Complaints Assessment Committee (CAC) v Teacher K
NZ Disciplinary Tribunal Decision 2018/56

Teacher K was referred to the Disciplinary Tribunal for allegedly punching a student in the face and saying words to the effect of "You're not laughing now" during an out of school incident.

The result: the Tribunal found that the conduct amounted to serious misconduct. The Tribunal ordered a penalty of censure, along with conditions on his practising certificate, and annotation. Teacher K's name was suppressed, along with the names of the student involved, and the school, and the area where these events occurred.

On 8 July 2019 the Tribunal released its decision following a hearing on the papers.

Teacher K was employed at a College, and 13-year-old Student B attended the College. On 7 February 2018, at about 7:30 pm, Teacher K was at the local Domain playing touch rugby in a community touch rugby competition, in the college social touch rugby team. Student B was sitting with a friend watching the game.

As Teacher K came off the field, Student B made a comment about Teacher K having a "moustache like a paedophile would". Teacher K approached Student B and asked if he wanted a smack in the face. Student B pointed to his cheek and said, "Yes right here". Teacher K then punched Student B once with a closed fist on his right check.

After punching Student B, Teacher K initially walked away before walking back and saying, "You're not laughing now". Student B stated he thought Teacher K was joking. Student B experienced some redness and soreness to his right cheek. Prior to the incident, Teacher K had been "play fighting" with Student B. Teacher K kicked the student in the bottom during this "play fight".

On 19 February 2018, Teacher K made a statement to the Police in which he confirmed he had hit the student. He completed Police Diversion on 8 May 2018. Teacher K wrote a letter of apology to Student B in the days immediately after the event, taking responsibility and expressing his regret, however the student did not take part in the restorative process.

In explanation, Teacher K said he was frustrated that the student had continued to give him cheek about his moustache and it was upsetting to him as a male teacher to be called a paedophile. The student had previously that day made a comment about the respondent's moustache. Teacher K stated that he is receiving ongoing counselling and medication for depression and anxiety.

The Tribunal found that punching a 13-year-old boy in the face meets all three limbs of the definition of serious misconduct contained in s 378. The Tribunal was satisfied that Teacher K's physical and verbal reaction to the student's teasing reflects adversely on his fitness to be a teacher, noting that "a teacher needs to be above such an emotive and knee-jerk reaction". The Tribunal considered that Teacher K's

comments to the student were vindictive and sarcastic and in the context of the physical assault also amounted to serious misconduct.

The Tribunal held that "punching a child's head is a very serious matter. We recognise that [Teacher K] was offended by the student's jibes about his moustache, but just as a student cannot retaliate towards another student in this manner, neither can a teacher. [Teacher K's] behaviour was totally unacceptable and set a very poor example to the student, not to mention that it could have had some very serious physical consequences for the boy."

The Tribunal imposed a censure and conditions on Teacher K's practising certificate (that he discloses the decision to current and future or prospective employers, and engages in mentoring by a colleague for a period of one year, with a particular focus on student management and emotional triggers and reactions to provocative behaviour), and annotated the register for two years.

An order for non-publication of Teacher K's name was made, and the name of Student B, the school and the area where these events occurred to protect the identity of the student involved. Teacher K was ordered to pay 40 percent of the CAC's and the Tribunal's costs.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-56

IN THE MATTER	of the Education Act 1989
AND	
IN THE MATTER	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**TEACHER K** **Respondent**

TRIBUNAL DECISION

DATED: 8 July 2019

HEARING: Held at Wellington 20 December 2018 on the papers

TRIBUNAL: Theo Baker (Chair)

Stuart King, Kiri Turketo (members)

REPRESENTATION: Ms van Echten and Ms Manning for the Complaints Assessment Committee

Ms King for the respondent

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge is that at approximately 7pm on 7 February 2018, the respondent punched a student in the face and said words to the effect of "You're not laughing now".

2. The matter was heard on the papers, based on an agreed Summary of Facts (**ASF**).

Preliminary matters and recall of decision

3. A decision was first issued on 23 April 2019, but it transpired that it had been made without the benefit of some information in relation to name suppression. The respondent had served the CAC with an application for non-publication, but had inadvertently not filed the application and supporting documents with the Tribunal.

4. Therefore we ordered that the interim order for non-publication was to end. This was recorded in our decision dated 23 April 2019.

5. An application for recall of the decision was made. The CAC provided helpful submissions on the law and conceded that this was "one of those truly exceptional circumstances in which it is open to the Tribunal to recall its decision".

6. In *CAC v Teacher* 2016-64 the legal principles of recall were traversed, and we proceeded on the basis that the Tribunal has the inherent power to revisit a decision in exceptional circumstances. We said:

> *Here, we will assume we have the inherent power to revisit a decision in exceptional circumstances. It is a high threshold, as while a court must be prepared to act to avoid a miscarriage of justice, it must also ensure that the principle of finality is not undermined.*[1] *As was said in Horowhenua County v Nash (No 2) by Wild CJ:* [2]
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> > *Generally speaking, a judgment once delivered must stand for better or for worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel*

[1] See *R v Smith* [2003] 3 NZLR 617, at [36].)
[2] *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC), at 633.

have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires the judgment be recalled.

7. We are satisfied that the error in not filing the documents (when they had been served on the other party) is a very special reason where justice requires that we recall the decision. We revoked our earlier order ending interim suppression and extended the interim order for non-publication until the Tribunal had considered the question of name suppression for the respondent. The question of name suppression is considered below, under the heading, "non-publication".

Summary of decision

8. We found that the charge was proved and that the conduct amounted to serious misconduct for the reasons outlined in paragraph 21 to 32 of this decision.

9. As outlined in paragraph 53 of this decision, we censured the respondent and imposed conditions. The register is also to be annotated.

10. We ordered costs totalling $3,397,52 as outlined in paragraphs 54 and 55 of this decision.

11. We made an order for non-publication of the respondent's name on the basis of risk of identification of the student and therefore possible harm to him. We also made an order for non-publication of the name of the student.

Evidence

12. The agreed Summary of Facts is set out in full:

SUMMARY OF FACTS

1. *The respondent, **[…]** is a fully registered teacher.*

2. *The respondent was charged with assault following an incident on 7 February 2018. On 9 March 2018, the respondent's case was approved for Police Diversion. The respondent completed diversion on 8 May 2018, and accordingly the charge was withdrawn and no conviction was entered.*

3. *At the time of the incident, the respondent was teaching at [the] College [redacted] He is still employed at [the] College but has, however, undertaken not to teach until the current proceedings are resolved. Initially, he did help with planning the lessons for the relief teacher. Over time this*

has not been possible due to the expectation that he stays away from the school, staff and students.

Circumstances of the incident

4. *A Police Summary of Facts regarding the incident is attached.*

5. *On 7 February 2018, at about 7:30 pm, the respondent was at the [local] Domain playing touch rugby in a community touch rugby competition. The respondent was playing in the […] College social touch rugby team. The student (and victim in this case) was sitting with a friend watching the game. The student was aged 13 years at the time. The student is from [the] College.*

6. *As the respondent came off the field, the student made a comment about the respondent having a moustache like a paedophile would. The respondent approached the student and asked if he wanted a smack in the face. The student pointed to his cheek and said, "Yes right here". The respondent then punched the student once with a closed fist on his right check. The incident occurred at the game and there were witnesses who saw what happened*

7. *After punching the student, the respondent initially walked away before walking back and saying, "You're not laughing now". The student stated he thought the respondent was joking.*

8. *The student experienced some redness and soreness to his right cheek.*

9. *Prior to the incident, the respondent had been "play fighting" with the student. The respondent kicked the student in the bottom during this "play fight".*

Police charge

10. *On 19 February 2018, the respondent made a statement to the Police in which he confirmed he had hit the student.*

11. *The respondent completed Police Diversion on 8 May 2018. The Police Diversion Contract is* ***attached.***

12. *[The respondent] wrote a letter of apology to the student in the days immediately after the event, taking responsibility and expressing his regret. He was not able to present the letter or express his regret directly to the student, as he was told to stay away from the school; and the student did not take part in the restorative process. As part of the diversion contract plan he made a donation of $500 to charities and provided evidence of counselling sessions aimed at assisting him*

to cope with legal proceedings and assisting him to recognise and more helpfully respond to painful emotions including depression, anxiety and anger.

Response of Teacher K

13. In explanation, the respondent said he was frustrated that the student had continued to give him cheek about his moustache and it was upsetting to him as a male teacher to be called a paedophile. The student had previously that day made a comment about the respondent's moustache.

14. The respondent has admitted to the conduct that occurred, namely punching a student in the cheek, and also admits to kicking the student lightly in the bottom during the "play fight".

15. In the respondent's statement to the Police on 19 February 2019, he states that he said to the student, "You're not laughing now".

16. The respondent states he is receiving ongoing counselling and medication for depression and anxiety. He suggests that his response of punching the student was a "paradoxical reaction" to being prescribed Lorazepam on 24 January 2018, which was medication he is prescribed for stress. He ceased using lorazepam once he realised its possible effects on him.

13. The narrative of events in the Police Summary of Facts is covered in the Agreed Summary of Facts and so does not need repeating. According to the Police Summary, the charge the respondent faced was for assault under s 9 of the Summary Offences Act 1981. The terms of the contract of diversion are set out in paragraph 12.

Factual Findings

14. Although the respondent has admitted the charge, the Tribunal is still required to consider the evidence and be satisfied that the CAC has proved the charge.

15. The evidence to support the allegations is clearly stated in the agreed statement of facts. The respondent accepts that he punched the student in the face and said, "You're not laughing now".

16. The charge is therefore proved.

Serious misconduct

17. In the Notice of Charge, the CAC alleges that the conduct (that is the punch and the words uttered) amount to serious misconduct under s 378 of the Education Act 1989 (**the Act**) or alternatively amounts to conduct otherwise entitling the Disciplinary

Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989. We have not been required to consider the punch and statement separately. We have focused our discussion on the physical assault as that is the conduct which we view as most serious. We see the respondent's statement as part of the factual matrix and, as outlined below, an aggravating feature.

18. Section 378 of the Act defines serious misconduct as follows:

serious misconduct *means conduct by a teacher –*

(a) that –

(i) adversely affects, or is likely to adversely affect, the well-being or learning of one or more students;

(ii) reflects adversely on the teacher's fitness to be a teacher; or

(iii) may bring the teaching profession into disrepute; and

(b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct.

19. The criteria for reporting serious misconduct are found in r 9 of the Education Council Rules 2016 **(the Rules)**, and the CAC relies rr 9(1)(a) and/or (c) and/or (n) and/or (o) of the Rules,[3] which are:

9 Criteria for reporting serious misconduct

(1) For the purposes of section 394 of the Act, an employer of a teacher must immediately report to the Education Council if it has reason to believe that the teacher has engaged in any of the following kinds of serious misconduct:

(a) the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):

…

(c) the psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment:

[3] The Education Council Rules 2016 were amended by the Education Council Amendment Rules 2018, and their name changed to the Teaching Council Rules by s 12 of the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018. Because this conduct occurred before 19 May 2018, the pre-amendment rules apply (see Schedule 1 of the Teaching Council Rules 2016).

…

(n) any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:

(o) any act or omission that brings, or is likely to bring, discredit to the profession.

20. The CAC provided detailed submissions on why the conduct amounts to serious misconduct. The respondent does not contest this position.

21. We find that punching a 13-year-old boy in the face meets all three limbs of the definition of serious misconduct contained in s 378. In our determination of the first limb (that the conduct adversely affected or was likely to adversely affect the well-being of one or more students) we considered whether the fact that this occurred at a non-school event makes any difference. Had the child not been a student of the respondent's school, it is possible that the first limb of the definition in s 378 might not have been met. However, this occurred when the respondent was playing for the school social club, and since this event, he has not been able to return to the school. This has evidently been done in order to protect students. We are therefore satisfied the conduct adversely affected or was likely to adversely affect students.

22. In considering sub-paragraphs (ii) and (iii), we take this opportunity to consider the guidance provided in two High Court decisions. In *Professional Conduct Committee v Martin*,[4] a case of disciplinary proceedings against a nurse, His Honour Gendall J, in considering "reflects adversely on his or her fitness to practise" under s 100(1)(c) of the Health Practitioners Competence Assurance Act 2003[5] described "fitness":

> *"Fitness" often may be something different to competence. … Aspects of general deterrence as well as specific deterrence remain relevant. So, too, is the broader consideration of the public or community's confidence and the upholding of the standards of the nursing profession.*

23. In that case, His Honour was emphasising that fitness to practise is not synonymous with competence. However the effect of that observation has perhaps blurred the distinction between the notions of adversely reflecting on fitness to practise, and bringing the profession into disrepute. Although s 378 (a)(iii) refers to bringing the

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[4] *Professional Conduct Committee v Martin* (unreported, Gendall J, High Court, Wellington CIV-2006-485-1461), at paragraph 46

[5] One of the grounds for disciplining a practitioner under this act is that "the practitioner has been convicted of an offence that reflects adversely on his or her fitness to practise"

teaching profession into "disrepute", the definition of "*bringing discredit to the profession"* under the Nurses Act 1977 as found in *Collie v Nursing Council of New Zealand*,[6] shows that the two terms are largely identical:[7]

> *"To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked by the Council being whether reasonable members of the public, informed with the knowledge of the factual circumstances, could reasonably conclude that the reputation and good standing of the nursing profession was lowered by the behaviour of the nurse concerned."*

24. Reviewing these two passages, there seems to be considerable overlap in interpretation, with an emphasis on the public's view of the profession. This no doubt arises from the words "reflects adversely". We can see that there will be situations where the profession may be better placed to make that assessment of fitness to practise, and the emphasis on not only the profession's expectations but also on public expectations is consistent with the purposes of professional discipline.

25. We are satisfied that the respondent's physical and verbal reaction to the student's teasing reflects adversely on his fitness to be a teacher. A teacher needs to be above such an emotive and knee-jerk reaction. We are also satisfied that members of the public would not condone his response and could decide that the standing and reputation of the teaching profession is lowered by this behaviour. Therefore the second and third limbs of the definition of serious misconduct in s 378 are met.

26. Turning to the r 9 criteria, Ms Manning referred to the statement in NZTDT2014-49:[8]

> *We repeat as we have said in a number of cases in the past that the use of physical force – even at a lower level such as evident in this case – is unacceptable in New Zealand schools, and that any teacher who uses physical force contrary to section [139A] puts his or her status as a teacher in peril.*

27. As we noted in *CAC v Tregurtha* 2017-39, [9] because of the broad definition of assault, not every assault will amount to "physical abuse". There may also be occasions when the use of force for correction does not meet that criterion. In *CAC v*

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[6] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at paragraph 28
[7] In the Teaching Council Rules, as amended by te … r 9 (1)(o) has been replaced by r 9(1)(k): "an act or omission that brings, or is likely to bring, the teaching profession into disrepute"
[8] NZTDT2014-49, 20 May 2014 at 6.
[9] *CAC v Tregurtha* 2017-39, 21 June 2018

Haycock, the Tribunal commented that where an assault has occurred the level of force used will generally determine the appropriate penalty.[10] But this position was modified in NZTDT 2016-50,[11] where we said:

> *[26]* Haycock *appears to suggest that any use of force contrary to s 139A of the Education Act will automatically comprise serious misconduct, with the assessment to be made by the tribunal solely focusing on where on the seriousness spectrum the matter concerned sits. That impression, to our minds, is wrong. This is because, to be serious misconduct, the behaviour concerned must satisfy the character and severity threshold established in the Rules. This is an assessment that must be undertaken on a case by case basis to determine if the charge is provide – thus it is not merely a question of dealing with gradations at the penalty stage.*

28. We are satisfied that punching a 13-year-old child in the face amounts to physical abuse under r 9(1)(a) of the Rules.

29. Ms Manning argues that the conduct was also psychological abuse under r 9(1)(c) because it was physical abuse of a student inflicted in front of other students. Again, the application of this rule is clearer when the conduct occurs in the school setting. The facts refer to Student A sitting with a friend watching the game. We are not told if the friend was a student or if there were any other school students present. Therefore on this occasion, the evidence of exposure of this behaviour to other students is not clear and so we do not make a finding under r 9(1)(c).

30. The physical assault is clearly an act that could be the subject of an offence punishable by imprisonment for a term of 3 months or more under r 9(1)(n). The respondent was charged with common assault under s 9 of the Summary Offences Act 1981. This attracts a maximum penalty of 6 months' imprisonment.

31. Finally, we agree that the respondent's conduct is an act that brings discredit to the profession under r 9(1)(o), for the same reasons that we find it is likely to bring the teaching profession into disrepute under s 378(a)(iii).

32. We are grateful for the CAC's summary of similar cases. We have not felt the need to refer to those for reaching a finding on disciplinary threshold. In our view a punch to a student's head falls clearly into the realm of serious misconduct. In conclusion, we find that the respondent's conduct in punching Student A amounts to serious

[10] NZTDT2016-2 at [13]-[16].
[11] NZTDT 2016-50, 6 October 2016

misconduct. The respondent's comments to the boy are vindictive and sarcastic and in the context of the physical assault also amount to serious misconduct.

Penalty

33. The Tribunal's powers following a hearing of serious misconduct are found in s 404 of the Act:

> ***404 Powers of Disciplinary Tribunal***
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> *(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
> - *(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):*
> - *(b) censure the teacher:*
> - *(c) impose conditions on the teacher's practising certificate or authority for a specified period:*
> - *(d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
> - *(e) annotate the register or the list of authorised persons in a specified manner:*
> - *(f) impose a fine on the teacher not exceeding $3,000:*
> - *(g) order that the teacher's registration or authority or practising certificate be cancelled:*
> - *(h) require any party to the hearing to pay costs to any other party:*
> - *(i) require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
> - *(j) direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*

34. The real question for the Tribunal is whether the appropriate disciplinary response is that he is removed from teaching for any period by an order for suspension or cancellation of his registration.

35. The CAC provided a useful summary of penalty principles, noting that the key and overlapping purposes of professional disciplinary proceedings are protection of the public through the provision of a safe learning environment for students, and maintenance of both professional standards and the public's confidence in the profession.[12]

36. In particular, the CAC reminded us that we should identify the least restrictive option which meets the seriousness of the case and discharges the Tribunal's obligations to

[12] See CAC v McMillan NZTDT 2016-52 and s 377 of the Act

the public and profession. After referring to some relevant decisions, the CAC acknowledged the respondent's prospects of rehabilitation and submitted that an appropriate penalty would be:

a. Censure

b. Conditions that the respondent:

    i. Undertakes and completes an anger management course or other appropriate professional development course;

    ii. Discloses to his current employer and any future or prospective employer, a copy of the Tribunal's decision for a period of two years from the date of conviction;[13] and

    iii. Engages in mentoring by an approved colleague for a period of one year, with a particular focus on student management.

c. Annotation of the register for two years.

37. Referring to the respondent's letter of apology, and his response to the Police, as outlined in the police summary of facts, the CAC submitted that the respondent lacked insight about the impact of his actions on the student and anyone else observing his conduct, but that he did show remorse and willingness to rebuild his relationship with the student. The CAC also acknowledged that the respondent has attended a number of counselling sessions aimed at assisting him to cope with legal proceedings and to recognise and more helpfully respond to painful emotions including depression, anxiety and anger.

38. In response, Ms King submitted that this was a one-off incident that took place against a background of the respondent suffering from depression and anxiety, and quite possibly was prompted by a "paradoxical reaction" to the drug lorazepam. In support of this she provided copies of three abstracts to some academic articles on paradoxical reactions to treatment.[14]

39. Ms King submitted that whatever the cause, the respondent took steps to address the issue. He notified his employer and wrote a letter of apology to the student. He was

[13] It is assumed that this should read the date of decision.

[14] CE Mancuso, MG Tanzi, M Gabay "Paradoxical reactions to benzodiazepines: literature review and treatment options" 2004 Sep; 24(9) Pharmacotherapy: 1177-85; JL Senninger, M Laxenaire."Violent paradoxal reactions secondary to the use of benzodiazapines" 1995 Apr; 153(4) Ann Med Psychol (Paris) 278-81; T Salas, T Gallarda "Paradoxical aggressive reactions to benzodiazepine use: a review" 2008 Sep; 34(4) Encephale 330-6.

unable to have a restorative session as the student did not want to participate. He consulted a psychologist, who provided a letter dated 3 May[15] stating that she had met with the respondent on 8 occasions between 1 March and 2 May 2018, and that he had actively engaged in these appointments and demonstrated that he was using therapy skills between appointments.

40. Ms King observed that the respondent has accepted that his actions were inappropriate and damaging and he has expressed remorse. She says that it is implicit in the letter of apology that the respondent recognises that what he did harmed the student. She also says that the statement to the police, as outlined in the Police Summary of Facts is what the Police have noted from what the respondent said. It is not about what the respondent thought about the impact of his actions on the students or observers.

41. Ms King submitted that the imposition of rehabilitative penalties would ensure that professional standards are maintained and the respondent is held to account.

42. Ms King advised that the respondent does not have an issue with undertaking an appropriate course, although he has already taken steps in that regard. She submitted that the disclosure requirements would be more appropriate for a year, given that this was a single incident; the facts point to the likelihood of a repeat as being highly unlikely. On that note, Ms King submitted that annotation would therefore not be necessary, but if it were to be imposed, a period of a year would be sufficient. There is no objection to mentoring or censure.

43. The CAC filed further submissions, seeking leave to address the abstracts of the journal articles provided by the respondent. The CAC objected to the inclusion of this evidence on the following grounds:

- Only the abstracts of the articles have been provided and therefore the evidence is incomplete;
- The expertise of the authors is unknown;
- The application of the reactions to benzodiazepine is unknown.

Our decision

44. In the summary of facts, the respondent suggests that his response of punching the student was a “paradoxical reaction” to being prescribed Lorazepam on 24 January

[15] The letter says 2017, but the dates of treatment are said to have taken place March to May 2018, which is consistent with them following the incident

2018.

45. From the abstracts, we understand that there have been some studies into the paradoxical reactions to benzodiazapines. We assume that Lorazepam is a benzodiazepine. Without the full articles, we cannot begin to understand the relevance of the literature to the case before us. We would need the opinion of a suitably qualified expert who had assessed the respondent around the time of these events, as to whether it was likely that this was a relevant factor in the respondent's reaction to being taunted by Student A. We are therefore unable to place any weight on these abstracts and have therefore disregarded them.

46. Punching a child's head is a very serious matter. We recognise that the respondent was offended by the student's jibes about his moustache, but just as a student cannot retaliate towards another student in this manner, neither can a teacher. The respondent's behaviour was totally unacceptable and set a very poor example to the student, not to mention that it could have had some very serious physical consequences for the boy.

47. We are, however, satisfied that the respondent has taken some appropriate steps following this offending. He wrote a letter of apology the day after the event, cooperated with the Police investigation, participated in diversion, was prepared to attend a restorative justice session with the victim, and self-referred to a psychologist to get some help in managing his stress. It is not clear whether he had attempted any non-pharmacological interventions such as talking therapies before these events.

48. We appreciate CAC's concern that the letter of apology does not address the impact on the student, and agree that some expression of empathy might have demonstrated that he fully appreciated how harmful his actions were, but we are not sure that we can therefore find that the respondent lacks insight.

49. We accept the point made by Ms King that the Police Summary of Facts simply records a summary of the respondent's explanation or initial response when questioned. It does not purport to be a full statement of everything he said to the police, and in any event, the focus of an interview of an accused is more on the conduct that might be the subject of a criminal charge, rather than an exploration of that person's insight into their actions.

50. We agree with the parties that on this occasion a rehabilitative approach is appropriate. We also consider that this penalty is consistent with other decisions, provides some protection for the public and is the least restrictive one available in the

circumstances. We suggest that the respondent might benefit from further counselling to manage his stress but we do not direct any further counselling or an anger management course. We accept Ms King's submission that the respondent has already taken steps in that regard. We encourage the respondent to continue to reflect on his emotions and seek assistance again as needed.

51. We do think that some mentorship would help the respondent, as suggested in the area of student management, and including exploration of the respondent's emotional triggers and reactions to provocative behaviour.

52. We think that some form of oversight is required for two years. This was a serious incident, and prospective employers should be aware of it so that they can ensure that the appropriate support is in place.

53. We make the following orders:

    a. The respondent is censured under s 404(1)(b);

    b. Under s 404 (1)(c), the following conditions are placed on the respondent's practising certificate that

        i. Discloses to his current employer and any future or prospective employer, a copy of the Tribunal's decision for a period of two years from the date of this decision; and

        ii. Engages in mentoring by a colleague approved by the Manager, Professional Responsibility for a period of one year, with a particular focus on student management and emotional triggers and reactions to provocative behaviour.

    c. The register is also annotated for a period of two years. The annotation recognises that the protective and deterrent nature of our powers. It is not solely prospective employers who should be aware that he has been censured and has conditions on his practice.

Costs

54. In its supplementary submissions, the CAC annexed a schedule of costs showing a total of $7,348.79. They seek a contribution of 40%, which comes to $2,939.52. The Tribunal estimate of costs was also included in the bundle of documents before us. The total was $1,148, of which 40% is $458.

55. Although no directions were issued for the respondent to reply on the question of costs, we note that we have received no request for the opportunity to be heard, and

further that costs of 40% are standard in a case such as this. On that basis, but subject to paragraph 51 of this decision we order:

a. Costs under s 404(1)(h) of $458.00

b. Costs under s 404(1)(i) of $2,939.52.

56. If the respondent wishes to be heard on the question of costs, he should advise the Tribunal within 7 days of the date of this decision, and those orders on costs may be stayed, pending further submissions.

Non-publication

The application

57. The grounds for non-publication of the respondent's[16] name are that publication would place his mental health at risk and would be detrimental to the student. In support of his application was a letter dated 7 November 2018 from a Clinical Psychologist stating that she had met with the respondent on 10 occasions between 1 March and 7 November 2018 following his self-referral for assistance with his mood and anxiety following the assault in February 2018. At that time, he appeared to have recovered well from his earlier episode of depression, but continued to experience some symptoms of depression and anxiety when dealing with the ongoing Education Council process. She said that publication of his name would trigger further negative thoughts about himself which could lead to more severe symptoms of depression and/or anxiety.

CAC response

58. The CAC appropriately sought the views of the student's mother and provided a letter from her expressing her concern that because they live in a small community the student would be identifiable if the respondent is not given name suppression. However, she felt that future employers should be aware of the matter.

59. The Principal also thought that if publication occurred, people would likely be able to identify the student and that if this matter is aired again, the student would likely be affected.

60. The CAC opposed name suppression and submitted that the letter from the

[16] Although the applicant in an application for non-publication of name, we have referred to him as the respondent throughout this decision.

respondent's health practitioner[17] was insufficient because it was brief, and did not comprehensively explain how, or to what extent the respondent's mental health would be affected. It was also submitted that because the respondent's depression had been managed previously, the risks from publication might be mitigated or managed. The CAC referred to two cases where it was found that the assertions in the evidence provided from health providers was not sufficient, but non-publication was ordered on other grounds (*CAC v Teacher* NZTDT 2016-27[18] and *CAC v Teacher S* NZTDT 2016-69)[19] and another where it was very finely balanced (*CAC v Teacher* NZTDT 2015-20).[20]

61. The CAC also submitted that it appeared that the respondent had not been granted name suppression in the criminal proceedings, noting that although no conviction was entered, the proceedings would have been conducted in open court.

62. The CAC submitted that publication is associated with the core functions of disciplinary regimes. It is important for members of the public to be aware of a respondent's conduct in the future and in other endeavours. It avoids rumour and suspicion being cast on others. It has a deterrent aspect that is appropriate for the respondent himself and for others.

63. The CAC also referred to *ASG v Hayne,* where the Supreme Court upheld the Court of Appeal's view that the definition of "publication" in 200 of the Criminal Procedure Act 2011 does not encompass the dissemination of information to persons with a genuine need to know or, as the Court of Appeal put it, "a genuine interest in knowing", where the genuineness of the need or interest is objectively established.[21] And in *CAC v Teacher* NZTDT 2016-64[22] we applied the Court of Appeal's reasoning in *Hayne* in this jurisdiction, and considers that non-publication orders did not prevent the school communicating about the decision with those it held to have a genuine interest in receipt of that information.

64. For the CAC, the primary concern is the protection of the student from further harm, saying that if the Tribunal accepts the evidence put forward that publication of the respondent's name might lead to the identification of that student, then the CAC did

[17] The CAC referred to the writer of the letter as a Consultant Psychiatrist, but according to the letterhead, she is a Clinical Psychologist.
[18] *CAC v Teacher* NZTDT 2016-27, 25 October 2016
[19] *CAC v Teacher S* NZTDT 2016-69, 14 June 2017
[20] *CAC v Teacher* NZTDT 2015-20, 20 November 2015
[21] *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777 at [79].
[22] *CAC v Teacher* NZTDT 2016/64, 16 February 2017 at [42].

not oppose name suppression for the respondent, but asked that the Tribunal make it clear that those persons who have a genuine interest in knowing are likely to include any future employer of the teacher who considers it necessary to obtain a police vet or similar check.

Discussion

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

> *(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
>
> *…*
>
> *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

66. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the applicant, as well as the public interest. If we think it is proper, we may make such an order.

67. The CAC has not provided any authority to support the submission that publication is associated with one of the core functions of disciplinary regimes. We note that until quite recently many professions conducted hearings in private.[23] It was not until July 2014[24] that the default position for this Tribunal was to conduct hearings in public.

68. In *CAC v McMillan*[25] we considered the purpose of disciplinary proceedings as outlined in *Dentice v Valuers Registration Board*[26] and *Young v PCC,*[27] and summarised the role of disciplinary proceedings against teachers as:

> *… to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account,*

[23] This changed for medical practitioners under the Medical Practitioners Act 1995 and for other health practitioners under the Health Practitioners Competence Assurance Act 2003.
[24] As a result of amendments made to the New Zealand Teachers Council (Conduct) Rules 2004 (now the Teaching Council Rules 2016.
[25] NZTDT 2016-52, 23 January 2017, paragraph 23.
[26] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720
[27] *Young v PCC* Wellington HC, CIV 2006-485-1002, 1 June 2007, Young J

imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

69. In *CAC v Teacher S*[28] we noted that unlike some other professional regulatory statutes,[29] the protection of the public or consumers is not an explicit purpose in the Education Act 1989, and observed that the distinction is relevant in determining what if any consideration should be given to those parts of society that are not involved in the teaching profession either as teachers, students or other stakeholders.

70. For the purposes of non-publication, we need to apply the principles in s 405, that is we must weigh the interests of any individual against the public interest. If we think it is proper, we may then make an order for non-publication.

71. We agree with the CAC that the information from the respondent's psychologist does not provide detail about the respondent's health condition and the potential impact of publication of name on that. There is insufficient evidence for us to be persuaded that the respondent's personal interest outweighs the public interest.

72. Because of the information provided by the student's parent and Principal, we have decided, by a narrow margin, that it is proper to suppress the respondent's name on the basis that publication of his name might lead to identification of the student. It is relevant that this incident occurred in a small community and we accept that further embarrassment to the student could follow. We therefore make orders for non-publication of the names and identifying details of the respondent, the student, the school and the area where these events occurred.

Theo Baker, Chair

[28] Above, note 19 at para 87

[29] For example, Lawyers and Conveyancers Act 2006, s 3(1) and Health Practitioners Competence Assurance Act 2003

73.

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

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.

2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.

3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).