

[NOTE: NON-PUBLICATION ORDERS AT [109]]

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/53

IN THE MATTER of the Education and Training Act 2020

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND **PETER WILLIAM THOMAS**

Respondent

DECISION

29 AUGUST 2023

HEARING/Te Rongonga: 4-5 July 2023

REPRESENTATION: Mark Shaw, Luke Cunningham Clere for the Complaints
Assessment Committee

Dzintra King, PPTA, for the respondent

TRIBUNAL: Catherine Garvey (Deputy Chair), Lynnette Evans, Simon Williams

INTRODUCTION

1. Peter Thomas is a registered teacher with nearly 30 years teaching experience, over half of which was spent at Epsom Girls Grammar School where he taught from 2002 until he resigned in September 2020. He has not taught since, having given a voluntary undertaking not to teach.
2. Student A was a pupil at the school for years 9-13, finishing in 2019. This case relates to allegations that the respondent had a sexual relationship with her while she was a student and which continued in early 2020. Mr Thomas denied any inappropriate relationship while Student A was at school but admitted meeting her for sex in March 2020. At the time he was 49 years old and Student A was aged 17.
3. Student A made a complaint to the Police on 3 August 2020, and while no criminal charge was laid the school was notified, and Student A confirmed her complaint to the school. Mr Thomas resigned on 11 September 2020, and the Principal made a Mandatory Report to the Teaching Council on 14 September. Mr Thomas denied the allegations regarding his conduct while Student A was at school but otherwise did not meaningfully engage with the CAC. By order of the District Court dated 13 December 2021 the CAC obtained a copy of Student A's evidential video interview and this formed the basis of the disciplinary charge.

THE CHARGE

4. A charge was laid on 11 August 2022, then an amended charge on 22 October 2022 which reads as follows:
 1. The CAC charges that PETER WILLIAM THOMAS, registered teacher, of AUCKLAND:
 - a. On various occasions between 2017 to 2019, signed Student A out of class without a legitimate reason.
 - b. Between 2017 and 2019 was intoxicated while supervising students at school events, including:
 - i. during a school music trip to Rotorua in 2017;
 - ii. during the school production in 2018;

- iii. at an arts and culture event in 2019.
 - c. At a school arts and culture event in 2019, offered alcohol to (then) Year 13 student, Student A.
 - d. Between 2019 to 2020, engaged in an inappropriate relationship with Student A, who was a Year 13 student at the School in 2019.
- 2. The conduct alleged in paragraph 1 and its sub-particulars:
 - a. Separately or cumulatively amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and any or all of rules 9(1)(b), (e), (h), and/or (k) of the Teaching Council Rules 2016 (for the conduct that took place after 19 May 2018 (inclusive) and/or rules 9(1)(m) and or (o) of the Education Rules 2016 for conduct that took place before May 2018 (inclusive); or
 - b. In the alternative, amounts to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020.
- 5. The conduct in the charge spans the period 2017 to 2020 and is therefore covered by both the Education Act 1989 and the Education and Training Act 2020. As submitted in opening by Mr Shaw, the procedural requirements of the 2020 Act apply.

THE HEARING

- 6. A defended hearing took place in Auckland on 4 and 5 July 2023. An order was made by consent to hear Student A's evidence-in-chief by way of the Tribunal watching the evidential video interview, with Student A available by audio visual link from a separate room at the hearing venue to answer questions. Members of the public were excluded for this evidence.
- 7. The CAC called the following witnesses:
 - (i) Student A.
 - (ii) Lorraine Pound, Principal Epsom Girls Grammar School.
 - (iii) Michele Heywood, Deputy Principal.

- (iv) Karyn Dempsey, Deputy Principal.
 - (v) Kate Henderson, CAC investigator.
8. The CAC also produced briefs of evidence from the Detective who took Student A's initial statement together with a copy of that statement; and from the owner of a Parnell motel confirming a room booking by Mr Thomas in March 2020. These were taken as read.
 9. Mr Thomas failed to meet timetabling orders for the filing of evidence and indicated he did not wish to give evidence in person, provoking counsel to seek directions. A Minute issued on 9 June 2023 outlined the need for proof of unavailability if the Tribunal was to receive evidence in the respondent's absence. On 15 June 2023 counsel filed a one-page brief, which Mr Thomas supplemented with oral evidence.
 10. The bulk of the evidence addressed the contested allegations of a sexual relationship while Student A was a student in 2019, so we deal with this matter first. Mr Thomas also defended the allegations relating to alcohol use, but accepted the allegation of inappropriate conduct in March 2020.

THE FACTS

Particular 1(d) – Inappropriate relationship between the respondent and student A between 2019 and 2020

11. The following summary outlines the factual matters accepted by the Tribunal. We found the evidence of Student A to be credible and frank. We do not accept the respondent's denial of any inappropriate behaviour in 2019 while she was a Year 13 student.
12. Mr Thomas taught for over 17 years at Epsom Girls Grammar School and was the Head of the Music Department when he resigned in 2020. He was valued for his knowledge and commitment to the music department, and his external relationships in the music community which were valuable to students.¹
13. Student A excelled in music and from Year 9 was a member of the school orchestra which was conducted by the respondent. He taught her in Years 11 and 12 when she completed NCEA Level 3 Music, meaning she was not in his class in her final year. Karyn Dempsey

¹ Transcript of Evidence, 5 July 2023 p 18, Karyn Dempsey

was the Deputy Principal responsible for Student A's cohort and said she had no concerns of a disciplinary nature about Student A.²

14. Student A and the respondent had an unremarkable student-teacher relationship until about mid-2019. In early 2019, Student A started working on Saturdays in a music school administered by Mr Thomas, something other students also did.
15. During term 3, Student A said Mr Thomas appeared to be physically upset on more than one occasion and he made comments such as "*I can't do this anymore.*" On one such occasion he asked Student A for a hug in his office. She acquiesced and said she did not think much of it. Around this time, Student A fell out with some of her school friends and was upset and anxious, and she sought support from the respondent. Mr Thomas agreed that he was aware of Student A having difficulties with friends but said that she spoke of this in the classroom with others around, and that he referred her to the school counsellor (which Student A denied). He said that he did not become personally involved.³
16. Ms Pound told the Tribunal that a teacher should not be alone in a room with an adolescent student behind a closed door; should maintain physical space, and considered hugging might only be appropriate on occasion with much younger (primary) students.⁴ Mr Thomas said he was aware of professional boundaries and agreed with Ms Pound's evidence as to what was appropriate and abided these expectations with Student A during 2019.⁵
17. Student A had the mobile phone number for Mr Thomas as he had given it to his Level 3 music class the previous year.⁶ Towards the end of term 3, Student A said she texted him when she arrived at school upset, and he asked her to the music library where they spoke and he hugged her. Student A's evidence included a detailed description of the music library, that it had a lockable door with a small window and large sliding shelving, and explained how it was possible to be in that space and out of the line of sight of others. None of Student A's evidence describing the music library was challenged.

² n 1 at p 8

³ Transcript Of Evidence 5 July 2023 p 91

⁴ n 1 at p35

⁵ n 3 at p 119

⁶ n 1 at p 12

18. Student A said that hugging occurred a couple of times when she was upset or anxious and that on one occasion Mr Thomas kissed her on the forehead. That same day Student A said that when they were together in the music library, he gestured to his lap and asked her to sit down. Despite feeling uncomfortable she did so, and he stroked her thigh over her clothing.
19. Student A said that the following day he broached the subject of their relationship, asking Student A what was going on between them or words to that effect. Student A was uncomfortable and told Mr Thomas this, but she said he texted her on that Friday or Saturday night saying that he missed her and sent sexualised messages.
20. The school holidays were 28 September to 13 October 2019. On Friday of the second week of the holidays, Student A went to the school to work on an assignment. Mr Thomas was at school, and they met in his office where he hugged and kissed her then asked her to go to the music library. He gave Student A his key to the library so she could go ahead of him. When asked in the evidential interview how she felt, she said:

Just really confused. Not even confused, it just felt like I wasn't feeling really, just like I didn't have any thoughts at that time. Because he was enjoying it, I felt like I should too, but I wasn't, and I know I wasn't but I couldn't figure out why...⁷

21. In the music library, Mr Thomas initiated kissing, hugging and sexual touching of Student A, pushing up her top clothing. She said she told him "no" when he put his hand at the top of her jeans and that he replied "okay, not today."⁸ Asked why she went with Mr Thomas, Student A said:

A: "Cos he told me to.

Interviewer: Instead of going home.

A: I don't know, I didn't want to make him feel bad I guess. *Because obviously he thought I was down for it and stuff.*⁹

⁷ Bundle of Documents, interview transcript tab 7 p 69

⁸ n7 at p72

⁹ n7 at p75. The words in italics are audible on the video recording viewed by the Tribunal, however this comes at the end of tape 2 and the transcript has not picked these words up.

22. Term 4 commenced on Monday 14 October 2019 and Student A describes Mr Thomas signing her out of class frequently so that she could meet him in the music library. Michele Heywood explained the procedures for teaching or administrative staff to sign students out of class. The school has a list of codes for this purpose, and attendance at each period is documented with an asterisk denoting that the student is present, or a letter code if the student is absent. The generic code for a school-based activity is N. Usually this can be linked with an activity that is identifiable from the school diary, or to an individual activity that the student attends such as a music lesson. The staff member who signs the student out is denoted by their initials so it can be seen who has marked the absence as legitimate.
23. The initials for Mr Thomas were TOP. The attendance log shows that Mr Thomas signed Student A out of class with the notation “N” with no further reason specified for the first, second, fourth and fifth periods on Tuesday 15 October 2019; second, fourth and fifth periods on Wednesday 16 October, fifth period on 17 October and two periods on Friday 18 October. He also signed her out of class without annotating the reason for this on the morning of Monday 21 October. Ms Heywood annotated a copy of the attendance log with a question mark beside these dates and explained that this was because there was no corresponding school-based activity that she could find.¹⁰ She also put a question mark beside five instances where Mr Thomas signed Student A out of class in September 2019.
24. Student A refers to having what she recalled was a free period on the morning of the first Tuesday of term 4, and the following interaction with Mr Thomas:

He said “Are you free?” and he said all that stuff and then he put his keys on the table and walked off into his office. So I went in first.

Interviewer: So at the time he puts the keys on the table, how did that make you feel?

I feel like trapped, just ‘cos it’s not, it just felt like I didn’t have a choice ‘cos he put his keys there and if I didn’t want to go, I’d have to go give him his keys and say “Hey, don’t really want to do this”. Like I didn’t want to make him angry so I just went in, yeah.¹¹

¹⁰ n1 at p52

¹¹ n7 at p82

25. Student A said she thought Mr Thomas would ‘just’ kiss her but that he placed his hands under her skirt and attempted to move them under her underwear and she told him to “stop”, which he did. The following day Student A said she had a music lesson and only went to one formal lesson as Mr Thomas signed her out of class. They again went to the music library where the sexual contact increased, from the respondent having digital contact with Student A’s vagina, placing her hand on his penis, asking her to give him a blowjob and attempting unsuccessfully to have sexual intercourse.¹² Student A described not knowing how to “*make it stop*” and being confused about what was happening.¹³
26. Student A’s video evidence then recounts events before a late school start in the second week of the term, when she says that Mr Thomas asked her to his office and gave her a vibrator, which he told her he had stolen. They again went to the music library where he asked Student A to lock the door. On this occasion Student A said that he fingered her and asked her for a blowjob and she complied for a short time. She stated that she felt “*disgusting for the rest of the day...*”¹⁴
27. Student A’s account of being signed out of class by Mr Thomas in the first week of term 4 is consistent with the attendance log. Ms Heywood said that it was not uncommon for a teacher not to add a notation beside an “N” but that it should be done. It was usual for the Arts and Culture Co-ordinator to sign out students for music purposes and generally a teacher does not sign a student out of another teacher’s class. Even without knowing the allegations, Ms Heywood said the attendance log in October 2019 would cause concern but confirmed that the school did not check these records until August 2020 after receiving notice of the Police investigation.¹⁵
28. Student A was on study leave from 31 October 2019. She continued to work with Mr Thomas on Saturdays at a Ministry of Education-run music school at Remuera Intermediate and on 2 November 2019 went to work as usual. Student A describes that Mr Thomas checked to ensure the students and teachers were settled into lessons then took her to a separate building, into a kitchen adjacent to the school hall. She describes him quickly initiating kissing and undoing his trousers, stating that he wanted to have sex.

¹² p87

¹³ p91

¹⁴ p95

¹⁵ n1 at p 55

Student A said she tried to avoid this by saying she was not on contraception and that he did not have a condom, but he deflected her arguments. She said he seated her on the kitchen bench and they had intercourse, which she said was painful. In her evidential interview Student A said *“I wasn’t scared, I just felt like I couldn’t do anything to say no.”*¹⁶ When asked why, she explained:

Because I was alone with him and like, so secluded away from everyone else. And like if I had said no, it would be so awkward for the rest of my shift. ‘Cos I’d have to sit right next to him. Like – if he asked why, it would be like – no you’re making me uncomfortable. And I just didn’t have the guts to say that.

- 29. Student A sent several Facebook messages to a school friend about Mr Thomas, including one on 2 November 2019 regarding the sexual conduct at Remuera Intermediate. Another student saw and took screenshots of the messages and emailed them to Lorraine Pound on 4 November 2019, directing her to Student A. Ms Pound did not speak to the student who sent the messages, but asked Michelle Heywood and Karyn Dempsey to make inquiries with Student A.
- 30. The messages are dated 1, 2 and 3 November 2019 and Student A confirmed in her evidence-in-chief that these were the messages she sent to a friend and which were emailed to the school as screenshots.¹⁷ A screenshot of a message timestamped at 1.56.47pm on 2 November 2019 reads:

[REDACTED]

¹⁶ Page 100

¹⁷ Screenshots are annexed as EXH-LP01 to the brief of Lorraine Pound. Student A’s confirmation in evidence in chief, TOE p

31. In a message on 3 November 2019, Student A says in what appears to be a response to a question about whether she is feeling upset: [REDACTED]
[REDACTED]” She goes on to say:
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
32. Student A and her parents were called to a meeting on 6 November 2019 with Karen Dempsey and Michelle Heywood to discuss “*sensitive online messaging*” (or similar). Student A said she asked Mr Thomas whether he knew what the meeting was about, that he did not know and he could not ask. He told her to delete all messaging and evidence of their phone calls. At the meeting, Student A and her parents were shown printouts of the messages, and she felt panic. She confirmed it was her Facebook profile picture and account but denied sending the messages. The meeting concluded with Student A being asked to reflect on her answers, and the prospect of a further meeting. No notes were produced from this meeting.
33. Student A said she contacted Mr Thomas afterwards to tell him about the screenshots and apologise to him. She said he was angry and made her feel that it was her fault and she had to “*fix*” things.
34. On Friday 8 November 2019 Student A emailed Ms Dempsey asking if the school had told Mr Thomas about the Facebook messages as she was “*nervous about going to work tomorrow if you’ve talked to him.*” She denied that he had been inappropriate with her, and wrote that she hoped he was not in any trouble. Ms Dempsey replied the following Wednesday that Mr Thomas had not been told.
35. Student A said that Mr Thomas phoned her on Monday 18 November 2019 as he had been sent the screenshots by anonymous email. She said he yelled and told her to say she was lying and that he did not do anything with her; that she was to think about his future and job. The second meeting with Student A’s parents and senior management was held that day. After being addressed by Ms Pound, Student A asked her parents to leave

the room and then admitted that she had written the messages but only to “hassle” her friend, and the content was not true. When Student A’s parents returned to the meeting, she repeated this explanation.

36. Ms Pound said that they were concerned about the repercussions for Student A at home and offered support, but nothing specific was put in place and it was left to Student A to make contact if she felt she needed to. No disciplinary measures were handed out to Student A. The record of the meeting is a handwritten note by Lorraine Pound made on one of the printed screenshots:

18/11 [illegible initials], DEM, HEW
 [Student A] admitted to writing the posts
 Made up to ‘hassle her friend, [student name]’
 Seriousness discussed
 [Student A] admitted it to her parents
 Balance of support needed for family-student fearful of repercussions
 Support offered here

37. Student A said she convinced her friend to say that the messages were a joke. Ms Heywood recalled the student saying the messages made her feel “*a bit queasy*” but she agreed it had been done as a joke.¹⁸ This student was in Year 12 and went on to be taught by the respondent in 2020.
38. By the second meeting the school had still not disclosed the Facebook messages to Mr Thomas. After receiving the anonymous email, he went to Ms Dempsey on 20 November 2019. Asked by Mr Shaw how he felt when he saw the messages Mr Thomas said “*I felt disgusted. I felt sick and I was very upset. Angry.*”¹⁹ Ms Dempsey told him Student A had admitted making up the messages.
39. Ms Dempsey asked Student A to confirm her explanation in writing, which she did by email on 23 November 2019 including an apology to Mr Thomas which Ms Dempsey conveyed to him orally. Essentially, the matter ended there from the school’s perspective. Student A and the staff witnesses were aware of rumours among students in or about November 2019 and written material in a school bathroom, but the rumours were not publicly acknowledged by the school. Ms Pound relied on the fact that no (other) student brought the matter to staff, that Student A had admitted making up the messages, and that it was

¹⁸ n1 at p63

¹⁹ n2 at p97

the end of the school year. No directions or advice were given to Mr Thomas about his ongoing working relationship with Student A or management of the rumours.²⁰ Ms Pound acknowledged that:

[N]ow looking back, [Student A] was in a very difficult position at that point. And so that was very hard for her. And has been ever since.²¹

40. Despite the seriousness of the Facebook messages Mr Thomas took little action from a professional point of view:
- (i) he did not seek professional advice.
 - (ii) he did not speak to the Principal, Lorraine Pound.
 - (iii) he did not take steps to distance himself from Student A and she continued to attend work in December 2019.
 - (iv) he did not seek assurance there was no adverse impact on the students who had read the messages or that they had been spoken to by senior management, given he was to have ongoing contact with at least one of them as their teacher in 2020.
 - (v) he did not ask for a formal meeting, or written confirmation that the allegations were considered untrue, but accepted an oral apology conveyed via Ms Dempsey.
41. After finishing her exams Student A worked until going on holiday overseas with her parents from 25 December 2019 until the beginning of February 2020. She said that she continued to exchange messages with Mr Thomas over this period. When she returned home Mr Thomas told her by phone that she could not work at the music school any longer. Student A believed this was on the advice of the school; Mr Thomas told the Tribunal a former worker was returning to the role. Regardless, he ensured Student A continued to be paid throughout the first few months of the year even though he said she had been on a one-year contract and was no longer employed.²² Mr Thomas said that

²⁰ n1 at pp32-33

²¹ n1 at p45

²² n2 at p116

their contact was limited to him advising Student A about her job, until she contacted him again wanting to meet.

42. In early 2020 Student A was experiencing low mood and anxiety and was prescribed antidepressant medication, and said she told Mr Thomas this as “...*it just felt like he was the only one I could talk to ‘cos he’s the only one that knew the truth really.*”²³ They met during the University of Auckland Orientation Week and went for a drive in Mr Thomas’ car, then parked in a carpark to talk. Mr Thomas admitted this meeting and that they could have hugged and kissed in the car and Student A could have disclosed that she was taking antidepressants. He said it was Student A who asked to meet and he agreed because he was “*not in a brilliant place at the time and I made some very poor choices.*”²⁴
43. They maintained contact over the following weeks. Screenshots of messages were retrieved from this time by Student A. In messages dated 12 March 2020 she asks Mr Thomas if she is seeing him the next day; he suggests 3pm and that he will confirm the venue. On 13 March he told Student A to meet in Parnell where he had booked a motel room, and asked what she would like to drink and agreed to bring alcohol. Mr Thomas asserted that it was Student A who instigated the meeting, overtly for sex. He said he thought she was 18 years old and “*at that point I did not think that [it] would have an impact, but it did, so I resigned.*”²⁵
44. That a sexual encounter occurred at the motel was not disputed. Student A’s evidential interview describes this in detail. Mr Thomas said he could not recall the same level of detail as he had “*not tried to think about it*” since, but essentially did not challenge her evidence.²⁶
45. The country then went into lockdown due to the COVID-19 pandemic and Mr Thomas and Student A did not meet again in person. Text and/or Facebook messaging continued for several months, some of which was sexualised (screenshots were retrieved by Student A and provided to the Tribunal). Student A commenced counselling at the University, and in or about May or June 2020 ended contact with Mr Thomas and told her parents about

²³ n7 at p61

²⁴ n2 at p90

²⁵ n2 at p99

²⁶ n2 at p82

their relationship. Her evidence indicates this was very difficult, leading her to move out of the family home.

46. In July 2020, Student A emailed Karyn Dempsey and Michele Heywood saying:

Hi,

I'm [Student A], (Y13 last year)

I'd like to set up a meeting with Ms Dempsey, Ms Heywood and Ms Pound regarding the situation with Mr Thomas last year. I have new information to share and think you should hear it. I'd rather you didn't contact my parents and bring my family into this meeting like last time.

47. This email went to their school accounts during the school holidays, and both teachers said that they did not see it. Student A complained to the Police on 3 August 2020 and made a statement on that day. The Police contacted Ms Pound and they met on 5 August to discuss the complaint. Student A's evidential video interview was recorded on 19 August 2020.
48. The Police determined not to lay a criminal charge and notified Mr Thomas of this, and then met with the school's senior management on 21 August 2020 to provide further details of the complaint. Student A confirmed on 24 August that she wished to make a formal complaint with the school and on 28 August 2020, Ms Pound gave written notice of the complaint and a meeting request to Mr Thomas and he was placed on leave on 31 August. The investigation meeting was deferred at his request until 9 September 2020, and in a letter to Ms Pound on that date he wrote:

I admit to a sexual liaison with the complainant in March 2020. Even though she was no longer a student at the school I accept my behaviour was unprofessional and inappropriate. I am deeply ashamed of what I did and unreservedly apologise for the distress and hurt that I have caused.

I made a poor choice and accept the consequences of my actions; however I do not want my stupid decision to define me as a person or my 27 years of contribution to teaching and music. There is much for me to reflect on and I have started professional counselling to help support me with that process.

With regards to events alleged to have occurred in 2019, they simply did not happen.

I would like to leave my position with as much dignity as possible despite the circumstances.

It is also important for me to mention the impact on my partner, children, and family, including my eldest daughter who is a second-year teacher, and [REDACTED]

[REDACTED] I am also concerned about the impact of all this on my colleagues and classes...

49. The mandatory report to the Teaching Council was made on 14 September 2020.

Particulars 1(a)-(c) – that the respondent was intoxicated while supervising students and offered alcohol to Student A

50. These particulars allege that Mr Thomas was intoxicated while supervising students on three occasions: during a school trip outside of Auckland in 2017, during the final performance of a school production while he was conducting the orchestra in 2018, and at an Arts and Culture evening attended by staff, parents and students in 2019. Student A provided a written brief addressing these particulars. Mr Thomas denied being intoxicated on any of the occasions described, or offering alcohol at a school event to Student A.
51. Ms Pound explained that the school policy for teachers involved in supervision outside the classroom was that they do not drink any alcohol.²⁷ Student A said, in short, that Mr Thomas drank alcohol in the evenings with other adults while supervising a school trip to Rotorua and that he was drunk while conducting the final performance of a school production from the orchestra pit, such that he missed cues and did not walk onto stage to receive a gift. There was no evidence that Student A saw him drinking at the school production, but it was her impression that he was drunk.
52. Ms Pound confirmed Mr Thomas' evidence that there were other teachers present on the school trip to Rotorua, and at the school production. She considered that had he been impaired to the extent described this would have been noticed by other staff present, and no concerns were raised with her.

53. Alcohol was served at the Arts and Culture event held annually and it was permissible for a teacher to have a social drink, but not to become intoxicated. Ms Pound was present at the Arts and Culture event in 2019 and observed the respondent and did not consider he was intoxicated.

54. Student A's evidence is that the respondent offered to get her an alcoholic drink:

That evening I was getting an award. Someone had made a comment to me about how I didn't deserve one which made me pretty upset.

I told Mr Thomas about the comment.

Mr Thomas said something like oh [expletive] them just go get a drink.

I told him it was all good. I was only 17 years' old at the time so it was not legal.

Mr Thomas told me he could go and get me one instead.

I told him, it's fine, I don't drink.

55. While it would not be appropriate for a teacher to offer a student alcohol, this allegation could equally have been an off the cuff remark to lessen the perceived slight on Student A receiving an award. Mr Thomas did not give Student A alcohol.

56. On the balance of probabilities, we do not consider particulars 1(a) to (c) are proved.

SERIOUS MISCONDUCT

57. Section 10 of the Education Act 2020 and s 378 of the 1989 Act both define "*serious misconduct*" as encompassing three types of behaviour, being conduct which:

- (i) adversely affects or is likely to affect the wellbeing or learning of one or more students; or
- (ii) reflects adversely on the teacher's fitness to be a teacher; or
- (iii) may bring the teaching profession into disrepute.

58. The conduct must also be such that it meets the criteria for reporting serious misconduct under the Teaching Council Rules 2016, or for the conduct before 19 May 2018, rules

9(1)(m) and/or (o) of the Education Rules 2016. Rule 9 contains a non-exhaustive list of the types of misconduct that an employer is required to notify to the Teaching Council. The charge pleads that Mr Thomas' conduct is in breach of r 9 (1)(b), (e), (h) and (k) of the current rules.

59. A sexual relationship between a teacher and student obviously constitutes a breach of professional boundaries warranting suitably serious sanction. Circumstances may require a more nuanced approach where a relationship develops involving a former student, but it will most likely be the case that this impacts on penalty, rather than avoiding a finding of serious misconduct. Here, there is no question that the relationship between Mr Thomas and Student A came about because of the respondent's role as her teacher. Even if we accepted his evidence that inappropriate conduct occurred only once Student A had left school, that does not assist him, given the short timeframe and the absence of intervening factors to support a profound change in the nature of their relationship. We do not consider it credible that Student A, with no former sexual or intimate relationship with Mr Thomas in 2019, contacted him and solicited this in or about March 2020.
60. At the time of the conduct covered by particular 1(d) of the charge, Student A was 17 years old, and Mr Thomas was aged 49 and had both adult and young children. Student A was academically capable and involved in extra-curricular music activities. Her evidence indicates that her home environment was not easy and under cross-examination she said that *"I had a pretty troubled home life growing up. I didn't have anyone to look after me and any attention I could get I would take."*²⁸ The Tribunal found the video interview helpful for its detailed content and to observe Student A when she was younger and closer to the events in question. Student A's evidence portrays a young woman who was not an enthusiastic participant in physical contact with Mr Thomas and was confused and compromised by it; but was ill-equipped to articulate this or to fully appreciate how wrong it was.
61. We have no hesitation in finding that the conduct meets all three limbs of the test in s10 for serious misconduct.

²⁸ n1 at p25

62. The impact of the respondent's conduct on Student A was undeniably adverse. As a secondary school student in 2019 she was in a situation over which she felt no control, and which damaged her relationships with her family, friends, and the school. It was profoundly wrong for Mr Thomas to have commenced a sexual relationship while Student A was at school, and he showed no regard for the impact of this on her at the time. He continued to show little regard for this during the hearing. Given the nature of the relationship it was also inappropriate for the respondent to remain in contact and to meet with Student A in March 2020, first in his car, and then at a motel, and to continue messaging her after that.
63. Mr Thomas' actions also have a potentially adverse effect on other learners: on the students who were aware of the allegations and were at school or in his class in 2020, and more generally, others who find themselves in a situation similar to Student A and feel unable to speak out and seek assistance.
64. The respondent's fitness to practise is also called into question. This would be so even if we had found the sexual relationship was confined to 2020 when there was no genuine break between the student-teacher relationship formed at school, and that contact. We are critical that Mr Thomas did not consider Student A's vulnerability until it was pointed out to him that such a relationship with a former student was a "no-no"²⁹ (given the inherent power imbalance, her youth and mental state). The sexual content of his messaging was also highly inappropriate with a former student.
65. Further, Mr Thomas' conduct at the end of 2019 when the Facebook messages came to light was highly unprofessional, in that we accept Student A's evidence that he was solely concerned for his own position and urged her to lie to the school and her parents.
66. With regard to bringing the profession into disrepute, we consider that a reasonable member of the public informed of the relevant circumstances would objectively see the respondent's actions as lowering the standards and reputation of the teaching profession.³⁰ Commencing and persisting with an inappropriate relationship with a student is the antithesis of professional behaviour, lacking in respect for Student A and

²⁹ n2 at p119

³⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28], cited in TDT decisions eg *CAC v Teacher X NZTDT 2020/33* at [13]

undoubtedly causing harm to her wellbeing. Members of the public quite reasonably expect schools to be a place for learning and growth in a safe environment where teachers are not compromised by a lack of integrity or self-control.

67. As for the alleged breach of rules, starting with 9(1)(k), this refers to “*an act or omission that brings, or is likely to bring the teaching profession into disrepute.*” Having found s10(1)(iii) made out, we need say nothing more about this as the wording is essentially the same.
68. Rule 9(1)(b) refers to “*emotional abuse that causes harm or is likely to cause harm to a child or young person.*” The rules do not define emotional abuse, but other decisions of this Tribunal indicate that something intentional or pre-meditated is likely to be required, rather than an incident that results in some distress for a student but which was not intended primarily to humiliate or degrade or the like.³¹ What constitutes emotional abuse needs to be assessed on a case-by-case basis, influenced by the intentions of the perpetrator of harm and the experience of the recipient. In this case, Mr Thomas was at best careless of the impact of his actions; the way he continues to describe the conduct indicates a deliberate lack of concern for Student A’s position. When he gave her his keys to the music library she experienced this as an exercise of control or manipulation; she felt she could not say no. Student A’s recount of some of their exchanges when she asked Mr Thomas to stop or was reluctant also indicate that he put pressure on her to comply. He also compelled her to lie to school management and her parents. We consider that the impact of these actions was emotionally abusive from Student A’s perspective, the implications of which included isolation from friends and family, low mood requiring treatment with prescribed medications, and ongoing counselling.
69. Rule 9(1)(e) refers to “*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*” for example:
- (i) Engaging in an inappropriate relationship with the child or young person:

³¹ See for example *CAC v Driver-Burgess aka Dovah* NZTDT 2019/69 (8 September 2020)

(ii) Engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person.

70. The respondent's conduct in 2019 was inappropriate in multiple respects including signing Student A out of class without good reason, initiating an inappropriate and sexual relationship, engaging in sexual messaging and coercing Student A into lying to her parents and senior school management about the nature of their relationship. In 2020, Mr Thomas was also in breach of this rule, with sexual messaging and sexual conduct with a former student who he was in contact with only as a result of his position as a teacher.
71. Rule 9(1)(h) deals with teachers who are impaired by alcohol or other drugs while responsible for the care or welfare of learners. Having not found particular 1(a), (b) and (c) proved we find no breach of this rule.

PENALTY

72. Having found part of the charge proved we must consider what if any penalties it is appropriate to impose. The penalty provisions under s500 of the 2020 Act range in seriousness. We should impose the least restrictive penalty that is appropriate in the circumstances to reflect the seriousness of the conduct proved, any rehabilitative prospects for Mr Thomas and, fundamentally, what is necessary to protect the public and to identify and maintain professional standards. A penalty should be "*fair, reasonable and proportionate in all the circumstances.*"³²
73. Counsel agreed on the relevant principles and both acknowledged that cancellation was appropriate. In summary, the CAC submitted that the admission by Mr Thomas of inappropriate conduct in 2020 was sufficient on its own to constitute gross serious misconduct. Mr Shaw submitted that Student A's account was all-encompassing, including reasonable concessions, and he pointed to the absence of any motive for making the allegations up. Counsel submitted that Mr Thomas oscillated between recalling details that suited his narrative and an inability to recall those that did not and that he attempted to minimise his involvement and that Student A's account of how the relationship developed and culminated in the motel meeting was the plausible one.

³² *Roberts v Professional Conduct Committee of the Nursing Council* [2012] NZHC 3354 at [44]-[51]

74. Ms King acknowledged the seriousness of Mr Thomas' actions in 2020 and accepted the likelihood of cancellation of his registration and noted that his attendance at the hearing was not to excuse those actions but to maintain his denial of inappropriate conduct in 2019. Ms King referred to the level of detail in Student A's evidential video evidence and submitted that this did not necessarily equate with truth, suggesting some addition of details after the fact. Ms King submitted that it was significant that Student A did not call corroborative evidence.
75. We prefer the submissions for the CAC. We found the detail and manner of Student A's evidence to be credible, and corroborated by the available attendance records from school and the Facebook messages that were recovered. Student A freely gave concessions. She also freely gave details of others with whom she had spoken about Mr Thomas, inviting the Police and CAC to make contact.
76. The only realistic penalty to reflect the seriousness of Mr Thomas' conduct and to promote appropriate professional standards is cancellation of his teaching registration. His conduct was premeditated, self-gratifying, and caused manifold harm. He has undoubtedly suffered deeply himself since the complaint was made and his conduct came to light but failed to show genuine insight into the extent of harm to Student A or to take responsibility for his actions in 2019. A lesser penalty would not meet the gravity of this conduct.
77. A censure is also appropriate.

Non-Publication

78. Pursuant to s 501 of the 2020 Act the Tribunal has the authority to make orders prohibiting publication of the name and identifying details of any person³³, any report or account of any part of a proceeding whether it was held in public or in private³⁴. The Tribunal may also prohibit publication of the whole or part of any books, papers or documents produced at a hearing, meaning orders can be tailored to provide for aspects to be kept private.³⁵ Publication of a teacher's name in relation to disciplinary proceedings is separate to considerations of penalty, and not determined with a punitive intent.

³³ s501(6)(c)

³⁴ s501(6)(a)

³⁵ s501(6)(b)

79. Interim orders were made prohibiting publication of the name of Student A, Mr Thomas, the school and teaching staff, pending the Tribunal's decision on permanent orders if sought. A permanent order for Student A will be made, as well as an order suppressing the content of the Facebook messages sent by Student A to her friend about Mr Thomas which are quoted at paragraphs 30 and 31 above, given the highly sensitive content.
80. The parties were allowed time to file any application and supporting evidence, which the Tribunal received as a bundle on 22 August 2023. Mr Thomas seeks a permanent order; no application was made on behalf of the school. The orders sought by Mr Thomas cover all aspects of s 501(6) and constitute an application that the Tribunal make none of the proceedings public. He seeks extensive orders suppressing the publication of his name and identifying particulars including the names and occupations of any family members, details regarding his health and the mental health of his family members, and any details about the case that might identify him.
81. The hearing itself was held in public, but with Student A giving her evidence in private pursuant to s 501(4). A member of the media was present on the second day of the hearing and sought disclosure of various documents from the Tribunal's file. A detailed Minute declining the application was issued on 7 July 2023.
82. Ms King filed submissions in support of the respondent's application, acknowledging that the default position is publication of the name of a teacher who is subject to disciplinary proceedings. Ms King submitted that the interests of Mr Thomas and his family outweigh the public interest in knowing his name, relying on the impact of publication on his close relatives³⁶ and that the ramifications go well beyond what is ordinary in disciplinary proceedings. Ms King relied heavily on *B v R* in which the defendant pleaded guilty to charges of being in possession of objectionable material, being images, videos and text files involving exploitation of children as young as 18 months for sexual purposes. There was a successful appeal against the decision to decline name suppression on the grounds of the impact of publication on immediate family members who were employed in court administration, and who filed affidavits in support. The Court found that publication would

³⁶ *B (CA860/2010) v R* [2011] CA 331

“plainly cause incalculable hurt to individual family members and the extended family as a group.”

83. Ms King further submitted:
- a. Mr Thomas has *“paid a heavy price. He has lost his career, his self-respect and has had to face the detrimental consequences his actions have had upon his family. That is an onerous burden.”*
 - b. Mr Thomas will suffer harm to his therapeutic progress and recovery.
 - c. publication will lead to a *“revictimization”* of his family members.
 - d. despite earlier publicity no others have come forward to allege inappropriate behaviour and he is no longer teaching. There is no risk of reoffending.
 - e. publication will cause acute embarrassment for his family and particularly for those *“involved in the teaching profession, [as] it would create difficulty given the need for there to be a relationship of trust between student and teacher.”*
 - f. Mr Thomas understands he did something wrong and has expressed remorse and suffered personally and financially.
 - g. publicity will lead to harassment of innocent parties, namely the former wife of Mr Thomas and their children.
84. Mr Thomas filed an affidavit in support of his application in which he asserts that any publication that identifies him will be *“hugely damaging”* to his mental health and to his partner and children. He deposes that because of the previous publicity and the level of detail already reported about this matter, *“publication of any detail from the hearing could easily identify me and lead to further harassment and bullying.”* The reference to ‘harassment and bullying’ is to former colleagues in the music community expressing negative views amongst each other regarding his reported conduct. Undated examples of messages were annexed to the affidavit and appear to show several colleagues discussing the allegations and expressing concern about working with Mr Thomas, and that musicians and sponsors ought to be aware of his conduct to allow them to choose whether they work with him in light of this.

85. Mr Thomas deposes that “*people on social media have threatened and implemented a very planned attack on me. They have written letters to people I have collaborated with, they have threatened me online, and they have started a Facebook group to discuss me.*” Copies of this material (assuming it differs from the messages described above) was not annexed to the affidavit. He states:

[6] I have expressed my absolute regret for the inappropriate misconduct in 2020. It was completely out of character for me as I had had an untarnished successful teaching and conduct career up until this time. It has been documented that leading up to the inappropriate misconduct, I was mentally not well. I did not continue with any form of relationship afterwards as I was so ashamed. This doesn't excuse this event, however, I was on a self destructive trajectory and that continued to a greater extent after this as a result of my realisation of the wrong I had done.

86. Mr Thomas did not provide specific evidence supporting the assertion that he was ‘mentally not well’ before embarking on his inappropriate conduct with Student A; we have only Student A’s evidence that he appeared at times to be upset and his intimation that he was not in a good place mentally. [REDACTED]

[REDACTED]

87. Mr Thomas annexes an article published by Stuff on 4 July 2021 and a subsequent New Zealand Herald article in August 2021 and says this publicity resulted in “*widespread condemnation and embarrassment.*” He asserts that some of the information given by Student A “*has proven to be false*” but does not elaborate on this. He describes the impact of the media reports on his family, [REDACTED]

[REDACTED] Mr Thomas refers to an adult child who works in the teaching profession, saying that the publicity had a “*huge*” effect on her and that further publicity will affect her career, but does not explain why this is so. [REDACTED]

[REDACTED]

88. Mr Thomas blames the 2021 publicity for his difficulties in starting new business ventures, made necessary because he is not teaching and lost non-teaching roles he held in 2020 and 2021. He states that he was for a time unable to financially support himself and his family, living off savings and surviving week to week. He refers to now working at producing events and holding a retail position and says that his current expenses “*are barely covered by my income.*”

89. The respondent’s clinical psychologist Anjana Gaekwad provided a report before the hearing dated 21 June 2023. Ms Gaekwad has engaged with the respondent since September 2020, and refers to his ongoing need for unspecified pharmacological support and psychological support. Referring to the prospect of the then-pending proceedings, she said these caused heightened distress and risk of a relapse and writes:

In light of this, I request you to keep the case proceedings private, and inaccessible from the press and public domain. This protective gesture would greatly spare pain and mental anguish and trauma for my client’s immediate family, in particular, his young children.

90. The affidavits by the respondent’s brother and sister acknowledge the serious nature of the charge and support name suppression due to the potential mental consequences of publicity for Mr Thomas and his partner and children. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

91. Finally, the Tribunal received a letter from the respondent’s former wife. [REDACTED]

[REDACTED]

[REDACTED] She refers to their three children [REDACTED] and the risk that they could suffer questions and harassment if Mr Thomas has his name published:

[REDACTED]

[REDACTED]

[REDACTED]

92. The CAC opposes the application for permanent orders in reliance on the following submissions:
- a. the concerns for the respondent's family cannot provide proper grounds for the orders sought.
 - b. evidence regarding the impact of the previous publication is not supported by affidavits from affected family members or their health professionals.
 - c. it is likely that the hardships referred to arise out of Mr Thomas' conduct itself, not publicity about this.
 - d. the respondent's family are not part of the factual narrative that will be reported.
 - e. evidence regarding Mr Thomas' mental health is not current, [REDACTED]
[REDACTED] This supports the proposition that mental health concerns arise from the conduct not the media.
 - f. the extent of publicity to date means the name of Mr Thomas is in the public domain and a departure from the starting point of open justice is not justified; rather, there is a greater public interest in knowing the outcome of the investigation and proceedings.
 - g. Student A supports publication of the respondent's name for reasons of accountability and responsibility for his actions.
93. We are required to determine whether it is proper to make one or all of the orders sought by weighing the interests of any particular person against the public interest. This is a lower threshold than the requirement for exceptional circumstances in criminal proceedings.
94. We note that while the private interests of one individual may in themselves not satisfy the test, there may be a number of private interests that taken together tip the balance in favour of non-publication.³⁷ We do not agree that the interest or concerns of the respondent's family "cannot" provide proper grounds for suppression. Evidence on behalf

³⁷ *ABC v Complaints Assessment Committee* [2012] NZHC 1901, [2012] NZAR 856 at [48]

of family members can be taken into consideration, and we have no doubt in this case that they have suffered as a result of Mr Thomas' actions.³⁸

95. One significant difficulty with the application is its scope. Mr Thomas argues that the publicity in 2021 means he will inevitably be identifiable from any reporting of these proceedings. The articles already published outline Student A's allegations, name the respondent and identify the school, Ms Pound and the music school at Remuera Intermediate also. We agree that for some readers there will be a very easy connection to Mr Thomas even if this matter was published without his name or the name of the school.
96. However, given that the nature of Student A's allegations were publicised two years ago it seems highly likely that those who wanted to distance themselves from Mr Thomas and express disapproval, or those who wanted to support him, have had an opportunity to do so and his evidence indicates this has occurred.
97. The application does not address the fact that the earlier reporting covers the allegations but pre-dates the hearing and findings. It is a matter of public interest that the charge was heard in detail by the Tribunal, that Mr Thomas gave evidence in his defence including denying an inappropriate relationship in 2019, and that the charge was found largely proved. There is also public interest in the Tribunal's reasoning and the penalty imposed, from the perspective of setting and maintaining standards and the potential deterrent effect this may serve.
98. [REDACTED]
[REDACTED]
[REDACTED] Likewise, there is no affidavit from Mr Thomas' [REDACTED] justifying the assertion that her teaching career will suffer. There may be embarrassment by association, but the conduct of Mr Thomas three years ago in no way reflects on his [REDACTED] in her professional or personal capacity, then or now.
99. With the exception of Mr Thomas [REDACTED] no other family members have been named in the media (nor should they be). As the CAC submitted, they do not form part of the relevant factual narrative. We acknowledge the concerns raised in Ms [REDACTED] letter, and

³⁸ *ANG v Professional Conduct Committee* [2016] NZHC 2949 (7/12/16) at [75]

accept that there is no good reason for media to approach her about these proceedings, and consider it proper that her name and association with Mr Thomas not be published, in order to minimise the risk to her and their young children.

100. Given the nature of the charge, there will inevitably be embarrassment and upset to Mr Thomas following publication of his name and our findings. Calling this an ‘ordinary hardship’ is not intended to minimise how unpleasant this may be, but based on the evidence provided we do not consider it is proper to grant wholesale suppression orders to avoid this. Earlier publicity will not always preclude a non-publication order being made, but in this case the articles make it impossible to publish any facts of the case without identifying Mr Thomas to some members of the public. We consider that the evidence filed in support of the application does not tip the balance in favour of non-publication. The case relied upon by Ms King (*B v R*)³⁹ was determined by the appellate court reviewing affidavit evidence from the family members claiming to be adversely affected. We consider it will seldom be sufficient for a teacher to rely on an assertion of harm to other adults without providing direct evidence. Mr Thomas also did not provide up to date medical evidence regarding the likely impact of proceedings on himself. Mr Thomas was very concerned during the hearing to protect sensitive health information, and we accept that it is proper not to publish this in detail.
101. As such, limited non-publication orders will be made suppressing the name of Student A and content of the Facebook messages produced in the hearing; the name of Mr Thomas’ former wife [REDACTED], and sensitive health information about Mr Thomas and [REDACTED] as outlined in his affidavit.

COSTS

102. The Tribunal may make an order for costs pursuant to s 500(1)(i). The CAC filed a schedule of costs in accordance with the Tribunal’s Practice Note 1, outlining total costs of \$24,231.30. The costs of the Tribunal are \$18,030.48. Mr Shaw submitted that an award of 50% of costs incurred was appropriate, and noted the absence of detailed financial evidence from the respondent in support of his claim that he is not in a position to meet a costs order, such as itemised details of his assets and liabilities.

³⁹ Above n 36

103. For the respondent, Ms King submitted that Mr Thomas “*engaged with the process to the best of his ability. He should not be penalised financially because depression makes carrying out normal tasks difficult.*” She referred to the affidavit evidence that he has had difficulty finding work and submits that he is not in a position to pay any costs.
104. The starting point is 50%, a figure which we may increase or reduce depending on the extent to which the charge was proved and other circumstances of the case. If a teacher wishes to claim impecuniosity it is important that the Tribunal receives sufficient evidence of their financial position to assess this such as income, assets and liabilities (noting that specific details would not be part of the published findings). Mr Thomas has not taught since September 2020 and has lost at least three other part-time positions, if we accept the articles published in 2021. He has found it difficult to find work and now has part time roles in event management and retail. We accept that he has suffered a loss of income.
105. The mitigating factors therefore are that particulars 1(a) to (c) were not made out, and the fact that Mr Thomas has experienced not insignificant financial loss which will impact on his ability to meet an order for costs. Other than this we find there is little basis on which to reduce an order of costs substantially. Mr Thomas was largely unsuccessful in his defence of the charge, and no agreed statement of facts was provided in relation to the 2020 conduct which he largely accepted.
106. We consider a contribution of 40% of costs is appropriate.

ORDERS

107. We make the following orders as to penalty:
- (i) Cancellation of Mr Thomas’ registration.
 - (ii) Censure.
108. We make the following orders as to costs:
- (i) Costs in favour of the CAC and Tribunal totalling 40% of the costs incurred, being \$9,692.52 and \$7,212.19 respectively.
109. The following names and details are subject to non-publication orders:

- (i) The name of Student A.
- (ii) The names of other students identified in the evidence before the Tribunal.
- (iii) The content of the Facebook messages quoted at paragraphs 30 and 31 of this decision.
- (iv) The name and identifying details of [REDACTED], former wife of Mr Thomas, and their children.
- (v) Details of Mr Thomas' [REDACTED] and [REDACTED]
[REDACTED]
- (vi) Details of the mental state of the adult children of Mr Thomas namely [REDACTED]
[REDACTED]

110. A person who is dissatisfied with all or any part of this decision may appeal to the District Court.

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



C Garvey

Deputy Chairperson