

# TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

## Complaints Assessment Committee (CAC) v Teacher L NZ Teachers Disciplinary Tribunal Decision 2018/23

Teachers have an obligation in the *Code of Professional Responsibility* to promote the wellbeing of learners and protect them from harm.

In this case, Teacher L taught the student when she was in Years 12 and 13, in 2015 and 2016. The student's effective last day at school was 18 November 2016 when she finished her last exam.

In December 2016, the student contacted Teacher L to thank him for his contributions to her progress at school, and the following day brought a cake in to Teacher L and met with him for approximately 45 minutes. Teacher L emailed the student thanking her for the cake, and an exchange of emails followed.

In January 2017, Teacher L set up a ChatStep conversation and provided the student with a password. ChatStep is a secure, private web-based disposable chat room. Teacher L and the student chatted on ChatStep most nights over the middle of January 2017, with their conversations often occurring between 10:00 pm and 1:00 am, and including Teacher L asking intimate questions.

In early February 2017, Teacher L set up a Facebook page under a false name to communicate with Student E. By mid-May 2017, the student messaged Teacher L thanking him for his help with her university work but asking that he stop messaging her as she felt his messages were inappropriate. In June, the school became aware of the messages and commenced its own investigation, and in July Teacher L resigned, prompting the school to lodge a mandatory report with the Teaching Council.

The matter was referred to the New Zealand Teachers Disciplinary Tribunal (Tribunal) by the Teaching Council's Complaints Authority Committee (CAC). At the Tribunal, Teacher L accepted that his conduct amounted to serious misconduct. However, during the CAC investigation, Teacher L stated he did not believe he had crossed professional boundaries as these communications started after the student had left school. He also noted he had not received any training on professional boundaries between teachers and past students. The Tribunal did not accept that Teacher L, an experienced teacher, was unaware that a power imbalance may remain after the teacher/student relationship ends.

The Tribunal found that Teacher L "blurred the teacher-student boundary through his intimate private communications." The student saw Teacher L as someone she could turn to for advice after she left school, and so Teacher L "retained a position of trust and responsibility". Teacher L took advantage of this, and his offers to assist Student E with her university course work were made alongside persistent attempts to initiate a more intimate "dual relationship".

The Tribunal stated that Teacher L's conduct reflected adversely on his fitness to teach and was also of a nature that brings the teaching profession into disrepute; and that the conduct amounted to serious misconduct. The Tribunal cancelled his registration, censured him, and annotated the register.

Permanent suppression was ordered for the student, Teacher L and the school. Teacher L was ordered to pay 40 percent of the CAC's and the Tribunal's costs.



**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 L**

Respondent

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**DECISION OF TRIBUNAL**

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**Tribunal:** Nicholas Chisnall (Deputy Chair), Susan Ngarimu and Graeme Gilbert

**Hearing:** On the papers

**Decision:** 17 December 2018, with the result decision released on 18 September 2018

**Counsel:** A R van Echten and L C Hann for the referrer  
S J Davies 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 breached professional boundaries by:

(a) Massaging the shoulders of Student E during class time in 2015 and 2016, when she was in Years 12 and 13; and

(b) Engaging in inappropriate, intimate online contact with Student E, which commenced on or about the conclusion of the 2016 school year, when Student E was a student, and into 2017, when Student E was a recent former student.

[2] The respondent, "Teacher L", agreed to this matter being heard on the papers. We issued a result decision on 19 September 2018, and said that we would provide substantive reasons in due course. These are our reasons.

[3] On 19 September, we said that we agreed with the parties' assessment of the gravity of the misconduct and made orders censuring Teacher L; cancelling his registration to teach, which he did not resist, and annotating the register. We also made orders suppressing the names and identifying particulars of the respondent, Student E and the school at which Teacher L taught. In light of those orders, we have anonymised this decision.

## **The evidence**

[4] The parties filed an agreed summary of facts, which provides:

1. The respondent was a registered teacher [REDACTED]
2. The respondent taught Student E [REDACTED] at the School in 2015 when she was a Year 12 Student and [REDACTED] in 2016 when she was a Year 13 student.
3. While away at the 2015 secondary schools [REDACTED] tournament, Student E asked the respondent for help with [REDACTED] coursework she was missing while away. There was an assessment the week after she returned to school. The respondent texted her once or twice in the evening after the games about how to do the [REDACTED] and then telephoned her to discuss it.

4. The respondent was also helping another pupil from his class at the same time he was at the tournament.
5. In 2016 the respondent contacted Student E a few times by text and phone mainly regarding [REDACTED] training and absences, and school email regarding her schoolwork. The respondent says this was no more or less than he would have done for other students.
6. Student E says the respondent would “massage her shoulders” when giving out assessments and work during 2015 and more so in 2016 and the rest of the class would notice and laugh. The respondent says he light-heartedly shook Student E’s shoulders in jest and it only occurred a few times in 2016 and not in 2015.
7. On 17 November 2016 Student E sought assistance from the respondent with her NCEA Level 3 [REDACTED] achievement standard exam, which was the next day. Straight after the examination on 18 November 2016, Student E brought in her exam resource book and asked the respondent to check if she was on the right track to pass.
8. Student E’s effective last at school was 18 November 2016 when she finished her last examination, [REDACTED]. She formally left the School at the end of the school Year 13 on [REDACTED] her graduation day.
9. On 6 December 2016, Student E contacted the respondent to say thank you to him for the contributions he had made to her academic and sporting progress while she was at the School and said she would like to bring him a cake the next day.
10. On 7 December 2016, Student E arrived at the School with a cake for the respondent. The respondent was in his classroom and was completing work. The respondent and Student E talked about: How the School had got on at the [REDACTED] championships the weekend after graduation; how work was going for her; what she had planned for the holidays; help with her university work with the negative feedback she had received about her being a school prefect. This meeting lasted for approximately 45 minutes.
11. The respondent emailed Student E to say thank you for the cake. Thereafter, there were sporadic short emails to and fro about how things were going.
12. In January 2017, the respondent set up a ChatStep conversation. ChatStep is a secure, private web-based disposable chat room. The respondent provided Student E with a password. The respondent says ChatStep made it easier to chat and was more private.
13. The respondent and Student E chatted on ChatStep on most nights over the middle of January. The conversations frequently occurred at night time between 10 p.m. and one a.m. They included the respondent asking questions of an intimate nature, for example “what are you wearing”, “how many times had sex” et cetera.<sup>1</sup>
14. At the time, the respondent was aged 49 and Student E was aged 18.

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<sup>1</sup> While we were provided with the messages, we have chosen not to set them out in this decision.

15. In early February 2017 the form of communication moved to Facebook. The respondent had set up a Facebook page under a false name. He set this up for the purposes of communicating with Student E, under a pseudonym to avoid his wife learning of the profile, and also to save the conversations (which on ChatStep were automatically deleted).
16. The messaging stopped on 18 May 2017 after Student E messaged the respondent to thank him for his help with her university work but felt the messages have been inappropriate and asked him to stop messaging her.
17. The School became aware of the messages and commenced an investigation on 13 June 2017.
18. On 14 July 2017, before the investigation concluded, the respondent resigned from the School. As a result, the School submitted a mandatory report on 21 July 2017.
19. The respondent signed a voluntary undertaking not to teach on 25 July 2017.
20. The respondent engaged with the CAC.
21. The respondent told the Education Council and CAC:
  - a. There are Facebook pages missing;
  - b. The communications of an intimate nature commenced after Student E left school, was away from home and was working;
  - c. The communications of an intimate nature were confined to being online;
  - d. He genuinely believed at the time that because Student E had left school this did not cross professional boundaries;
  - e. He is very ashamed and embarrassed; and
  - f. This whole experience has had a profound effect on his wife and family life and he has apologised to his family and to the School.
22. The respondent now concedes his actions as described in the agreed statement of facts amount to serious misconduct.
23. The respondent has offered up cancellation of his registration.

### **The CAC's application to amend the notice of charge**

[5] We were invited by the CAC to amend the first particular in the notice of charge by substituting reference to the type of act alleged – the massaging of Student E's shoulders – with the words "inappropriately touching". The CAC submitted that the amendment would reflect the facts admitted by the respondent, and that Teacher L would not suffer any prejudice as a consequence. Ms Davies opposed that application on various bases.

[6] As we said on 19 September, we declined to make the amendment sought because we agreed with Ms Davies that the way in which the

particular was initially framed accurately reflects what Student E described – the respondent massaging her shoulders. We went on to say:

[The] more fundamental issue is that the respondent does not accept that he massaged Student E's shoulders. That this happened is not an agreed fact. Rather, the agreed summary states that the respondent "light-heartedly shook Student E's shoulders in jest and it only occurred a few times in 2016, not 2015". Given this matter proceeded on the papers, we are not in a position to resolve this factual dispute. However, given that the respondent accepts that he crossed the professional boundary between him and Student E in the way described in the second particular, this does not make a difference to the outcome.

### **Our findings**

[7] 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.

[8] The test under s 378 is conjunctive.<sup>2</sup> 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 Education Council's criteria for reporting serious misconduct. The New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (the Rules), which applied when the behaviour with which we are concerned is said to have begun, describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.<sup>3</sup>

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

<sup>3</sup> Which were superseded by the Education Council Rules 2016 when they came into force on 1 July 2016. We accept that r 9(1)(e) of the 2016 Rules applies to the later behaviour. However, this makes no material difference as that rule is identically worded to r 9(1)(e) in the 2004 Rules.

[9] As we said in our result decision, Teacher L did not resist the assertion that his behaviour amounts to serious misconduct. We accepted that the CAC's charge is made out, for the reasons that follow.<sup>4</sup>

[10] We consider it 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. That upon which the CAC placed specific reliance is 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 Teacher L'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) in the following way:<sup>5</sup>

It is important to emphasise that r 9(1)(e) 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:

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

[13] We acknowledge that Teacher L's sexual interest in Student E was unreciprocated. However, we still consider that they were in a "relationship" for the purposes of r 9(1)(e) given their degree of connection via social media.<sup>6</sup>

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<sup>4</sup> We reminded ourselves that the burden rests on the CAC to prove the charge, on the balance of probabilities.

<sup>5</sup> In NZTDT 2016/64.

<sup>6</sup> We observe that r 9(1)(e) of the Education Council Rules 2016 was amended on 29 September 2018 to encompass a "breach of professional boundaries". It provides that:

[14] We are satisfied that there was a nexus between the respondent and Student E’s professional and personal relationships. This is evident from the very short pause between Student E completing her secondary education and the respondent inviting her to covertly electronically communicate with him.

[15] We now turn to whether the relationship was “inappropriate”. In *CAC v Teacher C* we said that:<sup>7</sup>

(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.<sup>8</sup>

(b) A relationship need not be sexual for it to be improper and to cross professional boundaries.<sup>9</sup>

[16] Relevantly, in *Teacher C* we addressed whether, and when, a relationship between a teacher and a former student might be inappropriate. We warned that:<sup>10</sup>

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

[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

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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.

<sup>7</sup> *CAC v Teacher C* NZTDT 2016/40, at [183].

<sup>8</sup> Discussed by the District Court in *Scully v the Complaints Assessment Committee of the New Zealand Teachers Council*, Wgtn DC, CIV 2008 085 000117, 27 February 2009.

<sup>9</sup> See *CAC v Teacher* NZTDT 2016/64 and the decisions it discussed.

<sup>10</sup> At [183].



why it is that a relationship between a teacher and former student might be inappropriate:<sup>11</sup>

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.

[18] We also endorsed the use of factors described in international guidelines when assessing 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.

[19] We are obliged to address the submission made on behalf of Teacher L 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". Moreover, his counsel submitted that there was, and remains, "a gap in guidance in the current [Code of Professional Responsibility and Standards for the Teaching Profession], which needs to be filled". And:

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<sup>11</sup> *Teacher C*, at [190], citing the Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries, September 2015.

Teacher L has explained in his evidence he had not received any professional development or awareness training on professional boundaries between teachers and past students.

[20] 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, "Develop and maintain professional relationships with learners based upon the best interests of those learners".<sup>12</sup> 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.<sup>13</sup> 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.

[21] 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.

[22] 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

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<sup>12</sup> At 1(a).

<sup>13</sup> *Teacher C*, at [185].

boundary between them and their charges. The general expectation is encapsulated in the Tribunal's statement that:<sup>14</sup>

As the adult and a teacher, [the teacher] has a responsibility to maintain professional boundaries. [The teacher and student] are not contemporaries. They could not be friends. [The teacher is] in a position of power and responsibility, where he [or she] should role model appropriate behaviour. [His or her] actions should attract esteem, not discomfort or fear. Students and parents should be able to trust that when a student seeks mentorship, counsel or comfort from a teacher, the teacher will respond in a way that has the student's wellbeing as being paramount.

[23] We do not accept the submission that Teacher L, 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.

[24] 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, in NZTDT 2016/64 we emphasised that teachers, and not students, bear the duty to distance themselves from any potentially inappropriate situation. In simple terms, when teachers become confidants, friends or counsellors of students,<sup>15</sup> a dual relationship is created that may blur the teacher-student relationship. Such interactions "help to foster inappropriate relationships with students".<sup>16</sup>

[25] In *Teacher C*, we said that:

[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.

[26] Teacher L did not exercise sound judgement, although we are prepared to accept that his interactions with Student E were, in the main, professional when he taught her. We say this because the agreed summary of facts provides that the respondent's contact with Student E via social

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<sup>14</sup> *CAC v Huggard* NZTDT 2016/33, at [21], which was a case where the teacher engaged in prolific text and phone communication with a student about personal matters.

<sup>15</sup> Where counselling is not part of the teacher's legitimate role.

<sup>16</sup> Page 4.

media was for legitimate, school-related purposes, and there is no suggestion that personal matters were discussed. Further, as we said earlier, there is an unresolvable factual dispute regarding whether Teacher L massaged Student E's shoulders in class, or "light-heartedly shook them in jest". We emphasise, however, that even if it was the latter scenario, such physical contact was ill-advised and risked jeopardising Teacher L's professional integrity.

[27] We accept that the dynamic changed when Student E completed her education. We find that the respondent blurred the teacher-student boundary through his intimate private communications with Student E that commenced mere days after she left the School.<sup>17</sup> A persuasive factor in our assessment is how Student E perceived the nature of the relationship with Teacher L at that point – he was someone to whom she turned for advice; thus the respondent retained a position of trust and responsibility. The respondent took advantage of this. His offers to assist Student E with her university course work were made in conjunction with persistent attempts to initiate a more intimate "dual relationship" that served his personal needs.

[28] Returning to the first limb of the definition of serious misconduct in s 378 of the Education Act, we are satisfied that the respondent's conduct reflects adversely on his fitness to teach (s 378(1)(a)(ii)). It is also of a nature that brings the teaching profession as a whole into disrepute when considered against the objective yardstick that applies (s 378(1)(a)(iii)).<sup>18</sup>

[29] We therefore accept that Teacher L committed serious misconduct.

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<sup>17</sup> We recently discussed the dangers of social media in *CAC v Teacher I* NZTDT 2017/12, 18 January 2018.

<sup>18</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

## Penalty

[30] 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.<sup>19</sup> 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.<sup>20</sup>

[31] As we recently said,<sup>21</sup> 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 Education Council to "ensure" that students are provided with a safe learning environment.<sup>22</sup> The specific focus of the Vulnerable Children's Act 2014 (the VCA) 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 VCA'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.

[32] In *CAC v Fuli-Makaua*,<sup>23</sup> we endorsed the point that cancellation is required in two overlapping situations, which are:

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<sup>19</sup> The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.

<sup>20</sup> See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

<sup>21</sup> In *CAC v Marsom* NZTDT 2018/25, 26 November 2018, at [33].

<sup>22</sup> Section 377 of Part 32 of the Education Act, which came into effect on 1 July 2015, which requires the Education Council to "ensure" that students are provided with a safe learning environment.

<sup>23</sup> *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 at [27].

(a) Where the conduct is sufficiently serious 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;<sup>24</sup> 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.<sup>25</sup>

[33] 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.<sup>26</sup>

[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.<sup>27</sup>

[35] In conclusion, a penalty short of cancellation is not a realistic proposition based on the information provided to us. We therefore cancelled Teacher L's registration to teach on 19 September.

### **Non-publication order regarding Student E**

[36] Rule 34(4) of the Education Rules 2016 (the Education Council Rules) obliges the Tribunal to consider making a suppression order whenever it receives evidence from anyone who falls into one of four specified categories

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<sup>24</sup> 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].

<sup>25</sup> See *CAC v Teacher* NZTDT2013/46, 19 September 2013 at [36].

<sup>26</sup> Examples cited by the CAC are *CAC v X* NZTDT 2008/18, *CAC v X* NZTDT 2009/1, *CAC v B* NZTDT 2015/68.

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

of persons deemed to be vulnerable.<sup>28</sup> Rule 34(1)(d) applies, as we are satisfied that Student E was required to provide “intimate or distressing evidence” to the Tribunal.<sup>29</sup>

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

### **The respondent’s application for permanent name suppression<sup>30</sup>**

[38] Teacher L sought permanent name suppression, and the CAC recognised the finely-balanced nature of the application in its submissions. We are satisfied that it is proper to order suppression of the respondent’s name and that of the School and made orders to that effect on 19 September. We did so for three reasons. First, ensuring that naming the respondent does not identify Student E is a paramount concern. It is a question whether publication of the respondent’s name risks defeating our order that Student E’s name be suppressed. The purpose behind r 34 of the Education Council Rules is to protect the welfare of young persons affected by practitioners’ misconduct. The identification of Student E, if publication occurs, must be a “likely” consequence, which simply means that there must be an “appreciable” or “real” risk. In light of the evidence we were provided by Student E’s family and the School, we accepted that there is an appreciable risk.

[39] Second, we were provided with information describing the ways in which naming the respondent may cause Student E acute distress. We have previously said that, in opening up the Tribunal’s proceedings to the public, it can be assumed that Parliament anticipated, and is therefore prepared to tolerate, a degree of hardship arising for students when practitioners are named.<sup>31</sup> However, we accepted that it is likely that publication will cause

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<sup>28</sup> Rule 34(4) of the Education Council Rules 2016 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)”.

<sup>29</sup> Which is defined as including a person “who is, or was at the relevant time, a student at a school or an early childhood education service”.

<sup>30</sup> 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.

<sup>31</sup> NZTDT 2016/68, at [54] and [55].

Student E more than fleeting distress and embarrassment, which is another reason why we were satisfied that it is proper to order suppression.

[40] Finally, we were satisfied that it is proper to order name suppression to protect the welfare of the respondent's son.

### **Costs**

[41] We made costs orders on 19 September, which we explain.

[42] The CAC sought a contribution from the respondent towards the actual and reasonable costs it incurred undertaking its investigative and prosecutorial functions. We also considered whether to make an order that the respondent contributes to the Tribunal's own costs, which is the third category described in our Practice Note.

[43] Our 2010 Practice Note sought to achieve an "objective and predictable" approach to costs applications. However, costs must be considered on a case-by-case basis to ensure that a fair result is achieved.

[44] The CAC's costs amount to \$12,878.08. The Tribunal's costs are \$1,145.

[45] The respondent asked the Tribunal to consider "his cooperation throughout, his truthfulness and importantly [his] very limited ability to pay". The latter factor was addressed in Teacher L's affidavit.

[46] In recent times, we have ordered a smaller contribution – 40 instead of the usual 50 per cent – where a practitioner has accepted responsibility for his or her misconduct and agreed to the matter being dealt with on the papers. That is the approach we took here, which addresses the first two matters the respondent invited us to consider.

[47] In previous cases we have reduced awards of costs from 50 per cent to one-third where the Tribunal was provided with evidence by a respondent that he or she is impecunious.<sup>32</sup> However, we did not accept that the respondent is unable to make any form of financial compromise to meet an order for costs. Therefore, we were not satisfied that the evidence adduced

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<sup>32</sup> See, for example, *CAC v Rangihau* NZTDT 2016/18C and *CAC v Tuaputa* NZTDT 2016/13C



demonstrates financial hardship of a type that requires a reduction in the quantum of the order.

[48] We ordered the respondent to make a 40 per cent contribution, \$5,151.23, towards the costs incurred by the CAC.

### **Orders**

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

- (a) Pursuant to s 404(1)(b), the respondent is censured.
- (b) The respondent's registration is cancelled under s 404(1)(g).
- (c) The register is annotated under section 404(1)(e).
- (d) Pursuant to s 405(6)(c) and r 34 of the Education Council Rules 2016, there is an order permanently suppressing the name and identifying particulars of Student E.
- (e) Under s 405(6)(c), the names of the respondent and the School are permanently suppressed.
- (f) The respondent is to pay \$5,151.23 to the CAC pursuant to s 404(1)(h).
- (g) The respondent is to pay \$458 to the Tribunal pursuant to s 404(1)(i).



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**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).