

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2021/51

IN THE MATTER of the Education and Training Act 2020

AND

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

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND

MICHAEL ANTHONY BUCKLEY

Respondent

DECISION OF THE TRIBUNAL ON CHARGES

7 June 2022

HEARING: Held on 30 March 2022 on paper via Teams

TRIBUNAL: Rachael Schmidt-McCleave (Deputy Chair)
Neta Sadlier and Nikki Parsons (members)

REPRESENTATION: Elena Mok, Meredith Connell for the Complaints Assessment
Committee
Janette Brown, NZEI for the respondent

Hei timatanga kōrero – Introduction

1. Pursuant to section 497(4) of the Education and Training Act 2020 (the “Act”), the Complaints Assessment Committee (“CAC”) referred the respondent’s conduct to the Tribunal, on the basis that the CAC considers that it constitutes “serious misconduct” as defined in section 10(a) of the Act.
2. The charge alleges that the respondent, a registered teacher of [REDACTED] while working as a teacher at [REDACTED]
 - (a) On or about 27 July 2020, tied a child aged 11 (Child A) to a goal post using Child A’s jersey strings; and/or
 - (b) On or about 28 July 2020, while in the playground, touched Child A, causing Child A to throw himself backwards; and/or
 - (c) On or about 30 July 2020, while inside a classroom, grabbed Child A by the ears and walked behind pretending to be a car; and/or
 - (d) On or about 11 August 2020, tried to pick up a child aged 9 years (Child B) from the ground by his underwear and, in doing so, gave Child B a wedgie; and/or
 - (e) On or about 20 August 2020, tickled Child B under the belly and/or on his arms; and/or
 - (f) On or about 20 August 2020, tickled Child A under the arms and/or on his belly; and/or
 - (g) On or about 21 August 2020, grabbed Child A by the neck and dragged him backwards across the quad; and/or
 - (h) On or about 24 August 2020, grabbed a child aged 7 (Child C) by the arm, yanked Child C up, and then let go of Child C’s arm; and/or
 - (i) On or about 24 August 2020, grabbed Child B’s ears and pulled and/or played with them; and/or
 - (j) On or about 24 August 2020, tried to jump on Child A’s back and/or sat on Child A’s back (as if trying to ride him) while Child A was on his hands and knees.

3. The CAC alleges that the conduct above separately and/or cumulatively amounts to serious misconduct pursuant to section 10 of the Act and any or all of Rules 9(1)(a), (e), (j) and/or (k) of the Teaching Council Rules 2016 or, alternatively, amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Act.
4. The matter was heard on the papers via Teams on 30 March 2022.

Ko te hātepe ture o tonono nei – Procedural History and Preliminary Matters

5. A pre-hearing conference (“PHC”) was held on 14 December 2021. The parties agreed to various timetabling matters. An interim name suppression order was made in respect of Mr Buckley, to stay in place until the charge is disposed of.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

6. The ASoF is set out in full below:

Background

1. *The respondent, Michael Anthony Buckley, is a registered teacher with a current practising certificate, valid until 21 April 2023.*
2. *At all relevant times, Mr Buckley was working as a teacher at [REDACTED] in [REDACTED] [REDACTED] (the School). [REDACTED]*
3. *Mr Buckley taught a class of six children in the [REDACTED] at the School. Each of these children, including those referred to below, had special needs, such as autism. One child referred to below, Child B, had a significant intellectual disability, limited verbal ability and was physically frail (having previously had cancer).*
4. *On 11 October 2020, Mr Buckley resigned from the School.*
5. *As at the date of this summary of facts, Mr Buckley is not working the education sector, and he has indicated that he does not intend to return to teaching.*

Conduct involving Child A

Goal post incident

6. *On or about 27 July 2020, Mr Buckley and a male student aged 11 (Child A) were outside at lunchtime.*

7. *Mr Buckley tied Child A to a basketball hoop goal post using the strings on Child A's jersey. Child A was laughing but kept asking Child A to stop.*

Playground incident

8. *On or about 28 July 2020, Mr Buckley was with Child A in the playground on school grounds. At one stage, Mr Buckley touched Child A to try and calm Child A down, which caused Child A to throw himself backwards. Mr Buckley told two other staff members about the incident, and said that the incident "would look bad on the cameras."*

Classroom incident

9. *On or about 30 July 2020, Mr Buckley was with Child A in a classroom. Mr Buckley grabbed Child A by the ears and walked behind him pretending to be driving a car. Although Child A was fine while Mr Buckley was doing this, Child A told Mr Buckley not to do this afterwards.*

Tickling incident

10. *On or about 20 August 2020, Mr Buckley was with Child A in a classroom. The class were about to start cooking in the kitchen inside the classroom. Mr Buckley tickled Child A under the arms and on his stomach.*

Quad incident

11. *On or about 21 August 2020, Mr Buckley and Child A were outside in the quad. Mr Buckley grabbed Child A by the neck and dragged Child A backwards across the quad for several steps. Child A remained on his feet as he was dragged backwards. Child A was saying "Mike Mike stop stop" as this was happening.*

12. *The incident was captured on CCTV footage.¹*

Further classroom incident

13. *On or about 24 August 2020, Mr Buckley was with Child A in a classroom. Mr Buckley tried to jump on Child A's back. At one point, Mr Buckley sat down on Child A's back as if trying to ride him, with his legs on either side of Child A while Child A was on his hands and knees. Although Mr Buckley's feet were on the ground, he was putting pressure on Child A's back when sitting on him. Child A later complained of having a sore back.*

Conduct involving Child B

First incident

¹ Two stills of the CCTV footage were attached as Tab 1 to the summary of facts and form part of the summary of facts.

14. *On or about 11 August 2020, Mr Buckley was with a male child aged nine (**Child B**) in the classroom.*
15. *The class had been doing bear crawls on the ground.*
16. *Mr Buckley tried to pick up Child B by his underwear, which were sticking up above Child B's pants. In so doing, Mr Buckley caused Child B to have a wedgie.*

Tickling incident

17. *On or about 20 August 2020, Mr Buckley was in a classroom with Child B. Child B was picking an item off the ground, and was on his hands and knees. Mr Buckley tickled Child B on his sides, under the belly and on Child B's arms until Child B managed to get up.*

Grabbing of ears incident

18. *On or about 24 August 2020, Mr Buckley was with Child B. Mr Buckley went up behind Child B and then grabbed onto Child B's ears. Mr Buckley then pulled and played with Child B's ears by wiggling them. Child B told Mr Buckley that he was hurting him.*

Conduct involving Child C

19. *On or about 24 August 2020, Mr Buckley was with a male child aged seven in the classroom (**Child C**). Child C was playing on a teacher's swivel chair. Mr Buckley grabbed Child C by the right arm and yanked him upwards. As he was yanking Child C upwards, Mr Buckley let go of Child C's arm. Child C was observed by another staff member rubbing his arm afterwards.*

School investigation and mandatory report

20. *Mr Buckley's conduct was witnessed by other staff members at the School, who informed the Assistant Principal, and then submitted various incident reports to the Deputy Principal in August 2020. The School commenced an investigation into the incidents, and notified the Police and Oranga Tamariki. Mr Buckley was stood down while the incidents were investigated.*
21. *On or about 1 September 2020, the School's Deputy Principal submitted a mandatory report about Mr Buckley to the Teaching Council.*
22. *As noted above, Mr Buckley was issued a formal Police warning for the offence of assault on a child.*

Response to mandatory report

23. *In his response to the mandatory report, Mr Buckley accepted that he had engaged in most of the conduct described. He acknowledged that he had not always shown the professional standard of behaviour expected of him as a teacher.*

24. *In regards to the quad incident involving Child A, Mr Buckley said that he had acted as he had so that Child A was not walking through the gate while the other students were passing through. Mr Buckley accepted that this was not professional conduct on his part.*
25. *In regards to the incident where Child A threw himself backwards, Mr Buckley said Child A was acting out at the time, and that Child A had thrown himself back or tripped after Child A had attempted to push past him.*
26. *In regards to the incident involving Child C, Mr Buckley stated that he did not intend to hurt Child C, but that he had not handled the situation well, and may have ended up hurting Child C. Mr Buckley said he was busy and frustrated at the time of the incident, and that he was ashamed at his reaction.*
27. *Mr Buckley characterised the other incidents as “boyish horseplay”. Mr Buckley said that he had never intended to hurt any students, and that these had been playful interactions. Mr Buckley said part of these interactions had been to try and encourage Child A to engage in physical play to improve his “strength and fitness, coordination and spatial awareness.” Mr Buckley said that, while his intentions were “pure”, “I got it very wrong and I can see that clearly now.” Mr Buckley further stated that he took full responsibility for his behaviour, and acknowledged that significant aspects of his conduct were “unprofessional, unnecessary and made others uncomfortable.”*

Te Ture - The Law

7. Section 10 of the Act defines serious misconduct:

serious misconduct means conduct by a teacher –

(a) *that –*

- (i) *adversely affects, or is likely to adversely affect, the wellbeing 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 Teaching Council’s criteria for reporting serious misconduct.*

8. As confirmed by the District Court in relation to the identical test under section 378 of the Education Act 1989 (the “former Act”),² the test under section 10 is conjunctive, meaning that as well as meeting one or more of the three adverse consequences, a teacher’s

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

conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.

9. The criteria for reporting serious misconduct are found in the Teaching Council Rules 2016 (the "Rules"). The Tribunal also accepts the CAC's submission that, if established, the respondent's conduct would fall within the following sub-rules of Rules 9(1):
 - (a) Rule 9(1)(a): unjustified or unreasonable physical force on a child:
 - (b) Rule 9(1)(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:
 - (c) Rule 9(1)(j): an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:³
 - (d) Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.
10. The Tribunal accepts that the test under Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the respondent's behaviour.⁴

Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

CAC submissions

11. In summary, the CAC submits that the respondent's conduct is serious misconduct because it:

³ Namely, assault.

⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43, 24 March 2017.

- (a) was clearly likely to, and in some cases did, in fact, adversely affect both the physical and emotional wellbeing of the three children involved (s 10(1)(a)(i));
 - (b) reflects adversely on his fitness to be a teacher (s 10(1)(a)(ii)). The respondent's conduct demonstrated an ongoing and consistent lack of professionalism, and showed a lack of regard for each child's emotional and physical wellbeing.
12. The Committee submitted that the conduct from the respondent demonstrated an ongoing and consistent lack of professionalism, and showed a lack of regard for each child's emotional and physical wellbeing. The Committee said this was particularly concerning given these learners' special needs and their special vulnerability to harm.
 13. The Committee referred to the expectations that teachers would not use physical force towards their students which is reflected in the prohibition on the use of force by school employees (for the purposes of correction or punishment) towards any student attending a registered school as set out in section 98 of the Act.⁵
 14. The Committee acknowledges that the respondent's use of force, for the most part, does not appear to have been for the purposes of correction or punishment (with the exception of the quad incident, where the respondent appeared to have used force for the purpose of managing child A's behaviour, but says further that the prohibition on the use of force in section 98 reflects a wider expectation that teachers will not engage in conduct that risks adversely impacting student's, physical and emotional wellbeing. The Committee also refers to the importance of ensuring the protection of children from harm as reflected in the Children's Act 2014, which focused on ensuring the protection and safety of children in educational settings.
 15. The Committee also submits that the respondent's course of conduct reflects adversely on his fitness to be a teacher by the fact that the conduct was contrary to various provisions of the Code:
 - (a) Section 1.3, maintaining public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity;

⁵ With an equivalent prohibition applying to children attending early childhood services (Section 24 of the Act).

- (b) Section 2.1, working in the best interest of learners by promoting their wellbeing and protecting them from harm; and
 - (c) Section 2.2, working in the best interests of learners by engaging in ethical and professional relationships with learners that respect professional boundaries.
16. The Committee notes that the guidance to section 1.3 of the Code refer to “*behaving in a way that damages the trust or confidence that my learners... have in me as a teacher, or in the profession as a whole*” as an example of conduct that will breach the Code and “*inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner’s behaviour*” is expressly referred to as an example of behaviour that will not promote learner’s wellbeing, as set out in section 2.1 of the Code. Further, adopting a role with a learner that is inappropriate and beyond the scope of the teacher’s professional role, for example, treating the learner as a friend, is conduct that may breach professional boundaries, contrary to section 2.2.
17. With respect to conduct which risks bringing the profession into disrepute, the Committee submits that both limbs of the test are met. The respondent’s conduct is plainly, says the Committee, conduct of a type that would bring the teaching profession into disrepute. The Committee submits that reasonable members of the public, informed of the relevant circumstances, would regard this kind of conduct as falling below acceptable standards for teachers. The Committee says that members of the public would reasonably expect that teachers would safeguard the physical and emotional wellbeing of students, and that teachers would conduct themselves professionally, rather than acting in a way which would risk adversely impacting the wellbeing of children and breach appropriate professional boundaries.
18. Finally, the Committee submitted that the respondent’s conduct, was also of a character and severity that meets one or more of the criteria for reporting serious misconduct contained in rule 9 of the Rules.

Respondent submissions

19. The respondent accepts that his misuse of physical force combined with the breach of professional boundaries amounts to serious misconduct. He goes on to submit that, while his actions did not come from a place of malice or anger, he disregarded his students’

vulnerability, their pleas for him to stop or their personal boundaries. He accepts that there is rarely a reason for teachers to touch students and by touching students, at times with some force, he assumed a familiarity that was not his to assume and in doing so crossed professional boundaries.

20. The respondent goes on to accept that his actions would likely have undermined his students' sense of wellbeing, brought into questions his fitness to teach, and brought disrepute to the profession. He agrees that, while most incidents were at a low level, commutatively they are likely to be of the character or severity to amount to serious misconduct. He accepts that incidents where there was pulling, grabbing or yanking of a student are likely to be serious misconduct in their own rights.

Kupu Whakatau – Decision

21. The Tribunal finds all the particulars set out in the notice of charge are established to the requisite standard.
22. The Tribunal considers that, cumulatively and for the reasons discussed below with respect to the legal position, the established particulars amount to serious misconduct pursuant to section 378 of the Act, and rules 9(1)(a), (e), (j) and (k) of the Rules. The Tribunal considers that the respondent's conduct:
- (a) adversely affected, or was likely to adversely affect, the well-being or learning of the children involved (section 10(a)(i) definition);
 - (b) reflects adversely on his fitness to be a teacher (section 10(a)(ii) definition);
 - (c) may bring the teaching profession into disrepute (section 10(a)(iii) definition and Rule 9(1)(k));
 - (d) constituted unreasonable and unjustified physical force (Rule 9(1)(a));
 - (e) breached his professional boundaries with the children involved (Rule 9(1)(e); and
 - (f) with respect to a number of the particulars, amounted to acts or omissions that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more, namely assault (Rule 9(1)(j)).

23. This Tribunal has commented many times that the use of force for corrective purposes, even where they may be no aggression or anger involved, will typically amount to serious misconduct, while acknowledging that each case must be determined on its facts and having regard to the nature of the force used and the surrounding circumstances.⁶
24. Here, the Committee notes that the respondent's conduct involved him on several occasions engaging in unnecessary physical contact, including by tickling his students and touching them during games. This Tribunal has on many occasions recognised the adverse impact that this kind of conduct can have on learners.
25. In *CAC v Buchan*⁷, a deputy principal placed his hands on the hips of a female student who was sitting in front of him at a cultural performance, and later hugged the student and another student at the end of the performance. Despite the fact there was no evidence of the teacher having any sexual motives, the Tribunal found that the teacher had engaged in serious misconduct, noting that for the students the respondent's behaviour carried a risk of undermining their learning experience and education and confusing their expectations of teachers and other adults.
26. In *CAC v Luff*⁸ the Tribunal observed that teachers have the "*responsibility to exercise some self-discipline and restraint and maintain professional boundaries*". The Tribunal noted that the reasons for this are many, stating that "*[s]tudents should be free from any type of exploitation, harassment or emotional entanglement with teachers. In other words, they should be free from having their learning or wellbeing adversely affected, as contemplated in the definition of serious misconduct... there are enough emotional and social challenges for students without a teacher adding to their confusion. Parents should be able to trust that teachers at any school should be fulfilling their roles in responsibilities to teach or coach their children, and not form inappropriate relationships.*"
27. The Tribunal accepts the CAC's submission that *CAC v Elms*⁹ is directly comparable to this situation. In *Elms*, the teacher involved became overly familiar with students on a number of occasions and engaged in inappropriate conduct such as playing as a team member in bullrush, tickling and hugging students, kissing students of the forehead, and

⁶ *CAC v Haycock* NZTDT 2016/2, 22 July 2016.

⁷ *CAC v Buchan* NZTDT 2017/23, 8 February 2018.

⁸ *CAC v Luff* NZTDT 2016/70, 20 July 2016, at [11].

⁹ *CAC v Elms* NZTDT 2015/35, 7 July 2016.

playing inappropriate games. The teacher accepted responsibility in proceedings before the Tribunal who characterised his conduct as “*roughhousing play*”. The Tribunal found that there was professional misconduct because of his failure to maintain appropriate professional boundaries with his students, and the risk he brought discredit to the profession.

28. The Tribunal views the respondent’s conduct in this case as of a similar ilk. The Tribunal was flabbergasted at the nature of some of the conduct displayed here and the range of behaviours, including the repetition in his behaviour.
29. The Tribunal regards the type of horseplay engaged in by the respondent in this case as inexcusable, particularly given the vulnerability of the students at the school he was working at.
30. The Tribunal particularly noted that in the case of one student, Child A, the student had been vocal about wanting the respondent to stop his behaviour. The Tribunal also was motivated by the fact that the respondent appeared to target some students and engaged in repetitive behaviours. The Tribunal is thankful that the CCTV footage was available to show some of the conduct involving Child A.
31. The Tribunal has no difficulty in finding the particulars to commutatively amount to serious misconduct. While one particular (particular 1(b)), involving the respondents touching child A and causing him to throw himself backwards, may not be in and of itself sufficiently serious to engage the reporting criteria for serious misconduct, the Tribunal considers it is part of a pattern of conduct including unnecessary and inappropriate physical conduct between the respondent and his students as shown by the repetition and nature of the conduct in question.

Whiu - Penalty

32. Having determined that this case is one in which we consider serious misconduct to be established, the Tribunal must now turn to consider what is an appropriate penalty in the circumstances:

500 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.*

(2) Despite subsection (1), following a hearing that arises out of a report under 493 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).

(3) A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.

33. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe

learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.¹⁰ We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.¹¹

34. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers¹²:
- (a) Protecting the public;
 - (b) Setting the standards for the profession;
 - (c) Punishment;
 - (d) Rehabilitation;
 - (e) Consistency;
 - (f) The range of sentencing options;
 - (g) Least restrictive;
 - (h) Fair, reasonable and proportionate.
35. The Tribunal does not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.
36. In its submissions on penalty, the CAC, after pointing the tribunal to comparable cases, submitted that the conduct in the present case is broadly similar to the sighted cases in terms of seriousness. The force used on most occasions was relatively low level in seriousness, in that the force was not prolonged, did not involve a significant amount of force, and did not cause injury to the children. However, the committee submits, there were a number of incidents that occurred over a short space of time, involving several children, suggesting an ongoing pattern of behaviour. The committee says that the

¹⁰ *CAC v McMillan*, NZTDT 2016/52.

¹¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

¹² Above n 16 at [40] – [62]

incident involving Child A in the quad was particularly serious, involving the respondent grabbing the child by the neck and dragging him backwards, potentially risking serious harm given where the force was applied. In addition, the children, were particularly vulnerable given they were special needs students, and given their young ages.

37. The Committee notes that it is not aware of any personal aggravating factors relating to the respondent. It acknowledges a number of personal mitigating factors which will be relevant to the Tribunal's assessment of penalty:
- (a) the respondent has engaged with the disciplinary process, and accepted his conduct at an early stage of the proceedings;
 - (b) the respondent has no previous disciplinary history;
 - (c) the respondent has previously displayed some insight into and remorse for his conduct as reflected in the response provided to the committee in the course of the Committee process and referred to in the agreed Summary of Facts.
38. The Committee submits that a penalty of censure and cancellation of the respondent's registration as a teacher is the appropriate outcome.
39. The respondent submits that he does not intend to return to the teaching profession at this stage and accepts cancellation of his practising certificate. However, as in *CAC v Teacher A*¹³ the Tribunal put conditions on a teacher's practising certificate should he return to teaching where the teacher misconducted himself in a similar way. Because the Tribunal had been able to fulfil their obligation to the profession and the public without cancelling the teacher's practising certificate in a similar case, cancellation of the respondent's practising certificate is not the least restrictive penalty in the circumstances and so the respondent asks the Tribunal to take a similar approach.
40. The respondent notes the aggravating features of his offending are that:
- (a) The students were particularly vulnerable because of their health and special needs.

¹³ *CAC v Teacher A* NZTDT 20108/27.

- (b) There were multiple events involving several students.
41. In mitigation the respondent says that:
- (a) He readily accepted his wrongdoing, and it would have made his students feel uncomfortable.
- (b) He accepted that his conduct amounts to serious misconduct.
- (c) The incidents happened over a two-month period and do not define his whole career.
- (d) His actions were heavy handed, unnecessary and inappropriate, but they were not in malice nor was there any “creepiness” in his touching.
42. The Tribunal has taken into account both sets of submissions carefully and considered the cases referred to by both parties. In the circumstances, the Tribunal is particularly concerned at the level and repetition of the behaviour here (whilst noting there was no sexual motivation in the respondent’s conduct). The Tribunal was particularly troubled by the young ages and vulnerability of the students involved, and the fact that the respondent has appeared to have targeted several children in his activities. The Tribunal also considered there to be an element of downplaying by the respondent, with his reference in the Agreed Summary of Facts to what is very serious conduct as “*boyish horseplay*.”
43. Bearing in mind the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
- (a) A censure under section 500(1)(b) of the Act;
- (b) Cancellation of the respondent’s registration under section 500(1)(g) of the Act.

Utu Whakaea – Costs

44. The CAC submits that a 40% contribution to the CAC’s overall costs is appropriate. This reflects a discount from the starting point of 50% to acknowledge the respondent’s cooperation.
45. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC. The CAC has filed a Costs Schedule which sets out the total costs as \$5,405.00, with 40% of that being \$2,162.00.
46. The respondent is also ordered to pay 40% of the Tribunal’s costs pursuant to section 500(1)(i).

He Rāhui tuku panui – Non-publication

47. There is an interim order for non-publication. The Tribunal does not have an application for a permanent order before it.
48. In any case, the application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.¹⁴
49. The Tribunal’s powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is “proper” to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.
50. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought.¹⁵ Bare assertions will not suffice for displacing

¹⁴ *CAC v Teacher* NZTDT 2016/27 at [66] [citing *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

¹⁵ *Ibid* at [61].

the principle of open justice and nor will the “ordinary” hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.¹⁶

51. Here, the Tribunal does not consider there to be a basis to displace the presumption of open justice by suppressing the respondent’s identity, even if there had been an application. The interim order in respect of the respondent’s name has therefore lapsed.
52. The Tribunal does, however, make permanent the names of the children involved.



Rachael Schmidt-McCleave
Deputy Chair

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

1. This decision may be appealed by the 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).

¹⁶ *Y v Attorney-General* [2016] NZCA 474 citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 approved by the Supreme Court declining leave to appeal in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.