NZTDT 2022/50

BEFORE THE NEW ZEALAND TEACHERS' DISCIPLINARY TRIBUNAL

UNDER	the Education and Training Act 2020
IN THE MATTER	of disciplinary proceedings under Part 5, Subpart 4
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE**
	Referrer
AND	[redacted]
	Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall KC (Deputy Chair), Simon Walker and Rose McInerney
Hearing:	On the papers
Date of this decision:	22 December 2023
Result decision:	13 October 2023
Counsel:	H M L Farquhar and J G Avia for the referrer P L Murray for the respondent

Introduction

[1] The Complaints Assessment Committee (the CAC) charged the respondent [redacted] with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers and referred the matter to us for determination. The CAC's amended notice of charge, which is dated 25 July 2023, alleges that [redacted], on various dates between 2018 and 2020, engaged in play-flighting with three students, C, JL and H, and also swore at H. The CAC also alleged that [redacted] swore from time-to-time in the presence of students he was teaching. It accepted that this was not directed at those students.

[2] We issued a result decision soon after we convened that explained why we are satisfied that the CAC has proved its charge to the requisite standard. That decision also addressed penalty and name suppression. We said we would provide full reasons in due course, which we do so now.

The facts

[3] What follows is the agreed summary of facts provided by the parties:

> The respondent, [redacted], is a registered teacher [redacted] was first fully registered on [redacted] He held a full practising certificate at the time of the relevant events described below, which later expired on [redacted].
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> At the time of the relevant incidents detailed below, [redacted] worked as a Science Teacher at [redacted] (the School), a co-educational secondary school in Palmerston North. [redacted] worked at the School from [redacted] to [redacted], when he resigned from his position.
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> [redacted] is not currently teaching, but he advised the Complaints Assessment Committee (CAC) that he is currently studying full time and wishes to return to teaching.
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> On 8 September 2020, the Teaching Council of Aotearoa New Zealand (the Teaching Council) received a mandatory report from the Principal of the School, alleging that on a number of occasions [redacted] had inappropriate physical contact with students and has used inappropriate language with students.
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> **The Incidents**
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> *Play fighting with Student C*
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> In early 2019, Student C was in Year 11. One day after school, Student C called out to [redacted] from the corridor and asked for a lolly. [redacted] retrieved it.

[redacted] gave Student C a lolly in the doorway of the classroom, and then engaged in play-fighting with Student C by shoving and wrestling with him.

The incident was witnessed by Head of Science, [redacted], who described [redacted] conduct as "argy-bargy". [redacted] told [redacted] to stop, and told him he could not behave like this with students.

Play fighting with Student JL

Between around 13 May 2020 and 8 June 2020, Student JL (who at the time was in [redacted]) and [redacted] were in the corridor outside a computer room. Student JL, and other students, were about to enter the computer room. [redacted] was walking past.

[redacted] and Student JL were laughing together.[redacted] and Student JL then started pushing and shoving one another.

The incident with Student JL was witnessed by [redacted] who was standing approximately 14 metres away, further up the corridor. [redacted] described the incident as a "full on wrestling, like what boys do in the playground".[redacted] told [redacted] and Student JL to "stop it, cut it out" and then told[redacted] off, explaining that it was not okay to touch students. He also told [redacted] that if he saw him play-fighting with a student again, he would report it. [redacted] took no further action at that time.

Student H

Between 2018 and 2020, [redacted] engaged in play-fighting with Student H (who was in [redacted]) by punching her in the arms on two occasions. On one of these occasions,[redacted] swore at Student H while play-fighting with her.

The incidents were reported by Student H when she was asked about[redacted] by the School Principal. Student H said that [redacted] play-fighting and language towards her made her feel uncomfortable.

Swearing in class

On occasion,[redacted] swore in class. The swearing was not directed at students.

Teacher's Response

In his written response to the CAC,[redacted] said that he misjudged his actions and took risks he should not have taken. [redacted] accepted his behaviour was inappropriate at times but emphasised that his touching of students was never of a sexual nature. He said he would err on the side of caution and not touch students in future.[redacted] said that teaching is his passion and that he wants to continue to grow and develop as a teacher.

At the meeting before the CAC, [redacted] admitted to play-fighting with Student C, Student JL and Student H. [redacted] acknowledged that play-fighting with students was inappropriate, and said that he would not touch students again.

[redacted] admitted to swearing at Student H while play-fighting with her, which was intended to be a joke. At the meeting before the CAC, [redacted] said a swear word would "pop out" occasionally but that he had never sworn at a student in a direct aggressive manner.

Our findings regarding the test for serious misconduct

[4] [redacted], realistically, in our view, accepted that his behaviour meets the definition of serious misconduct contained in both the Education Act 1989 and the Education and Training Act 2020 (the Act) when considered on a cumulative basis.[1] The Tribunal is required to reach its own view. That being said, we have no hesitation accepting that the respondent's concession was appropriately made.[2]

[5] Section 10 of the Act is drafted in identical terms to its predecessor located in s 378 of the Education Act 1989. The Act defines "serious misconduct" as behaviour by a teacher that:

a. Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or

b. Reflects adversely on the teacher's fitness to be a teacher; and/or

c. May bring the teaching profession into disrepute.

[6] The test under s 10 is conjunctive.[3] Therefore, as well as having one or more of the three adverse professional effects or consequences described, the act or omission concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Teaching Council Rules 2016 (the Rules) describe the types of acts or omissions that are of a prima facie character and severity to constitute serious misconduct.[4] Those relied upon by the CAC are r 9(1)(a) of the Rules, which describes the use of "unreasonable and/or unjustified

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[1] The behaviour spanned a time period during which the former Act was repealed and replaced by the latter, which came into force on 1 August 2020.
[2] We kept in mind that, notwithstanding the parties' agreed position, the burden rests on the CAC to prove the charge on the balance of probabilities.
[3] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.
[4] Which came into force as the Education Council Rules on 1 July 2016 and had a name change to the Teaching Council Rules 2016 in September 2018.

force", r 9(1)(e), which describes "breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher" and the catchall in r 9(1)(o) / r 9(1)(k), which encompasses "any act or omission that brings, or is likely to bring, discredit to the teaching profession".[5]

[7] In terms of the first stage of the test, we observe that s 10(1)(a)(i) of the Act does not require actual proof of harm to a student's wellbeing or learning; only that the behaviour is of a type "likely" to have one or both of those effects. We unhesitatingly accept that there was no malicious intent underpinning [redacted] behaviour towards C, JL and H. However, H said that [redacted] behaviour made her uncomfortable, which is why she reported it. On that basis, we are satisfied that s 10(1)(a)(i) is engaged. Moreover, we accept that swearing at (or, to be precise, in the presence of) students is likely to affect wellbeing and learning. Indeed, H was discomforted by [redacted] bad language, which reinforces that such a consequence is real.

[8] We are satisfied that the respondent's conduct, considered in totality, reflects adversely on his fitness to teach: s 10(1)(a)(ii). It fell below the standard of professional behaviour and integrity expected of, and by, the profession. [redacted] did not "[engage] in ethical and professional relationships with learners that respect professional boundaries", which meant that he failed to act in the best interests of C, JL and H.[6] For the same reasons, we are satisfied that the respondent's behaviour is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies under s 10(1)(a)(iii) of the Act.[7] We will elaborate.

[9] [redacted] behaviours postdate when the Teaching Council's Code of Professional Responsibility (the Code) came into effect, which was June 2017. The Code emphasises the need for practitioners to work in the best interests of learners by:

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[5] Rule 9(1)(k) is identically worded to the old r 9(1)(o), and came into effect on 19 May 2018.
[6] *Code of Professional Responsibility* at p 10 [1.3] and [2.2].
[7] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

> 2.2 Engaging in ethical and professional relationships with learners that respect professional boundaries.

[10] The Tribunal, in a series of cases, has described the obligation resting on teachers to maintain a professional boundary between them and their charges that respects the position of power and responsibility they hold. We said in *CAC v Teacher K* that:[8]

> Maintaining appropriate professional boundaries is a fundamental skill, obligation and professional discipline for all teachers. Teachers who lack the ability to maintain appropriate professional boundaries are likely to step onto a "slippery slope" of tangled relationships with students which ultimately are highly likely to be damaging to students, will be confusing, will set poor role models and may result in even more serious misconduct. Mutual emotional dependency can arise and in the worst cases sexual relationships can develop. Teachers are guides, not friends in the usual sense.

[11] We will repeat what we said in *CAC v Huggard*:[9]

> Even if this student had wanted to continue the contact at this level, it would have been unacceptable for the teacher to do so. As the adult and a teacher, the respondent has a responsibility to maintain professional boundaries. The two were not contemporaries. They could not be friends. He was in a position of power and responsibility, where he should role model appropriate behaviour. His actions should attract esteem, not discomfort or fear. Students and parents should be able to trust that when a student seeks mentorship, counsel or comfort from a teacher, the teacher will respond in a way that has the student's wellbeing as paramount.

[12] To similar effect is what we said in *CAC v Luff*:[10]

> As a teacher, he had a responsibility to exercise some self-discipline and restraint and maintain professional boundaries. The reasons for this are many. Students should be free from any type of exploitation, harassment or emotional entanglement with teachers. In other words, they should be free from having their learning or well-being adversely affected, as contemplated in the definition of serious misconduct in s 378(1)(a)(i) … There are enough emotional and social challenges for students without a teacher adding to the confusion.

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[8] *CAC v Teacher K* NZTDT 2018/7.
[9] *CAC v Huggard* NZTDT 2016/33. See, too, *CAC v Teacher L* NZTDT 2018/23 and *CAC v Teacher I* NZTDT 2017/12.
[10] *CAC v Luff* NZTDT 2016/70, at [11].

[13] In *Teacher B*, we endorsed the point that:[11]

> The teacher-student relationship is not equal. Teachers are in a unique position of trust, care, authority and influence with their students, which means that there is always an inherent power imbalance between teachers and students.

[14] Parents, and the public in general, place a very high degree of trust in teachers and rely upon those in the profession to interpret right from wrong.

[15] Having fulfilled the first step in the test for serious misconduct, we must next be satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules. Again, of this there can be no doubt. For the reasons we have already explained, we are satisfied that the respondent's behaviour in respect to each of C, JL and H engages r 9(1)(e) and that he breached the professional boundary with each.

[16] We are also satisfied that [redacted] used "unreasonable and/or unjustified force" against C, JL and H, in contravention of r 9(1)(a) of the Rules. We have kept in mind the need for the Tribunal to undertake a context-specific assessment of the facts.[12] [redacted] use of force, even if it was an ill-conceived way to bond with his students rather than to simply correct or punish, breached s 99 of the Act because it was not necessary to prevent imminent harm.[13] As the cases cited by the CAC demonstrate, the use of force, even in jest, is not commensurate with modern teaching practices.[14]

[17] While there is no suggestion that [redacted] language towards H was aggressive or threatening, it was a further example of poor boundary-setting. We are not satisfied that [redacted] general use of bad language in the presence of students is serious misconduct in its own right, given that it was not directed at an individual or students in the class. However, we have previously said that swearing at students is "inexcusable" conduct that

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[11] *CAC v Teacher B* NZTDT 2018/10, 8 July 2019 at [19].
[12] *CAC v Teacher* NZTDT 2016/50, *CAC v Mackey* NZTDT 2016/60 and *CAC v Whelch* NZTDT 2018/4.
[13] Previously s 139AC of the Education Act 1989.
[14] *CAC v Tate-Rushworth* NZTDT 2012.67, *CAC v Elms* NZTDT 2105/35 and *CAC v Driver-Burgess* NZTDT 2019/69.

lowers the reputation and good standing of the profession.[15] The same logic applies when a student is exposed to bad language. We accept that this is behaviour that lends modest weight to the overall gravity of the respondent's behaviour.

Penalty

[18] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[16] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[17]

[19] The Tribunal is required to consider the range of powers available to it under s 500 of the Act, and to impose the least restrictive penalty that can reasonably be imposed in the circumstances. This requires us to consider "alternatives available to [the Tribunal] ... and to explain why lesser options have not been adopted in the circumstances of the case".[18] In doing so, the Tribunal must try to ensure that the maximum penalty of cancellation is reserved for the worst examples of misconduct.

[20] In *CAC v Fuli-Makaua*[19] we endorsed the point that cancellation is required in two overlapping situations, which are:

a. Where the conduct is sufficiently serious that no outcome short of deregistration will reflect its adverse effect on the teacher's fitness

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[15] In *CAC v Webster* NZTDT 2016/57, at [46].
[16] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[17] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[18] *Patel v The Dentists Disciplinary Tribunal* HC Auck Reg AP77/02, 8 October 2002, Randerson J at [31].
[19] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54]. These principles were affirmed by the District Court in *Rachelle v Teachers Disciplinary Tribunal* [2020] NZDC 23118, 11 November 2020.

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. Therefore, there is an apparent ongoing risk that leaves no alternative to deregistration.

[21] We must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances, as consistency is the bedrock of fairness. We considered the cases cited by the CAC, but acknowledge the inevitable factual differences.[20]

[22] As we said in our result decision, we are satisfied that a penalty short of cancellation will achieve the relevant disciplinary purposes. Our decision reflects the fact that [redacted] has no previous disciplinary history, and he was a relatively inexperienced teacher during the time he misconducted himself. Importantly, we accept that [redacted] is remorseful and has clear insight into his wrongdoing. As such, we accept that he has strong rehabilitative prospects and there is little chance of repetition.

[23] [redacted] does not hold a current practising certificate. As such, we decided that the least restrictive penalty is censure, combined with the imposition of conditions, which we direct the Teaching Council to place on any future practising certificate issued to [redacted]. We see this as the least restrictive, reasonable way in which to achieve the purposes of maintaining (1) the public's confidence in the profession and, (2) professional standards. We are satisfied that [redacted] has sufficient insight into his wrongdoing that the imposition of conditions will ensure that he is provided with the opportunity to learn from his errors and remain in the profession.

Name suppression

[24] [redacted] sought permanent name suppression.[21] Before turning to the specific ground, we will briefly address the relevant principles that apply

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[20] *CAC v Tate-Rushworth*; *CAC v Elms*; *CAC v Driver-Burgess*; *CAC v Whiu* NZTDT 2018/86; *CAC v Natanahira* NZTDT 2019/89; and *CAC v Teacher N* NZTDT 2018/90.

[21] In an application dated 21 September 2022, with an affirmation from Mr Shah dated 19 September 2022.

when determining whether to make a non-publication order under s 501(6) of the Act. The default position is for Tribunal hearings to be conducted in public and the names of teachers who are the subject of these proceedings to be published. We can only make one or more of the orders for non-publication specified in the section if we are of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and to the public interest.

[25] The purposes underlying the principle of open justice are well enumerated. It forms a fundamental tenet of our legal system. As we said in *CAC v McMillan*,[22] the presumption of open reporting, "exists regardless of any need to protect the public".[23] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In NZTDT 2016/27,[24] we described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[25]

[26] In *CAC v Teacher (NZTDT 2014/52P),*[26] we considered the threshold for non-publication and said that our expectation is that orders suppressing the names of teachers (other than interim orders) will only be made in exceptional circumstances. In a subsequent decision, we said that we had perhaps overstated the position.[27] More recently, we observed in *CAC v Finch*[28] that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, we confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to

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[22] *CAC v McMillan*, above. See, too, *CAC v Teacher I* NZTDT 2017/12, where we summarised the relevant legal principles at [41].
[23] *McMillan*, at [45].
[24] *CAC v Teacher* NZTDT 2016/27.
[25] See, too, *CAC v Teacher S* NZTDT 2016/69, at [85], where we recorded what was said by the High Court in *Dentice v Valuers Registration Board* [1992] NZLR 720, at 724-725.
[26] *CAC v Teacher* NZTDT 2014/52P, 9 October 2014.
[27] *CAC v Kippenberger* NZTDT 2016/10S, at [11].
[28] *CAC v Finch* NZTDT 2016/11, at [14] to [18].

place a gloss on the term "proper" that imports the standard that must be met in the criminal context.[29]

[27] The Tribunal has in recent times tended to adopt a two-step approach to name suppression that mirrors that used in other disciplinary contexts.[30] The first step, which is a threshold question, requires deliberative judgement on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 501(6) of the Act, this simply means that there must be an "appreciable" or "real" risk.[31] While we must come to a decision on the evidence regarding whether there is a real risk, this does not impose a persuasive burden on the party seeking suppression. The Tribunal's discretion to forbid publication is engaged if the consequence relied upon is likely to eventuate. This is not the end of the matter, however. At this point, the Tribunal must determine whether it is proper for the presumption in favour of open justice to yield. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[32]

[28] The respondent provided us with medical evidence that identifies the fact that he suffers from a relatively serious form of depression. After the Tribunal convened, we invited the respondent to provide us with an update regarding his condition, as the material filed was stale. Having received that update, we were satisfied that it is proper to order suppression of the respondent's name on the basis that there is an appreciable risk to [redacted] health and wellbeing should we name him.

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[29] See our discussion about the threshold in *McMillan*, above n 16 at [46] to [48].
[30] See *CAC v Jenkinson* NZTDT 2018/14 at [36].
[31] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.
[32] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3]. Also, the Court of Appeal said in *Y v Attorney-General* [2016] NZCA 474 at [32] that while a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".

[29] This accords with what we have said in earlier cases, which is that it may be proper to order suppression where there is a real risk that publication will either exacerbate an existing condition, or adversely affect a practitioner's rehabilitation and recovery from an illness or disorder.[33]

[30] We were satisfied that it is proper to suppress the names and identifying particulars of C, JL and H.

Costs

[31] The CAC sought a contribution from the respondent towards the actual and reasonable costs it incurred undertaking its investigative and prosecutorial functions. We also had to consider whether to make an order requiring the respondent to contribute to the Tribunal's own costs.

[32] The CAC's total costs are in the amount of $14,116.89, exclusive of GST. It sought a contribution of $5,646.76.

[33] The Tribunal's total costs came to $1455.

[34] The Tribunal issued an updated practice note on costs on 1 April 2022 (the Practice Note). It provides that:

> 8. Without limiting the Tribunal's discretionary decision-making, in most cases where a teacher has admitted a charge and fully co-operated in bringing the matter to an end in an expedient way, the costs contribution has usually been in the region of 40%.

[35] We held that the CAC's costs appear reasonable, and the respondent did not suggest otherwise. While Mr Murray submitted that we should reflect in our decision that [redacted] is a fulltime student who lives with his elderly parents, has no significant assets, and whose primary income is a student allowance.

[36] In previous cases we have reduced awards of costs from 40 per cent to one-third where the Tribunal has been provided with evidence by a respondent that he or she is impecunious. However, while we accepted that [redacted] is currently in a financially difficult position, we were not satisfied that we should reflect that in our order. Rather, we accepted that it may be

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[33] See *Jenkinson* at [46] and *CAC v Teacher B* NZTDT 2017/35, 25 June 2018.

necessary for [redacted] to pay in instalments. We said that he can make arrangements with the Council to do so.

[37] We ordered the respondent to pay $5,646.76 to the CAC pursuant to s 500(1)(h) of the Act.

[38] We ordered the respondent to make a 40 per cent contribution towards the Tribunal's full costs under s 500(1)(i) of the Act, which is $582.

Orders

[39] The Tribunal made the following formal orders under the Act on 13 October 2023:

a. Pursuant to s 500(1)(b), the respondent was censured.

b. Pursuant to s 500(1)(j), the following conditions are to be imposed on any practising certificate issued to the respondent in future:

i. [redacted] has 12 months to satisfactorily complete a professional learning and development course approved for him by the Teaching Council.

ii. The respondent is to undertake mentoring, on a monthly basis, for a period of 12 months from the date he resumes teaching, and the mentor is to provide a report to the Teaching Council every six months that addresses the respondent's ongoing fitness to teach. While [redacted] may propose a mentor, the Council must approve the person to fulfil that role.

c. Under s 500(1)(e), the register is to be annotated until such time as the conditions, above, are fulfilled.

d. The respondent, for 18 months from the date of the result decision, is to provide any prospective employer with a copy.

e. The respondent's name and identifying particulars are suppressed pursuant to s 501(6)(c) of the Act.

f. There are orders pursuant to s 501(6)(c) of the Act permanently suppressing the names and any details that might identify C, JL and H.

g. Under s 500(1)(h), the respondent is to pay $5,646.76 towards the CAC's costs.

h. Under s 500(1)(i), the respondent is to pay $582 to the Teaching Council.

Nicholas Chisnall KC
Deputy Chairperson