

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2021/38**

**IN THE MATTER** of the Education Act 1989

**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**

**HĒNARE PIRIPI HŪTANA**

Respondent

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**DECISION OF THE TRIBUNAL ON CHARGES**

**4 July 2022**

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**HEARING:** Held on 9 May 2022 on paper via Teams

**TRIBUNAL:** Rachael Schmidt-McCleave (Deputy Chair)  
Lyn Evans and Nikki Parsons (members)

**REPRESENTATION:** R Gibbs, Meredith Connell for the Complaints Assessment Committee  
Dzintra King, NZPPTA for the respondent

## Hei timatanga kōrero – Introduction

1. Pursuant to section 404 of the Education Act 1989 (the “Act”),<sup>1</sup> 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 ██████████, on 20 May 2019:
  - (a) Swore multiple times at two students in an angry and/or aggressive manner.
3. The CAC alleges that the conduct above amounts to serious misconduct pursuant to section 378 of the Act and Rule 9(1)(1)(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 404 of the Act.
4. The matter was heard on the papers via Teams on 9 May 2022.

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

5. A pre-hearing conference (“PHC”) was held on 27 October 2021. There was no appearance for the respondent although it was noted that the respondent had instructed counsel. A second conference was therefore directed to be held.
6. The second PHC took place on 9 December 2021. This time the respondent was represented. At that conference it was indicated that the respondent accepted the charge and an agreed summary of facts would follow. Various timetabling directions were therefore made.
7. No non-publication orders were sought or ordered.

## Kōrero Taunaki - Evidence

### *Agreed Summary of Facts*

8. The ASoF is set out in full below:

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<sup>1</sup> The Education Act 1989 applies, as the mandatory report initiating the disciplinary process was submitted prior to the Education and Training Act 2020 coming into force.

### **“Introduction**

1. Mr Hēnare Hūtana (**respondent**) is a registered teacher in New Zealand (registration number 191825). He was first fully registered on 22 October 1997. His practising certificate expired on 12 June 2020.
2. At the relevant time, the respondent was a teacher at [REDACTED] (**School**) in [REDACTED], [REDACTED]. Mr Hūtana is no longer teaching.

### **Mandatory report**

3. On 23 June 2019, the Teaching Council received a mandatory report from [REDACTED], the principal of the School, about an incident on 20 May 2019 when the respondent swore at two students.
4. The following day, 21 May 2019, when the principal was advised of the incident the respondent was placed on discretionary leave pending a hui on 30 May 2019 for him to answer the allegation. In the interim the students were interviewed. The respondent subsequently went on sick leave. The hui was adjourned to 12 June 2019.
5. At the hui on 12 June 2019 the respondent resigned his teaching position effective from 13 October 2019. He remained on sick leave until his resignation date.
6. The principal’s mandatory report was made after the respondent resigned at the hui scheduled in response to his conduct on 20 May 2019.

### **20 May 2019**

7. On 20 May 2019 at about 12.20 pm three students were in the back of a classroom, room 5, at the School. Student A was [REDACTED] years old, student B was [REDACTED] years [REDACTED] months old, and student C was [REDACTED] years [REDACTED] months old. The respondent was also in room 5.
8. The school bell had rung and the students were supposed to be in another classroom, the Te Reo Māori class. The rest of the students had already left room 5.
9. The respondent asked the students to go to their next class a couple of times but they did not leave straight away. The respondent became angry, student A described him as “really mad” and student B said he could tell by looking at the respondent that he had “started getting pissed off at us” and he looked angry. The respondent began to yell and swear at students A and B.
10. The respondent yelled at students A and B about five or six times, while waving his arms and swearing. He yelled: “Fucken get down to Māori or I’ll get [REDACTED] [REDACTED]” and/or “Fucken go down to Te Reo.”
11. The students did not respond and left room 5.

12. Student A said at the time he was “alright” with what had happened but he was “not sure” how he felt about the incident when spoken to about it three days later on Thursday 23 May 2019.
13. Student B said that he did not think the respondent swearing at them was ok and reiterated that, saying “I don’t think it’s right what he did.”
14. Student C said he was using his notebook and headphones at the time, but he saw the respondent standing up. The respondent appeared stressed and like he was yelling at someone, although student C could not hear the exchange.
15. The following day, 21 May 2019, the respondent spoke to another teacher at the School. The respondent said that the day before, after lunch, he had trouble sending some of the students to their Te Reo Māori class. He said he told students A and B to “get the fuck out of here, get out of this fucking classroom.”

### **Respondent’s comments**

16. The investigator made approximately 12 attempts to obtain input into the investigation from the respondent’s representative and/or the respondent himself between 3 July 2019 and 15 July 2021, including providing them with a copy of draft [sic] investigation report on 15 July 2021. However the respondent did not himself, nor through his representative, provide a substantive response to the investigation beyond the following emails:

- a. On 15 March 2021, in response to an email requesting contact, the respondent said: Why I’ve done my time paid the price can’t renew my teaching certificate. The teaching council stripped me of everything barring my 6 months sick leave entitlement which I took under a doctors certificate stress leave, (burnt out, under pressure because I lived on site for 15 years available 24/7. I went on a 8 week course to help me recover from the above. I’ve paid the lawyers bill you sent and I’ve closed the door with you lot. So, what further damage do you intend to do to me and my family. Get a life and leave me and my family alone, because that’s what we’ve done and it excludes the horrible teaching council.

Me the victim Henare Hutana.

- b. On 15 July 2021, in response to the provisions of the draft investigation report and a final request for contact, the respondent said:

I wish to be left alone. I’m no longer at your disposal and if you finer again like the last (lawyers feed) then go ahead, you’ll not get another cent out of me. I will be disposing further notifications by deletion. I no longer hold a teaching certificate and I’m no longer teaching. Free at last !!!!!

Henare Hutana

***Previous involvement with the Complaints Assessment Committee and Disciplinary Tribunal***

17. *On 10 May 2017 the respondent was employed at the School and teaching a Year 9 class. He entered into a verbal altercation with student D who was misbehaving. He threatened violence towards student D, used verbal put downs, and yelled.<sup>2</sup>*
18. *The Board of Trustees of the School undertook a formal disciplinary process and the following conditions were put in place to support the respondent in his return to teaching:*
- a. three sessions with a counsellor in the Employee Assistance Programme;*
  - b. that the respondent develop strategies to cope with incidents involving challenging student behaviour;*
  - c. that the respondent write a letter of apology to student D's family;*
  - d. weekly meetings between the respondent and the principal to monitor the respondent's wellbeing; and*
  - e. the Board of Trustees gave the response [sic] a formal first warning to remain on his file for 12 months.*
19. *On 10 July 2017 a mandatory report was filed by [REDACTED], the principal of the School alleging a verbal altercation in which the respondent swore at student D. Based on the matters outlined in the mandatory report including the restorative process and the actions taken by the Boards of Trustees, the Education Council initially decide to take no further [sic]. This was communicated in a letter dated 17 July 2017.*
20. *However, on 18 October 2017 at [sic] video of the incident made by a Year 9 student in the classroom on 10 May 2017 was received, which disclosed the threats of violence in an approximately two minute verbal exchange. A decision was then made to investigate.*
21. *The [CAC] subsequently met on 30 August 2018. The respondent attended with his representative. The CAC considered the respondent's conduct may constitute serious misconduct as defined in s 378 of the [Act] and referred the matter to the Disciplinary Tribunal.*
22. *Following a hearing on the papers on 7 February 2019 the Disciplinary Tribunal released its decision on 19 June 2019.*
23. *The Tribunal found that the respondent's conduct amounted to serious misconduct noting the language used, the threats of violence and the fact the conduct involved a sustained verbal attack.*

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<sup>2</sup> The Agreed Summary of Facts annexed that summary of facts for that incident.

24. *The Tribunal noted the absence of evidence that the respondent had behaved like this on any other occasion, the respondent's insight, the steps the respondent had taken in response, the restorative process, and the actions taken by the Board of Trustees in holding the respondent to account while providing him with support inspiring confidence in the prospects of rehabilitation. The Tribunal endorsed the conditions imposed by the Board of Trustees. The Tribunal therefore imposed the following penalties:*

- a. *The respondent was censured under s 404(1)(b) of the Act.<sup>3</sup>*
- b. *There was a condition on his practising certificate that he inform existing and prospective employers of the decision for a period of two years from the date of the decision pursuant to s 404(1)(c) of the Act.*
- c. *The register was to be annotated for a period of two years from the date of the decision under s 404(1)(e)."*

## **Te Ture - The Law**

9. Section 378 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.*

10. As confirmed by the District Court,<sup>4</sup> the test under section 378 is conjunctive, meaning that as well as meeting one or more of the three adverse consequences, a teacher's 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.

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<sup>3</sup> There are extra words in the ASOF which the Tribunal apprehended were in error (confirmed in the Committee's submissions).

<sup>4</sup> *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018 at [64]

11. 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-rule of Rules 9(1):
- (a) Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.
12. 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.<sup>5</sup>

### **Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions**

#### *CAC submissions*

13. In summary, the Committee submits that:
- (a) The respondent’s accepted conduct, as set out in the agreed summary of facts, amounts to serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers.
- (b) Having regard to the nature and gravity of the relevant conduct, the respondent’s personal factors, and the principles and purposes of disciplinary proceedings, censure and cancellation of the respondent’s registration as a teacher is the appropriate penalty.
14. In terms of the section 378(1)(a)(i) limb of the test for serious misconduct, the Committee submits that, as an authority figure and role model, the respondent’s conduct, including swearing and yelling at the students, was clearly likely to adversely affect the emotional well-being of those students.
15. Further, with respect to whether the conduct reflects adversely on the respondent’s fitness to be a teacher (under section 378(1)(a)(ii) the Committee submits that the conduct does so adversely reflect, and the respondent demonstrated a complete lack of professionalism and lack of regard for the emotional well-being of the students. The Committee says that

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<sup>5</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43, 24 March 2017.

not only was the swearing inappropriate and unprofessional, but the respondent's conduct in the circumstance was an unacceptably disproportionate response to the behaviour of the students concerned. The Committee says the conduct was plainly unjustified and calls into question the respondent's ability to cope with the usual stressors of being a teacher, and demonstrates very poor role modelling to the young students.

16. In support of this submission, the Committee contends that the conduct was contrary to various provisions of the Code of Professional Responsibility ("Code") which sets out the professional standards expected of teachers:<sup>6</sup>
- (a) Section 1.3: Maintaining public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.<sup>7</sup>
  - (b) Section 1.5: Maintaining public trust and confidence in the teaching profession by contributing to a professional culture that supports and upholds the Code.
  - (c) Section 2.1: Working in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.<sup>8</sup>
17. Finally, as to whether the respondent's course of conduct risked bringing (or did bring) the profession into disrepute, the Committee submits that both limbs of the test are clearly met. The Committee referred to analogous cases, submitted that reasonable members of the public, informed of the relevant circumstances, would regard this kind of conduct as falling below acceptable standards for teachers.<sup>9</sup> Members of the public would reasonably expect that teachers would conduct themselves professionally, rather than engaging in yelling and swearing at children – conduct which risks adversely impacting the emotional wellbeing of children.

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<sup>6</sup> See *CAC v Teacher NZTDT 2014-18*, 5 June 2016, where the Tribunal stated that any breaches of the Code's predecessor Code (the *Code of Ethics for Certificated Teachers*) would be a highly relevant consideration when assessing whether a teacher has engaged in serious misconduct.

<sup>7</sup> The guidance to section 1.3 of the Code refers 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.

<sup>8</sup> The guidance to section 2.1 of the Code refers to "using verbal or body language that is unreasonable and inappropriate (for example, using aggressive, threatening or humiliating language, or using an intimidating stance and demeanour)".

<sup>9</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC)



18. The Committee also submitted that the respondent's conduct was also of a character and severity to meet the Rule 9(1)(k) criteria for reporting serious misconduct.

*Respondent submissions*

19. The respondent, through his representative, accepts that the conduct constitutes serious misconduct.
20. He goes on to detail a number of emails sent in 2021 (and discussed in the respondent's submissions), which he contends are clearly indicative of a continuing state of ill health. The emails are set out above in the Agreed Summary of Facts. He submits, for instance, that the words "*free at last*" are not an indication of lack of respect for the profession and its regulations but, rather, an assertion of total and utter inability to deal with the stress and anxiety created by the incident and the ongoing investigation. He accepts the emails are discourteous and refers again to the underlying issues of poor health and anxiety, which he says also contributed to a lack of desire and inability to engage with the disciplinary process.

**Kupu Whakatau – Decision**

21. The Tribunal finds the particular set out in the notice of charge is established to the requisite standard. The Tribunal emphasises that it makes this decision based solely on the incident itself, and not the respondent's follow-up emails. Any lack of engagement with the disciplinary process itself is a matter for penalty (in terms of mitigating and aggravating features) and does not impact upon the Tribunal's underlying finding in relation to serious misconduct.
22. The Tribunal considers that, cumulatively and for the reasons discussed below with respect to the legal position, the established particular amounts to serious misconduct pursuant to section 378 of the Act, and rule 9(1)(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 378(a)(i) definition);
  - (b) reflects adversely on his fitness to be a teacher (section 378(a)(ii) definition);

- (c) may bring the teaching profession into disrepute (section 10(a)(iii) definition and Rule 9(1)(k));
23. The Tribunal regards the respondent's swearing and yelling at the students to be completely unacceptable and unprofessional. Poor health and external stressors affect everyone's ability to react proportionately to work stressors and to manage emotion, but it is part of all professional life to be able to respond appropriately. This is especially so when it comes to dealing with tamariki and rangatahi, as all the provisions cited by the Committee demonstrate.
24. The Tribunal considers that the respondent's conduct in this incident was totally out of proportion to the behaviour being demonstrated by the students in question and shows the respondent's ability to cope with the expected stressors of teaching is extremely limited. There is no justification for the behaviour demonstrated by the respondent, and it exhibits extremely inferior role modelling to the rangatahi involved.
25. The Tribunal considers that its decision is consistent with other similar decisions of this Tribunal dealing with comparable conduct.
26. In *CAC v Whiu*,<sup>10</sup> the Tribunal found serious misconduct to be (just) established in a case where a teacher became angry at a student not completing his work, and began using offensive and abusive language including swearing at the student. The Tribunal found it a one-off incident unlikely to be repeated, and the teacher in that case did express remorse and participate in a restorative meeting, which meant the Tribunal took an approach of censure, annotation of the register and conditions.
27. In *CAC v Evans*,<sup>11</sup> the teacher used offensive language towards a student, and swore at a malfunctioning DVD player. Regardless of whether the teacher meant to offend, the Tribunal found serious misconduct and imposed rehabilitative penalties. The Tribunal referred to the following statement from *CAC v Huggard*,<sup>12</sup> which this Tribunal considers is equally apt in this case:

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<sup>10</sup> *CAC v Whiu* NZTDT 2018-86, 31 October 2019

<sup>11</sup> *CAC v Evans* NZTDT 2018-43, 29 May 2019

<sup>12</sup> *CAC v Huggard* NZTDT 2016-33 at [20]-[21]

*“When a student feels uncomfortable with a teacher’s interactions, it is difficult for the student to tell a teacher to leave [him or] her alone...as the adult and a teacher, the respondent had a responsibility to maintain professional boundaries....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.”*

28. In a case very like the present case, namely *CAC v Webster*,<sup>13</sup> the teacher swore at and verbally abused students six times over a period of four years. The teacher continued the behaviour, despite attempts to train and coach her, and she did not engage with the disciplinary process. The Tribunal had no difficulty in finding serious misconduct and considered it had no option but to order censure and cancel the teacher’s registration, noting it was difficult to know what a suitable rehabilitative penalty would be without hearing from the teacher.

#### **Whiu - Penalty**

29. 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:

#### **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:*

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<sup>13</sup> *CAC v Webster* NZTDT 2016-57, 6 April 2017

- (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 397 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.*

30. 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.<sup>14</sup> 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.<sup>15</sup>

<sup>14</sup> *CAC v McMillan*, NZTDT 2016/52.

<sup>15</sup> *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).

31. In *McMillan* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers<sup>16</sup>:
- (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.
32. 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.
33. In its submissions on penalty, the CAC submits that the respondent's conduct, particularly when considering the background against which it occurred, was moderately serious. It repeats its submissions about the lack of professional judgement, and the fact the conduct calls into question the respondent's fitness as a teacher.
34. The Committee points to the fact the respondent has previously been dealt with by the Tribunal in relation to similar conduct (as set out in the Agreed Summary of Facts above). It says that restorative and rehabilitative steps were put in place by the Board of Trustees and the Tribunal in relation to that previous incident, but the respondent has engaged in similar behaviour this time. The Committee also submits that the respondent has not demonstrated any remorse for, or insight into, the conduct the subject of the current charge, and has indeed referred to himself as a victim.
35. Although the respondent ultimately accepted the charge, this occurred against a background of a repeated failure to engage, followed by discourteous and unprofessional

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<sup>16</sup> Above n 16 at [40] – [62]

emails to the investigator as set out in the Agreed Summary of Facts. The Committee says that the respondent has claimed to be burnt out and under pressure but has provided no further details or evidence. He has also indicated he is no longer teaching and his practising certificate expired in June 2020.

36. In the absence of any willingness to engage in rehabilitation, and comparing the conduct to other cases, the Committee submits that a penalty of censure and cancellation of the respondent's registration as a teacher is the appropriate outcome.
37. The respondent submits that he has resigned and does not wish to teach again.
38. The Tribunal has taken into account both sets of submissions carefully and considered the cases referred to by both parties. The Tribunal, in reaching its penalty decision below, has been particularly motivated by the nature of the respondent's conduct, the previous offending, the respondent's indication that he does not intend to return to teaching and the limited engagement with (and disdain for) the disciplinary process.
39. 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) Censure under section 404(1)(b) of the Act.
  - (b) Cancellation of the respondent's registration under section 404(1)(g) of the Act.

#### **Utu Whakaea – Costs**

40. 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. The respondent notes he has no ability to meet a costs award.
41. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC. The respondent is at liberty to reach an arrangement with the Council as to the payment of costs.
42. The CAC is to file a Costs Schedule within 7 days of this decision, and any objection to that Costs Schedule is to be filed and served within a further 7 days from receipt.

43. 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**

44. There is an interim order for non-publication. The Tribunal does not have an application for a permanent order before it from the respondent (or accompanying evidence), although a one line submission is made by his counsel seeking such an order.
45. The Committee seeks non-publication orders in respect of the names and identifying details of the three students referred to in the Agreed Summary of Facts (given their ages and the lack of public interest in their names being known). The Committee also submits it would be proper for the Tribunal to order non-publication of the name and identifying details of the School (including its location) [REDACTED]  
[REDACTED]
46. 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.<sup>17</sup>
47. 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.
48. 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.<sup>18</sup> Bare assertions will not suffice for displacing

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<sup>17</sup> *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].

<sup>18</sup> *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.<sup>19</sup>

49. 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.
50. The Tribunal does, however, make permanent the names and identifying details of the children involved, as well as the name and identifying details (including location) of the School.

*R. E. Schmidt-McCleave*

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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).

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<sup>19</sup> *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.