

TEACHING COUNCIL

NEW ZEALAND | Matatū Aotearoa

Complaints Assessment Committee (CAC) v Teacher X NZ Disciplinary Tribunal Decision 2018/64

Teacher X was referred to the Disciplinary Tribunal on a charge of engaging in inappropriate contact with a student.

The result: The Tribunal found that the conduct amounted to serious misconduct and ordered a penalty of censure and cancellation of his registration. There are non-publication orders in place for Teacher X's name, and additional details have been redacted to prevent identification.

On 24 June 2019 the Tribunal released its decision following a hearing on the papers. Teacher X was had worked one-on-one with Student A from 2013 to 2015. Student A's mother made a complaint to the school, reporting that her son's attitude to life changed towards the end of 2013. Student A was getting easily upset and angry and at the end of 2015 he kept running away from home. He was sent to Australia towards the end of 2015 after he had left school.

It was alleged Teacher X made a number of phone calls to Student A both before and after Student A returned to NZ from Australia in February 2016. Student A's mother reported she heard Teacher X say "I miss you so much", "I want to be alone with you, among other things on the phone to Student A.

Student A also alleged that (while Teacher X was his teacher) Teacher X shook Student A's hand "weirdly", sat close to him when reading, put his arm around his shoulder, rubbed his neck, sat close to him, touched his upper thigh, told him he [Teacher X] was gay, and discussed boyfriends, girlfriends, kissing and sexual acts with Student A.

Teacher X stated that he rang Student A's home, as he was concerned Student A was not at school. He stated that he asked if Student A wanted to meet to be alone to talk. He denied telling Student A he was gay or had a boyfriend or talking to Student A about his girlfriend. He denied touching as alleged but accepted that at times he would pat Student A on the arm, back and shoulder.

Teacher X accepted that he had telephoned Student A, making inappropriate comments to him. He accepted that his conduct would likely amount to serious misconduct and result in cancellation. He advised via his representative that he did not wish to pursue teaching.

The Tribunal found that the conduct amounted to serious misconduct, as it was both inappropriate contact with a student, and an inappropriate relationship (rule 9(1)(e).

The Tribunal referred to two recent cases (*CAC v Huggard*, and *CAC v Buchan*) where conduct of this nature had been considered. The Tribunal noted in *Huggard* that as the adult and teacher, the teacher had a "...responsibility to maintain professional boundaries. The two were not contemporaries. They could not be friends..", and while in *Buchan* there was no evidence that the teacher was making sexual advances, stated that "there are situations in which adults with sexual motives start with more subtle measures to test the waters and start to cross the line of a teacher/student relationship". The Tribunal observed that "the fact that this type of conduct can be a tactic in sexual grooming is one of the reasons it is not tolerated".



The Tribunal cancelled Teacher X's registration and censured him. An order for non-publication of Teacher X's name, the student, the school and witnesses was made. Teacher X was ordered to pay 40 percent of the CAC's and the Tribunal's costs.



BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018-64

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
Respondent

TRIBUNAL DECISION

DATED: 24 JUNE 2019

HEARING: Held at Wellington on 7 November 2018 (on the papers)

TRIBUNAL: Theo Baker (Chair)
David Hain and Nikki Parsons (members)

REPRESENTATION: Mr Lewis for the CAC
Ms Cooper for the respondent

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct entitling the Tribunal to exercise its powers under s 404 of the Education Act 1989 (**the Act**). The charge is that the respondent, during 2016 engaged in inappropriate contact with a student of his.
2. The Tribunal deliberated on 7 November 2018 and recorded a minute seeking further submissions and evidence on the question of name suppression. Unfortunately, that minute was not issued to the parties for some time. We have now had the benefit of further information from Ms Cooper on behalf of the respondent.

Evidence

3. This matter was heard on the papers. Before the hearing the parties conferred and filed an Agreed Summary of Facts (**ASF**). The ASF is set out in full:
 1. *The Respondent, [REDACTED], is a fully registered teacher. He is not currently employed. He has not worked as a teacher since signing a voluntarily undertaking dated 3 May 2016. The Respondent had approximately 42 years teaching experience. [REDACTED]*
 2. *A mandatory report was submitted by the Principal of [REDACTED], dated 22 March 2016. The mandatory report was received on 29 March 2016.*
 3. *At the time of the conduct the subject of the notice of charge, the Respondent was an [REDACTED]*
 4. [REDACTED]
 5. *On 7 March 2016 [Ms B], the step-mother of a [REDACTED] student [REDACTED], [Student A], complained to Ms J [REDACTED] alleging inappropriate contact with [Student A] by the Respondent.*
 6. *A meeting was held on 7 March 2016 between Ms W [REDACTED] [Student A], his step-mother, Ms B, and the [REDACTED] support worker.*
 7. *During the meeting, [Ms B] advised that:*

- a. *the Respondent had worked one-on-one with [Student A] from 2013 to 2015. [Ms B] said that [Student A]’s attitude to life changed towards the end of 2013. He got upset easily and was angry and would not express what was going on for him. At the end of 2015, [Student A] kept running away from home. He was sent to Australia towards the end of 2015 after he had left school.*
 - b. *After [Student A] had left for Australia, the Respondent repeatedly rang [Ms B]’s cell phone asking for [Student A]. When [Ms B] asked why the Respondent was ringing, the Respondent advised that he was offering [Student A] a job.*
 - c. *[Student A] returned to Auckland on 28 February 2016. When the Respondent rang a few days later, [Student A] spoke to the Respondent but put the cell phone on speaker phone so that [Ms B] could hear the conversation.*
 - d. *[Ms B] heard the Respondent say to [Student A] “I miss you so much” and “I really want to see you”. The Respondent asked, “Is someone else listening”. [Student A] said “yes, my mum”. The Respondent asked [Student A] “can you go somewhere private to talk”. [Ms B] continued to listen. The Respondent said, “I want to be alone with you” and “I’ll pick you up”.*
 - e. *[Ms B] took the phone and said to the Respondent “what do you mean you miss [Student A] and want to be alone with him. You are disgusting and I’m going to ring the police. Don’t ring again”. The Respondent hung up.*
8. On Wednesday 9 March 2016, Ms [REDACTED] spoke with [Student A]. [Student A] informed Ms [REDACTED]:
- [REDACTED] was my teacher.
- He always teaches me [REDACTED].
- [REDACTED] started shaking my hand weirdly.
- He would sit close to me when I was reading and keep moving closer and closer to me.
- He put his arm around my shoulder.
- We read the book together. He rubbed my neck.
- I stopped reading the book.

He said why you stop reading the book.

I thought he was gay but I didn't say anything, I just wouldn't read. So he was rubbing round my shoulder.

The next lesson I sat opposite him at the table and he told me to come round and sit beside him.

He started touching my leg (upper thigh).

I said nothing.

I felt sick as Im not gay.

One time he told me he is is [sic] gay and has a boyfriend since his wife passed away.

When I told him I had a girlfriend he told me what to do, kissing and sexual act stuff."

9. *The Respondent states in response to paragraphs 7 and 8 above that he rang [Student A]'s home, after [Student A] left for Australia, as he was concerned [Student A] was not at school. He states that when he spoke to [Student A] on 28 February 2016, he asked if he wanted to meet at the zoo to be alone to talk. The Respondent denies telling [Student A] he was gay or had a boyfriend or talking to [Student A] about his girlfriend. The Respondent denies touching [Student A] in the way [Student A] alleged but accepts that at times he would pat [Student A] on the arm, back and shoulder.*
10. *Ms [REDACTED] advised Ms [REDACTED] of the complaint on 10 March 2016. Ms [REDACTED] advised the Respondent he was to work from home on full pay until an investigation could take place.*
11. *Ms [REDACTED] advised the Respondent of the complaint by letter dated 11 March 2016 and sought a meeting with him. The Respondent resigned from his position as an [REDACTED] on 21 March 2016.*
12. *On 3 May 2016, the Respondent agreed not to teach and to the Register being annotated to show that he was suspended from teaching.*
13. *The Respondent's representative from [REDACTED] wrote to the Complaints Assessment Committee on 12 May 2016 advising that the Respondent acknowledged the truth of some of the allegations made against him. He specifically admitted that:*
 - a. *He telephoned [Student A]'s home on a number of occasions;*

- b. *He spoke with [Student A] by telephone on one occasion;*
 - c. *He made a number of inappropriate comments to [Student A] during the conversation, including stating that he wanted to be alone with [Student A] and missing [Student A] and wanted to see him again.*
14. *The [REDACTED] representative acknowledged that the matters would likely constitute serious misconduct and result in cancellation of the Respondent's registration. The representative also advised that the Respondent had decided that he did not wish to pursue a future employment as a teacher.*
15. *The Respondent accepts that the conduct alleged in the Notice of Charge, including particular 1, is correct and amounts to serious misconduct and/or conduct entitling the Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.*

Serious misconduct

4. Serious misconduct is defined in s 378 of the Education Act 1989:

serious misconduct means conduct by a teacher—

(a) *that—*

(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or

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

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

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

5. Those criteria are found in r 9 of the Education Council Rules 2016. The CAC alleges that the conduct amounts to serious misconduct pursuant to s 378 and r 9(1)(e) and/or (o) of the Rules. These are:

(e) *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:*

...

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

6. The parties filed a consent memorandum. The respondent accepted that the conduct alleged in the charge amounts to serious misconduct under s 378 of the Act and rr 9(1)(e) and/or (o) of the Rules or alternatively amounts to conduct which otherwise entitles the Tribunal to exercise its powers under s 404. The respondent

requested the following penalty, with which the CAC concurred:

- Censure
- Cancellation of registration
- A contribution of 50% towards the costs of the CAC and the Tribunal.

Discussion

7. We agree that the conduct set out in the summary of facts amounts to inappropriate contact with a student. We also find it amounts to an inappropriate relationship for the purposes of r 9(1)(e).

8. As we said in *CAC v Huggard*, which involved a teacher engaging in prolific and inappropriate texts of a personal nature with a student:

Even if this student had wanted to continue the contact at this level, it would have been unacceptable for the teacher to do so. As the adult and a teacher, the respondent had a responsibility to maintain professional boundaries. The two were not contemporaries. They could not be friends. He was in a position of power and responsibility, where he should role model appropriate behaviour. His 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 paramount. This did not happen here.

9. And in *CAC v Buchan NZTDT 2017-23*¹ where a deputy principal sitting on the ground at a performance placed his hands on the hips of the female student who was sitting in front of him (and later hugged the student and another at the end of the performance), we noted that while there was no evidence that the teacher was making sexual advances, “*there are situations in which adults with sexual motives start with more subtle measures to test the waters and start to cross the line of a teacher/student relationship*”. We observed that “*the fact that this type of conduct can be a tactic in sexual grooming is one of the reasons it is not tolerated*”.

10. We are satisfied that the respondent engaged in an inappropriate relationship as evidenced by:

- Repeatedly ringing Student A
- Telling Student A that he missed him, that he really wanted to see him and he wanted to be alone with him.

¹ *CAC v Buchan NZTDT 2017-23*, 8 February 2018

- Rubbing his neck
- Putting his arm around Student's shoulder and rubbing his shoulder
- Telling Student A what to do with his girlfriend, including kissing and sexual behaviour.

11. We find that this conduct amounts to serious misconduct. It meets all three limbs of the definition under s 378, and both of the criteria under r 9 as set out in the notice of charge.

Penalty and costs

12. Section 404 (1) of the Act provides:

404 Powers of Disciplinary Tribunal

(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.*

13. The disciplinary functions of the Education Council and Disciplinary Tribunal are found in Part 32 of the Education Act 1989, and the purpose of the Education Council is set out in s 377.

The purpose of the Education Council is to ensure safe and high quality leadership, teaching, and learning for children and young people in early childhood, primary, secondary, and senior secondary schooling in English medium and Māori medium settings through raising the status of the profession.

14. This section provides for protection of the public in the sense that the Council must ensure safe and high-quality leadership, teaching and learning for the children and young people, in other words, the “users” of teaching services. As with other professional regulatory acts, professional discipline is only one of the means by which this purpose may be achieved.
15. Given the respondent’s cooperation with this matter, and the agreement on matters, we will order costs of 40% under s 404(1)(h) and (i).
16. We agree with the parties’ proposal for penalty and make the following orders:
 - a. The respondent is censured under s 404(1)(b)
 - b. His registration is cancelled under s 404 (1)(g)
 - c. He is to pay:
 - i. a contribution of 40% of the CAC costs under s 404(1)(h)
 - ii. A contribution of \$368 of the Tribunal costs under s 404(1)(i). This sum is 40% of the Tribunal’s estimated costs.
17. The Tribunal delegates to the Chairperson authority to determine the quantum of the CAC costs and issues the following directions:
 - a) Within 10 working days of the date of this decision, the CAC is to file and serve on the respondent a schedule of its costs
 - b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions he wishes to make in relation to the costs of the CAC.
 - c) The Chairperson will then determine the total costs to be paid.

Name suppression

18. The parties agreed that the respondent should have permanent name suppression on the basis that the conduct alleged in the mandatory report had been the subject of a criminal charge which was withdrawn, and the respondent was granted final name suppression. Therefore if we did not order non-publication, we would be in

breach of the final suppression order made in the Court. We asked for further submissions, noting that if the respondent had been convicted in the court, and the conviction had been referred to us, we would have been bound by the District Court's ruling. However, because we were considering a charge of serious misconduct based on "inappropriate contact", it is possible to publish this disciplinary decision with no reference to the fact that the respondent was charged by the Police with something alleged in the mandatory report. We therefore invited further submissions on this issue.

19. The second ground for name suppression is to do with the respondent's health. We had no details of the nature of the health condition and the relationship between that and the need for suppression.
20. We therefore invited the respondent to file further information and gave the CAC an opportunity to respond.

The application for name suppression

21. The respondent's counsel filed a memorandum seeking permanent name suppression on the basis that it is proper to do so having regard to the interests of the Respondent who has significant health issues that would be significantly aggravated by publication of his name. In support of this, we were provided with a letter from the respondent's general practitioner including a clinical summary of significant "life-threatening" health conditions. It is her opinion that should the respondent's name be published, his anxiety is likely to worsen and there would be direct effects on his physical health.
22. The respondent has previously turned to self-destructive behaviour (heavy drinking) when he has been under significant stress and anxiety.
23. The respondent has not told his family of his criminal or disciplinary matters out of a sense of humiliation. The stress of publication would be further compounded by the fact that the 7 November 2018 minute of the Tribunal was not provided to counsel until over four months later giving the Respondent a false sense that all matters has been disposed of without issue.
24. The respondent acknowledged that the starting point is that Tribunal proceedings be open and transparent. The same starting point exists in criminal proceedings when name suppression is applied for and that while it is inevitable that a degree of hardship and embarrassment will be suffered by a teacher who is found guilty of serious misconduct, the hardship that would be faced by the respondent is extreme

and would likely have a serious impact on the Respondent's health.

25. The respondent's name was suppressed throughout his criminal proceedings on the basis that the District Court was satisfied that publication of his name would be likely to cause extreme hardship to the respondent. The Crown and defence were in an agreed position that publication would cause extreme hardship to the respondent, particularly in terms of his health. The respondent submitted that it is persuasive that a criminal court has already determined that publication of the Respondent's name would reach the threshold of exceptional or extreme hardship.
26. The respondent has no intention of ever returning to teaching so it is submitted that there is little public interest in the publication of his name.

Decision

27. We are grateful for the further information provided. There is no need for us to set out the detail of the respondent's health conditions. We are satisfied on the information the respondent has provided and submissions that the District Court has suppressed the respondent's name on the basis that publication would cause him extreme hardship because of the significant risk to his health. On that basis we are satisfied that it is proper to make an order for non-publication of his name under s 405(6) of the Act.



Theo Baker
Chair

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

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