NZTDT 2018/63

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	of the referral of convictions by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**TEACHER P** Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Kiri Turketo and Simon Walker
Hearing:	22 June 2022
Decision:	16 August 2022
Counsel:	R Scott for the referrer The respondent in person

Introduction

[1] The Complaints Assessment Committee (the CAC) referred to the Tribunal Teacher P's three convictions for driving with excess breath alcohol, and one for driving with excess blood alcohol.[1] Each is an offence against section 56 of the Land Transport Act 1998. The convictions were accrued between 2017 and 2020.

[2] The CAC also alleges that Teacher P failed to comply with the mandatory requirement in s 397 of the Education Act 1989 to report her convictions to the Teaching Council.

[3] Predating her registration as a teacher, the respondent was convicted of driving with excess blood alcohol in 2005. While its referral relates to the offences committed between 2017-2020, the CAC invites us to take into account the earlier conviction when establishing penalty.

[4] We convened to hear the case in Auckland on 22 June 2022. Teacher P did not put the CAC to proof. Rather, the focus during the hearing was the commensurate penalty, and whether we should suppress the respondent's name.

[5] At the conclusion of the hearing, we indicated to Teacher P that, while very finely balanced, we intended to step back from cancelling her registration to teach. We said that we were minded to instead suspend the respondent's practising certificate. The Tribunal invited the parties to confer regarding suspension, and the form of the conditions required to facilitate Teacher P's safe return to the profession. We subsequently received a helpful joint memorandum. As the parties pointed out in their memorandum, the power to suspend is not available, as Teacher P does not currently hold a practising certificate. We commend Ms Scott for her careful submissions, recorded in the memorandum, that:

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[1] In two separate referrals, dated 27 September 2018 and 6 July 2021.

> While the CAC recognises that the matters that gave rise to this referral were serious and that cancellation remains open to the Tribunal, it is also acknowledged that the imposition of conditions under s 404(1)(j) [of the Education Act 1989, on any practising certificate issued in future] would take account of the underlying health issues affecting the respondent and be less burdensome to her in the course of her ongoing rehabilitation.
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> One further option would be to make the period of annotation of the conditions three years rather than two years which would take into account what would have been a period of suspension, plus a period under annotation of two years.

[6] We have taken the less restrictive course proposed, and have elected not to cancel Teacher P's registration. We explain our reasons for that decision later.

[7] We make an order, under s 405(6)(c) of the Education Act 1989, for the permanent suppression of the respondent's name. We have anonymised this decision for that reason.

The evidence before the Tribunal

[8] What follows is taken from the agreed summary of facts approved by the parties:

> ***"March 2017 conviction***
>
> The Police Summary of Facts states:
>
> *CIRCUMSTANCES*
>
> *About 1:00am on Friday 17 March 2017 the Defendant TEACHER P was driving a Chrysler vehicle … on [a road].*
>
> *The Defendant was stopped following complaints made to Police by members of the public regarding the Defendant's manner of driving.*
>
> *Breath test procedures were commenced and a subsequent Evidential Breath Test gave a reading of 1393 micrograms of alcohol per litre of breath.*
>
> Teacher P was convicted under s 56(1) of the Land Transport Act 1998.
>
> ***July 2019 conviction***
>
> The Police Summary of Facts states:
>
> *CIRCUMSTANCES*
>
> *On Saturday 27 July 2019 at about 5:00pm the defendant TEACHER P drove a Mitsubishi motor vehicle south on [a road].*

She was heading towards an address that she was supposed to be moving into.

The occupants of the address have seen her drive up the driveway and stagger out of the driver' s door.

They have noticed a strong smell of alcohol coming from the defendant and have advised her that she is not welcome at the address.

One of the occupants have given her a ride to a hotel where the defendant has attempted to get her keys and drive away.

They have called Police who located the defendant seated in her car. The defendant was required to undergo a compulsory breath test.

Breath test procedures were commenced and a subsequent Evidential Breath Test gave a reading of 1751 micrograms of alcohol per litre of breath.

Teacher P was convicted under s 65AB of the Land Transport Act 1998.

November 2019 conviction

The Police Summary of Facts states:

CIRCUMSTANCES

On Sunday, 17 November 2019, at approximately 8:00pm the Defendant, Teacher P, drove a Mitsubishi motor vehicle east on [a road], and turned left into [a supermarket] carpark.

The defendant was stopped following complaints made to Police by members of the public regarding the Defendant' s manner of driving and inability to walk once exiting the vehicle.

As a result of the traffic incident, the Defendant began to lose consciousness and was transported to Tauranga Public Hospital where a sample of blood was taken. Upon analysis, blood alcohol level was 425 milligrams of alcohol per 100 millilitres of blood.

Teacher P was convicted under s 6SAB of the Land Transport Act 1998.

May 2020 conviction

The Police Summary of Facts states:

CIRCUMSTANCES

On Tuesday, 05 May 2020 at approximately 11:30am the Defendant, TEACHER P drove a Mitsubishi motor vehicle, registration …, west on [a road].

The Defendant was stopped for a compulsory breath test.

Breath test procedures were commenced and a subsequent evidential breath test gave a reading of 578 micrograms of alcohol per litre of breath.

Teacher P was convicted under s 65AB of the Land Transport Act 1998.

On 21 September 2020, in the District Court, Teacher P was sentenced to intensive supervision for a period of 18 months, was disqualified from driving for 28 days, and was issued an alcohol interlock licence.

Teacher P did not report these convictions to the Teaching Council within seven days of conviction, in contravention of s 397(1) of the Education Act 1989.

Despite the convictions having been entered, Teacher P denies that she was driving with excess breath or blood alcohol. Teacher P says that, on three of the occasions, she was simply sitting in the car, and on the final occasion she had used an alcohol-based mouthwash.

Teacher P's practising certificate expired on 19 July 2021 and she has not been employed in a teaching position since she resigned from her early childhood education role at [redacted] in October 2017."

The relevant law regarding the referral of convictions

[9] This case involves the referral to the Tribunal of the fact the respondent has been convicted of criminal offences.[2] The test that therefore applies is whether the behaviour that resulted in the convictions reflects adversely on the fitness of the respondent to practice as a teacher.[3] It is only by reaching an adverse conclusion that we are empowered to exercise our disciplinary powers.

[10] The District Court said in *CAC v S* that we are not required to find the respondent guilty of serious misconduct before we can exercise the disciplinary powers available to us under the Education Act.[4] That being said, regardless of whether a matter reaches the Tribunal for adjudication by way of notice of referral, or by notice of charge of serious misconduct, our function is to decide if the behaviour concerned reflects adversely on the

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[2] All convictions punishable by three months' imprisonment or more must be reported to the Teaching Council, both by the teacher and by any employer.
[3] *Complaints Assessment Committee v S*, Auckland DC, CIV 2008 004001547, 4 December 2008, Judge Sharp, at [47].
[4] At [48]. We also said in *CAC v Campbell* NZTDT2016/35, at [14], that a referral to the Tribunal does not need to be framed as a charge of serious misconduct.

teacher's fitness to teach. This explains why it is helpful, but not mandatory, to scrutinise whether the offending engages one or more of the three professional consequences described in the definition of serious misconduct under s 378 of the Education Act.[5] The District Court recently endorsed the utility of this approach.[6]

An overview of the principles that apply when a drink-drive conviction is referred to the Tribunal

[11] In *CAC v Fuli-Makaua,*[7] the Tribunal heard five cases involving the referral of convictions for driving with excess breath or blood alcohol (EBAs), during which "a thorough review of the Tribunal's decisions on these types of referrals" was presented. In *Rachelle v Teachers Disciplinary Tribunal,*[8] the District Court approved the principles described in *Fuli-Makaua.*[9] We will summarise the applicable principles, which are:

(a) Teachers are role models for learners and have considerable influence in and beyond the learning environment. Under the now-replaced Code of Ethics for Registered Teachers, practitioners made a commitment to the community to "teach and model those positive values that are widely accepted in society and encourage learners to apply them and critically appreciate their significance". Under the current Code of Professional Responsibility, teachers are obliged to "maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity".

(b) There is a spectrum of disciplinary responses by the CAC and the Tribunal to EBA convictions. At one end, the CAC can deal with an EBA conviction by way of agreement under s 401(2) of the Education Act. In cases that fall into this category, a practitioner has

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[5] As we said in *CAC v Lyndon* NZTDT 2016/61 at [18] and in *CAC v Sefton* NZTDT 2017/35 at [12]. In *Sefton*, we said at [21] that, "We should be careful that in using the serious misconduct test as guidance, we do not limit ourselves in our disciplinary response. The wording of s 404 does not require a finding of serious misconduct in order to impose a penalty. We simply must hear a 'charge of serious misconduct or any matter referred to it by the Complaints Assessment Committee'."
[6] *Rachelle v Teachers Disciplinary Tribunal* [2020] NZDC 23118, at [20]-[21] and [41].
[7] *CAC v Fuli-Makaua* NZTDT 2017/40.
[8] Above.
[9] At [42].

usually returned a relatively modest breath or blood alcohol reading, and there is the presence of "significant mitigating features". However, "at the other end are convictions that are dealt with by the Tribunal and where cancellation is the only available outcome".

(c) The starting point with respect to EBA offending is that even one conviction "places a teacher's registration in jeopardy". A series of convictions "will certainly do so". Notwithstanding the fact that it is a traffic offence, it is, as the Tribunal said in 2009, "a very serious one and not behaviour which our society is prepared to tolerate". Driving whilst intoxicated poses a danger to the public and does not mirror the expectation of practitioners "to both teach and model positive values for their students". Doing so undermines teachers' "trusted role in society".

(d) The Tribunal set out the factors that "tend to aggravate the conduct or otherwise suggest that a higher penalty is required". We said that, "We agree that it is timely to set out the aggravating and mitigating factors derived from previous decisions and we hope that the teaching profession and their legal advisers will find them helpful in understanding how these matters are viewed; albeit "we do not want to create an impression that we will simply follow a formula".

Offence-related factors

(e) Factors that increase the seriousness of the offending include:

i. <u>The level of alcohol involved</u>: All things being equal, a lower reading is less serious than a very high reading.

ii. <u>The nature of the driving</u>: The teacher's conduct will be viewed more seriously if his or her driving was unsafe to the extent it attracted attention.

iii. <u>Passengers</u>: The teacher's conduct will be more disquieting when he or she had passengers in the vehicle, thus put others at risk.

iv. <u>Timing</u>: Where the circumstances of the conviction disclosed that the practitioner was intoxicated in the early hours of a

school night, questions will be raised as to the teacher's judgement and ability to perform his or her role appropriately.

v. Associated offending: it will be particularly aggravating where the drink–driving was accompanied by other offences. For example, where the teacher also drove whilst disqualified, this will indicate poor judgement and a disregard for the law. Other relevant offences may include refusing to give blood, careless driving and assault on a police officer.

vi. Where students are put at risk: The conduct will be much more serious if it has put the safety of students at risk, or had the potential to do so.

Personal aggravating factors

(f) Previous convictions are relevant, as:

i. Those for driving with excess breath or blood alcohol suggest that "there may be a risk of future offending, a harmful relationship with alcohol and/or poor self-regulation". When assessing the weight of prior convictions, "it will be relevant to consider both the time that has elapsed between convictions and how long ago the convictions occurred".

ii. Drug-related convictions may indicate that the practitioner has an issue regarding the use of harmful substances.

iii. A practitioner's prior traffic history may elevate the seriousness of the conduct. It may indicate a lack of care and responsibility and demonstrate that the teacher has "a flagrant disregard for the law".

iv. Convictions for other types of offences (unrelated to drugs or driving) "may provide a backdrop that is strongly suggestive of a flagrant disregard for the law".

(g) A harmful relationship with alcohol: While care must be taken to impose a penalty in respect of the conviction, rather than punish a practitioner for "evidence of alcoholism", the extent of a teacher's

harmful relationship with alcohol is relevant to the assessment of the risk that he or she poses.

(h) Failure to report conviction: Section 397 of the Education Act obliges teachers to report qualifying convictions to the Teaching Council. Failure to do so is, in and of itself, "misconduct that may give rise to disciplinary proceedings". At the bottom end of the scale is a teacher who is unaware of his or her obligation to report relevant convictions, although this is still an aggravating feature, "as it is incumbent on members of the profession to be cognisant of the requirement that rests on every holder of a practising certificate convicted of an offence punishable by imprisonment … to report". At the other end of the scale is a teacher, "who is dismissive of his or her obligation or who repeatedly or purposefully avoids reporting relevant convictions". It is particularly serious if a teacher receives and fails to disclose further convictions while disciplinary proceedings relating to other convictions are afoot.

Mitigating factors

(i) The most significant mitigating factor will be a teacher's "potential for, and established commitment to, rehabilitation". This requires assessment of:

i. Accountability, remorse and insight into behaviour: The practitioner's degree of insight into the cause of behaviour will be important in assessing his or her rehabilitative potential. Knowing what motivated the conduct is a way to gauge the risk of repetition. Cancellation is less likely to be required where the practitioner understands what led him or her to offend and is taking, or has taken, meaningful steps to reduce the risk of it happening again. Also, it is not sufficient for a practitioner to pay lip service to how remorseful he or she is.

ii. Evidence of rehabilitative steps: There should be independent evidence the concrete steps the practitioner has already taken to rehabilitate him or herself. A claim that the practitioner will attend a course in the future should ordinarily be viewed dimly. Rehabilitative efforts might include, for

example, attendance at drug and alcohol courses or sessions with a drug and alcohol counsellor.

When cancellation is the commensurate outcome

(j) A theme emerged from our review of previous cases involving convictions for driving with EBA, which is that cancellation is required in two overlapping situations:

i. When the offending is so serious that no outcome short of deregistration will sufficiently reflect the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession; and/or

ii. If inadequate rehabilitative steps have been taken by the teacher to address his or her issues with alcohol.

Should we make an adverse finding regarding the respondent's fitness to teach?

[12] We are satisfied that we are required to make an adverse finding. As we have said, we are not required to conclude that the offending behind the respondent's convictions constitutes serious misconduct before we can make an adverse finding. However, using the applicable limbs of the definition of serious misconduct in the Education Act as a reference point, we accept, first, that the respondent's offences adversely reflect on her fitness to teach. Practitioners have an obligation to model positive values for those they teach, and driving while intoxicated does not mirror that expectation. Second, the respondent's commission of offences with a public safety focus brings the teaching profession into disrepute when considered against the objective yardstick that applies.[10]

Penalty

[13] 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

[10] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

standards and the public's confidence in the profession.[11] 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.[12]

[14] It is not the purpose of a professional disciplinary proceeding to punish the teacher a second time for the same behaviour where he or she has been convicted of a criminal offence. Rather, as we said in *CAC v McMillan*,[13] the Tribunal's mandate is to protect the public through the provision of a safe learning environment for students, and to maintain professional standards and the public's confidence in the profession.[14]

[15] We consider that the following constitute aggravating features and must inform our assessment of penalty:

(a) The nature of the respondent's driving on 17 March 2017 and 17 November 2019: As the agreed summary records, other road users were sufficiently concerned about the erratic way in which the respondent was driving on each occasion that they felt compelled to contact police.

(b) The level of alcohol involved: The respondent's readings in March 2017, July 2019 and November 2019 were extraordinarily high. That on 27 July 2019, 1751 micrograms of alcohol per litre of breath, was seven times the adult limit. Her blood alcohol reading in November 2019 was a staggering 8½ times the adult limit.

(c) Prior relevant conviction: The respondent's 2005 conviction is a relevant personal aggravating feature; albeit we place only modest weight on it given it is relative historic.

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[11] The primary considerations regarding penalty were helpfully discussed in *CAC v McMillan* NZTDT 2016/52.
[12] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[13] *CAC v McMillan* NZTDT 2016/52, at [16] to [26], citing *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) and *Ziderman v General Dental Council* [1976] 1 WLR 330.
[14] See, too, *CAC v White* NZTDT 2017/29 at [19] and *CAC v Sefton* NZTDT 2017/35 at [19].

(d) The respondent's failure to report her convictions: For the reasons we explained in *Fuli-Makaua*, the respondent's unresponsiveness to her legal obligation under s 397 of the Education Act is an aggravating factor.

[16] We gave serious thought to whether this is a case in which no outcome short of cancellation would adequately reflect the adverse effect of her convictions on Teacher P's fitness to teach, or their tendency to lower the reputation of the profession. We acknowledge that, based on the cases cited by Ms Scott, it might have been open to us to place Teacher P's case into the first category described in *Fuli-Makaua*.[15] However, we elected to instead carefully scrutinise Teacher P's rehabilitate prospects. After all, cancellation of registration does not pose a complete bar to a teacher returning to the profession in future.[16] If rehabilitation is a realistic possibility, then we consider it falls to the Tribunal to transparently establish the steps that a practitioner must take to enable the Council to be confident that it is safe to allow him or her to remain part of, or re-join, the profession.

[17] We had intended to suspend the respondent's practising certificate. Insofar as s 404 of the Education Act provides a penalty hierarchy, suspension is the step below cancellation. For the reasons we have explained, the power to suspend is not available. We acknowledge that the Tribunal is required to consider the range of powers available to it under s 404 of the Education Act, and to impose the least restrictive penalty that can reasonably be imposed in the circumstances. This requires us to consider "alternatives available to it ... and to explain why lesser options have not been adopted in the circumstances of the case".[17] In doing so, the Tribunal must try to ensure that the maximum penalty of cancellation is reserved for

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[15] *CAC v Teacher* NZTDT 2011/19, *CAC v Thomson* NZTDT 2014/57, *Fuli-Makaua* and *CAC v Spedding* NZTDT 2020/27.
[16] See *CAC v Teacher* NZTDT 2013/18, where the Tribunal said, "We recognise that this teacher can apply for reregistration at any time in the future should he elect to do so, he may care to consider some recognised form of alcohol management programme which would enable him to make such an application to the New Zealand Teachers Council in circumstances in which he can demonstrate that he had achieved some level of insight and the Council can be satisfied that the prospects of a further conviction of this sort are minimal." See, too, *CAC v Wilcox* NZTDT 2014/55.
[17] *Patel v The Dentists Disciplinary Tribunal* HC Auck Reg AP77/02, 8 October 2002, Randerson J at [31].

the worst cases. Given Teacher P's rehabilitative prospects, we have decided to step further down the penalty hierarchy, rather than to revert to cancellation. Put another way, given Teacher P's particular circumstances, we are satisfied that censure, combined with the conditions proposed by the parties, will achieve the relevant disciplinary purposes and principles.

[18] To recapitulate, whether we must cancel a teacher's registration following the referral of an EBA conviction almost inevitably turns on the practitioner's degree of insight into the cause of the behaviour concerned, and his or her rehabilitative prospects.[18] As we said in *CAC v Fuli-Makaua*, a teacher is in less jeopardy of cancellation if he or she has insight into the genesis of the offending and is taking, or has taken, meaningful steps to reduce the risk of it happening again. The Tribunal expects a teacher to provide concrete evidence of the steps taken to reduce the risk of relapse.

[19] Teacher P is to be commended for the fact that she did not attempt to resist the proposition that she has a very harmful relationship with alcohol, and poor self-regulation, which explains her relapses following treatment. The sentence imposed in the District Court for the latest conviction is instructive in this regard. Notwithstanding that Teacher P was in serious jeopardy of a sentence of imprisonment given her two prior EBA convictions in 2005 and 2017, the Judge imposed a rehabilitative sentence of intensive supervision for the two offences committed in 2019 and that in May 2020. The Judge was satisfied that Teacher P had insight into, and the desire to treat, her harmful relationship with alcohol.

[20] Teacher P provided us with comprehensive expert evidence addressing the steps that she has taken, and must continue to take, to mitigate the effects of her addiction. We need not outline the traumatic and sad circumstances that contributed to Teacher P's dependence on alcohol, or the ways in which her addiction has blighted her life. We record that we accept that Teacher P has been diagnosed with post-traumatic stress disorder, which poses very significant challenges. What matters from our perspective is that the respondent has committed to intensive residential treatment and counselling to enable her to develop strategies to avoid a

[18] *CAC v Lyndon* NZTDT 2016/61, at [18].

further relapse. While we are satisfied that Teacher P has insight into her addiction, and is genuinely motivated to recover, her journey is by no means complete.

[21] In their joint memorandum, the parties proposed a series of conditions to be imposed on any practising certificate that the Council issues in future, which we have adopted in our orders.

[22] Teacher P resigned from her teaching position in October 2017, and has not worked in the profession since then. The fact that she has relapsed on serval occasions demonstrates the level of commitment that will be required if the respondent is to remain abstinent. As the respondent acknowledged when she spoke to us, she must achieve a greater degree of resilience if she is to re-establish her teaching career. The conditions that we have imposed are designed to facilitate Teacher P's return to teaching, while also meeting our protective disciplinary function. Whether, and when, the respondent can secure a return to teaching ultimately rests in her hands.

Name suppression

[23] Teacher P sought name suppression. Before turning to the grounds, we will describe the relevant principles that apply when the Tribunal decides whether to make a non-publication order under s 405(6) of the Education 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.

[24] 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*,[19] the presumption of open reporting, "exists regardless of any need to protect the public".[20] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to

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[19] *CAC v McMillan*, above. See, too, *CAC v Teacher I* NZTDT 2017/12, where we summarised the relevant legal principles at [41].
[20] *McMillan*, at [45].

practitioners whose profession brings them into close contact with the public. In NZTDT 2016/27,[21] 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.[22]

[25] The Tribunal has in recent times tended to adopt a two-step approach to name suppression that mirrors that used in other disciplinary contexts.[23] The first step, which is a threshold question, requires deliberative judgment 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 405(6) of the Education Act, this simply means that there must be an "appreciable" or "real" risk.[24] 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".[25]

[26] Teacher P seeks suppression on the basis that publishing her name, and personal details about her addiction and the underlying reasons it formed, will pose a risk to her recovery. We observe that the District Court, in the criminal proceedings, declined to order permanent name suppression. Instead, the Judge suppressed information pertaining to the respondent's

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[21] *CAC v Teacher* NZTDT 2016/27.
[22] 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.
[23] See *CAC v Jenkinson* NZTDT 2018/14 at [36].
[24] 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.
[25] *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".

medical and psychiatric background. As we explained to Teacher P during the hearing, we cannot usurp the District Court's order, which means that we are prevented from ordering blanket suppression of her name. That being said, the order we have made should provide some measure of protection, given the remote possibility that the media will link the earlier criminal proceedings to that in the Tribunal. We observe that the threshold for suppression in the Education Act is less exacting than that which applies in criminal proceedings.[26] Also, we are seized of expert evidence about the risks associated with publishing the respondent's name to which the District Court Judge was not privy.

[27] We accept 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.[27] We received opinions from three health practitioners who are aiding the respondent. Based on the recent and carefully conveyed information contained in those letters, we are satisfied that there is a real risk that naming the respondent will heighten her anxiety, and, as a corollary, increase the possibility of relapse.

[28] For completeness, we record that we have not ordered suppression on the alternative basis put forward by Teacher P; that publishing her name will adversely affect her career. That is an "ordinary" repercussion of the commission of the EBA offences underpinning the convictions referred to the Tribunal.

[29] We are satisfied that it is proper to permanently suppress the respondent's name, and for the open justice principle to yield.

Costs

[30] Section 404(2) of the Education Act prohibits the Tribunal from ordering a teacher to contribute to the CAC's costs and those of the Tribunal

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[26] Section 200(2)(a) of the Criminal Proceedings Act 2011, which is the provision that the respondent relied upon in the District Court, requires a court to be satisfied that "extreme hardship" is likely if publication occurs.

[27] A recent case where we ordered suppression for this reason, and where we were provided with evidence from the teacher's clinician setting out the risks associated with publication, is *CAC v Teacher B* NZTDT 2017/35, 25 June 2018.

following a hearing “that arises out of a report under section 397 of the conviction of a teacher”. As such, we do not order costs.

Orders

[31] The Tribunal’s formal orders under the Act are as follows:

(a) The respondent is censured for her serious misconduct pursuant to s 404(1)(b).

(b) Under s 404(1)(e), the register is annotated until such time as the conditions imposed on any practising certificate issued in future under s 404(1)(j), listed below, are fulfilled.

(c) Pursuant to s 404(1)(j), the Teaching Council is directed to impose the following conditions on any practising certificate issued to the respondent in future, with the conditions to expire three years after the said practising certificate is issued:

i. The respondent will continue to undergo appropriate counselling and treatment for alcohol addiction and to provide evidence of that to the Council on a quarterly basis showing her engagement with treatment;

ii. The respondent is to inform any prospective learning institution/employer of this proceedings and provide it with a copy of this decision;

iii. If employed as a teacher, the respondent is to satisfactorily undergo mentoring and supervision with a mentor approved by the Council, and is to consent to the mentor reporting to the Council on a quarterly basis; and

iv. The respondent is to submit to breath alcohol testing, as required by her employer. The respondent and her employer are to agree upon and record the consequences of the evidence of alcohol on her breath.

v. The employer will promptly make report to the Council should a positive test resulted be returned, in accordance with s 491 of the Education and Training Act 2020.

(d) There is an order under s 405(6) permanently suppressing the name and identifying particulars of the respondent.

Nicholas Chisnall
Deputy Chairperson

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).