

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Teacher B

2018-10

Teacher B was referred to the Disciplinary Tribunal on a charge that he formed an inappropriate relationship with a year 13 student (aged 17) at his school at the conclusion of the 2016 school year.

The result: The Tribunal found that Teacher B's conduct amounted to serious misconduct and ordered that Teacher B is censured and his registration is cancelled. The Tribunal granted permanent suppression of the name and identifying particulars of the student, Teacher B and the school at which he taught.

Teacher B had been teaching at the school for 15 years. Teacher B was also in charge of the school's Facebook page and monthly newsletter. Teacher B had been spoken to previously by the school in 2011-2012 about relationships with students and the importance of maintaining professional boundaries with students. In June 2014 Teacher B and the student became "friends" on Facebook and they began interacting by "liking" each other's posts. In late 2015 Teacher B also began to attend events outside of school that the student was participating in. In December 2016 Teacher B and the student sat together at the school's graduation dinner, and shortly after the school year ended Teacher B and the student began running together.

In mid-December 2016 Teacher B finished his employment at the school. In December 2016 the student and Teacher B became aware of feelings they shared for each other and discussed whether a relationship would be possible. The relationship was disclosed to the student's mother in late December 2016. At the end of January 2017 the student's father was advised of the relationship and he filed a complaint with the Education Council (as it then was) in respect to Teacher B's relationship with his daughter. Later, the school that Teacher B was set to start teaching at in 2017 submitted a mandatory report alleging Teacher B had commenced a relationship with a former student, the student.

Teacher B and the student remain in a relationship together and Teacher B accepted that this relationship may be in breach of the Code of Professional Responsibility, published in June 2017.

The Tribunal issued a decision on 1 April 2019 and then later released its reasons on 8 July 2019. The Tribunal found that there was a nexus between Teacher B and the student's professional relationship and the subsequent personal one. The Tribunal was also satisfied that the relationship was inappropriate when it commenced, by taking into account: the length of time between the conclusion of the teacher-student relationship and the beginning of the intimate relationship ("*mere weeks*"); the age difference (25 years considered to be "*very significant indeed*"); the emotional and social maturity (vulnerability) of the student; evidence of the nature of the teacher-student relationship (noting that Teacher B only taught the student from 2012-2014); and that Teacher B had disregarded the two warnings he received from the school about the importance of maintaining professional boundaries with students.

The Tribunal concluded that there was a persisting power imbalance between Teacher B and the student at the time the relationship began. The Tribunal was satisfied that Teacher B, to all intents and purposes, remained the student's teacher when the intimate relationship began just weeks after she finished secondary school. This is because he was still in a position of '*trust, care, authority and influence*' regarding the student.

The Tribunal noted that this case demonstrates the risk associated with teachers engaging with students via social media about personal matters, and commented that it is teachers, not students, who bear the onus to distance themselves from a potentially inappropriate situation.



The Tribunal ordered that Teacher B is censured for misconduct, has his registration cancelled, the register is annotated and that the student's name (and any details that might identify her) are permanently suppressed, and the names and identifying particulars of Teacher B, and the school at which he taught the student, are also permanently suppressed.

The final determination regarding costs was delegated to the Deputy Chair.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND **Teacher B**

Respondent

DECISION OF THE TRIBUNAL

Tribunal: Nicholas Chisnall (Deputy Chair), Simon Williams and Kiri Turketo

Hearing: 20 November 2018

Decision: Result decision 1 April 2019 and substantive decision on 8 July 2019

Counsel: D R La Hood and E Fitzherbert for the referrer
D King for the respondent

Introduction

[1] The Complaints Assessment Committee (the CAC) referred a charge against the respondent, Teacher B, of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC's notice of charge, which is dated 14 May 2018, alleges that the respondent:

Did form an inappropriate relationship with a year 13 student at his school [Student ■] at the conclusion of the 2016 school year.

[2] We heard this matter on 20 November 2018. We issued a result decision on 1 April 2019, in which we said, "The filing of supplementary submissions required us to delay releasing our decision. As such, we have decided to issue a result decision to provide the parties with closure. We will provide substantive reasons in due course". These are our reasons.

[3] We heard Teacher B's charge on the same day as another matter referred to the Tribunal, which alleged the same type of serious misconduct – the formation of an inappropriate relationship with a former student. We issued a result decision in that matter on 1 April 2019 and a substantive decision on 17 June. We will refer to that decision in our reasons as "2018/41". Ms King represented both practitioners. Ms King and counsel for the CAC prepared lengthy and comprehensive submissions addressing this type of referral.

[4] On 1 April, we made the usual order, under s 405(6) of the Education Act 1989 and r 34 of the Teaching Council Rules 2016, for the suppression of Student ■'s name and identifying particulars. It was also agreed that we should suppress Teacher B's name. As we explained:

Having received further submissions from the parties, we are satisfied that it is proper to order suppression of the respondent's name and that of the school where he taught Student ■. Ensuring that naming the respondent does not identify Student ■ is a paramount concern. It is a question whether publication of the respondent's name risks defeating our order that Student ■'s name be suppressed. The purpose behind r 34 of the Rules is to protect the welfare of young persons affected by practitioners' behaviour. The identification of Student ■, if publication occurs, must be a "likely" consequence, which simply means that there must be an "appreciable" or "real" risk. Having

considered the information provided, we accept that there is an appreciable risk.

A summary of our findings

[5] Teacher B denied that he and Student ■ formed an inappropriate relationship. We found otherwise.

[6] For convenience, we set out in full what we said in our result decision:¹ We are satisfied that the CAC has proved its charge to the requisite standard. We briefly explain why that is.

The test for serious misconduct under s 378 of the Education Act 1989 is conjunctive.² As such, as well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The CAC places specific reliance on r 9(1)(e) and 9(1)(o) of the Education Council Rules 2016 (the Rules), which applied at the commencement point of the alleged inappropriate relationship.

We began our enquiry by addressing the second element to the test for serious misconduct, which is whether we are satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules. Rule 9(1)(e) prohibits a practitioner "being involved in an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in contact with as a result of his or her position as a teacher". Rule 9(1)(o) of the Rules talks about "any act or omission that brings, or is likely to bring, discredit to the teaching profession".

If there was an inappropriate relationship in contravention of r 9(1)(e), then it would almost inevitably follow that Teacher B's behaviour – in terms of the first limb of the test for serious misconduct in s 378(1) - both reflects adversely on his fitness to teach and brings the profession into disrepute.

Under r 9(1)(e), the CAC must satisfy us that:

- (a) The relationship commenced as a result of the respondent's position as Student ■'s teacher; and
- (b) The relationship was "inappropriate".

¹ At paragraphs [4] to [14].

² *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

We are satisfied that the first element is met, given the intensity and duration of the personal contact between Teacher B and Student ■ while he was still her teacher, and the fact that the intimate relationship began virtually straight after Student ■ left school. There is the clear nexus that r 9(1) (e) requires.

We are also satisfied that the relationship between Teacher B and Student ■ was inappropriate.

In *Teacher C*,³ we referred to the way in which international guidelines address the reason why teachers owe a duty of care to former students, and why it is that a relationship between a teacher and former student might be inappropriate:⁴

Romantic/sexual relationships with former students may violate professional boundaries.

A significant factor in teacher-student relationships is the difference in power and authority between the two parties and the unusually high level of trust the student places in the teacher. These differences do not suddenly disappear at a specific point in time. They linger as an imbalance between two individuals and as a potential impediment to their capacity to make decisions in their own and others' best interests.

Consequently, teachers should not assume that they will be protected from disciplinary action by claiming a relationship began only after the school term concluded or exams finished.

In *Teacher C*, we endorsed the use of factors described in international guidelines to assess whether a relationship is or was inappropriate. These provide that:

The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is only one of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a teacher's conduct in these circumstances. Other factors that teacher regulatory authorities may take into account include:

- The age difference between the Student and the teacher;
- The emotional/social maturity of the student;
- The vulnerability of the student;
- Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school;
- Any misconduct of the teacher during the professional relationship with the student.

³ *CAC v Teacher C* NZTDT 2016/40.

⁴ *Teacher C*, at [190], citing the Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries, September 2015.

We have weighed the various factors described in *Teacher C*. Having undertaken the context-specific assessment required, we are abundantly satisfied that Teacher B formed an inappropriate relationship with Student [REDACTED].

Therefore, we are satisfied that Teacher B committed serious misconduct.

The evidence we heard

[7] The parties filed an agreed statement of facts, which provides:

The respondent, Teacher B, was a registered teacher at [REDACTED] (the College), [REDACTED]. At the end of 2016, Teacher B was aged 43 and had been teaching at the College for approximately 15 years. Teacher B was also the teacher in charge of [REDACTED] College's Facebook Page and monthly newsletter. Teacher B had arranged to take a leave of absence from the College to commence teaching at another College, [REDACTED] College, from the start of the 2017 school year.

Teacher B has been spoken to previously by the College in 2011-2012 about relationships with students and the importance of maintaining professional boundaries with students.

Student [REDACTED] started at the College in 2012, as a Year 9 student. Teacher B taught Student [REDACTED] in 2012, 2013 and 2014.

In June 2014, Teacher B and Student [REDACTED] became "Friends" on Facebook.

From June 2014 onwards, Teacher B began interacting with Student [REDACTED] on Facebook using his personal Facebook account (not the College's Facebook account). These interactions included Teacher B "liking" Student [REDACTED]'s personal Facebook posts, and also commenting on Student [REDACTED]'s personal Facebook posts. Student [REDACTED] also reciprocated these interactions by "liking" Teacher B's posts.

Events in 2014-2015

Social media and sporting events

On 29 June 2014, Student [REDACTED] posted on Facebook, [REDACTED] at [REDACTED] today! ". Teacher B liked that post.

On 29 October 2015, Teacher B posted about the All Blacks. Student [REDACTED] liked that post.

Teacher B then began to attend events that Student [REDACTED] was participating in, outside of school and outside of school time.

On 1 November 2015, Teacher B attended a [REDACTED] event that Student [REDACTED] was [REDACTED] in. This event was on a Sunday and was not a school event. Teacher B attended to

support Student [REDACTED]. Teacher B videoed Student [REDACTED] as she finished the [REDACTED].

The Facebook contact between Teacher B and Student [REDACTED] continued in November, and included:

- On 6 November 2015, Teacher B liked a post on Student [REDACTED]'s Facebook page.
- On 8 November 2015, Student [REDACTED] liked a post on Teacher B's Facebook page.
- On 12 December 2015, Teacher B posted a comment on Student [REDACTED]'s Facebook page stating, "Awesome achievement, [Student [REDACTED]]. Well done!!". This was in relation to Student [REDACTED] having completed her first [REDACTED]

Informal caution re boundaries

On or around January 2015, the Principal of the College, [REDACTED], had an informal chat to Teacher B about overstepping the mark with female students. [REDACTED] informally cautioned Teacher B about the importance of maintaining professional boundaries.

Events in 2016

In 2016, Student [REDACTED] was in Year 13 aged 17 years old.

In 2016, the relationship between Teacher B and Student [REDACTED] became closer and contact became more frequent.

Between February 2016 and December 2016, Teacher B would spend time with Student [REDACTED] and her group of friends. During this time, Teacher B would talk to Student [REDACTED] during break times in the canteen area.

Social media activity

On 20 February 2016, Student [REDACTED] liked a Facebook picture posted by Teacher B who was dressed in costume.

On 21 February 2016, Teacher B commented on Student [REDACTED]'s Facebook page about the [REDACTED] [REDACTED] Student [REDACTED] completed. Teacher B commented, "7 minutes?! That is excellent!!".

On 25 February 2016, Student [REDACTED] liked a Facebook picture posted by Teacher B of Teacher B's [REDACTED] children.

On 16 March 2016, Teacher B commented on Student [REDACTED]'s Facebook post regarding a [REDACTED] fundraiser, stating "Always keen for a feed!"

On 19 March 2016, Student [REDACTED] liked a Facebook picture posted by Teacher B, showing Teacher B in a [REDACTED] onesie.

On 14 April 2016, Teacher B liked a picture of Student [REDACTED] and another student with their tongues on a bottle of alcohol that was posted on Facebook.

On 11 May 2016, Student [REDACTED] liked a Facebook picture of Teacher B's daughter posted by Teacher B.

On 22 May 2016, Student [REDACTED] liked a Facebook post of a quote posted by Teacher B which stated "sometimes when things are falling apart they may actually be falling into place".

On 24 May 2016, Student [REDACTED] liked a Facebook post of photos of students at assembly. These photos were uploaded to Facebook by Teacher B.

On 25 May 2016, Student [REDACTED] liked a Facebook post of a quote posted by Teacher B which stated "at the end of the day you can either focus on what's tearing you apart or what's holding you together".

On 28 May 2016, Student [REDACTED] and Teacher B both attended an event, being the [REDACTED] Challenge at [REDACTED]. This was not a school event.

On 28 May 2016, Student [REDACTED] later liked a picture of Teacher B with the [REDACTED] Challenge competitor tag.

On 29 May 2016, Student [REDACTED] liked a picture of a poker table and trophy posted by Teacher B on Facebook.

On 11 June 2016, Student [REDACTED] liked a joke Facebook post by Teacher B regarding tickets to [REDACTED] in 2016.

On 20 June 2016, Student [REDACTED] liked a Facebook picture of Teacher B's daughter's love note. That same day Student [REDACTED] also liked a post by Teacher B which contained the quote stating "some days, its just plain hard to see the potential positives, ...".

On 10 July 2016, Student [REDACTED] liked a prank video posted by Teacher B.

On 8 October 2016, Teacher B posted a photograph of a sign which said "[REDACTED]". Teacher B 'tagged' Student [REDACTED] and two other people and wrote "Personally, I think you guys are priceless".

On 6 November 2016, Teacher B "loves" a picture of Student [REDACTED] and [REDACTED] on their way to the [REDACTED]. This was a Facebook post by [REDACTED].

[REDACTED] event weekend

In the first weekend of December 2016 ([REDACTED] December 2016), Student [REDACTED] competed in the [REDACTED] event in [REDACTED] with other students and staff from the School. Teacher B, who was not competing, drove one of the School's vans to [REDACTED]. Student [REDACTED] travelled in the van driven by Teacher B.

During the weekend in [REDACTED], one of the other teachers (Mr N, also Student [REDACTED]'s Coach) got up in the night to use the bathroom. He noticed Teacher B, with whom he was sharing a room, was not there. Teacher B was not in his bed between 12am and 1am. Mr N said he had no idea where Teacher B was and he did not check on the students as the doors to their rooms were shut. Mr N did not question Teacher B about his disappearance during that night.

Graduation and prizegiving

On Sunday 4 December, Student [REDACTED] travelled back to [REDACTED] with the other students in the respondent's van. On the night of 4 December 2016, both attended the School's graduation dinner, where they sat together.

Student [REDACTED]'s final school engagement was attending the prize-giving on 5 December. At this prize-giving, Student [REDACTED] and another student [REDACTED] delivered their joint speech to the school. This joint speech had been reviewed by the school principal. Student [REDACTED]'s part of the speech included a statement that, "we as a year group have experienced many trips and camps that have brought us closer together, and also brought us closer to our teachers".

On 6 December 2016, Student [REDACTED] liked a Facebook picture of Teacher B holding a trophy.

In mid-December 2016, shortly after the school year ended, Teacher B and Student [REDACTED] began training together. Teacher B wished to compete in a [REDACTED] and sought advice from Student [REDACTED]. They began running together in the [REDACTED] in [REDACTED].

On 18 December 2016, Teacher B finished his employment at [REDACTED]

It was in December 2016, that Student [REDACTED] and Teacher B became aware of feelings they shared for each other and discussed whether a relationship would be possible.

In the days leading up to Christmas Eve, Teacher B initiated a conversation with Student [REDACTED], telling her that he, "wished he could find someone just like her, but who was twenty years older".

On 24 December 2016, Student [REDACTED] disclosed to her mother her relationship with Teacher B, and that they were possibly becoming "an item".

In late December 2016, Teacher B and Student [REDACTED] met with Student [REDACTED]'s family where he disclosed his feelings for Student [REDACTED], and sought permission from Student [REDACTED]'s mother to spend time with Student [REDACTED] so they could get to "know each other in a courting/dating scenario".

Events in 2017

In 2017, Teacher B was to commence a new role at [REDACTED]
[REDACTED]

Student [REDACTED] and Teacher B continued their romantic relationship.

Complaint and mandatory report

At the end of January 2017, Student [REDACTED]'s father was advised of the relationship. He raised it with the Principal of the School, who spoke with Student [REDACTED]. Student [REDACTED] told the Principal that she did not go out on any dates with Teacher B until January 2017, when they went to the movies and out for two dinners. Student [REDACTED] also said they told their respective families after Christmas that they had been seeing each other.

On 3 February 2017, Student [REDACTED]'s father filed a complaint form with the Education Council in respect to Teacher B's relationship with his daughter. In this complaint form Student [REDACTED]'s father stated:

Sunday 29 Jan 2017 we discovered that my daughter [Student [REDACTED]] who is 17 had been in a relationship with Teacher B since leaving [REDACTED] at the end of 2016.

I believe this is both morally and ethically wrong and do not condone this relationship.

Looking back through Facebook posts and [REDACTED] school events I believe that their relationship started while she was still a student at [REDACTED]. I do not currently have any proof of this ...

I believe that both morally and ethically due to the fact he as a teacher he has entered into a relationship with a 17 year old (ex student) that he is not suitable to fulfil the role of being a teacher.

It is my hope that he will never be able to take advantage of another young girl.

On 5 February 2017, Teacher B sent a text message to Mr N stating the following:

"[Student [REDACTED]] and I started seeing each other ... we realise it wont be the same for most other people out there. I know it sounds crazy (or worse) so we obviously haven't made it public ..."

On 10 March 2017, [REDACTED] College submitted a mandatory report to the Education Council. The mandatory report alleged that the respondent had commenced a relationship with a particular student at [REDACTED] in December 2016, that she was 17 years old, and that she was previously a student of Teacher B's.

Events post report

In the course of the school investigation, Teacher B was asked to provide his cell phone and computer records. He declined to provide his cell phone records. The school examined his work laptop but it had been wiped of data.

The respondent has signed a voluntary undertaking not to teach and is currently employed elsewhere. He remains in a relationship with Student ■.

On 18 April 2017, Teacher B commented about his birthday on Facebook stating: “definitely feeling the love after an awesome day out with my gorgeously delicious honey (that’s you [Student ■]).

Teacher’s response

When spoken to, Teacher B stated:

- The relationship commenced after Student ■ had finished school;
- During the night on the ■ trip, he had been up chaperoning a small group of students who were still up. Student ■ was not one of them;
- He interacted with a number of his students on Facebook, and was not aware of any school policy about interactions with students on Facebook; and
- He accepts that his relationship with Student ■ may be in breach of the Code of Professional Responsibility: Examples in Practice at 2.2, published in June 2017.

The relevant legal framework

[8] Section 378 of the Education Act 1989 defines “serious misconduct” as behaviour by a teacher that has one or more of three outcomes; namely that which:

- (a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or
- (b) Reflects adversely on the teacher’s fitness to be a teacher; and/or
- (c) May bring the teaching profession into disrepute.

[9] The test under s 378 is conjunctive.⁵ As such, as well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The Education Council Rules 2016 (the Rules), which applied in 2016 and 2017, describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.⁶

[10] As we said in our result decision, it is sensible to commence our enquiry by addressing the second element to the test for serious misconduct, which is whether we are satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules. The CAC placed specific reliance on r 9(1)(e), which prohibits a practitioner "being involved in an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in contact with as a result of his or her position as a teacher". If there was an inappropriate relationship in contravention of r 9(1)(e), then it almost inevitably follows that we can be satisfied that the respondent's behaviour both reflects adversely on his fitness to teach and brings the profession into disrepute.

[11] We have previously described the purpose of r 9(1)(e) of the Rules in the following way:⁷

It is important to emphasise that [the rule] is prophylactic in nature, and thus is concerned with the prevention of harm to a student that the formation of a personal relationship with a teacher might cause.

[12] Under r 9(1)(e), the CAC must satisfy us that:

⁵ *Teacher Y* above n 2, at [64].

⁶ Which came into force on 1 July 2016 and had a name change to the Teaching Council Rules 2016 in September 2018. Rule 9(1)(e) was amended in September 2018, but we will address the version in force when the alleged inappropriate relationship began.

⁷ In NZTDT 2016/64.

(a) The respondent and Student ■ were, when their relationship commenced, in contact as a result of Teacher B's position as a teacher; and

(b) The relationship was "inappropriate".

[13] In *CAC v Teacher C* we said that:⁸

(a) The long-settled position is that, for a teacher to have a sexual relationship with a student at the school at which he or she teaches, is serious misconduct at a high level.⁹

(b) A relationship need not be sexual for it to be improper and to cross professional boundaries.¹⁰

[14] In *Teacher C* we addressed whether, and when, a relationship between a teacher and a former student might be inappropriate. We warned that:¹¹

There is not, and cannot be, a blanket prohibition on intimate relationships between teachers and former students.

[15] We said in the companion case to Teacher B's, 2018/41, that:¹²

We interpolate that we have rejected [the CAC's] submission that the Tribunal should presume that it would be inappropriate for a teacher to form a relationship with a former pupil within six months of the date upon which the student left school. This approach would be arbitrary. In *Teacher C*, we recorded the CAC's acknowledgement that whether a relationship is inappropriate must be decided case-by-case. We said:¹³

The CAC posed, for our consideration, the following question – when (if ever) can a teacher have a romantic relationship with a

⁸ *Teacher C*, above n 3 at [183]. This was the Tribunal's first substantive consideration of a charge alleging that a teacher had seriously misconducted herself by forming an intimate relationship with a former student. While we dealt with a relationship between a teacher and a former student (who, it appears, was still at school) in NZTDT 2011/17, the teacher in that case admitted the charge and the Tribunal therefore did not closely scrutinise the issue.

⁹ As the District Court said in *Scully v the Complaints Assessment Committee of the New Zealand Teachers Council*, Wgtn DC, CIV 2008 085 000117, 27 February 2009.

¹⁰ See NZTDT 2016/64 and the decisions it discussed.

¹¹ At [183].

¹² 2018/41, at [28].

¹³ At [12].

former student? We record that Mr La Hood made it clear that the CAC was not suggesting that it will always be inappropriate for a teacher to form a romantic relationship with a former student, and we consider that to be a realistic concession. Rather, Mr La Hood submitted, whether a relationship can be deemed inappropriate is context-specific. We return to the factors said to guide that assessment later in this decision.

[16] In 2018/41, we repeated and endorsed what we said In *Teacher C*, which was:

[192] [We] emphasise that whether a relationship is inappropriate is a context-specific enquiry and not amenable to prescriptive regulation. It is essential that practitioners exercise personal judgement and ask themselves whether their behaviour towards, or interactions with, a student or former student may risk blurring the teacher-student boundary. Teachers carry the responsibility to distance themselves from any potentially inappropriate situation.

[17] In *Teacher C*, we referred to the way in which international guidelines address the reason why teachers owe a duty of care to former students, and why it is that a relationship between a teacher and former pupil might be inappropriate. We said:¹⁴

In a recent decision, NZTDT 2016/64, we considered the reasons why it is important to maintain boundaries between teachers and students. We referenced guidelines created in two other jurisdictions and said:¹⁵

International guidelines usefully describe why the teacher-student boundary exists, and identify the circumstances in which the line demarking the professional from the personal may be crossed.

And:

The [Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries] acknowledge that a teacher-student relationship may initially be appropriate, but a boundary violation will occur if the relationship shifts to serving the needs of the teacher instead of those of the student.

[18] In *Teacher C*, we endorsed what is said in the Northern Territory Teacher Registration Board Guidelines on Managing Professional

¹⁴ *Teacher C*, above n 3, at [186] and [187].

¹⁵ *Teacher C*, at [23]. We considered the Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries, September 2015 and the General Teaching Council for Scotland's Code of Professionalism and Conduct.

Boundaries (the NT Guidelines) regarding relationships between teachers and former students. They provide:¹⁶

Romantic/sexual relationships with former students may violate professional boundaries.

A significant factor in teacher-student relationships is the difference in power and authority between the two parties and the unusually high level of trust the student places in the teacher. These differences do not suddenly disappear at a specific point in time. They linger as an imbalance between two individuals and as a potential impediment to their capacity to make decisions in their own and others' best interests.

Consequently, teachers should not assume that they will be protected from disciplinary action by claiming a relationship began only after the school term concluded or exams finished.

[19] In NZTDT 2016/64 and *Teacher C*, we took notice of the caution contained in the NT Guidelines that:

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

[20] The other guidelines we referenced in both NZTDT 2016/64 and *Teacher C*, from Scotland, describe the fact that parents, and the public in general, place a very high degree of trust in those who are educating pupils and rely upon teachers to interpret what is right and what is wrong. Regarding relationships with pupils, the Scottish code emphasises that teachers, and not students, bear the duty to distance themselves from any potentially inappropriate situation.

[21] In *Teacher C*, we also adopted the factors described in the NT Guidelines to assess whether a relationship is or was inappropriate. These state that:

The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is only one of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a

¹⁶ *Teacher C*, above n 3, at [190].

teacher's conduct in these circumstances. Other factors that teacher regulatory authorities may take into account include:

- The age difference between the student and the teacher;
- The emotional/social maturity of the student;
- The vulnerability of the student;
- Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school;
- Any misconduct of the teacher during the professional relationship with the student.

[22] In *Teacher C*, we also considered how other professions address the formation of relationships. We repeat and endorse what we said, which was:

[193] We were also referred to the codes of conduct of three other professions – medical practitioners, social workers and psychologists. Ms King [counsel for Teacher C] submitted that the teaching profession stands apart from those others because teachers do not form a therapeutic relationship with their charges. However, we disagree that there is a sharp distinction. While the duties and responsibilities are clearly different, each is a profession that brings its members into contact with inherently vulnerable people. There is an ability to influence those with whom the practitioner has a professional relationship, which explains why, in each profession concerned, a high standard of both professional and personal conduct, as well as integrity, are expected to protect the public.

[Footnote in original omitted]

[23] Parents, and the public in general, place a very high degree of trust in teachers and rely upon those in the profession to interpret right from wrong. Regarding relationships with pupils, we repeat that it is teachers, and not students, who bear the duty to distance themselves from any potentially inappropriate situation.

[24] While not relevant in the instant case, for completeness we observe that r 9(1)(e) of the Rules was amended on 29 September 2018. It now provides that:

A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious

breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:

(e) 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:

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

Our findings

[25] We reminded ourselves that the burden rests on the CAC to prove the charge and that, while the standard to which it must be proved is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in mind.¹⁷

[26] As we explained in our result decision, we are satisfied that the CAC has met its burden by proving that it is more probable than not that the respondent formed an inappropriate relationship with Student ■.

[27] In 2018/41, we accepted the CAC's submission that a purposive approach should be taken to r 9(1)(e), "simply requiring that there be some form of causal nexus between the teacher–student relationship and the subsequent contact for the rule to be met".¹⁸

[28] We are satisfied that the respondent and Student ■ were in contact, at the time their relationship commenced, as a result of Teacher B's position as a teacher. There can be no doubt whatsoever of that given the immediacy of the announcement made by Teacher B and Student ■ - mere weeks after Student ■ finished at the School - that they were getting to know each other "in a courting/dating scenario". Therefore, the first element of r 9(1)(e) is met.

[29] Put another way, we accept that there was a nexus between the respondent and Student ■'s professional relationship and the subsequent

¹⁷ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

¹⁸ At [42] and [43].

personal one. It is a logical and unavoidable inference that Teacher B's recent association with Student [REDACTED] in his capacity as a teacher was a, if not *the*, reason why the relationship developed.

[30] We now explain why we are also satisfied that the relationship between the respondent and Student [REDACTED] was inappropriate when it commenced. We will do so by addressing the factors described in the NT Guidelines, which were adopted in *Teacher C*.

The length of time between the conclusion of the teacher-student relationship and the beginning of the intimate relationship

[31] The respondent's refusal to the School's request that he provide his cell phone and computer records makes us strongly suspect that the relationship between the respondent and Student [REDACTED] began before she finished her secondary schooling. We also suspect that the respondent and Student [REDACTED] were together when Mr N, during the [REDACTED] December 2016 [REDACTED] event in [REDACTED], got up to use the bathroom and found Teacher B absent. We consider the respondent's explanation provided to the CAC during its investigation, that he was "chaperoning" students between midnight and 1am to be inherently implausible. However, taking the position most favourable to the respondent, we find that the intimate relationship began when Teacher B and Student [REDACTED] went public with their relationship in late December 2016. This was mere weeks after Student [REDACTED] completed her secondary schooling.

[32] In 2018/41, we endorsed, as a general proposition, the CAC's submission that, "The closer proximity there is between the teacher-student relationship and intimate relationship, the greater likelihood there is of the relationship being inappropriate". However, we also said in 2018/41 – when assessing the CAC's submission that six months would constitute a sufficient "break" – that we expect it will seldom be satisfactory to consider time-lapse in isolation in order to determine whether a relationship between a teacher

and former pupil began inappropriately.¹⁹ This is because, as the NT Guidelines say:

The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is *only one* of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a teacher's conduct in these circumstances.

[Our emphasis]

[33] We recognise that the difference in power and authority between a teacher and former student, “[Do] not suddenly disappear at a specific point in time. They linger as an imbalance between two individuals and as a potential impediment to their capacity to make decisions in their own and others’ best interests”.²⁰ The other factors described in the NT Guidelines, which this Tribunal has adopted, inform the enquiry whether the requisite imbalance still “lingered” at the point the relationship began.

[34] The CAC submitted that the teacher-student dynamic, and its associated inherent power imbalance, remained when Teacher B and Student ■ began their relationship. We agree, given the abbreviated timeframe between when Student ■ finished school and when she announced the commencement of her relationship with the respondent.

[35] This is a factor that pulls firmly in favour of a finding that Teacher B began an inappropriate relationship with Student ■.

The age difference between the respondent and Student ■

[36] Student ■ was 17 in December 2016, whereas Teacher B was 43. The difference in age is therefore very significant indeed - 25 years.

[37] In *Teacher C*, we said in relation to a 16-year age gap that:

[197] The age difference between the respondent and Student A is a factor that weighs heavily in the mix, although we accept the point made by Ms King that “it cannot be that an age difference

¹⁹ A clear-cut example where time-lapse was dispositive is the case of *CAC v Teacher S* NZTDT 2016/69, where the teacher behaved inappropriately with a student after a leaving dinner. *Scully*, above n 9, involved a similar allegation, as the relationship took place very shortly after the student left school.

²⁰ NT Guidelines.

per se is a barrier to a consensual, non-exploitative relationship". Rather, it is the age difference in conjunction with other factors that makes the relationship inappropriate. The point is that the age difference tends to accentuate the power imbalance between the respondent and Student A.

[38] We accept that this is a factor that strongly points to an inappropriate relationship between the respondent and Student ■.

The emotional and social maturity of Student ■ and whether she was vulnerable

[39] Not unusually, given that Teacher B and Student ■ remain in a relationship, we know little about Student ■'s personal circumstances at the point in time that the relationship formed, other than her age.

[40] Counsel for the CAC referred to what we said in *Teacher C*; namely:

[198] [We] have also considered the growing body of scientific evidence on adolescent brain development that demonstrates that young people are significantly different neurologically to adults, discussed by the Court of Appeal in *Churchward v R*.²¹ In brief, the research shows that age-related neurological differences between young people and adults mean that young persons may be more vulnerable or susceptible to negative influences and outside pressures, and may be more impulsive than adults.²²

[41] In 2018/41, we said that it would involve a degree of speculation for the Tribunal to find that a person – by virtue of his or her age alone, in reliance upon the research into adolescent brain development discussed in *Churchward* – lacked the autonomy to form a consensual relationship, and one on an equal footing, with a former teacher.

[42] Ms King submitted that this case can be contrasted to *Teacher C*, where there was substantial evidence outlining the former student's vulnerability and the fact that Teacher C was aware of his circumstances when she commenced a relationship with him. While that is correct, we have taken into account Student ■'s father's immediate reaction to the news his

²¹ *Churchward v R* (2011) 25 CRNZ 446.

²² Also, the Court in *Churchward* recognised that youth is seen as a larger concept than childhood and extends past 18 years of age.

daughter had entered a relationship with Teacher B – that the age differential and Teacher B’s status as her former teacher meant that she was being taken advantage of. We consider that we are entitled to place weight on this opinion, as it is a comment on Student ■’s social and emotional maturity at the point the relationship began, from someone who knows her well.

Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school

[43] Teacher B taught Student ■ for three consecutive years – from 2012 to 2014. However, as the agreed facts make clear, Teacher B also continued to have direct contact with Student ■ at the School after he ceased teaching her. Importantly, in early December 2016 the respondent was one of the members of faculty entrusted with the care of Student ■ and others during the trip to ■. Thus, he remained in a position of responsibility towards Student ■ close in time to when the intimate relationship began.

[44] When spoken to by the CAC, Teacher B accepted that his relationship with Student ■, “may be in breach of the Code of Professional Responsibility: Examples in Practice at 2.2, published in June 2017”. We acknowledge that the Code was not in place when Teacher B’s relationship with Student ■ formed. However, in *CAC v Teacher L*²³ we recently addressed the submission made on behalf of the practitioner that there was “a gap in guidance” about professional boundaries in the Code’s predecessor. Teacher L’s counsel submitted that, “He should not be judged against the standards expressed in Codes in other countries, Codes of Ethics and/or other professions of which he had no access or awareness of at the material time”. In response, we said:²⁴

The Education Council’s Code of Ethics for Certified Teachers (Code of Ethics) applied in 2015 and 2016, which is the timeframe during which Teacher L is alleged to have behaved inappropriately. It relevantly provided that practitioners must,

²³ *CAC v Teacher L* NZTDT 2018/23, 17 December 2018.

²⁴ At [20] to [22].

“Develop and maintain professional relationships with learners based upon the best interests of those learners”.²⁵ As the CAC acknowledged in *Teacher C*, the Code of Ethics did not “provide clear guidance” on the issue of relationships between teachers and former students.²⁶ However, we consider that whatever opacity previously existed has been remedied by the Education Council’s Code of Professional Responsibility (the Code), which came into effect in June 2017. It emphasises the need for practitioners to work in the best interests of learners by:

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

The Code provides examples of behaviour that may breach the “boundaries of ethical and professional relationships with learners”. These include:

- (a) Fostering online connections with a learner outside the teaching context (for example ‘friending’) or privately meeting with them outside the education setting without a valid context.
- (b) Communicating with them about very personal and/or sexual matters without a valid context.
- (c) Engaging in a romantic relationship or having sexual or intimate contact with a learner or with a recent former learner.

None of this, however, is new. While we accept that there were not prescriptive rules addressing the formation of relationships with former students in 2015 and 2016, the Tribunal has said many times that a teacher’s professional obligations to his or her students do not end outside the classroom, and it is crucial that practitioners maintain and respect the boundary between them and their [charges].

...

[45] Therefore, in *Teacher L* we were unable to accept that, “... a practitioner with many years’ experience was not alert to the fact that the inherent power imbalance between a teacher and his or her pupils may persist after the formal professional relationship has ended”. This explains why we consider that Teacher B was realistic to concede that his decision to foster an online connection with Student ■ outside the education setting was improper.

²⁵ At 1(a).

²⁶ *Teacher C*, above n 3, at [185].

[46] The Tribunal, in a number of recent decisions, has found that a teacher's contact with a student via social media was not professionally motivated and therefore serious misconduct. In more severe cases, similar to the scenario we are addressing in Teacher B's case, social media contact was the precursor to the formation of an intimate relationship.²⁷ This explains why it is essential that teachers regulate their social media contact with students.

[47] Ms King focused on the fact that the subject matter of Teacher B's communication with Student ■ did not involve "grooming" or "manipulation". However, it is not necessary for us to find that Teacher B had a predatory purpose in mind when he began to communicate with Student ■ on Facebook. Communication of the type initiated by Teacher B when he "friended" Student ■ - that without any apparent pedagogical purpose – and which sidestepped the School's social media platform that he oversaw and which was assumedly monitored – blurred the professional boundary. The online communication, which commenced in 2014 and persisted through until when Student ■ left the School, clearly enabled the subsequent intimate relationship to develop.

[48] Teachers, not students, bear the onus to distance themselves from any potentially inappropriate situation. This case demonstrates the risk associated with teachers engaging with students via social media about personal matters – where the professional boundary is blurred because the nature of the relationship shifts so as to serve the personal needs of the teacher.

[49] This is a factor that weighs very strongly in favour of a finding that the respondent began an inappropriate relationship with Student ■.

²⁷ Some of the cases are helpfully discussed in *CAC v Teacher I* NZTDT 207/12, at [7] to [9].

Any misconduct of the respondent during the professional relationship with Student ■

[50] While Teacher B was not expressly warned about his behaviour towards Student ■, it is of significance that he disregarded the two warnings he received from the School about the importance of maintaining professional boundaries with students – first in 2011 - 2012 and then again in 2015.

Conclusion on the charge

[51] We are satisfied that the CAC has met its burden by proving that it is more probable than not that the respondent formed an inappropriate relationship with Student ■. Reverting to the language of r 9(1)(e) of the Rules, the respondent's breach constituted being involved in an inappropriate relationship with Student ■ with whom he was, when the relationship commenced, in contact with as a result of his position as a teacher.

[52] The focus of the enquiry under r 9(1)(e) is on whether there was a persisting power imbalance between the teacher and former student at the time the relationship began. We are satisfied that Teacher B, to all intents and purposes, remained Student ■'s teacher when the intimate relationship began bare weeks after she finished secondary school. This is because he was still in a position of "trust, care, authority and influence" regarding Student ■.²⁸

[53] Returning to the first limb of the definition of serious misconduct, we readily accept that Teacher B's behaviour fulfils at least two of the three criteria in s 378 of the Education Act. In terms of the first criterion, we do not know whether the respondent's conduct did, in fact, adversely affect Student ■'s well-being or learning. However, the test that s 378(1)(a)(i) poses is whether the behaviour is "likely" to have had that effect.²⁹ We strongly

²⁸ Which is the test in the NT Guidelines, outlined at [19], above.

²⁹ We adopt the meaning of "likely" used in the name suppression context - described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and

suspect that Teacher B's attention would have distracted Student ■ from her studies. Also, there is strength in the CAC's submission that the respondent's behaviour has the potential to detrimentally affect Student ■'s wellbeing in the longer-term. However, it is not necessary for us to reach a concluded view on this criterion, given what we have decided in relation to the other two.

[54] We are satisfied that the respondent has exhibited a profound lack of professional judgement, which inevitably reflects adversely on his fitness to teach (s 378(1)(a)(ii)). The formation of an inappropriate relationship with a former student is also behaviour of a type that brings the teaching profession as a whole into disrepute when considered against the objective yardstick that applies (s 378(1)(a)(iii)).³⁰

[55] We are satisfied that the respondent committed serious misconduct.

Does rule 9(1)(o) of the Rules apply to the respondent's behaviour?

[56] The CAC submitted that r 9(1)(o) of the Rules, as well as r 9(1)(e), applied to Teacher B's behaviour. The former describes "any act or omission that brings, or is likely to bring, discredit to the teaching profession". Our finding that the respondent's behaviour is of a type and severity that fulfils the requirements of r 9(1)(e) means that, strictly speaking, it is not necessary to address r 9(1)(o). However, we were required to consider the issue in 2018/41 and, for convenience, will repeat what we said in that decision.

[57] The language employed in r 9(1)(o) almost replicates that used in s 378(1)(a)(iii) of the Education Act, which defines, as serious misconduct, any conduct that "may bring the teaching profession into disrepute". Section 378, which came into effect on 1 July 2015, can be contrasted with its

bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

³⁰ *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

predecessor, s 139AB of the Education Act,³¹ which defined serious misconduct as behaviour by a teacher that:

- (a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or
- (b) Reflects adversely on the teacher's fitness to be a teacher.

[58] Thus, s 378 added a third criterion.

[59] We acknowledge the CAC's submission that the Tribunal has previously held that any discreditable behaviour that is of a severity to engage r 9(1)(o) will amount to behaviour that brings the profession into disrepute under s 378(1)(a)(iii).³²

[60] In *Teacher Y*, the District Court recently held that r 9(1)(o) is not subject to the ejusdem generis rule, but rather:³³

[Reflects] a legislative intention to expand the scope of the Rule beyond the categories set out in the previous subparagraphs to effectively act as a "catch all" provision catching any act or omission that brings, or is likely to bring, discredit to the profession. What that conduct might be is a matter for the Tribunal.

[61] In 2018/41, we stated:³⁴

While we of course accept the CAC's submission that the Tribunal is imbued with specialist expertise and therefore best placed to determine whether there has been a departure from the standards expected of a teacher³⁵ - given that r 9(1)(o) is a "catch all", we question how it can have application when we have held that the elements of r 9(1)(e) have not been met. As we said on 1 April 2019:

In this case, given that r 9(1)(e) is directly responsive to the type of mischief alleged, we are not prepared to find that this is behaviour that is caught by the general - r 9(1)(o) - where we

³¹ This is not a proceeding to which the repealed s 139AB applies (pursuant to cl 5 of Schedule 20), as the mandatory report that ultimately resulted in the CAC's notice of charge post-dated the coming into force of Part 32 of the Education Act on 1 July 2015.

³² Referring to *CAC v Usofuno* NZTDT 2017/30, at [19].

³³ *Teacher Y*, above n 2, at [66].

³⁴ 2018/41, at [70].

³⁵ Referring to *Cole v Professional Conduct Committee of the Nursing Council* [2017] NZHC 1178, at [61].

have held that it does not contravene the specific - r 9(1)(e). This is because the way in which it is alleged that [REDACTED] brought discredit to the profession was by initiating an inappropriate relationship with Student S.

Penalty

[62] We invited further submissions from the parties on penalty after advising that we had found the respondent guilty of serious misconduct. In brief, the CAC submitted that cancellation is inevitable, whereas Ms King contended that any penalty “should be less than that of the ultimate sanction”. Ms King submitted that the commensurate outcome is censure, annotation of the register and imposition of a condition requiring Teacher B to undertake “professional development regarding boundaries”, which “would meet the requirements to ensure that students are protected and that the public can have confidence in the profession”.

[63] The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public’s confidence in the profession.³⁶ We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.³⁷

[64] As we recently said,³⁸ in cases engaging r 9(1)(e) our penalty assessment must bear in mind legislative developments that represent Parliament’s commitment to reducing the harm to students posed by those employed or engaged in work that involves regular contact with them. It must also take into account the obligation on the Teaching Council to “ensure” that students are provided with a safe learning environment.³⁹ The specific focus

³⁶ The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.

³⁷ See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

³⁸ In *CAC v Marsom* NZTDT 2018/25, 26 November 2018, at [33].

³⁹ Section 377 of Part 32 of the Education Act, which came into effect on 1 July 2015, which requires the Teaching Council to “ensure” that students are provided with a safe learning environment.

of the Children's Act 2014 (the Act)⁴⁰ is on safety, which mirrors a key factor the Tribunal must consider whenever it decides if a teacher who has engaged in behaviour prohibited by the Rules – whether it took place inside or outside the work environment, and whether or not it attracted a criminal conviction – is fit to remain a member of the profession. The Act's introduction reinforces the importance of the Tribunal's obligation to closely scrutinise the fitness to teach of any practitioner who faces a disciplinary charge for behaviour of a type that may pose an ongoing risk to students.

[65] In *CAC v Fuli-Makaua*,⁴¹ we endorsed the point that cancellation is required in two overlapping situations, which are:

(a) Where the seriousness of the conduct is such that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession;⁴² and

(b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. In this scenario, there is an apparent ongoing risk that leaves no alternative to deregistration.⁴³

[66] In the majority of cases where a teacher has formed an inappropriate bond with a student that has a sexual element, even where a physically intimate relationship did not develop, it will fall into the first category described in *Fuli-Makaua* - for which cancellation is virtually automatic.⁴⁴

[67] *Scully* is an example of a case where the District Court held that a penalty short of cancellation was justified.⁴⁵ Also, *Teacher L* was a case in

⁴⁰ Previously known as the Vulnerable Children's Act.

⁴¹ *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 at [27].

⁴² Referring to the sixth of eight penalty factors described by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [50].

⁴³ See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].

⁴⁴ See, for example, *CAC v X* NZTDT 2008/18, *CAC v X* NZTDT 2009/1, *CAC v B* NZTDT 2015/68.

⁴⁵ *Scully* above n 9.

which the practitioner's interest in a former student via social media was unreciprocated, which led us to say:

[34] We do not consider this to be a case that unequivocally falls within the first category described in *Fuli-Makaua*. It is conceivable that the respondent might have been allowed to continue to teach, provided he could satisfy us that he will not pose an extant risk to students. However, since the respondent does not resist cancellation, he has chosen not to provide information that addresses "reflection and remedial steps taken since the event", which might enable the disciplinary purposes behind the Tribunal's powers to be met by a penalty short of cancellation.⁴⁶

[Footnote in original]

[68] In *Teacher L* we concluded that a penalty short of cancellation was not a realistic proposition based on the information provided to us about the practitioner's insight. In any event, he did not resist cancellation. We are obliged to reach the same conclusion in Teacher B's case, for the reasons we go on to explain.

[69] First, we are satisfied that this is a case that fits into the first category described in *Fuli-Makaua*, despite the fact that there is no evidence that the relationship had a sexual element to it in late 2016. This is because the respondent abused the position of trust and confidence he held towards Student ■ by beginning a friendship with her via social media while she was still at the school at which he was teaching. He elected to do so on the back of two warnings from the School about the risks associated with blurring the professional boundary with pupils. The respondent then immediately and selfishly exploited the friendship he had developed with Student ■ after she finished her schooling – by inviting the formation of an intimate relationship. Simply put, no penalty short of cancellation will meet the purpose of protecting the public through the provision of a safe learning environment for students who come into contact with Teacher B. Next, cancellation is necessary to maintain professional standards and the public's confidence in the teaching profession.

⁴⁶ *CAC v Davies* NZTDT 2016/28, at [54]. See, too, *CAC v White* NZTDT 2017/29, at [26] and [27].

[70] We turn to the second category described in *Fuli-Makaua*. We accept that Teacher B has a degree of insight into why he faces this disciplinary proceedings. This does not mean, however, that we can have any confidence that there will not be any repetition. Teacher B has chosen not to provide information that addresses “reflection and remedial steps taken since the event”, which means there is no surety that the disciplinary purposes behind the Tribunal’s powers can be met by a penalty short of cancellation.⁴⁷

[71] What his email to Mr N on 5 February 2017 shows is that Teacher B was aware how forming a relationship with Student ■ would be objectively perceived, and was not deterred. Nor did the two informal warnings provided by the School dissuade the respondent. Given the lack of deterrence of previous warnings, we have no confidence that the imposition of a condition, as Ms King invites the Tribunal to do, will achieve the applicable disciplinary purposes.

[72] Teacher B’s registration to teach is cancelled.

Name suppression

[73] Rule 34(4) of the Teaching Council Rules 2016 obliges the Tribunal to consider making a suppression order whenever it receives evidence from anyone who falls into one of four specified categories of persons deemed to be vulnerable.⁴⁸ Rule 34(1) applies to Student ■.⁴⁹

[74] We make an order under s 405(6) of the Education Act for the permanent suppression of the name and identifying particulars of Student ■.

[75] Having received submissions from the parties, we are satisfied that it is proper to order suppression of the respondent’s name and that of the

⁴⁷ *CAC v Davies* NZTDT 2016/28, at [54]. See, too, *CAC v White* NZTDT 2017/29, at [26] and [27].

⁴⁸ Rule 34(4) is headed “Special protection for certain witnesses and vulnerable people”. It obliges the Tribunal to consider whether it is proper to make an order for suppression under s 405(6) of the Education Act whenever it has evidence before it that “includes details relating to a person described in subclause (1)”.

⁴⁹ Student ■ is a person “who is, or was at the relevant time, a student at a school or an early childhood education service”.

school where he taught Student ■. It is a paramount concern to ensure that naming the respondent does not identify Student ■. It is a question whether publication of the respondent's name risks defeating our order that Student ■'s name be suppressed. The purpose behind r 34 is to protect the welfare of young persons affected by practitioners' behaviour.⁵⁰ The identification of Student ■, if publication occurs, must be a "likely" consequence, which simply means that there must be an "appreciable" or "real" risk. In light of the fact that Teacher B remains in a relationship with Student ■, we accept that there is an appreciable risk she could be identified if we name the respondent.

Costs

[76] The starting point is for the Tribunal to make an award in favour of the successful party reflecting 50 per cent of its, his or her actual and reasonable costs. Here, that it is the CAC. We are also entitled to consider the Tribunal's own costs.

[77] The final determination regarding costs is delegated to the Deputy Chair. We invite the parties to consider how to approach costs given that Teacher B chose to defend the charge, but did so on the basis of an agreed summary of facts. Also, we wish to ensure that an equitable approach to costs is struck given that this matter was heard alongside 2018/41, and where the practitioner in that case chose to give evidence.

[78] To assist the respondent, we direct the CAC to provide a schedule of its costs to Ms King.

Orders

[79] The Tribunal's formal orders under the Education Act are as follows:

⁵⁰ We recently described the relevant principles regarding name suppression in *CAC v Jenkinson* NZTDT 2018/14, 17 September 2018, at [32] to [36]. We will not repeat them here.

- (a) The respondent is censured for his serious misconduct pursuant to s 404(1)(b).
- (b) The respondent's registration is cancelled under s 404(1)(g).
- (c) The register is annotated under s 404(1)(e).
- (d) There is an order pursuant to s 405(6)(c) permanently suppressing the name of Student ■ and any details that might identify her.
- (e) There is an order pursuant to s 405(6)(c) permanently suppressing the names and identifying particulars of the respondent, and the school at which he taught Student ■.



Nicholas Chisnall
Deputy Chair

NOTICE

- 1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.
- 2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.
- 3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

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

BETWEEN **THE COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND 

Respondent

RESULT DECISION OF TRIBUNAL

Tribunal: Nicholas Chisnall (Deputy Chair), Simon Williams and Kiri Turketo

Hearing: 20 November 2018

Decision: Result decision 1 April 2019

Counsel: D R La Hood, A R van Echten and D M Helm for the referrer
D King for the respondent

Introduction

[1] The Complaints Assessment Committee (the CAC) referred a charge against the respondent of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC's notice of charge alleges that the respondent "did form an inappropriate relationship with a year 13 student (Student [REDACTED] at his school at the conclusion of the 2016 school year".

Our findings

[2] [REDACTED] agreed to his case being dealt with on the papers and we heard it on 20 November 2018, along with another case that raised similar issues. The filing of supplementary submissions required us to delay releasing our decision. As such, we have decided to issue a result decision to provide the parties with closure. We will provide substantive reasons in due course.

[3] We are satisfied that the CAC has proved its charge to the requisite standard. We briefly explain why that is.

[4] The test for serious misconduct under s 378 of the Education Act 1989 is conjunctive.¹ As such, as well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The CAC places specific reliance on r 9(1)(e) and 9(1)(o) of the Education Council Rules 2016 (the Rules), which applied at the commencement point of the alleged inappropriate relationship.

[5] We began our enquiry by addressing the second element to the test for serious misconduct, which is whether we are satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules. Rule 9(1)(e) prohibits a practitioner "being involved in an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in

¹ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

contact with as a result of his or her position as a teacher”. Rule 9(1)(o) of the Rules talks about “any act or omission that brings, or is likely to bring, discredit to the teaching profession”.

[6] If there was an inappropriate relationship in contravention of r 9(1)(e), then it would almost inevitably follow that ██████’s behaviour – in terms of the first limb of the test for serious misconduct in s 378(1) - both reflects adversely on his fitness to teach and brings the profession into disrepute.

[7] Under r 9(1)(e), the CAC must satisfy us that:

- (a) The relationship commenced as a result of the respondent’s position as Student █’s teacher; and
- (b) The relationship was “inappropriate”.

[8] We are satisfied that the first element is met, given the intensity and duration of the personal contact between ██████ and Student █ while he was still her teacher, and the fact that the intimate relationship began virtually straight after Student █ left school. There is the clear nexus that r 9(1)(e) requires.

[9] We are also satisfied that the relationship between ██████ and Student █ was inappropriate.

[10] In *Teacher C*,² we referred to the way in which international guidelines address the reason why teachers owe a duty of care to former students, and why it is that a relationship between a teacher and former student might be inappropriate:³

Romantic/sexual relationships with former students may violate professional boundaries.

A significant factor in teacher-student relationships is the difference in power and authority between the two parties and the unusually high level of trust the student places in the teacher. These differences do not suddenly disappear at a specific point in time. They linger as an imbalance between two individuals and as a potential impediment to their capacity to make decisions in their own and others’ best interests.

² *CAC v Teacher C* NZTDT 2016/40.

³ *Teacher C*, at [190], citing the Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries, September 2015.

Consequently, teachers should not assume that they will be protected from disciplinary action by claiming a relationship began only after the school term concluded or exams finished.

[11] In *Teacher C*, we endorsed the use of factors described in international guidelines to assess whether a relationship is or was inappropriate. These provide that:

The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is only one of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a teacher's conduct in these circumstances. Other factors that teacher regulatory authorities may take into account include:

- The age difference between the Student and the teacher;
- The emotional/social maturity of the student;
- The vulnerability of the student;
- Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school;
- Any misconduct of the teacher during the professional relationship with the student.

[12] We have weighed the various factors described in *Teacher C*. Having undertaken the context-specific assessment required, we are abundantly satisfied that [REDACTED] formed an inappropriate relationship with Student [REDACTED].

[13] Therefore, we are satisfied that [REDACTED] committed serious misconduct.

Penalty

[14] While we have received submissions addressing penalty from the CAC, we do not appear to have submissions from Ms King. We invite Ms King to file submissions and, given the circumstances, will give the CAC the opportunity to respond. The parties are to liaise with the Council to make timetabling arrangements.

Name suppression

[15] We intend to make the usual order, under r 34 of the Rules, for the suppression of Student [REDACTED]'s name and identifying particulars.

[16] Having received further submissions from the parties, we are satisfied that it is proper to order suppression of the respondent's name and that of the school where he taught Student ■. Ensuring that naming the respondent does not identify Student ■ is a paramount concern. It is a question whether publication of the respondent's name risks defeating our order that Student ■'s name be suppressed. The purpose behind r 34 of the Rules is to protect the welfare of young persons affected by practitioners' behaviour. The identification of Student ■, if publication occurs, must be a "likely" consequence, which simply means that there must be an "appreciable" or "real" risk. Having considered the information provided, we accept that there is an appreciable risk.

Costs

[17] We invite the parties to file memoranda addressing costs.



Nicholas Chisnall
Deputy Chair