

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER THE Education Act 1989

IN THE MATTER disciplinary proceedings pursuant to Part 32 of the Act

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

AND **DEREK EDWARD NEAL** registered teacher
(Registration Number 139472)

Respondent

DECISION OF THE TRIBUNAL

Hearing: 25 August 2021

Tribunal: Jo Hughson (Deputy Chairperson),
Kiri Turketo, Simon Walker
(Members)

Counsel: David Neild and Siobhan McArthur for the Complaints
Assessment Committee
Fran Renton, NZPPTA Te Wehengarua, for
for the Respondent
Gretchen Stone for the Onslow College Board of Trustees
(in respect of respect of non-publication orders)

Decision: 13 September 2021

SUMMARY

- [1] Mr Neal is a fully registered teacher (subject to confirmation)¹. At the relevant time Mr Neal was a teacher at Onslow College in Wellington. At the time of the hearing Mr Neal was not working as a teacher. He had left his teaching job at Onslow College [REDACTED] [REDACTED] having tendered his resignation earlier that year.
- [2] According to the register, Mr Neal's practising certificate will expire on 29 November 2022.
- [3] The Complaints Assessment Committee (the CAC) charged that on or around [REDACTED] [REDACTED] Mr Neal touched a [REDACTED] student (Student A) on the bottom and/or pinched it; and said 'nice bum' to Student A.
- [4] This conduct was alleged to amount to serious misconduct pursuant to section 378 of the Education Act 1989 (the Act), when the alleged acts are considered separately and cumulatively. Alternatively, it was alleged the conduct amounted to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 202 of the Act.
- [5] The hearing proceeded on the papers based on an Agreed Summary of Facts².
- [6] Mr Neal admitted the conduct and accepted that his behaviour was serious misconduct. Despite Mr Neal's admissions it was for the Tribunal to reach its own view as to whether the conduct, if established, amounted to serious misconduct; and if so, what, if any, penalty should be imposed.
- [7] Written submissions were received from Counsel for the CAC and from Mr Neal's PPTA representative, addressing the issues of both liability and penalty.
- [8] The Tribunal found the charge established. It had no difficulty concluding that the conduct was serious misconduct. The Tribunal made orders of censure, imposed conditions on practice, annotation of the register to note the censure, and costs.
- [9] The interim non-publication order that was in effect prior to the hearing, in respect of Mr Neal's name and identifying particulars, was not made permanent. Mr Neal did not seek a permanent order and the Tribunal was not satisfied that there were any grounds for a permanent order. It follows that Mr Neal's name may be published in connection with these proceedings.
- [10] In view of the indication given that Mr Neal did not intend to apply for a permanent non-publication order in respect of his name (and if a permanent order was not made), the School Board of Trustees, through its Counsel, indicated that it would not be seeking a permanent order in respect of Onslow College.³ Accordingly the Tribunal's interim order in respect of the name of the school will expire when this decision is issued.
- [11] The Tribunal made a permanent order under section 405(6) of the Act that the name of Student A, who was identified in the papers before the Tribunal, be prohibited from

¹ Agreed Summary of Facts (ASF) at [1].

² Above, fn.1. Signed by the parties' representatives on 1 July 2021. It is noted it is the Tribunal's expectation that the respondent teacher should sign any agreed statement of facts.

³ An interim order had been made at a pre-hearing conference held on 23 June 2021 (Minute of Chairperson, Theo Baker).

publication. The Tribunal considered the privacy interests of Student A outweigh the public interest in her being identified. It followed that it was proper for there to be a permanent order.

[12] As the names of Mr Neal and Onslow College may be published, to ensure that the Tribunal's order in respect of the name of the student is not undermined were those names to be published, the Tribunal considered it was proper that the year in which the conduct occurred also be prohibited from publication (it being an identifying particular of Student A). Therefore, the order made in respect of Student A's name is to extend to the year in which she was a [REDACTED] student at Onslow College.

[13] The reasons for the Tribunal's decisions follow.

Facts

[14] The Tribunal made the following findings of fact⁴:

[15] On or about [REDACTED] Mr Neal attended a dinner held for Onslow College's [REDACTED].

[16] At the dinner a [REDACTED] student (Student A), invited Mr Neal to be in a photograph with her. Mr Neal agreed.

[17] When posing for the photo, Mr Neal placed his arm around Student A and touched and/or pinched her bottom.

[18] Mr Neal then told Student A she had a 'nice bum'. He said "nice bum [Student A's name]"⁵.

Legal Principles - Liability

[19] It was for the CAC to prove the charge, on the balance of probabilities.

[20] "Serious misconduct" is defined in section 378 of the Act as follows:

Serious misconduct means conduct by a teacher –

- (a) That-
 - (i) Adversely affects, or is likely to adversely 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; and
- (b) That is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

[21] This test for serious misconduct is conjunctive⁶. That is, as well as being conduct that has one or more of the adverse professional effects or consequences described in subsection

⁴ ASF at [2]-[7].

⁵ Mr Neal admitted this to the CAC when he was interviewed in [REDACTED].

⁶ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

(a)(i)-(iii) the conduct must also be of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct. Those criteria are set out in Part 3, Rule 9 of the Teaching Council Rules 2016 (the Rules).

- [22] Rule 9 states that a teacher’s employer must immediately report to the Council in accordance with section 394 of the Act if the employer has reason to believe the teacher has committed a “serious breach of the Code of Professional Responsibility”.
- [23] The Code of Professional Responsibility (the Code) documents the minimum standards for ethical and professional behaviour that are expected of every registered teacher. As such the Code sets out the commitments that teachers make to the profession, learners, families and whānau, and to society.
- [24] Rule 9(1)(a) through (k) is a non-exhaustive list of conduct which may constitute a serious breach of the Code and therefore, which must be reported by the teacher’s employer.
- [25] Whether or not there has been serious misconduct and the severity of any such misconduct is assessed by objective standards.
- [26] The CAC submitted that the Respondent’s conduct engaged all three limbs of the definition in section 378 (a). It was submitted further that the conduct engaged section 378 (b) as it was a serious breach of the Code as demonstrated by the examples given in Rule 9 (1)(e) and (k) of the Rules. As such, the CAC submitted that the test for serious misconduct was met.
- [27] When determining whether established conduct is likely to have had an adverse effect on a student for the purposes of the definition of serious misconduct in section 378 (a)(i), the Tribunal is not required to be satisfied that there has been an actual adverse impact on a student’s or students’ wellbeing or learning. While there may be no direct evidence of adverse consequences for a student, the Tribunal is entitled to proceed on the basis that such consequences are a logical outcome or likely occurred because of the teacher’s conduct. Further, the CAC is not required to prove that the teacher intended to actively exploit the student⁷.
- [28] Previous Tribunal decisions demonstrate that the term “fitness to practise” in the definition of serious misconduct in section 378 (a)(ii) extends beyond competence issues and includes conduct that, when considered objectively, will have a negative impact on the trust and confidence which the public is entitled to have in the teacher and the teaching profession as a whole, including conduct which falls below the standards legitimately expected of a member of the profession, whether of a teaching character or not.⁸
- [29] When considering whether particular conduct may bring the teaching profession into disrepute (for the purposes of section 378 (a)(iii); and Rule 9(1)(k)) the question to be asked is whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of

⁷ *CAC v Teacher R.*

⁸ This is the approach taken to “fitness to practise” for the purposes of the Health Practitioners Competence Assurance Act 2003, and the approach which has been taken by this Tribunal in previous decisions.

the teaching profession was lowered by the behaviour of the teacher concerned.⁹ This objective test is applied regularly by the Tribunal.

- [30] It is well established that a teacher's actions in his or her personal life may reflect adversely on the teacher's fitness to be a teacher and bring the profession into disrepute¹⁰. The principal question is not whether the incident occurred in a teacher's private or professional capacity, but rather, whether the teacher's actions, wherever and whenever they took place, reflect adversely on his or her fitness to be a teacher and/or bring the teaching profession into disrepute.
- [31] As to the requirement that the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, relevantly, Rule 9(1)(e) relates to the breaching of 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, engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person). It is Rule 9(k) that encompasses an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
- [32] Subjective matters personal to the respondent teacher are not to be considered in any significant way when objectively assessing whether there has been serious misconduct¹¹. Personal factors may be given full consideration at the penalty stage if a charge is found to have been established. As below, the Tribunal considered matters that Mr Neal raised by way of explanation for his conduct (including his consumption of a psycho-active substance on the evening of the [REDACTED] Dinner to treat his depression) in that way.

Relevant standards

- [33] The Code makes it clear that teachers are expected to behave in ways that promote a culture of trust, respect, and confidence in them as a teacher and in the profession. Clause 1.3 of the Code addresses a teacher's commitment to the teaching profession and relates to:
- maintaining public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.
- [34] By acting with integrity and professionalism, teachers and the teaching profession maintain the trust and confidence that learners, families and whānau, and the wider community place in teachers to guide their children and young people on their learning journey and to keep them safe¹².

⁹ Being the standard stated by the High Court (Gendall J) in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28] in relation to the test of "likely to bring discredit to the [nursing] profession", adopted by the Tribunal in previous decisions including *CAC v Webster NZTDT 2016-57*, 6 April 2017 at [46] and *CAC v Harrington NZTDT 2016/63*, 6 April 2017 at [17].

¹⁰ For example, see NZTDT 2009/05 11 May 2009.

¹¹ See *Martin v Director of Proceedings* [2010] NZAR 333 and *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, at [126]-[130] applied in previous decisions of this Tribunal.

¹² Clause 1.3 Code of Professional Responsibility.

- [35] Conduct that damages this trust and confidence breaches the expectation set out in Clause 1.3. That may include conduct outside of work that interferes with their performance as a teacher, that affects the trust and confidence that others have in them as a teacher, or that reflects badly on the integrity or standing of the teaching profession.
- [36] Clause 2.2 of the Code states that teachers will work in the best interests of learners by engaging in ethical and professional relationships with learners that respect professional boundaries. The Guidance provided in the Code about this clause specifically refers to the following behaviour as “Examples in Practice” which may breach the Code; adopting a role with a learner that is inappropriate and beyond the scope of the teacher’s teaching position, such as treating the learner as a friend, having sexual or intimate contact with a learner or with a recent former learner, and making inappropriate comments about a learner’s physical appearance.
- [37] The Tribunal assessed the conduct against those standards.

Findings on the Charge

- [38] The Tribunal considered the established facts and the submissions for the parties, carefully.
- [39] The Tribunal was satisfied the evidence established that on [REDACTED] Mr Neal touched a [REDACTED] student (Student A) on the bottom and pinched it and said, ‘nice bum [Student A’s name]’.
- [40] The Tribunal had no difficulty concluding that the conduct was serious misconduct, when the acts are considered separately and together, and therefore that it was entitled to exercise its powers pursuant to section 404 of the Act.

Serious misconduct – limb (a)(ii) and (iii) established

- [41] As to the first limb of the test for serious misconduct, the Tribunal was on the opinion that Mr Neal’s acts of touching and pinching a student’s bottom in what was a sexual manner, and making what was a sexual comment about a student, raises significant questions about Mr Neal’s fitness to practise; in particular his ability to uphold the fundamental skill, obligation and professional discipline expected of all teachers to respect professional boundaries with students. Limb (a)(ii) is met. The Tribunal noted that Mr Neal accepted that his actions reflect adversely on his fitness to be a teacher.
- [42] Further, in the Tribunal’s opinion, any reasonable member of the public, informed of the facts and circumstances, would reasonably conclude that the reputation and good standing of the profession is lowered when a teacher engages in conduct of the nature Mr Neal engaged in. Failure to maintain professional boundaries almost inevitably brings discredit to the profession because breaches of such a well-known fundament of a teacher’s role would cause members of the public to doubt whether or to what extent the teaching profession was observing its obligations. Mr Neal accepted that his actions breached professional boundaries in respect of a young person with whom he was in contact because of his position as a teacher.
- [43] For those reasons, the Tribunal accepted the submission for the CAC that Mr Neal’s conduct may bring the teaching profession into disrepute. Limb (a)(iii) is met.

Serious misconduct – limb (a)(i) not established

- [44] The Tribunal did not accept the submission that was made for the CAC that the conduct adversely affected or was likely to adversely affect the learning or wellbeing of “the other students in the class and in the school community who will have inevitably witnessed or heard about the incident”. There was no evidence before the Tribunal that any other students witnessed or heard about the incident. Other than the fact that the incident occurred in the context of having a photo with Student A at the [REDACTED] Dinner, no other evidence was before the Tribunal about where the incident occurred, the set-up of the venue or the subsequent actions of the parties.
- [45] There was no evidence before the Tribunal about what, if any effects, Mr Neal’s behaviour has had on Student A, although as above, that is not determinative. However, given the context in which the incident occurred (at a [REDACTED] Dinner) and that it was a one-off incident, the Tribunal was not satisfied it could fairly or reasonably conclude that it was a logical and likely outcome that Mr Neal’s conduct adversely affected Student A’s learning, or her wellbeing. The Tribunal was not satisfied limb (a)(i) is met. That is not to say the Tribunal did not consider that the incident involved a significant falling short of accepted standards by Mr Neal. Without doubt it did.
- [46] For those reasons, the Tribunal concluded that Mr Neal’s conduct has or has had two of the three adverse professional effects or consequences described in the definition of serious misconduct in section 378(a) of the Act.

Serious misconduct – limb (b)

- [47] Mr Neal engaged in behaviour and communication of a sexual nature towards Student A by touching her on the bottom and pinching her bottom and telling her she had a “nice bum”. Student A was in contact with Mr Neal because of his position as a teacher at her school.
- [48] Touching a student on the bottom, pinching a student’s bottom, and telling a student they have a “nice bum” is sexually driven behaviour and behaviour that reasonable members of the public would not consider to be appropriate for a teacher, in the Tribunal’s view.
- [49] For those reasons, the Tribunal concluded that Mr Neal’s conduct involved serious breaches of the Code of Professional Responsibility as demonstrated by the examples described in Rule 9(1)(e) and (k) of the Teaching Council Rules 2016. His conduct was of a character and severity that met the reporting criteria specified in Rule 9 and therefore, the Tribunal was satisfied the second limb of the test for whether there has been serious misconduct, is met.

Comparable cases

- [50] The Tribunal noted that there have been similar cases where the Tribunal has found comparable conduct to amount to serious misconduct. Those referred to by Counsel for the CAC were:
- (a) *Edgecombe*¹³: Mr Edgecombe was found to have committed serious misconduct by slapping a student’s bottom, giving a student a ‘horsey bite’ on her thigh, placing a student in a headlock, and putting his finger in the student’s ear, making comments about students’ bottoms, and referring to a student’s sister as “the ugly one”.

¹³ NZTDT 2018/22

(b) *Teacher*¹⁴ made multiple inappropriate sexualised comments to Year 11 students in his class, including but not limited to “let me take a photo of your bum so it lasts longer”, “bend over and I’ll take a photo of your tits”, “when your nipples are hard you get horny”, referring to a student’s breasts as “tits” and her bottom as “bum” and commenting on her breast size. The Tribunal found that this conduct was serious misconduct.

[51] In *Teacher V*¹⁵ the teacher was found to have used inappropriate language on a number of occasions including “I love you. I love everything about you”, “after Tuesday you are going to be all mine” and “I miss you, make sure you come back”. The teacher also made inappropriate physical contact on several occasions, including touching on the shoulder and hand, and sitting close to a student on a bench so that legs were touching. The Tribunal concluded that there was no sexual motivation behind the conduct, and it occurred in the open. Rather, the teacher’s actions “were a clumsy attempt to engage with the student”, albeit inappropriate and amounted to misconduct, rather than serious misconduct.

[52] The Tribunal accepted the submission for the CAC that Mr Neal’s conduct was not as serious as *Mr Edgcombe’s* conduct, or *Teacher’s* conduct but that it was more serious than *Teacher V’s* conduct. Mr Neal’s conduct was explicitly sexual in nature, albeit that it occurred only on one occasion.

Finding – serious misconduct

[53] It was for those reasons the Tribunal was satisfied the Charge of serious misconduct was established.

Penalty

[54] Having made an adverse finding of serious misconduct, the Tribunal was entitled to exercise its powers under section 404 of the Act. The Tribunal could do one or more of the things set out in section 404(1).

[55] It is well established that the primary purposes of the imposition of disciplinary penalties under the Act are to maintain professional standards (through general and/or specific deterrence), to maintain the public’s confidence in the teaching profession, and to protect the public through the provision of a safe learning environment for students¹⁶.

[56] Rehabilitation of the teacher is often an important purpose.¹⁷

[57] In previous decisions the Tribunal has accepted as the appropriate sentencing principles those identified by Collins J in *Roberts v Professional Conduct Committee of the Nursing Council*¹⁸. His Honour identified eight factors as relevant whenever an appropriate penalty

¹⁴ NZTDT 2010/24

¹⁵ NZTDT 2020/22

¹⁶ As discussed in *CAC v McMillan* NZTDT 2016/52 at [23].

¹⁷ *CAC v Teacher* NZTDT 2016/55 at [30].

¹⁸ [2012] NZHC 3354 at [44]-[51].

is being determined in professional disciplinary proceedings. In short, the Tribunal must arrive at an outcome that is fair, reasonable, and proportionate in the circumstances. It must identify the least restrictive penalty that can reasonably be imposed which meets the seriousness of the case and discharges the Tribunal's obligations to the public and the teaching profession.

Facts relevant to penalty

Personal circumstances of Mr Neal

Mr Neal's response

[58] The following facts were agreed¹⁹, and the Tribunal made findings accordingly:

[59] In an email to the Principal of Onslow College on [REDACTED], Mr Neal admitted the allegations and stated:

This behaviour is completely out of character for me and the only change in my normal behaviours is to have begun medication for depression. I have been taking a drug called Fluoxetine every evening. I have looked this up and discovered it is an alternate name for the better known Prozac. It seems that a common side effect is behaviour change. I did not know of this side effect. I took this drug at about 7pm and had not eaten since lunch. This is the only factor I can suggest as a reason for my appalling behaviour. I am completely ashamed of myself.

Impairment Committee Process

[60] Mr Neal volunteered to take part in the Teaching Council's impairment process. The following was noted in the Impairment Report compiled by Dr Lynn McBain (Impairment Committee Chair)²⁰:

I am unable to assert one way or the other if the behaviour was related to the medication, but I cannot rule that out either.

[61] On 10 July 2020, in an email to the Teaching Council, Mr Neal said his doctor had changed his medication. He stated:

I now believe that a recurrence of the inappropriate behaviour is very unlikely.

Complaints Assessment Committee Process

[62] In a meeting with the CAC on [REDACTED] Mr Neal admitted that he initially placed his hand on Student A's waist and then moved his hand to her bottom. He admitted he said, 'nice bum [Student A's name]' to Student A. Mr Neal said Student A was being "sexy" and "lovely" at the time of the incident and that she "threw herself at him" by putting her arm around him and pulling him in. He said that he felt awful about the conduct and accepted that it was "unprofessional behaviour".

¹⁹ ASF [8]-[11].

²⁰ Teaching Council Impairment Report dated 27 June 2020. Agreed Bundle of Documents, page 8. The initial impairment was noted to be depression, but the medical records indicated that the depression had lessened by the time of the conduct. The Report noted that at the time of the incident Mr Neal was taking two psychoactive substances, and he had "unresolved depression". Further, that "confusion" is listed as a possible side-effect of both medications.

[63] It was submitted for the CAC that the Impairment Report at most provides possible context for Mr Neal's actions but does not provide any defence for the actions themselves. The Tribunal agreed.

[64] Further, it was submitted for the CAC that the various comments Mr Neal made when he met with the CAC could reasonably be characterised as an attempt to disparage other parties and that they show Mr Neal does not fully take responsibility for his actions and blames others, at least in part, for the incident, including Student A. The Tribunal agreed that those comments by Mr Neal are inconsistent with his explanation that the conduct was a side-effect of medication he was taking and was out of character.

Penalties imposed in comparable cases

[65] It is necessary to ensure that the penalty imposed for the serious misconduct that has occurred in this case, is consistent with the penalties imposed in comparable previous cases. As was said by Randerson J in *Patel v Dentists Disciplinary Tribunal*²¹:

... while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.

[66] The Tribunal sought guidance from the comparable cases relied on by the CAC, as discussed, and used those cases to benchmark the relative seriousness of Mr Neal's conduct.

[67] In *Edgecombe*²² the teacher's registration had already been cancelled due to criminal offending however the Tribunal gave an indication of what penalty would have been imposed for the conduct it had reviewed. The Tribunal indicated that Mr Edgecombe's conduct was not at the most serious end of the spectrum in terms of conduct involving professional boundary breaches, and that considered in isolation from the criminal offending, it did not warrant cancellation of his registration. The indication given was that the Tribunal would have censured Mr Edgecombe, the register would have been annotated, his practising certificate would have been suspended until he undertook an approved course on professional boundaries and ethics and provided evidence to the Teaching Council that he had sufficient knowledge of professional boundaries to be able to practise safely, and he would have had a condition placed on his practising certificate to inform any current, prospective or future employers of the Tribunal's decision, for two years.

[68] In *Teacher*²³ the teacher was censured, the register was annotated, and his practising certificate was suspended until he undertook approved courses relating to appropriate behaviour management, provided a reflective statement about what he learned on the courses, provided evidence that he had sufficient knowledge of professional boundaries (by way of psychological assessment), and consented to the Teaching Council enquiring with the Ministry of Education as to whether he was teaching or not.

²¹ (High Court, Auckland, AP77/02, 8 October 2002), at [31].

²² Above, fn. 12.

²³ Above, fn.13.

[69] In *Teacher V*²⁴ the Tribunal imposed a penalty whereby for a period of one year from the date of issue of any practising certificate, the teacher was required to appoint a mentor and show a copy of the Tribunal's decision to any future employer. The Tribunal took into account that there was no sexual motivation behind the conduct, and that it was all done in the open. Further, that the teacher had made efforts to address his conduct, through counselling.

[70] As above, the Tribunal accepted the CAC's submission that Mr Neal's conduct was not as serious as that in *Edgecombe* or *Teacher* because it was a one-off incident and was not sustained; but that Mr Neal's conduct was more serious than *Teacher V*'s because there is the added sexual element.

CAC's submissions

[71] Counsel for the CAC indicated from the bar (through his written submissions) that Mr Neal has had a long teaching career spanning almost three decades and held a leadership position for a significant portion of this time. Further, that during his time at Onslow College, Mr Neal held the roles of Media Studies/English teacher (January 2002 – December 2019), Outdoor Education Coordinator (January 2009- February 2010) and Subject Leader of Media Studies (2008-December [REDACTED]). In addition, Counsel indicated that it is the CAC's understanding Mr Neal retired in December [REDACTED] and does not intend to return to teaching.

[72] It was submitted for the CAC that "if it was possible for Mr Neal to return to teaching at some stage the appropriate starting point would be censure, annotation of the censure on the register, and the imposition of conditions on future practising certificates requiring further training on appropriate conduct with students and/or mentoring to ensure he fully understood appropriate boundaries with students, as well as suspension of his practising certificate until those conditions were fulfilled". It was submitted this disciplinary response would properly address the offending and would be commensurate in the light of the authorities, where the more serious cases resulted in conditions being imposed requiring the teachers to undertake approved training courses and the less serious case required the teacher to undergo mentoring.

[73] However, Counsel for the CAC drew attention to the fact that Mr Neal "states that he has retired from teaching. It appears that he had intentions to retire at the end of the [REDACTED] school year because he had handed in his resignation of employment to the school prior to the incident". Counsel for the CAC submitted that as such, a penalty imposing conditions on Mr Neal to attend "some sort of training or mentoring is not appropriate or necessary". It was submitted that cancellation of Mr Neal's practising certificate would be most appropriate. It was further submitted that the Tribunal should make an order under section 404(1)(j) directing the Teaching Council to impose conditions on any subsequent practising certificate issued to Mr Neal; specifically, requiring Mr Neal to complete a reflection on his teaching practises against the Code that satisfies the Manager of Professional Responsibility at the Teaching Council, that he understands professional and ethical boundaries.

²⁴ Above, fn. 14.

- [74] It was acknowledged by the CAC that a mitigating factor is that Mr Neal has admitted the allegations and the facts underpinning them, and that at no point has he denied them. That indicates that Mr Neal has some level of insight into the behaviour and its unacceptability.
- [75] However, it was submitted that despite the admissions, the incident shows a failure to understand what is appropriate in a student-teacher relationship. Mr Neal's comments to the CAC that Student A was being 'sexy' and 'lovely' and that she 'threw herself at him' demonstrate a clear lack of insight into the power imbalance between students and teachers and the responsibility of the teacher to maintain professional boundaries at all times without exception. It was submitted this should be recognised and addressed by the penalty imposed.
- [76] It was submitted that the least restrictive and punitive disciplinary response in this case, having regard to the above factors and the principles of specific deterrence and harm prevention would be: censure, annotation of the register for two years to ensure transparency should Mr Neal seek to work in relief teaching, cancellation of Mr Neal's practising certificate, and the imposition of a condition on any subsequent practising certificate held by Mr Neal requiring him to complete a reflection on his teaching practices against the Code that satisfies the Manager of Professional Responsibility at the Teaching Council, that he understands professional and ethical boundaries.

Submissions for Mr Neal

- [77] Mr Neal's representative confirmed in her written submissions that Mr Neal had a long teaching career with varying levels of responsibility and that he has no history of any concerns being raised about his behaviour or boundaries with students during this time.
- [78] It was noted by the Tribunal that no information was provided that suggested Mr Neal does not intend to return to teaching, or which supported the information provided by Counsel for the CAC about that.
- [79] It was submitted that Mr Neal's actions were attributable to the medication he was taking at time for his mental health. It was pointed out that the potential effects of the medication (causing confusion) could not be ruled out by the Impairment Committee as having explained the behaviour. As above, the Tribunal considered that Mr Neal's comments to the CAC at his meeting with the Committee in December 2020 were inconsistent with Mr Neal's attribution of his behaviour to medication effects.
- [80] It was submitted that "Mr Neal's description to the CAC of the student's actions reflect what his impaired perception was at the time of the incident, not a general attitude towards students or an attempt to shift blame on the student".
- [81] It was submitted that Mr Neal had "immediately admitted his behaviour and has genuinely apologised for it. He recognised that it was inappropriate and was appalled that it occurred". It was pointed out that Mr Neal had participated in person at the CAC meeting and had further cooperated by agreeing the summary of facts in these proceedings.
- [82] It was highlighted that Mr Neal has stated that his medication has been changed and that he believes a recurrence of this "inappropriate behaviour" is "extremely unlikely".
- [83] For those reasons, it was submitted that a penalty of censure, annotation for two years (of the censure), and a requirement that Mr Neal complete a reflection of his behaviour against

the Code that satisfies the Teaching Council that he understands professional boundaries, would be appropriate

Findings on Penalty

- [84] The Tribunal considered the relevant penalty principles including the comparative cases, as well as the submissions that were made for the CAC and for Mr Neal.
- [85] The Tribunal was satisfied that it was appropriate and necessary to impose a formal penalty. For the reasons given below, the Tribunal considered that the least restrictive penalty which meets the seriousness of the case and discharges the Tribunal's obligation to the public and the teaching profession is a censure to express the Tribunal's disapproval of the conduct which occurred (section 404(1)(b)), annotation of the register (of the censure) for a period of two years (section 404(1)(e)) and the imposition of conditions on practice (section 404(1)(c)).
- [86] The Tribunal recognised that cancellation or suspension of registration or a practising certificate should not be ordered if an alternative penalty can achieve the objectives sought. Further, that rehabilitation of the teacher is a factor requiring careful consideration. Ultimately, the Tribunal must balance the nature and gravity of the offending and its bearing on the teacher's fitness to practise against the need for removal or suspension and its consequences to the individual teacher²⁵.
- [87] The Tribunal considered whether there were any alternatives to cancellation or suspension of registration or of Mr Neal's practising certificate which would achieve the objectives of protecting the public and maintaining the standards of the teaching profession, having regard to the gravity of his offending and its bearing on his fitness to be a teacher.
- [88] The Tribunal concluded that there were alternatives to cancellation and suspension of Mr Neal's registration or practising certificate. The Tribunal did not consider that Mr Neal's conduct was of sufficient gravity to warrant the imposition of these most severe penalty outcomes and was of the view that such measures would be a disproportionate response to what was a one-off occasion when the professional boundary with a student was breached, albeit that there was a sexual element to the offending.
- [89] When determining the penalty orders to be made, the Tribunal also took into account the aggravating and mitigating features identified by the parties and in addition, had regard to the fact that there was no indication given by or for Mr Neal that he does not intend to practise as a teacher in the future.
- [90] The Tribunal decided to make an order censuring Mr Neal as a mark of its serious disquiet about his conduct, and to uphold professional standards. Mr Neal's conduct involved behaviour that cannot be tolerated in the teaching profession.
- [91] In addition, the Tribunal ordered that the register of teachers be annotated to record the censure, pursuant to section 404(1)(e). Such an order will ensure transparency and protect the public, should Mr Neal seek to work as a relief teacher.

²⁵ *Dad v General Dental Council* [Privy Council] at [1543] referred to in *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, AP77/02, 8 October 2002, Randerson J) at [31].

[92] The Tribunal decided to impose the following conditions on Mr Neal's practising certificate, for rehabilitative purposes and to protect the public (pursuant section 404(1)(c)):

92.a.1 Mr Neal to participate in mentoring with a mentor of his choice. The mentoring to focus on assisting Mr Neal to understand appropriate professional boundaries with students. No later than six months from the date of this decision, Mr Neal to provide evidence of the mentoring to the Manager of Professional Responsibility at the Teaching Council, to demonstrate he fully understands appropriate boundaries with students.

92.a.2 Mr Neal to provide a reflective statement about his teaching practises against the Code of Professional Responsibility to the Manager of Professional Responsibility at the Teaching Council. The reflective statement to satisfy the Manager of Professional Responsibility that Mr Neal understands professional and ethical boundaries and adheres to them in his teaching practise. This condition to be satisfied no later than six months from the date of this decision.

92.a.3 Mr Neal to advise any current, prospective, or future employers, including in respect of any relief-teaching roles he may apply for and/or undertake, of this decision (and provide a copy of this decision to those employers). This condition is to apply for two years from the date of this decision.

Costs

[93] It is usual for an award of costs to be made against a teacher once a charge is established. When considering the appropriate quantum of costs, the Tribunal must take account of the need for the teacher who has come before the Tribunal to make a proper contribution towards the costs that have been incurred. As has been said in previous decisions of the Tribunal, the teaching profession as a whole should not be expected to fund all the costs of the disciplinary regime under the Act.

[94] The CAC indicated that the costs of its investigation and prosecution amounted to \$9,775.76 excluding GST. It was submitted that as Mr Neal has cooperated, had admitted the charge, and agreed to it being heard and determined on the papers, a 40% contribution to the CAC's costs would be appropriate.

[95] Mr Neal accepted that a 40% contribution to the CAC's costs would be appropriate.

[96] The Tribunal agreed that a 40% contribution to the CAC's costs was reasonable and appropriate. That is in line with recent decisions of the Tribunal.

[97] Accordingly, the Tribunal made an order pursuant to section 404(1)(h) that Mr Neal is to pay the sum of \$3,910.30 to the CAC.

[98] As to the hearing costs the Tribunal made an order that Mr Neal make a 40% contribution towards those costs, being payment of the sum of \$458.00 to the Teaching Council. That order is in line with the Tribunal's Costs Practice Note and is made under section 404(1)(i).

Non-publication orders

- [99] Interim non-publication orders had been made at a pre-hearing conference on 23 June 2021.²⁶ Those orders were made in respect of Mr Neal, Onslow College, and Student A (whose name was disclosed in the Agreed Summary of Facts).
- [100] The Tribunal’s jurisdiction to make non-publication orders is found in section 405 of the Act. An order can only be made under section 405 (6) (a)-(c) if the Tribunal is of the opinion that it is proper to do so, having regard to the interests of any person (including, without limitation, the privacy of the complainant, if any) and the public interest.
- [101] Mr Neal did not seek a permanent non-publication order in respect of his name. Now that he has been found guilty of serious misconduct there is a public interest in his name being published in connection with these proceedings. The principle of open justice is paramount to maintain public confidence in the teaching profession through the transparent administration of justice²⁷. There are no private interests of Mr Neal that are apparent to the Tribunal which would override the public interest in open disciplinary proceedings and his name being published. Accordingly, the Tribunal concluded that it is proper that the interim order in respect of Mr Neal’s name and identifying particulars not be made permanent. The interim order will expire when this decision is issued to the parties.
- [102] Counsel for the Onslow College Board of Trustees indicated that if Mr Neal did not seek or is not granted permanent name suppression, then it would not seek a permanent order in respect of Onslow College. Counsel advised that the reality of managing the media and social media interest if the teacher is named, will be “easier for the school without suppression orders”²⁸. As Mr Neal’s name may now be published, and in view of that indication from the school, the Tribunal determined not to make permanent the interim order that had been in effect in respect of the name of the school. That order will also expire when this decision is issued to the parties.
- [103] The Tribunal considered that it is proper that the name of Student A be permanently suppressed from publication having regard to her privacy interests. Further, there is a public interest in Student A’s name being permanently suppressed from publication. Were her name to be published in connection with these proceedings, other students who are subjected to similar conduct may be discouraged from reporting such conduct if they fear their name may ever be published. That would have adverse flow on effects for the Teaching Council in terms of its ability to regulate the profession and thereby protect the public.
- [104] To ensure that the Tribunal’s permanent order in respect of Student A’s name is not undermined if Mr Neal’s name and the school’s name are published, the Tribunal’s order in respect of the student’s name will extend to prohibiting from publication that it was in ██████ that Student A was a ██████ student at Onslow College (that is, the year in which the conduct occurred ██████ is to be permanently suppressed from publication).

Conclusion

²⁶ Minute of the Chairperson, Theo Baker, dated 23 June 2021.

²⁷ *CAC v Teacher* NZTDT 2016/27, at [66].

²⁸ Email from Counsel for the Onslow College Board of Trustees to Tribunal Hearing Officer dated 24 August 2021.

[105] The Charge was established. Mr Neal is guilty serious misconduct.

[106] The Tribunal's formal orders under the Education Act 1989 are:

- (a) Mr Neal is censured for his serious misconduct pursuant to section 404(1)(b).
- (b) The register is to be annotated to record the censure, for two years pursuant to section 404(1)(e).
- (c) The following conditions to be imposed on Mr Neal's practising certificate, pursuant to section 404(1)(c):
 - 106.c.1 Mr Neal to participate in mentoring with a mentor of his choice. The mentoring to focus on assisting Mr Neal to understand appropriate professional boundaries with students. No later than six months from the date of this decision, Mr Neal to provide evidence of the mentoring to the Manager of Professional Responsibility at the Teaching Council, to demonstrate he fully understands appropriate boundaries with students.
 - 106.c.2 Mr Neal to provide a reflective statement about his teaching practises against the Code of Professional Responsibility to the Manager of Professional Responsibility at the Teaching Council. The reflective statement to satisfy the Manager of Professional Responsibility that Mr Neal understands professional and ethical boundaries and adheres to them in his teaching practise. This condition to be satisfied no later than six months from the date of this decision.
 - 106.c.3 Mr Neal to advise any current, prospective, or future employers, including in respect of any relief-teaching roles he may apply for and/or undertake, of this decision (and provide a copy of this decision to those employers). This condition is to apply for two years from the date of this decision.
- (d) The Respondent is to pay \$3,910.30 to the CAC as a contribution to its costs pursuant to section 404(1)(h),
- (e) The Respondent is to pay \$458.00 to Teaching Council in respect of the costs of conducting the hearing, under section 404(1)(i).
- (f) There is an order under section 405(6)(c) permanently suppressing from publication the name of Student A [REDACTED] and that it was in [REDACTED] when Student A was a [REDACTED] student at Onslow College.

Dated at Wellington this 13th day of
September 2021



Jo Hughson
Deputy Chairperson

NOTICE

- 1 A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 404 of the Education Act 1989 may appeal against that decision to the District Court (section 409(1) of the Education Act 1989).
- 2 The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 404 (section 409(2)).
- 3 An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.
- 4 Section 356(3) of the Education Act 1989 applies to every appeal under section 409 as if it were an appeal under section 356(1).