

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2021/54**

**IN THE MATTER** of the Education Act 1989

**AND**

**IN THE MATTER** of a charge referred by the Complaints Assessment  
Committee to the New Zealand Teachers  
Disciplinary Tribunal

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

**AND**

**Respondent**

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**TRIBUNAL REASONS DECISION**

**5 September 2022**

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**TRIBUNAL:** Ian Murray, Rose McInerney and Lyn Evans

**HEARING:** 2 June 2021 (by Microsoft Teams)

**DECISION:** Results decision 2 June 2021  
Reasons decision 5 September 2021

**REPRESENTATION:** Elena Mok for the CAC  
Janette Brown for the Respondent

## Charge

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The particulars of the charge are that while working as a teacher at [REDACTED] [REDACTED] the respondent:
  - a. Allowed a student (Child A) to use her personal phone to speak with his father, who at the time was incarcerated in prison, on one occasion in or around June 2018; and/or
  - b. Lied to the Principal of [REDACTED] about her failure to attend a union meeting, for which she had been given paid leave to attend, on or about 28 June 2018.
2. Following the hearing we issued a results decision on 2 June 2022. We found that the charge had been established but it did not amount to either serious misconduct or misconduct. This decision sets out the reasons for that finding.

## Evidence

3. Before the hearing the parties conferred and submitted an Agreed Summary of Facts (ASF), signed by [REDACTED] and counsel for the CAC. The ASF is set out in full below:

### Introduction

1. The respondent, [REDACTED], is a registered teacher. [REDACTED] holds a subject to confirmation practising certificate, valid until 9 June 2023.
2. At all material times, [REDACTED] worked as a teacher at [REDACTED] [REDACTED] (the School), a primary school located in [REDACTED]. The School is a co-educational primary school for children in Years 1 to 6 (aged five to ten). [REDACTED] resigned from the School on 27 January 2020.
3. As at the date of this summary of facts, [REDACTED] is working at [REDACTED] in [REDACTED] on a fixed term contract until

December 2021.

### **Allowing student to speak to father in prison**

4. One Monday morning in or around June 2018, ██████████ was in her classroom. After the morning announcements were read over the classroom speakers and the bell rang, ██████████ received a call on her personal phone from a friend who was incarcerated in prison. ██████████ friend told ██████████ that the father of a male student in her class, **Child A**, was in the same unit as him in prison. ██████████ friend asked if Child A's father could speak to him if he was there, and that he was "hanging out to talk to him".
5. Child A was still in the classroom. ██████████ called Child A over to her and asked him if he would like to talk to his father. Child A said he would. ██████████ friend put Child A's father on the phone, and ██████████ allowed Child A to use her phone to speak to his father. The call lasted around five to seven minutes. After the call finished, Child A put ██████████ phone on her table and ran outside to play.
6. On or about 26 June 2018, Child A's mother lodged a complaint about ██████████ with the Principal of the School, ██████████. Child A's mother noted that she had been in contact with ██████████ ██████████, but ██████████ had failed to mention the phone call to her. She expressed her concern that the phone call had been able to take place without her knowledge or consent, and her concern about Child A being embarrassed. She stated that the call was not appropriate during school hours, and also noted that Child A's father had her contact number and could contact Child

A directly through her at any time.

### **Lying about attendance at union meeting**

7. On or about 28 June 2018, [REDACTED] was given paid leave for half a day to attend an NZEI union meeting being held at [REDACTED]. [REDACTED] was the sole person from the School attending the union meeting.
8. [REDACTED] did not attend the union meeting, and instead went home. [REDACTED] subsequently lied to the Principal of the School about her failure to attend the union meeting.

### **School investigation and mandatory report**

9. During the School's investigation of the complaint submitted by Child A's mother, when spoken to, [REDACTED] accepted that she had allowed Child A to speak to his father in prison using her personal phone on one occasion. [REDACTED] expressed that she was deeply sorry and she apologised.
10. In a written response to the complaint on 26 June 2018, [REDACTED] stated that immediately after the incident she had thought: "shit that might not have been such a good idea. At that point I realised that I done [sic] something wrong and stupid. I had behaved in a very compromising manner professionally. I am extremely remorseful for my lack of good judgement towards this incident. I have let [Child A] and his family down which I am deeply sorry for...I have certainly learnt a huge lesson from this, and I realise the severity of my actions. I will never do anything like this again".
11. On 27 June 2018, the Principal wrote to [REDACTED] informing her

that Child A's mother did not wish to take the complaint further. He noted that he expected no further incidents of this kind to occur and expressed concern that events in [REDACTED] personal life were impacting on her ability to teach. No further action was taken by the School in respect of Child A's mother's complaint.

12. On or about 29 June 2018, the Principal wrote to [REDACTED] about her failure to attend the union meeting, after being told by a number of sources about [REDACTED] non-attendance. The Principal noted his concern that [REDACTED] had failed to attend the meeting despite the fact that school had finished early to enable teachers to attend. He also expressed concern that the incident had occurred despite the recent incident involving Child A, following which [REDACTED] had assured him that she would make adjustments to her professional conduct.
13. From October 2018 to December 2019, [REDACTED] was placed on unpaid discretionary leave. On 27 January 2020, [REDACTED] resigned from the school.
14. On 14 May 2020, the Principal of the School submitted a mandatory report with the Teaching Council about [REDACTED].

#### **Teacher's response**

15. In her responses to the mandatory report and during the Complaints Assessment Committee process, [REDACTED] [REDACTED] acknowledged that she had allowed Child A to use her phone on one occasion to speak to his father in prison. She stated that she knew she had done something wrong shortly after the call had happened, and that she had wanted to tell the Principal at the time, but did not know how to do this.

16. In regards to the allegation about failing to attend the union meeting, [REDACTED] accepted that she had lied to the Principal about this. She said that she had lied because she felt like the Principal would not understand her explanation because of issues that had arisen in the pair's professional working relationship. She said that she had not attended the meeting because she was very stressed and needed some time to herself, and that her failure to attend had been "a very foolish decision", and would not be repeated. [REDACTED] further stated that she accepted that she had no real excuse for lying, and that her actions had compromised her reputation and the trust and confidence her employer had in her.

17. In her response, [REDACTED] also referred to the fact that she was undergoing difficult personal circumstances at the time of the relevant conduct. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] She stated that she had since worked through these issues, had better support structures in place, and that "I reflect all the time on the mistakes I made and I know that I most certainly will not make those mistakes again".

4. We must be satisfied on the balance of probabilities that the CAC has proved the charge. In this case, the admissions in the summary of facts provide an adequate basis to establish the particulars of the charge.
5. Accordingly, we find that the particulars of the charge are established.

## Serious misconduct

6. It is for the Tribunal to be satisfied that the established conduct amounts to serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers.
7. Section 378 of the Act provides:

***serious misconduct*** means conduct by a teacher—

- (a) that—
  - (i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 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 Education Council's criteria for reporting serious misconduct.

8. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC relies on r 9(1) (k).

### ***Criteria for reporting serious misconduct***

- (1) *The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*

...

- (k) *an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

### ***CAC submissions***

9. The CAC submits that by allowing the student to speak with his father, [REDACTED] risked adversely impacting Child A's emotional and psychological wellbeing. While there was no evidence that the child was adversely affected, allowing the child to speak to his father while in prison had the potential to cause embarrassment to the child. The CAC also argued that by allowing contact where she did not know why he was in prison and not having permission from the child's mother also risked adversely impacting the child's emotional and psychological wellbeing,
10. In reply submissions the CAC acknowledged there was no evidence of actual harm but argued that there was a real risk of harm. The CAC rejected the submission that the that the child's mother would have advised the teacher if there were reasons not to

permit contact with the child's father.

11. With regard to the fitness of ██████████ to be a teacher being adversely affected, the CAC argued that ██████████ ought to have recognised the potential adverse impact on the child of speaking to the father in prison and, as such, the conduct demonstrated a lack of proper professional judgement. In doing so, she blurred appropriate professional boundaries. This breached, it is argued, clauses 1.3 and 2.2 of the Code.
12. In reply submissions the CAC rejected ██████████ submission that the teacher did not need consent and if they were required to get consent then that would permit a parent to isolate the child from the incarcerated child. Further they argue there is no evidence of that occurring in this case.
13. In relation to lying to the Principal, it is argued that ██████████ actions lacked professionalism, honesty and integrity. In doing so, it is argued that she breached clauses 1.3 of the Code.
14. In relation to the third ground, it is submitted that the actions towards Child A risked bringing the teaching profession into disrepute and viewed objectively, could reasonably lower the reputation and good standing of the profession in the eyes of the public. The same is the case for the lying to the principle.
15. With regard to the reporting criteria, it is again argued that the conduct is likely to bring the teaching profession into disrepute for the reasons outlined.
16. Alternatively, the CAC argue that these breaches, if not serious misconduct, are nonetheless misconduct given the nature of the behaviour and the failure to display professionalism and good judgement on two occasions.

#### *Respondent submissions*

17. ██████████ accepts an error in judgement in respect to both aspects of the charge but argues that it falls short of the character or severity to be considered serious misconduct.
18. ██████████ highlights that there was no evidence of any adverse effect on the child, there was no pressure involved and the child opted to talk to his father. This it is argued suggests he was not afraid of his father, as does the fact that the phone call was 5 – 7 minutes long and afterwards the child went out to play unaffected. All of this suggests that the child was comfortable with the call.

19. ██████ notes that it is extremely difficult for children when they are estranged from a parent, especially so for Child A who had been close to his father and was missing him, so the phone call may have lifted his spirits. It is also noted that while there are prison protocols for contacting whanau which ██████ should have been aware of, there was no evidence of an adverse effect on the child. Further, ██████ had not been advised by the child's mother of any possible adverse consequences from speaking to his father and there was no protection order in place. The fact that Child A's mother had been willing to allow Child A to talk to his father on occasions suggests that the mother did not think the child would be harmed by his phone calls.
20. While Child A's mother may have been concerned that the child was embarrassed by the contact from his father, there was no evidence of the child actually being embarrassed and if that were to be the case then there would have been expected to be evidence of that. For those reasons, it is argued that this criteria was not made out.
21. With regard to ██████ fitness to teach, she accepts her failure to stop and think was an error, but her primary concern was the child's happiness, and she did not think there was a risk of harm to the child. It is noted that the challenge where a child is estranged from family in this type of case is that the caregiving parent could attempt to alienate the child from the estranged parent. As a result, teachers cannot be expected to get the consent of a parent before allowing the child to speak to the other parent. Further, it is argued that ██████ was aware of the closeness of Child A to his father and as such there did not appear to be a risk to him.
22. Moving to the reputation of the profession, it is argued there is no evidence of harm to the child and that ██████ had Child A's welfare and happiness at the forefront of her mind so that the teaching profession was not undermined by her actions.
23. It is argued that ██████ lack of circumspection in this case does put a question on her judgement, but it was a momentary lapse of judgement and allowed a child to speak briefly to his father.
24. Turning to particular (b), ██████ argues that dishonesty can raise questions about the person's integrity, but in this case it does not because ██████ was struggling to cope with personal circumstances which she did not feel comfortable to talk to her Principal about. Her behaviour is more accurately characterised as a lie by a broken person to avoid conflict and not by someone who set out to manipulate. The

background of ██████████ being an ██████████ is noted and it is also noted that days earlier she had been reprimanded for poor judgement in letting Child A talk to his father so her relationship with the Principal was strained. In those circumstances, she did not think she would have a sympathetic ear from the Principal.

25. It is argued there was no effect on anyone else by her non-attendance at the meeting and her lie was out of expedience by someone who did not feel her Principal would support her. As a result, it is submitted that the lie does not indicate someone who is unfit to be a teacher.
26. Further, it is submitted that a member of the public, knowing ██████████ personal circumstances and the difficult relationship she had with the Principal, would be unlikely to consider the reputation of the teaching profession had been diminished by ██████████ behaviour.
27. In summary, it is submitted that this was low end dishonesty when ██████████ had serious personal difficulties and was not of the character or severity to amount to serious misconduct.
28. ██████████ further argues that the two particulars combined together do not amount to serious misconduct.

## **Analysis**

29. We have assessed ██████████ behaviour against the test for serious misconduct. Starting with the first criteria, because there is no direct evidence of any adverse effect on the child, we need to look at the likelihood of an adverse effect on that child. We accept that there is a possibility that allowing a child to have contact with a parent in prison could adversely affect them. However, in this case there was no evidence which we were satisfied established that such an adverse effect was likely. There was no evidence that the parent had previously harmed the child, or that the parent was in prison because of his behaviour towards his son. The evidence suggests that the child and the parent had a good relationship, and that the child was missing the father. The suggestion of embarrassment to the child was not borne out by the evidence. While we accept it was an error in judgement in allowing the child to have contact in this way, we are not satisfied that there is sufficient evidence of any likelihood of an adverse effect on the child.
30. Ultimately, we conclude that the possible effect on the child is too speculative to

establish the criteria for serious misconduct.

31. Turning to the second ground, whether the conduct reflects adversely on the teacher's fitness to be a teacher, we accept at the outset that this was an error of judgement. The teacher should not have done what she did, and she accepts that now. However, we formed the view that it was a momentary lapse of judgement motivated, in our view, by kindness towards the child and not for any other illegitimate purpose. Momentary lapses of judgement can adversely affect a teacher's fitness to be a teacher, but that is not inevitably the case. Each case must be determined on its own facts. We consider that consent should be obtained from a parent in cases like this and reject the argument that requiring this could permit one parent to alienate a child from an incarcerated parent. However, in this case, we ultimately concluded that while she should not have done what she did, , we were not satisfied that [REDACTED] conduct adversely reflected on her fitness to be a teacher because of her altruistic motivations for her actions. As a result, we do not find this ground of serious misconduct is made out in relation to the phone call particular.
32. Turning to the second particular, we considered independently whether the behaviour adversely reflected on [REDACTED] fitness to be a teacher. Obviously, dishonesty by a professional is concerning and often the lack of integrity that it demonstrates will affect that teacher's fitness to be a teacher. However, that cannot be an automatic or invariable rule. We need to make a fact specific inquiry in the particular circumstances of the case, taking into account any context provided. Here, we have been advised of the difficult personal circumstances of [REDACTED] and that she was struggling because of them. This incident came at a very difficult time for [REDACTED] and was soon after she was reprimanded by her Principal for the permitting contact between child A and his father. Against that background, while it was inappropriate for her not to attend the meeting when she was given leave from the school and to mislead the Principal about her attendance, ultimately we decided that it was not established that this behaviour adversely affecting her fitness to be a teacher. In the end we concluded that the context provided sufficient mitigating factors for us to ultimately decide that her fitness to be a teacher was not sufficiently adversely affected.
33. Turning the last of the criteria for serious misconduct in the Act, bringing the profession into disrepute. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is informed by the conclusions of the Court in *Collie*

*v Nursing Council of New Zealand*.<sup>[1]</sup> It is an objective test and requires consideration of whether reasonable members of the public informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by [REDACTED] actions.

34. We carefully considered whether allowing a child to have contact with a parent in prison would lead to a reasonable member of the public considering the teaching profession had been lowered in their eyes. In the end, we concluded it would not. For the reasons we have already outlined, we considered this to be a misguided attempt to assist the child who was estranged from a parent due to circumstances outside of that child's control. It was an error, but that does not mean that the statutory criteria for disrepute was made out. Not all errors by a teacher will bring the teaching profession into disrepute. We did not consider that this was an error that was likely to do that. So, we find this ground for serious misconduct not established in relation to the phone call incident.
35. Turning to the second particular, for the reasons we have already outlined, we do not consider that a teacher with difficult personal circumstances, who was struggling in her relationship with her Principal and made a mistake in not going to a meeting after she was given leave to attend it then being dishonest about not having gone would bring the teaching professional into disrepute. Again, this was an error of judgement which she should not have made but it was not of the seriousness to meet the statutory criteria for bringing the teaching profession into disrepute. So, on the second particular we also find this ground for serious misconduct not established.
36. The test for serious misconduct has not been established so we concluded that the behaviour does not amount to serious misconduct.

### **Misconduct**

37. Having concluded that the statutory criteria for serious misconduct were established, we have to also consider whether this amounts to misconduct. We carefully considered whether or not this conduct amounted to misconduct in relation to [REDACTED], but ultimately, we concluded by a fine margin that it did not. Again, the context that we have already considered led us to the conclusion that this was not

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<sup>[1]</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

misconduct.

38. In our opinion [REDACTED] made mistakes in what she did, but she did that at a time when she was personally struggling and had a difficult relationship with her Principal. Her allowing the child to speak to his father was well intentioned, if misguided. Her failure to be honest with her Principal came at a time when their relationship was strained, and she was personally overwhelmed. Ultimately, for those reasons we concluded that this was not misconduct, and therefore we are not going to take disciplinary action against [REDACTED].

### **Costs**

39. We asked for submissions on costs and [REDACTED] provided a memorandum advising that they did not seek costs. That concession is appropriate and consistent with cases where serious misconduct has not established.<sup>1</sup> In our view, the CAC was proper to bring the charge before the Tribunal and the fact that we did not find serious misconduct or misconduct does not alter that fact. As a result, we do not consider this an appropriate case to award costs against the CAC, and we do not.

### **Name suppression**

40. [REDACTED] seeks suppression of her name and the name of the child involved. The School independently seeks suppression of its name.
41. The basis on which [REDACTED] seeks suppression of her name is to [REDACTED]  
[REDACTED]  
[REDACTED]
42. The School seeks suppression on a number of grounds. These are:
- (a) Naming the School would likely lead to identification of the child at the centre of the allegation;
  - (b) Identification of the child will identify the child's whanau who are facing difficult times already.
  - (c) The whanau have asked that their names be suppressed;
  - (d) The naming of the School places the school community at risk of incorrect accusations and potential threats;

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<sup>1</sup> CAC v SineI NZTDT 2019 - 61 and CAC v Teacher G NZTDT 2019 – 59.

- (e) There is a real risk that if the School is named, the community and the school community will be adversely affected;
- (f) There is a real risk that naming of the School would be damaging to the reputation of the School;
- (g) There is a real risk that naming the School will adversely affect the school community for the tamariki at the school.

#### *General Principles on Non-Publication*

43. Section 405(3) provides that hearings of this Tribunal are public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

*(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*

*(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*

*(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*

*(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

44. In deciding if it is proper to make an order prohibiting publication, we must consider relevant individual interests as well as the public interest. If we decide that it is proper, then we may make such an order.

45. As we noted in *CAC v Finch*,<sup>[1]</sup> we apply a two-stage approach. The first stage involves an assessment of whether the particular consequence is "likely" to follow. This simply means an "appreciable" or "real" risk. If we are so satisfied, our discretion to forbid publication is engaged and we must determine whether it is proper for the presumption in favour of open justice to yield. There is no onus on the

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<sup>[1]</sup> *CAC v Finch* NZTDT 2016/11

applicant and that the question is simply whether the circumstances justify an exception to the fundamental principle.<sup>[2]</sup>

46. The correct approach is to strike a balance between open justice considerations and the interests of the party who seeks suppression.<sup>[3]</sup>
47. We have recently comprehensively reviewed the principles for suppression of a school's name or associated people such as students at the school.<sup>[4]</sup> We made the following observations:

29. *Where the request for a non-publication order is made by a school or other person involved in the disciplinary proceedings, the threshold can possibly be somewhat relaxed, as the public interest in publication of the name of a teacher who has engaged in professional misconduct, and the protective effects which publication can produce, are not involved. But nevertheless, the underlying and fundamental principle is that of open justice, and the presumption of open justice must be displaced by more than mere assertion.*

30. *In order to justify a conclusion that it is proper to order name suppression for a school there must be some evidence of a real risk that publication will cause real adverse effects which are at least more than speculative. It must be clear that such potential effects are likely to go beyond the normal embarrassment or disruption a school might suffer where one of its teachers is found to have engaged in professional misconduct. A bare assertion by a school, without evidence, that it will suffer beyond the norm will not usually be enough, although that possibility cannot be excluded.*

### **CAC position**

48. We obviously will suppress Child A's name to protect him.
49. Turning to the other grounds for suppression. The CAC responsibly do not strongly advocate against suppression in this case. They acknowledge [REDACTED] personal circumstances and the force in her submission in support of name suppression. They obviously support suppression of the child's name and also responsibly accept suppression of the School is necessary to avoid identification of the student.
50. Were it not for these responsible concessions we would analyse the material in this

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<sup>[2]</sup> *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14].

<sup>[3]</sup> *Hart v Standards Committee* (No 1) of the New Zealand Law Society [2012] NZSC4 at [3].

<sup>[4]</sup> *CAC v Taylor* (NZTDT 2019/ 92).

case more thoroughly, but we entirely agree with the CAC's position.

51. As has been noted earlier, while the grounds for suppressing the name of the School is less strict than it is for ██████████, nonetheless the presumption of open justice still applies and there needs to be a proper basis for suppression. We would not have accepted the other bases for suppression of the School's name other than the risk of identifying the child. However, we do accept that there is a risk of identification of the Child A and of his whanau. Given the family circumstances, we accept that would be inappropriate. So we suppress the name of the school.

52. We also entirely accept that ██████████ has very challenging personal circumstances and has valid concerns for her and her son's safety. So we will suppress her name and any identifying features.

*Orders*

53. For all these reasons, we order suppression of ██████████ name and any details that might identify her, the name of Child A and the name of the School.



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Ian Murray  
Deputy Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).