rehabilitation to mitigate the risk of conduct such as this happening again. It is the CAC's submission that such material is not available to the Tribunal.

[53] No submissions were received from the Respondent in relation to the characterisation of the conduct or in terms of penalty.

Discussion

[54] We have no hesitation in concluding that the behaviour of the Respondent meets the threshold for serious misconduct.

[55] In relation to the criteria set out in section 10 of the Act, we are satisfied that the Respondent's conduct adversely affected and continues to affect the wellbeing or learning of Student X, it reflects adversely on his fitness to be a teacher, and that it may bring the teaching profession into disrepute.

[56] Despite the offending not taking place in a classroom, it is very clearly connected to the Respondent's employment at the school. It is well established that a teacher's actions in his or her personal life may well reflect adversely on a teacher's fitness to teach and bring the teaching profession into disrepute. It was noted by the Tribunal in *CAC v Teacher*⁹

The legislation is simply not structured in such a way as to draw a line between a teacher's private and professional life. The principal question is never whether some incident took place in a teacher's private or professional capacity. The principal question is always whether the teacher's actions, wherever and whenever they took place, reflect adversely on his or her fitness to be a teacher.

[57] The guidance to the Code of Conduct which specifically refers to the need for teachers to take steps to manage professional boundaries both in and beyond the professional environment. This is reflected in the examples in practise for the Code, which includes an example of demonstrating a high standard of professional behaviour and integrity, is that teachers must take care that their actions outside of work do not affect the trust and confidence others have in teachers, or reflect badly on the integrity or standing of the teaching profession.¹⁰

⁹ CAC v Teacher NZTDT 2009/5 11 May 2009

¹⁰ Teaching Council the Code of Professional Responsibility: Examples in Practice (June 2017) at page 7.

- [58] We accept that a teacher's obligation to act with professional integrity does not end when the school year ends.
- [59] We agree with the CAC submission that the Respondent's conduct was a failure on his behalf to demonstrate a high standard of professional behaviour and integrity. We accept that it was a breach of the Code to message a 14-year-old student on Instagram and initiate conversation including sexual innuendo, and topics of an explicit sexual nature. This conduct was, in our view, the antithesis of professional behaviour and integrity, and the antithesis of acting in student X's best interests.
- [60] We also accept the submission that the Respondent's conduct went beyond simply being inappropriate to the point of being illegal. The Tribunal takes note of the formal warning given by police for indecent communication with a young person under 16 years. We accept that that is a criminal offence, however we do not overlook the fact that it was not tested by way of a formal charge and criminal court proceeding. That, however, does not have significant bearing on the impact that such conduct has on the Respondent's fitness to be a teacher.
- [61] We accept the submission that engaging in indecent communications with a young person is conduct that may bring the teaching profession into disrepute. We agree that reasonable and informed members of the public would conclude that a teacher engaging in this type of on-line communication with a student is conduct which could lower the reputation and good standing of the teaching profession. We agree that a higher standard of conduct is expected of teachers.
- [62] We find that the conduct alleged is of such a character or severity that it reaches the Teaching Council's criteria for reporting serious misconduct.
- [63] We agree with the aggravating and mitigating features submitted by the CAC.

PENALTY

- [64] 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.*

[65] The CAC submits that the starting point for penalty in this case must be cancellation. The CAC acknowledges that whether it is necessary to cancel a teacher's registration in order to discharge the Tribunal's disciplinary obligations will often turn on the teacher's rehabilitative prospects and the degree of insight he or she has demonstrated into the causes of the behaviour.¹¹

[66] The CAC referred us to the two cases set out above in support of this submission.

Discussion

[67] We agree that the start point for this type of conduct must be cancellation. We then consider the decision in *CAC v Fuli-Makaua*¹², where the Tribunal said that cancellation is generally required in two over situations, which are:

¹¹ *CAC v Adams* NZTDT 2018/11 13 September 2018 at para [25].

¹² *CAC v Fuli-Makaua* NZTDT 2017/40, 5 June 2018.

- (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.

[68] 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 profession¹³. 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.¹⁴

[69] 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.

[70] 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.

[71] We do agree with the submission from the CAC that the starting point for offending as serious as this must be one of cancellation. However, we do not consider that would be an inevitable outcome for conduct of this type. While this is clearly serious misconduct, it is not the worst instance of this type of behaviour, and it is not without the possibility of redemption.

[72] The hurdle the Respondent faces is the complete lack of material in relation to his insight, his acknowledgement and acceptance of responsibility, beyond accepting the charge or the conduct occurred, and any specific details into his rehabilitation

¹³ *CAC v McMillan* NZTDT 2016/52.

¹⁴ *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).

or rehabilitative prospects. We note there is reference to counselling being undertaken by the Respondent, and he is to be commended for this, however the details of what the counselling covers and the benefits and insights gained from that counselling, is sadly lacking.

- [73] We wish to make clear that had material indicating the Respondent's full acceptance of the seriousness of his conduct, his remorse for it and steps to ensure that such conduct was never repeated being available to us, it is entirely possible that we would have imposed a penalty short of cancellation of registration. We note this because despite our orders, below, it remains open to the respondent should he wish, to undertake such counselling and engage in such rehabilitation as necessary to prove his insight and suitability to reapply for registration as a teacher.

COSTS

- [74] 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.
- [75] 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.
- [76] 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.
- [77] We see no reason that the award of costs should be reduced, and order costs of 40%.

NON-PUBLICATION

- [78] The Respondent seeks name suppression on the basis that publication of the Tribunal decision could lead to the identification of student X and may have a detrimental effect on his mental health and the mental health of his wife.
- [79] The Respondent notes that there is a need to ensure that student X is protected from the potentially negative impact on her that publication of the Respondent's name is likely to result in. He notes that student X has suffered ongoing detrimental effects of the conduct, and that publication would revive the embarrassment, awkwardness and unpleasantness suffered by student X at the time. He notes that she is likely still involved in secondary education, and that publication creates a real risk of re-traumatisation.
- [80] Further, the Respondent himself has ongoing mental health issues that are likely to be exacerbated if publication were to occur, and there is concern for the

deterioration of both the Respondent and his wife's wellbeing if name suppression is not allowed.

- [81] The CAC opposes suppression noting, correctly, that the question for the Tribunal is whether, if it named the Respondent in its decision, there is a real and appreciable risk of the pleaded consequences occurring, and if so, whether these consequences are such that it would be "proper" for the Tribunal to order suppression of his name.
- [82] The CAC submits that there was no evidence provided of the likelihood of identification of student X beyond the assertion by the Respondent that this may occur. The CAC notes that the Respondent was a teacher at the college for a short time on a fixed term contract for one year. The CAC submits that it is unlikely he was well known in the college community. The CAC submits that the ground of identification of student X is largely speculative.
- [83] In relation to the impact on student X if the decision is published, the CAC submits that first, media attention as a result of publication is a normal consequence of disciplinary proceeding, and further that there is an absence of evidence that the case will receive media attention. Secondly, the CAC submits that while student X required ongoing counselling as a result of the conduct, it does not follow that if the Respondent's name is published student X will be detrimentally impacted by the publication of his name. The CAC submit that there was insufficient evidence to establish that there is a risk that student X will be detrimentally impacted by the publication of the Respondent's name.
- [84] In relation to the exacerbation of the Respondent's mental health, the CAC submits that the anxiety suffered by the Respondent is as a result of these proceedings.
- [85] The CAC submits that the starting point is the presumption of open justice, the CAC accept that in principle the risk of identification of student X, and the detrimental impact on student X would provide grounds for suppression, if those risks were substantiated. However, it is the CAC's position that there is insufficient evidence to establish that student X would be identified or adversely affected by the publication of the Respondent's name.
- [86] A similar submission is advanced in relation to the impact on the Respondent's mental health. The CAC submits that where there is evidence of a real risk of detrimental effect of mental health, it may be proper for suppression to be ordered. However, in the present case, the CAC submits that the anxiety, stress and embarrassment that result from public scrutiny are ordinary and expected consequences, and there is insufficient evidence to show that publication of the Respondent's name in this case would go beyond those ordinary consequences.
- [87] The CAC does seek suppression of the name and identifying particulars of student X. They seek that this cover any documents before the Tribunal.

Discussion

[88] The principles relating to name suppression were summarised in *CAC v Teacher*¹⁵ 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*¹⁶, 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.

[89] We accept the CAC’s submission, to an extent in relation to the impact of the publication of the Respondent’s name on his mental wellbeing. That said, we are also concerned about the impact of the publication of the Respondent’s name on his wife, particularly when noting the impact her diagnosis had on his state of mind at the time of this conduct.

[90] On its own that would be unlikely to displace the presumption of open justice.

[91] However, when taken in combination with the risk that student X will be identified, and the risk of detrimental impact on student X, we are satisfied that it is proper to make an order for non-publication. We note, in this regard, that the college is

¹⁵ *CAC v Teacher* NZTDT 2016/27.

¹⁶ *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.

relatively small, the student's age at the time of the conduct, and therefore her class year, are able to confirmed from the material available, and that from that there is, in our view, sufficient risk that she will be identified if the Respondent's name is published.


[92] We do not accept the CAC's submission that media attention as a result of publication is a normal consequence of a disciplinary proceeding is something that would apply to the student involved. If the application for suppression was based solely on the impact of publication on the Respondent, this submission would have merit, however no weight can be given to the idea that media scrutiny is a normal consequence for the victim of the conduct.

[93] We accept the submission that publication of the Respondent's name, the identification of student X, and the rehashing of this incident, raises a substantial risk of re-traumatisation of student X, and that this makes the order for non-publication a "proper" one.

ORDERS

[94] The Tribunal's formal orders under the Education and Training Act 2020, are as follows:

- a) The Respondent's registration is cancelled pursuant to section 500(1)(g).
- b) There is an order preventing publication of the name and identifying details of student X in this decision and any other material on the Tribunal file. This includes that name of the school.
- c) There is an order preventing publication of the name or identifying details of the Respondent.
- d) Pursuant to section 500(1)(h) the Respondent is ordered to pay 40% of the costs shown in the CAC's Schedule files.
- e) 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