NOTE: THIS DECISION WAS APPEALED TO THE DISTRICT COURT – REFER JUDGMENT IN COMPLAINTS ASSESSMENT COMMITTEE v ANDREW MACLENNAN [2022] NZDC 25116 (CIV-2021-009-00743)

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2018/44

WĀHANGA *Under*	the Education Act 1989
MŌ TE TAKE *In the matter of*	of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
I WAENGA I A *Between*	**COMPLAINTS ASSESSMENT COMMITTEE** **Kaiwhiu** *Prosecutor*
ME *And*	**ANDREW RONALD MACLENNAN** **Kaiurupare** *Respondent*

TE WHAKATAUNGA Ā TE TARAIPIUNARA

Decision of the Tribunal

3 March 2021

HEARING: Held on 23 July 2019

TRIBUNAL: Rachel Mullins (Deputy Chair)

Nikki Parsons and Dave Turnbull (members)

REPRESENTATION: Luke Cunningham Clere for the Complaints Assessment Committee

Tim MacKenzie for the respondent (until withdrawal from acting in June 2020)

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee ("CAC") has sent to the Tribunal pursuant to section 401 of the Education Act 1989 ("The Act") an own motion referral complaint about the conduct of the respondent. The CAC alleges that the respondent's conduct amounts to serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.

2. The particulars of the charge are that the respondent formed an inappropriate relationship with a student ("Student A").

3. That the respondent allegedly engaged in inappropriate conduct by:

   (a) Engaging in ongoing conduct with Student A, including discussing personal matters, despite being asked to desist by Student A's parents;

   (b) Regularly meeting with Student A in secret, in spite of Student A's parents' wishes;

   (c) Telling Student A that she would not be able to succeed in athletics without his help, after Student A's parents had decided that they did not want him to coach her;

   (d) Picking Student A up from school in his vehicle;

   (e) Giving Student A a necklace as a gift;

   (f) Loaning Student A money;

   (g) Meeting with Student A at his house; and

   (h) Continuing to meet with and communicate with Student A after telling Student A's parents that he would not do so.

4. It is further alleged that the respondent misled his employer about his relationship with Student A.

5. The CAC alleges that the conduct amounts to serious misconduct separately and/or cumulatively pursuant to section 378 of the Act and Rules 9(1)(d), 9(1)(e) and/or 9(1)(o) of the Education Council Rules 2016 (as drafted prior to the 2018 amendment) or

alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Act.[1]

Ko te hātepe ture o tono nei – Procedural History

6. A Pre-Hearing Conference ("PHC") was held on 2 October 2018 where the parties indicated that there was work still to be done to achieve an Agreed Summary of Facts ("ASoF") and it could be possible that the matter will be defended. A further PHC was set down for Tuesday, 6 November 2018.

7. At the PHC on 6 November 2018, Counsel advised that only a limited ASoF may be possible and that the matter was likely to proceed to hearing.

8. The parties were encouraged to seek agreement on a summary of facts so that the matter could be dealt with on the papers. The respondent has no practising certificate and is not currently registered. Early in 2018, he was teaching as STC (subject to confirmation having returned to teaching after a period away). On 6 July 2018, he resigned and informed the Registrations Manager at Teaching Council that he no longer wished to pursue a teaching career.

9. The minutes of the PHC record:

> *Under the Act, the Tribunal does have jurisdiction to proceed with a disciplinary proceeding against a former registered teacher (section 378(1)) and it is appropriate to do so, and to proceed to a disciplinary outcome against the possibility that the teacher concerned may seek to restore their registration at a later date. But on the other hand, this is not a situation where the respondent (who currently does not hold registration) is facing the cancellation of registration as an outcome of the disciplinary proceeding. Were the charges to be established, a possible outcome could include an order imposing conditions if his registration is later restored. A sensible and practical resolution of the matter would result in avoidance of the need for a hearing and a reduction in any possible award of costs.*

[1] This was the final amended Notice of Charge filed on 1 October 2018.

10. A timetable was agreed on the basis that the current position was that a hearing would be likely:

    (a) CAC witness statements to be filed by 18 December 2018;

    (b) Respondent's witness statements to be filed by 12 February 2019;

    (c) CAC submissions to be filed by 27 February 2019;

    (d) Respondent's submissions to be filed by 12 March 2019;

    (e) Bundle of documents to be made available to the Tribunal by 19 March 2019; and

    (f) Hearing set down for 26 and 27 March 2019.

11. CAC witness statements were duly filed.

12. On 16 April 2019, Counsel for the respondent filed a memorandum objecting to parts of the evidence filed by the CAC and requested an adjournment to the hearing.

13. On 16 April 2019, the CAC responded to the respondent's memorandum regarding admissibility of evidence and adjournment of the hearing.

14. On 3 May 2019 the Tribunal issued a Pre-Hearing Direction that the evidence sought to be excluded will be of assistance to the Tribunal in exercising its functions in this matter pursuant to Rule 31 of the Teaching Council Rules 2016.

15. The respondent was directed to file evidence on or before 26 April 2019 and the hearing was to proceed as scheduled on 7 and 8 May 2019.

16. On 26 April 2019, the respondent filed evidence.

17. On 16 April 2019 the CAC filed an application to have the evidence of Student A heard in an alternative way. This was opposed by the respondent.

18. A memorandum was also filed by the respondent on 1 May 2019, seeking that the hearing be vacated on the grounds that the respondent had confirmed that his behaviour amounts to serious misconduct, that he does not wish to teach again and accepts that penalty will follow.

19. In response, the CAC submitted that the hearing needed to continue as there was still a significant dispute as to the facts.

20. The Deputy Chair convened a PHC on 3 May 2019 to discuss the matter further with the parties. The minute following the PHC recorded:

> *"The respondent has accepted that he had an inappropriate relationship with Student A, and that that relationship was sexual. He has also accepted that Student A fell pregnant to the respondent during her final year of high school. The respondent has accepted that his conduct amounts to serious misconduct. He has indicated that he does not wish to pursue a teaching career. He has accepted that a penalty will follow, the only outstanding issue being non-publication.*
>
> *The CAC position is that there is still a significant dispute as to the facts and that the respondent's proposed Summary of Facts apportions "responsibility for the relationship" to the student.*
>
> *The issue of "responsibility for the relationship" is not a mitigating factor, just as consent is not a defence in criminal cases under section 134 of the Crimes Act 1961. At all times the teacher, not a student, has the duty to distance themselves from a potential inappropriate situation. The teacher is in a position of power and responsibility. Given the admissions already made by the respondent about his conduct, a full evidential hearing is unlikely to be of any further assistance to the Tribunal's consideration of the substantive matter. I am also mindful of the impact that a full evidential hearing may have on Student A.*
>
> *My preliminary view therefore is to vacate the hearing set down for 7-8 May and instead the matter can be heard on the papers on receipt of submissions."*

21. The Deputy Chair gave the parties a few days to consider her preliminary thoughts and if necessary, a further PHC could be convened on Monday.

22. The matter proceeded on the papers. The CAC filed submissions on 13 May 2019 along with victim impact statements from Student A and her family. The respondent filed an application for permanent name suppression and supporting affidavit on 23 May 2019 along with submissions on 24 May 2019 with respect to costs and name suppression.

Kōrero Taunaki – Evidence

Briefs of Evidence/Witness Statements

23. The following briefs of evidence and/or witness statements were filed by the CAC:

    (a) Mother of Student A;

    (b) Father of Student A;

    (c) Student A;

    (d) Brother of Student A.

24. The respondent also filed a brief of evidence.

Summary of the Evidence

25. Although this matter proceeded on the papers, there was no ASoF. For the parties, a couple of key issues remained in dispute. Lengthy briefs of evidence were filed and to a large degree, most of the key facts have been accepted. Therefore, for the purposes of this decision, we will just summarise the main points. This is not meant in any way to minimise the voices of those that prepared briefs of evidence, but simply to summarise the key evidential points.[2]

26. The respondent was previously registered as a teacher, teaching at secondary schools in Christchurch from 1991 to 2005.

27. In 2005 he began working in sports coaching and personal training and his teaching registration and practising certificate lapsed. His coaching included training secondary school athletes.

28. He returned to teaching between 2013 and 2016 when he did casual relief teaching. He sought to renew his practising certificate and registration in March 2017.

29. In 2006 the respondent was coaching at an athletics camp for high performing secondary school aged athletes. He was 39 at the time.

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[2] Much of the summarised evidence has been taken from the draft Agreed Summary of Facts filed by the CAC with its Memorandum of Counsel dated 2 May 2019.

30. During this camp he coached Student A. She was 15 years old and was a student at the School in Year 11.

31. Following the camp the respondent began ongoing coaching with Student A. He also provided maths tutoring, for which he was paid by Student A's parents.

32. In approximately December 2006 Student A's parents asked another athletics coach to speak to the respondent about the allegations they had heard about him having relationships with young girls. The respondent told this coach that he would no longer coach Student A and he was then asked to have no more contact with her.

33. Student A's parents told her that she would no longer be coached by the respondent but would not tell her why. Student A's relationship with her parents deteriorated.

34. Student A continued to secretly be in contact with the respondent via text. They would text regularly including late at night. The respondent told Student A that she would not be able to make it in athletics without his help.

35. He also spoke to Student A about his personal issues including about how his relationship with his ex-wife had ended.

36. In 2007 the respondent and Student A started meeting in secret for coaching without Student A's parents being aware of this. The respondent was not paid for this coaching.

37. The respondent and Student A also met regularly in a local park where they would talk about personal issues including the fact that the respondent was disappointed that he could no longer coach Student A as he believed she was talented.

38. Student A's parents contacted the respondent and asked him to have no further contact with Student A. The respondent emailed back confirming that he would not, however contact between the respondent and Student A continued.

39. In 2008 Student A was in Year 13 and she continued to meet in secret with the respondent.

40. In March 2008 on Student A's 17th birthday, the respondent kissed her and gave her a necklace as a present. They continued to see each other and started meeting at the respondent's home.

41. In April 2008 Student A's new coaches spoke to the respondent and advised him to stay away from her.

42. On or around 8 April 2008 Student A's parents also confronted the respondent in person and reiterated that he was not to contact her. The respondent replied that Student A had threatened to commit suicide and that he was worried about her. He then promised Student A's parents that he would leave her alone.

43. Despite these requests, the respondent and Student A continued their relationship, and in April 2008 had sex for the first time. This occurred at the respondent's house and became a regular part of their relationship. Following the first time they had sex, Student A suffered from ongoing anxiety. This is disputed by the respondent who says that Student A had always struggled with anxiety.

44. Student A's relationship with her parents continued to deteriorate. She would sneak out of her house in order to see the respondent. Student A and the respondent would see each other around four to five times a week, often during the night. They would also text regularly throughout the day.

45. At times, the respondent would also pick Student A up from school but would park his car away from the entrance so as to avoid people seeing him and Student A together. He would also make Student A sit in the backseat, so that people could not see her.

46. Student A was seen in the respondent's car on or about 2 June 2008. Student A's parents then engaged a solicitor, who wrote to the respondent on 30 June 2008 asking that he no longer contact Student A and to ignore any attempts by Student A to contact him. The respondent responded on 3 July 2008 that he would act in accordance with Student A's parents' wishes. Despite this, the relationship continued.

47. During 2008, Student A started missing classes, often to visit the respondent, and her grades started dropping. She failed to gain university entrance. The respondent was aware that she was missing classes to see him.

48. Student A also became depressed and started self-harming by cutting herself. At one point she received treatment from a crisis team and received regular counselling. The

respondent told her not to tell her counsellor anything that could get them in trouble. The respondent also threatened to commit suicide.

49. Student A and her family also underwent family group counselling.

50. On occasions the respondent loaned Student A money.

51. The respondent also said to Student A on occasion that she should not spend time with him, as it was ruining her chances of living a life that a teenager should live. Student A said she would rather spend time with the respondent.

52. Student A's parents reported their concerns regarding the respondent's conduct to Athletics New Zealand in August 2008. In response to this, two senior members of Athletics New Zealand met with the respondent on 25 September 2008. During this meeting, the respondent accepted that he had been in contact with Student A, but stated that this was in response to communication from Student A. He also denied having had sexual intercourse with Student A. He agreed not to contact Student A further, and to notify her parents if she contacted him.

53. In January 2009, Student A moved to Dunedin and enrolled in a polytechnic course.

54. In February 2009, Student A discovered she was pregnant to the respondent. The conception date was estimated to be December 2008. A decision was made to terminate the pregnancy.

55. Student A turned 18 in March 2009. She and the respondent continued their relationship while living in different cities.

56. In September 2011, Student A moved to Auckland to carry out further studies. The respondent continued to visit her on occasion. The respondent and Student A's relationship ended in approximately 2013.

57. In February 2013, Student A was granted a Protection Order against the respondent. The respondent did not object to this Order being put in place. As a standard condition of this Order, the respondent was not permitted to contact Student A.

58. Despite this Order, the respondent and Student A continued to communicate.

59. The respondent applied to have the Protection Order discharged in September 2014. This was granted in April 2015, with Student A's agreement.

Misleading Employer

60. The respondent sought a teaching position at a Christchurch school ("the Christchurch school") in 2017. As part of the recruitment process, he underwent a Police vet which provided details about his relationship with Student A, and the Christchurch school asked for further information, including about Athletics New Zealand's awareness of the matter.

61. The respondent provided an email to Christchurch school between himself and two senior members of Athletics New Zealand which discussed his abilities as a high-performance coach. He did not provide any emails to the Christchurch school about his previous relationship with Student A, or any details of Athletics New Zealand's investigation into his conduct.

62. The respondent was subsequently given a part-time position at the Christchurch school.

63. The respondent does not accept that he misled the Christchurch school and has not responded in any way to the allegation other than to state that he does not accept that allegation and is unsure as to what exactly is being alleged.

Teacher's Response

64. The respondent accepts in hindsight that he should not have entered into a relationship with Student A. However, he made the following statements in evidence:

> "*Student A is an extremely anxious and demanding person. She sent me hundreds of text messages most days and was very difficult to shake off. Her relationship with her parents was worsening and this seemed to be taking a toll on her. She was looking for me to replace what her parents weren t doing and offer her guidance and support.*"

65. In relation to the relationship becoming sexual, the respondent says:

> "*The relationship developed into a physical one in 2008 (Year 13) as described by Student A.*

> *Student A was continually talking about sex and asking me to have sex. I declined on numerous occasions. She was 17. I eventually agreed to this.*
>
> *I completely reject the insinuation at paragraph 61 that this was somehow forced on her. Student A was a very willing participant and very sexual person. I also don't believe that I was the first person she had had a sexual experience with, and she told me about her experiences with other men.*
>
> *Student A did not begin to suffer anxiety because of this. She had always been a very anxious person with many troubles.*"

66. The respondent also denies that he misled the Christchurch school. In evidence he says:

> "*I also don't accept the allegation that I misled* [redacted] *I am unsure what is alleged to have occurred that was misleading and who precisely was misled.*"

Ngā Kōrero a te Kōmiti – CAC Submissions

67. Whilst the CAC acknowledges that the respondent has accepted that he formed an inappropriate and sexual relationship with the student which amounted to serious misconduct, the CAC submit that it has not been possible to reach an ASOF because the respondent denies that he was responsible for the relationship. He instead maintains that it developed due to Student A's insistence and persistence. He describes it as a *"two-way street"* in the sense that Student A was *"very sophisticated in advancing the relationship".*

68. Given the allegations, the CAC submits that the only appropriate penalty would have been one of cancellation, however as the respondent is not currently registered, the only appropriate and available disciplinary position is a censure.

69. The respondent returned to teaching between 2013 and 2016 and did casual relief teaching. He applied to renew his practising certificate and registration in March 2017. He was given authorisation to teach from January 2018 subject to supervision. He accepted a position at a secondary school commencing in January 2018 but resigned in July 2018.

70. The definition of teacher in section 378 of the Act includes “former registered teacher” and “former authorised person”. It is submitted therefore that the Tribunal has jurisdiction to impose a penalty on the respondent pursuant to section 404(1).

71. The CAC provided quite lengthy submissions setting out the factual background and the law regarding serious misconduct and penalty, including the leading cases on inappropriate relationships.

Serious Misconduct

72. The CAC submits that the respondent's conduct is a clear breach of the Education Council's Code of Ethics and the Code of Professional Responsibility.

73. The CAC submits that the respondent's conduct engages all three criteria in section 378 of the Act and is of a character and severity addressed by Rule 9(1)(d) and/or 9(1)(e) and/or 9(1)(o) of the 2004 Rules or Rule 9(1)(e) and/or 9(1)(o) of the current Rules.

74. In relation to Rule 9(1)(d) of the 2004 Rules, a relationship between the respondent and student began to develop when Student A was under 16 years old. Further, it is submitted that Rule 9(1)(e) of the 2004 Rules and the current Rules are engaged as the inappropriate relationship commenced partly due to the respondent's position as a teacher when he began to tutor her in mathematics.

75. The CAC acknowledges that the determination of whether a relationship is inappropriate will be a context specific enquiry. In this case what began as a coaching and tutoring relationship in 2006, relatively quickly progressed into an inappropriate relationship. This occurred before Student A turned 17 and it is submitted is conduct likely to bring discredit to the teaching profession. Similarly, misleading his employer about the nature of his relationship with Student A was also conduct likely to bring discredit to the profession.

76. The CAC highlights the following aggravating factors which can be drawn from the case law, the Northern Territory guidelines, and the Code:

    (a) The age difference between Student A and the respondent. The respondent was aged 39 when they first met. Student A was 16 when she first kissed the respondent and 17 years old when they first had sex. As previous Tribunal cases have found, an age difference "*tends to accentuate the power and balance between a student and teacher*"[3]. While age difference is a significant factor for consideration, it needs to be looked at alongside other factors to determine

[3] *CAC v Teacher C*, NZTDT 2016/40, 20 June 2017.

whether the relationship is inappropriate. In the present case there is a 24-year age gap between Student A and the respondent.

(b) The duration of the relationship between the respondent and Student A extended for many years during a formative stage in her development. As previous Tribunal cases have held, an intimate relationship with a former student may also amount to serious misconduct.

(c) The emotional, social maturity and/or vulnerability of the student. The CAC refers to the Court of Appeal decision in *Churchwood v R*[4] which noted that the age-related neurological differences between young people and adults mean that young persons may be more vulnerable to negative influences and outside pressures and may be more impulsive than adults.[5]

77. The CAC submits that Student A was a very talented and determined athlete but suffered from anxiety and later self-harm. It is submitted that the respondent used his position as an athletics coach to manipulate Student A into forming and then continuing, a relationship with her. The manipulation continued into the relationship as evidenced by the diary entries he emailed to Student A in 2012.

78. The CAC submits that the relationship was deliberately and actively pursued by the respondent and progressed to a point where the respondent and Student A were in constant text message communication and met regularly, usually in secret. Student A began to rely on the respondent for emotional support and he also began to invite her to his house, sometimes picking her up from school in his car. The CAC submits that of particular concern is that it continued after Student A's parents had repeatedly asked the respondent not to contact Student A and after he had been spoken to by other coaches and even Student A herself eventually asked him not to contact her.

79. In relation to misleading his employer, the CAC submits that the respondent deliberately omitted to advise his employer that Athletics New Zealand had been made aware of his relationship with Student A and had met with him to discuss the concerns raised. Neither did he advise that he had told the Athletics New Zealand officials that he would cease

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4 *Churchwood v R*, [2011] NZSA 531 (2011) 25 CRNZ 466
5 Above n4 at [77]

contact with Student A, instead simply giving his employer an email relating to his technical proficiency as a coach.

80. The CAC submits the respondent's actions in entering into and then continuing an intimate relationship with Student A amounted to a severe breach of and lack of appreciation for professional boundaries. The obligation rested on the respondent as a professional to maintain those boundaries.

81. Further, the CAC submits that his behaviour has the potential to not only lower the standing of the teaching profession within the community, but also to eradicate the trust that families and whānau place on teachers to act in the best interests of young persons and promote their wellbeing. This behaviour also affects the way in which students view teachers, therefore influencing the learning environment as a whole.

Case Law

82. The CAC refers the Tribunal to the following cases where the Tribunal has found that an inappropriate relationship existed and therefore serious misconduct was established:

Inappropriate (non-sexual) relationships with current students

83. In *CAC v Holmes*[6] a teacher engaged in intimate online communication with a current student at the end of the school year. The Tribunal found that all three limbs of section 378 of the Act were engaged and the behaviour was of a severity that met the criteria of Rules 9(1)(e) and (o) of the Rules.

84. The Tribunal found serious misconduct in *CAC v Teacher*[7] where a teacher developed a relationship with a Year 11 student which led to her communicating and socialising with the student outside of school hours.

85. A teacher formed a relationship with a 10-year-old student in *CAC v Teacher*[8], taking the student home on two occasions, sending personal messages on Instagram, and giving the student gifts. We said in that case[9]:

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6 *CAC v Holmes* NZTDT 2018/23, 19 September 2018
7 *CAC v Teacher* NZTDT 2016/64, 16 February 2017
8 *CAC v Teacher* NZTDT 2016/55
9 Above at [29]

> *We have said on a number of occasions that a teacher's professional obligations to his or her students do not end outside the classroom, and it is crucial that teachers maintain and respect the professional boundary placed between them and their charges…*

86. In *CAC v Huggard*[10] a teacher sent a prolific number of text messages (including personal and lengthy texts) and engaged in phone calls late at night with a Year 9 student. In the case we held[11]:

> *As the adult and the 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…*

87. The situation in *CAC v Teacher*[12] involved a teacher who had taught a student in Year 7 and 8, which development into a close relationship. When the student struggled to adjust when she moved onto College, the student's mother invited the teacher into their home to assist. The student's mother became concerned by the content of the text message between the student and the teacher. Whilst the Tribunal did not accept that the text exchange was sexually motivated, it did still find the relationship inappropriate.

Inappropriate intimate relationships with former students

88. The Tribunal found serious misconduct after a teacher performed oral sex on a student after his school leaving dinner. In *CAC v Teacher S*[13] the Tribunal found that this behaviour is *"not the conduct of a person who is fit to teach"*.[14]

89. In *CAC v Teacher*[15], the Tribunal made a finding of serious misconduct where a teacher had sex with a former student who attended a school at which he had formerly taught.

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10 *CAC v Huggard* NZTDT 2016/33, 14 November 2016
11 Above at [21]
12 *CAC v Teacher* NZTDT 2013/41, 26 August 2013
13 *CAC v Teacher S* NZTDT 2016/69, 14 June 2017
14 Above at [43]
15 *CAC v Teacher* NZTDT 2011/17, 1 September 2011

90. A teacher began interacting with a student on Facebook when the student was in Year 11 and over time the contact became more frequent and eventually intimate. When the student finished secondary school the relationship continued.[16]

91. The situation in *CAC v Teacher C*[17] involved a teacher in a youth justice facility who formed an intimate relationship with a student once he had been transferred to prison. In this case the Tribunal considered whether a teacher could ever pursue a relationship with a former student. The Tribunal noted that there cannot be a blanket prohibition on intimate relationships between teachers and former students,[18] and that, whether the relationship is inappropriate will be a context-specific enquiry.[19]

92. In *Teacher C* the Tribunal referred to the Northern Territory Teacher Registration Board's Guidelines ("NT Guidelines") and the General Teaching Council of Scotland's Code of Professionalism and Conduct. The Tribunal was assisted further by expert evidence on professional boundaries.

Penalty

93. In terms of penalty, the CAC submits that this type of conduct is not the conduct of a person who is fit to teach. Such transgressions are simply too serious to permit any other outcome in the public interest but cancellation of a teacher's registration.

94. The victim impact statements filed by the CAC, it is submitted, illustrate how far reaching and long lasting the effects of the respondent's conduct are on the student and her whānau. The CAC acknowledge that as the respondent is not currently registered and does not have a current practising certificate or an authority to teach, cancellation of registration is not possible. Therefore, the CAC submit that an appropriate penalty is one of censure.

95. The respondent has stated that he has no wish to return to teaching. While the Tribunal is able to impose conditions on any subsequent practising certificate issued to the respondent, it is very difficult to suggest meaningful conditions when the respondent would

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16 *CAC v Teacher B* NZTDT 2018-10, 8 July 2019
17 *CAC v Teacher C* NZTDT 2016/40, 28 June 2017
18 Above at [183]
19 Above at [192]

first need to apply to be registered. If he did decide to return to teaching in the future, it is submitted that the matter could be addressed through the registration process.

Ngā kōrero a te Kaiurupare – Respondents' submissions

96. Counsel for the respondent did not file submissions on liability and penalty as the behaviour was admitted by the respondent. Counsel for the respondent instead noted the following:

> 1. *The behaviour is serious misconduct, and this has been admitted already.*
>
> 2. *The only allegation of real dispute is the allegation of misleading* [redacted] *It is submitted that the Tribunal does not need to determine this given the findings and penalties already available.*
>
> 3. *The respondent agrees with the penalties suggested by the CAC save for costs.*

97. Counsel for the respondent has then filed lengthy submissions regarding costs and name suppression which we will deal with later in the decision.

Whaimana – Jurisdiction

98. The first matter for consideration is whether the Tribunal has the jurisdiction to determine the charges.

99. Section 378(1) of the Act defines serious misconduct:

> *(1) In this Part unless the context otherwise requires. –*
>
> *…*
>
> ***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.*

[Emphasis added]

100. *Teacher* is also defined in section 378(1):

> *(1) In this Part unless the context otherwise requires. –*
>
> *…*
>
> ***teacher** includes –*
>
> (b) *A registered teacher; and*
>
> (c) *A former registered teacher; and*
>
> (d) *An authorised person; and*
>
> (e) *a former authorised person*

101. On the face of it, the respondent is a teacher for the purposes of this part of the Act, in that he is a *"former registered teacher"*, both at the time of the conduct, and now.

102. However, careful consideration must be given to the interpretation of "teacher", and specifically who the legislature was intending to capture when they included in the definition "former registered teacher" and "former authorised person".

103. The Tribunal's view is that the mischief that the inclusion of *"former registered teacher/authorised person"* is intended to address is someone who has retired or finished teaching for whatever reason and later it is discovered that ***whilst they were a registered teacher***, they engaged in alleged serious misconduct. This is to respond to the potential situation where a teacher engages in serious misconduct, then leaves the profession thinking that they can no longer be held to account by the Tribunal. By being a "former registered teacher" they can be brought before the Tribunal to answer to allegations about their behaviour when they were a teacher.

104. Interpreting the definition in any other way would distort the purposes of the Act. As an example – a person registered as a teacher and practices for five years then decides to leave teaching and go on to another career. Their registration and practising certificate lapse. Some 10-15 years down the track (whilst in their new career) they are alleged to have neglected a child or young person – Rule 9(1)(c) of the Rules. Does that mean that

10-15 years since leaving the profession, that can still be brought before the Tribunal simply because they are a "former registered teacher" even though the conduct for which they are being called to account for happened at a time when they were not a teacher? We do not believe this is what was intended.

105. In this situation we have a respondent who is a "former registered teacher". He had been a registered teacher with a practising certificate for approximately 14 years before leaving teaching and letting his registration and practising certificate lapse. He then entered into a relationship with Student A and at no point during that relationship did he renew his registration. Approximately four years after the relationship ended, he sought to renew his registration and was granted a Limited Authority to teach which has also since lapsed.

106. At no time during the relationship with Student A was the respondent a registered teacher. Is it therefore in line with the Act that his conduct be brought before the Tribunal for determination? Is that what the legislature intended. We think not. Our view is that the legislature intended the Tribunal to consider matters of alleged serious misconduct that occurred while the person was a registered teacher – while they were bound by the Code of Professional Conduct or its predecessors, while they held a registration/practising certificate that required them to be of good character and fit to teach. What non-teachers do, is not of concern for this Tribunal.

107. It is axiomatic to say that if at the time of his relationship with Student A the respondent held a current registration that he would fit within the definition of "teacher", even if at the time of hearing that registration had lapsed. In that situation, it would be proper for the Tribunal to consider the charges against him because the alleged serious misconduct occurred while the respondent was a registered teacher. But the context here is that at no time during that relationship was he a registered teacher.

108. Section 5 of the Interpretation Act 1999 provides:

> ***5 Ascertaining meaning of legislation***
>
> *(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
>
> *(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*

> *(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and the organisation and format of the enactment.*

109. When considering the inclusion of *"former registered teacher"* in the definition of "teacher" we must do so in light of not so much purpose of the Act, but the purpose of the Teaching Council and the Tribunal.

110. Section 377 sets out the purpose of the Teaching Council:

> *377* ***Purpose of Teaching Council***
>
> *The purpose of the Teaching 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.*

111. It is clear that the purpose of the Council is to ensure student safety in the ***learning environment*** through raising that status of the ***profession***. The Australian Council of Professions defines a profession as[20]:

> *"…a disciplined group of individuals who adhere to ethical standards and who hold themselves out as, and are accepted by the public as possessing special knowledge and skills in a widely recognised body of learning derived from research education and training at a high level, and who are prepared to apply this knowledge and exercise these skills in the interest of others.*
>
> *It is inherent in the definition of a Profession that a code of ethics governs the activities of each Profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the Profession and are acknowledged and accepted by the community."*

112. The Code of Professional Responsibility and Standards for the Teaching Profession and its predecessor the Code of Ethics for Certificated Teachers apply to every ***certificated***

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[20] Australian Council of Professionals, 2003

teacher, meaning for these to apply, a teacher must not only be registered, but also hold a current practising certificate. This is to understandably capture those that do not necessarily work in a "classroom environment" but rather in management, administration and policy.

113. The important point being however is that they are *"members of the profession"* by virtue of their registration and practising certificate. They are accepted by the public as holding certain skills and adhering to certain ethical standards of practise and conduct.

114. At the time of his relationship with Student A, the respondent was not registered and did not hold a practising certificate, therefore it is not plausible that that intention of the legislature was to consider him a *"teacher"* for the purposes of this part of the Act and the Tribunal's disciplinary functions.

115. Further, it is important to look at the wording at the beginning of section 378 – *In this part, **unless the context otherwise requires..*** [emphasis added]. The Act is clearly saying that the interpretation of the definitions in the section requires a context specific enquiry. The purpose of the Teaching Council is to ensure the quality teaching and high standards of *registered teachers*, maintaining professional standards and ensure that those registered teachers are fit to teach. The definition of teacher under section 378 and the scope of the Tribunal's disciplinary functions therefore is concerned with the conduct of *registered teachers*. That is, their conduct while they were registered, even if at the time the matter comes before the Tribunal they are no longer registered. It is the timing of the alleged conduct that is critical. To interpret the definition of "teacher" as including the respondent, who although is a *former registered teacher*, was not a registered teacher at the time of the conduct, is inconsistent with the purpose of the Act. This is a situation where the context requires a more purposive approach.

116. This finding also applies to the allegation that the respondent misled his employer. At the time the respondent applied for the position in 2017 he was not registered and did not have a practising certificate. He was granted authorisation to teach subject to supervision from January 2018. Therefore as per our reasoning above, as the time of the alleged conduct, he was not a teacher.

117. Even if we are wrong about whether the respondent is a teacher for the purposes of the Act (and we do not think that we are), the CAC has not established its case for serious

misconduct to the requisite standard in relation to the respondent's relationship with Student A. We discuss this in detail below.

Te Ture - The Law

118. For conduct before 1 July 2015, section 139AB of the Education Act 1989 ("the Act") defines serious misconduct as:

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

119. The test under section 139AB was conjunctive meaning that as well as having one or more of the adverse consequences described in section 139AB(1)(a), it also needs to be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

For conduct from 1 July 2015

120. Section 139AB of the Act was replaced by section 378 which defines serious misconduct as:

> ***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.*

121. Like its predecessor section 378 is conjunctive and as well as requiring one or more of the adverse professional effects, the conduct must also be such that it meets the Teaching Council's criteria for reporting serious misconduct.

New Zealand Teachers' Council (Making Reports and Complaints) Rules 2004

122. Prior to 1 July 2016, the criteria for reporting serious misconduct was found in Rule 9 of the 2004 Rules.

123. The relevant rules under the 2004 Rules are:

(a) Rule 9(1)(d) – for a teacher to be involved in an inappropriate relationship with any person under the age of 16 years;

(b) Rule 9(1)(e) – to be 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;

(c) Rule 9(1)(o) – any act or omission that brings or is likely to bring discredit to the profession.

124. From 1 July 2016 to 18 May 2018[21] the 2016 Rules apply. Whilst the wording was virtually unchanged from the 2004 Rules, for completeness the relevant rules are:

(a) Rule 9(1)(e) – an inappropriate relationship with a student with whom the teacher is or was when the relationship commenced in contact as a result of his or her position as a teacher;

(b) Rule 9(1)(o) – any act or omission that brings or is likely to bring discredit to the profession.

125. If the Tribunal finds that an inappropriate relationship exists under Rule 9(1)(d)[22] and/or (e) then there is no need to consider Rule 9(1)(o) in detail as the specific allegation and elements of (d) and/or (e) have been met and in doing so the respondent's behaviour is such that brings discredit to the profession. However, if we find that the CAC has not met the burden of proof required to prove the elements of Rule 9(1)(d) or (e), we note the comments of the Tribunal in *CAC v Teacher B*[23] in that regard:

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21 Rule 9 was replaced by the Education Amendment Rules 2018 on 19 May 2018.
22 Under the 2004 Rules
23 Above n 4 at [57] to [61].

[57] The language employed in r 9(1)(o) almost replicates that used in s 378(1)(a)(iii) of the Education Act, which defines, as serious misconduct, any conduct that "may bring the teaching profession into disrepute". Section 378, which came into effect on 1 July 2015, can be contrasted with its predecessor, s 139AB of the Education Act,[24] which defined serious misconduct as behaviour by a teacher that:

> *(a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or*
>
> *(b) Reflects adversely on the teacher's fitness to be a teacher.*

[58] Thus, s 378 added a third criterion.

[59] We acknowledge the CAC's submission that the Tribunal has previously held that any discreditable behaviour that is of a severity to engage r 9(1)(o) will amount to behaviour that brings the profession into disrepute under s 378(1)(a)(iii).[25]

[60] In Teacher Y, the District Court recently held that r 9(1)(o) is not subject to the ejusdem generis rule, but rather:[26]

> *[Reflects] a legislative intention to expand the scope of the Rule beyond the categories set out in the previous subparagraphs to effectively act as a "catch all" provision catching any act or omission that brings, or is likely to bring, discredit to the profession. What that conduct might be is a matter for the Tribunal.*

[61] In 2018/41, we stated:[27]

> *While we of course accept the CAC's submission that the Tribunal is imbued with specialist expertise and therefore best placed to determine whether there has been a departure from the standards expected of a teacher[28] - given that r 9(1)(o) is a "catch all", we question how it can have application when we have held that the elements of r 9(1)(e) have not been met. As we said on 1 April 2019:*
>
> > *In this case, given that r 9(1)(e) is directly responsive to the type of mischief alleged, we are not prepared to find that this is behaviour that is caught by the general - r 9(1)(o) - where*

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[24] This was not a proceeding to which the repealed s 139AB applies (pursuant to cl 5 of Schedule 20), as the mandatory report that ultimately resulted in the CAC's notice of charge post-dated the coming into force of Part 32 of the Education Act on 1 July 2015.

[25] Referring to *CAC v Usofuno* NZTDT 2017/30 at [19] cited in *Teacher B*.

[26] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141at [66] cited in *Teacher B*.

[27] NZTDT 2018/41 at [70] cited in *Teacher B*.

[28] Referring to *Cole v Professional Conduct Committee of the Nursing Council* [2017] NZHC 1178, at [61].

> *we have held that it does not contravene the specific - r 9(1)(e). This is because the way in which it is alleged that [redacted] brought discredit to the profession was by initiating an inappropriate relationship with Student S.*

126. The CAC has helpfully referred us to numerous cases on the issue of inappropriate relationships. We note the following key principles from relevant cases:

(a) From *CAC v Huggard*, the Tribunal held: [29]

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

(b) In *Teacher C*, the Tribunal acknowledged the helpful criteria in the NT Guidelines about whether a relationship is or was inappropriate. However, the Tribunal went on to say:[30]

> *However, we emphasise that whether the relationship is inappropriate is a context specific enquiry and not amenable to a prescriptive regulation. It is essential that practitioners exercise personal judgement and ask themselves whether their behaviour towards, or interactions with, a student or former student may risk blurring the teacher/student boundary. Teachers carry the responsibility to distance themselves from any potentially inappropriate situation.*

(c) In relation to the requirement that a causal nexus must exist between the teacher-student relationship and the subsequent contact, in *CAC v Teacher*[31] we said:

> *[42] We explain our reasoning, beginning with the first element of r 9(1)(e), about which Mr La Hood submitted:*

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29 Above n 12
30 Above n 1 at [192].
31 *CAC v Teacher* NZTDT 2018/41, 20 November 2018

> *A narrow and literal interpretation of r 9(1)(e) suggests that the contact that has led to the commencement of the inappropriate relationship has to be "as a result of" the teacher's "position as a teacher". Such an interpretation could potentially exclude [Teacher B] who came into contact with the student at Kapa Haka class, after the cessation of the teacher–student relationship.*
>
> *[43] We accept the CAC's submission that a purposive approach should be taken to r 9(1)(e), "simply requiring that there be some form of causal nexus between the teacher–student relationship and the subsequent contact for the rule to be met".*
>
> *[44] We are satisfied that the respondent and Student S were in contact, at the time their relationship commenced, as a result of position as a teacher. Therefore, the first element of r 9(1)(e) is met.*

(d) The case of *CAC v Luff*[32], the teacher taught at a different school from Student A but came into contact with her in his capacity as the Volleyball and Basketball Coach for the Southern Regional Area Schools Team. An inappropriate relationship developed via Facebook, Snapchat, and text messaging. The Tribunal accepted that *"the relationship arose out of the respondent's position as a coach of a secondary schools' team and that his initial contact with Student A was as a result of his position as a teacher even though he taught at a different school."*[33]

Allegation that the respondent Misled his Employer

127. This allegation requires a separate consideration of the test under section 378 of the Act and Rule 9(1)(o) of the Rules.

128. We note further the recent decision of *CAC v Jenkinson*[34] where we agreed with submissions from the CAC that a professional practitioner is expected to be honest and candid when faced with conduct allegations. The Tribunal went on to say that *"there is not a material distinction between the duty of candour that teacher owes his or her professional body vis-á-vis that in respect to an employer. Moreover, we accept that this*

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32 *CAC v Luff* NZTDT 2016-70 25 July 2017
33 Above at [4]
34 *CAC v Jenkinson* NZTDT 2018/14

expectation of cooperation and honesty applies notwithstanding that the practitioner considers the allegation to be spurious."[35]

Kōrerorero – Discussion

129. If we were satisfied that the respondent was a teacher for the purposes of the Act, there are two quite separate allegations, firstly the alleged inappropriate relationship with Student A and secondly the alleged misleading of his employer which we discuss each separately.

The charges involving an alleged inappropriate relationship with Student A

Factual Findings

130. The Notice of Charge alleges that the respondent engaged in inappropriate conduct in the following ways:

(a) Engaging in ongoing conduct with Student A, including discussing personal matters, despite being asked to desist by Student A's parents;

(b) Regularly meeting with Student A in secret, in spite of Student A's parents' wishes;

(c) Telling Student A that she would not be able to succeed in athletics without his help, after Student A's parents had decided that they did not want him to coach her;

(d) Picking Student A up from school in his vehicle;

(e) Giving Student A a necklace as a gift;

(f) Loaning Student A money;

(g) Meeting with Student A at his house; and

(h) Continuing to meet with and communicate with Student A after telling Student A's parents that he would not do so.

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[35] Above at [22]

131. The above factual allegations are all accepted by the respondent in the evidence, so we will move on to consider whether the specific elements of the charges would been established.

132. For these charges, given the dates of the conduct (2006-2013) the relevant statutory framework is section 139AB of the Act and the 2004 Rules.

133. The respondent has admitted that an intimate relationship developed between himself and Student A. He accepts that his conduct amounts to serious misconduct. That said, we question the sincerity of the respondent's acknowledgement of his conduct given that he had continued to maintain that Student A was "responsible" for the relationship. In evidence he said:

> *What I don't accept is the insinuation that I was responsible for this relationship and/or preyed on a vulnerable person. It was very much a two-way street. [Student A] was very sophisticated in advancing the relationship.*

134. However, the Tribunal must still determine itself whether in fact the CAC has made out the charge against the respondent.

135. We have no hesitation in finding that the respondent's conduct meets the limbs of section 139AB of the Act. Firstly, it adversely affected Student A's wellbeing, and the evidence is clear of not only the impact on Student A while she was at school, but also the long-term impacts of the respondent's actions. We are also satisfied that the conduct reflects adversely on the respondent's fitness to be a teacher. Entering into a personal and then sexual relationship with Student A in her Year 13 year and her becoming pregnant as a result, is the most extreme and incredibly traumatic example of consequences of the respondent's behaviour and without a doubt reflects on his fitness to be a teacher.

136. Turning now to whether or not the respondent's conduct is also of a nature and severity that meets the Teaching Council's criteria for reporting serious misconduct. Specifically, the CAC alleges the respondent's conduct is addressed by the following Rules in the 2004 Rules:

(a) Rule 9(1)(d) – for a teacher to be involved in an inappropriate relationship with any person under the age of 16 years;

(b) Rule 9(1)(e) – to be 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;

(c) Rule 9(1)(o) – any act or omission that brings or is likely to bring discredit to the profession.

Rule 9(1)(d) – for a teacher to be involved in an inappropriate relationship with any person under the age of 16 years

137. This Rule covers the period from October 2006 when the respondent and Student A met and 9 March 2007 when Student A turned 16.

138. From October 2006 until January 2007 the respondent and Student A were in a coaching relationship and he was also tutoring her in maths. All was approved by Student A's parents. Student A was 15 at the time.

139. Student A's evidence is that were texting regularly during this time, but it was not inappropriate, and she described it as *"Nothing that I would say was flirting"*.

140. In December 2006, Student A's parents were told about rumours that the respondent allegedly had relationships with young girls. They raised their concerns with another athletics coach who spoke to the respondent about the allegations. The respondent made the decision to no longer coach Student A. He was asked to have not further contact with her. The respondent did not speak directly with Student A's parents about their concerns.

141. The respondent wrote to Student A's parents on 24 January 2007 explaining his coaching methods and noting that he would modify his approach in response to the concerns that had been raised with him about his coaching style. Nowhere in the letter did he say the concerns had been raised by Student A's parents, nor did he mention Student A. The letter was very general in that regard. He enclosed a Code of Conduct that he had recently prepared based on the feedback that he had received.

142. Despite deciding to terminate his coaching relationship with Student A, the evidence is that from January 2007 when Student A returned home from holiday, she continued to engage via text message with the respondent. She believed that he was the only coach

that could help her reach the elite levels she aspired to, and he confirmed this mindset by telling her that she would not *"make it in athletics"* without him.

143. The evidence is that Student A started attending training sessions with the respondent after school without her parent's knowledge.

144. Student A turned 16 on 9 March 2007.

145. The question for the Tribunal is whether during the period from January 2007 to 9 March 2007 when Student A turned 16, the respondent was involved in an inappropriate relationship with Student A.

146. We note that the only evidence we have about the continued coaching "in secret" is that it was happening "after school". At the earliest this would have commenced in early February 2007 (being the beginning of the school year) and would have continued for a month until Student A's 16th birthday.

147. Student A describes that coaching at that time:

> *There wasn't anything dodgy going on. It was just that nobody knew where I was or what I was doing.*

148. The respondent's evidence is that there were other athletes at these sessions and therefore they were only "secret" in so much as Student A's parents were not aware Student A was attending. For the purposes of Rule 9(1)(d), at the most they continued for a month until Student A turned 16.

149. The respondent continued to engage with Student A and coach her despite being aware of her parents' concerns and having made the decision to terminate his formal coaching relationship with her. However, there is no evidence to suggest that during this month, the text messaging was excessive, the nature of the engagement was personal, or that the respondent and Student A were meeting for any other purpose other than coaching.

150. Given the short time period of just over a month (this being from the end of January 2007 when the respondent terminated his coaching relationship with Student A due to the concerns raised by her parents until her 16th birthday on 9 March 2007) that the Tribunal has to consider whether or not the respondent's conduct amounts to an inappropriate

relationship, and Student A's own evidence that at this time, there was nothing personal in the relationship, we are not satisfied that the CAC has established that an inappropriate relationship existed at this time.

151. Whilst we do not condone that the respondent continued to engage with Student A despite being fully aware that her parents did not know this was happening, we do not believe that this in and of itself is enough to establish that an inappropriate relationship existed in that month prior to Student A turning 16, there also being no intimate or personal communication at that time.

152. We also note that although Student A's parents raised concerns about the respondent with another coach, initially they did not seek to terminate the formal coaching relationship. That was the respondent's decision after hearing the concerns from another coach.

Rule 9(1)(e) – to be 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

153. This Rule covers the period 9 March 2007 (when Student A turned 16) onwards.

154. In relation to whether the respondent's conduct meets the requirements of Rules 9(1)(e), the Tribunal must be satisfied of two things:

(a) Firstly whether the respondent was involved in an inappropriate relationship with Student A, and

(b) Secondly whether the respondent was in contact with Student A at the time the relationship commenced, as a result of his position as a teacher.

155. The first limb is very straightforward. The respondent accepts that during Student A's Year 12 year (2007), their relationship grew into a personal one, and in her Year 13 year (2008), further developed into an intimate relationship that continued until 2013.

156. We have no hesitation in concluding that the inappropriate relationship existed from 2007 when the respondent and Student began meeting outside of coaching and the texting became personal, excessive, and late at night. The relationship intensified and in 2008 became sexual and ultimately Student A fell pregnant towards the end of her Year 13 year.

157. We find the respondent's behaviour abhorrent. Student A was in a position of vulnerability and looked up to the respondent as a mentor, coach, and confidant. He took advantage of her insecurities and exploited the trust she and her parents placed in him. The fact that he has attempted to apportion blame for the relationship on Student A confirms his lack of self-awareness, ability to reflect on his conduct and take responsibility for his actions.

158. However, for Rule 9(1)(e) to be satisfied, the respondent had to have been in contact with Student A at the time the relationship commenced, as a result of his position as a teacher. At this time, the respondent was not registered and did not hold a practising certificate. The sole reason that the respondent and Student A came into contact was in his position as a sports coach. It was outside of any educational setting.

159. In *CAC v Teacher*[36] we said that a purposive approach should be taken to Rule 9(1)(e), simply requiring that there must be some form of causal nexus between the teacher-student relationship and the subsequent contact. In that case the teacher had taught the student for a couple of years and she was also in the school's Kapa Haka roopū which the teacher was also involved in as a tutor. A few months after leaving school, the student joined the teacher's adult Kapa Haka roopū and a relationship developed. The Tribunal found that the teacher and student were in contact, at the time their relationship commenced, as a result of position as a teacher.

160. Contrast that with the factual scenario here, where the respondent and Student A were in contact when their relationship commenced, as a result of his position as a sports coach, not as a teacher. Further at the time they met the respondent's registration and practising certificate had lapsed. They had not known each other previously in any capacity.

161. In the case of *CAC v Luff*[37]*,* the teacher taught at a different school from Student A but came into contact with her in his capacity as the Volleyball and Basketball Coach for the Southern Regional Area Schools Team. An inappropriate relationship developed via Facebook, Snapchat, and text messaging. The Tribunal accepted that *"the relationship arose out of the respondent's position as a coach of a secondary schools' team and that*

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[36] Above n 31
[37] Above n 32

his initial contact with Student A was as a result of his position as a teacher even though he taught at a different school."[38]

162. In present case, the respondent was not a registered teacher, he came into contact with Student A at an athletics training camp, as a coach – that was his sole role at that camp. Whilst he had been a registered teacher, the respondent is also an experienced and accomplished sports coach. Even if he had not been a teacher, he still would have been at the athletics training camp in his capacity as a sports coach. It is our view that the respondent and Student A were in contact, at the time their relationship commenced as a result of his position as a sports coach, not as a teacher.

163. In terms of the maths tutoring, this was a secondary coincidence. It so happened that Student A's new sports coach, was a former maths teacher so was able to support her in that area as well. The maths tutoring was only for a couple of months, supervised in Student A's home, and was purely contractual with no evidence that the relationship developed further during that short period.

164. While we would have been satisfied that an inappropriate relationship developed, the second limb of Rule 9(1)(e) cannot be established in that the respondent and Student were not in contact when the relationship commenced as a result of the respondent's position as a teacher.

Rule 9(1)(o) – any act or omission that brings or is likely to bring discredit to the profession

165. While we in no way condone the respondent's conduct had he been a teacher, and on the face of it his actions in pursuing a relationship with Student A would bring discredit to the profession, we do not think that Rule 9(1)(o) could have been applied when the specific elements of the Rule designed to capture this behaviour – Rule 9(1)(e), have not been met. We refer again to our comments in *2018/41*[39]

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[38] Above at [4]
[39] Above n 31 at [65] – [70]

Does rule 9(1)(o) of the Rules apply to the respondent's behaviour?

[65] The CAC submitted that r 9(1)(o), as well as r 9(1)(e), applied. The former rule describes "any act or omission that brings, or is likely to bring, discredit to the teaching profession".

[66] The language employed in r 9(1)(o) almost replicates that used in s 378(1)(a)(iii) of the Education Act, which defines, as serious misconduct, any conduct that "may bring the teaching profession into disrepute". Section 378, which came into effect on 1 July 2015, can be contrasted with its predecessor, s 139AB of the Education Act,33 which defined serious misconduct as behaviour by a teacher that:

> *(a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or*
>
> *(b) Reflects adversely on the teacher's fitness to be a teacher.*

[67] Thus, s 378 added a third criterion.

[68] We acknowledge the CAC's submission that the Tribunal has previously held that any discreditable behaviour that is of a severity to engage r 9(1)(o) will amount to behaviour that brings the profession into disrepute under s 378(1)(a)(iii).

[69] In Teacher Y, the District Court recently held that r 9(1)(o) is subject to the ejusdem generis rule, but rather:

> *[Reflects] a legislative intention to expand the scope of the Rule beyond the categories set out in the previous subparagraphs to effectively act as a "catch all" provision catching any act or omission that brings, or is likely to bring, discredit to the profession. What that conduct might be is a matter for the Tribunal.*

[70] While we of course accept the CAC's submission that the Tribunal is imbued with specialist expertise and therefore best placed to determine whether there has been a departure from the standards expected of a teacher - given that r

> *9(1)(o) is a "catch all", we question how it can have application when we have held that the elements of r 9(1)(e) have not been met. As we said on 1 April 2019:*
>
> > *In this case, given that r 9(1)(e) is directly responsive to the type of mischief alleged, we are not prepared to find that this is behaviour that is caught by the general - r 9(1)(o) - where we have held that it does not contravene the specific - r 9(1)(e). This is because the way in which it is alleged that brought discredit to the profession was by initiating an inappropriate relationship with Student S.*

166. As was the case in *2018/41*,[40] the way in which the respondent allegedly brought discredit to the profession is by entering into an inappropriate relationship with Student A. However, as we would have held that the specific elements of Rule 9(1)(e) were not met and therefore the "catch all" Rule 9(1)(o) cannot be relied on to capture conduct that does not reach the requisite standard of the specific rule directly responsive to the mischief alleged.

Misleading his Employer

167. It is further alleged that the respondent misled his employer regarding his relationship with Student A.

168. The respondent sought to renew his registration and practising certificate in March 2017.

169. When the respondent applied for a teaching position at a Christchurch school in 2017, a police vet revealed details about his relationship with Student A. The respondent was asked for further information including whether Athletics New Zealand were aware of the matter. The respondent provided correspondence to the Christchurch school between himself and two senior members of Athletics New Zealand which discussed his abilities as a high-performance coach. He did not disclose any details of Athletics New Zealand's investigation into his conduct.

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[40] Above n 31

170. The respondent was asked specifically for further information about his relationship with Student A and whether Athletics New Zealand were aware of the matter. In fact, Athletics New Zealand had investigated and reached an outcome:

> *As a result of our investigation we have determined that Athletics New Zealand will have no formal relationship with Andrew in the immediate future. This will extend to any Athletics New Zealand team management or team coaching positions.*

171. This decision was communicated to Student A's parents on 9 February 2014.

172. The respondent for reasons unknown to the Tribunal has chosen not to respond to this allegation other than to say that he denies the allegation, does not fully understand it and given that he has accepted his conduct in relation to the relationship with Student A, then the Tribunal does not need to determine this issue.

173. Putting aside the fact that we have already determined that the respondent is not a teacher for the purposes of the Act, the Notice of Charge alleges that the respondent misled his employer. Therefore in the absence of any amended notice removing that charge, the Tribunal would be required to determine the charge.

174. We note our comments in *CAC v Jenkinson*[41] about the duty of candour owed by a teacher:

> *"there is not a material distinction between the duty of candour that teacher owes his or her professional body vis-á-vis that in respect to an employer. Moreover, we accept that this expectation of cooperation and honesty applies notwithstanding that the practitioner considers the allegation to be spurious."*

175. The respondent should have disclosed all information about the matter to his prospective employer, including the fact that Athletics New Zealand had investigated the matter and the outcome of that investigation. It was a deliberate decision on his part to withhold that information, and in simple terms was inherently dishonest, even more so when he was specifically asked whether Athletics New Zealand were aware of the matter.

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[41] Above n 34

176. If the respondent was a "teacher" would his conduct in misleading his employer amount to serious misconduct pursuant to section 378 of the Act and Rule 9(1)(o) of the Rules?

177. The respondent's conduct in not being open and transparent with his employer is unlikely to adversely affect the wellbeing or learning of any students. However, we are satisfied that not honouring the duty of candour to your employer does reflect adversely on the respondent's fitness to be a teacher and may being the teaching profession into disrepute based on the test in *Collie*.[42]

178. Turning now to whether the respondent's conduct is also of a character and severity that meetings the Teaching Council's criteria for reporting serious misconduct.

179. Although not clear from the Notice of Charge, we have assumed that in relation to this charge, the CAC alleges that the respondent's conduct falls within Rule 9(1)(o) – any act or omission that brings, or is likely to bring, discredit to the teaching profession.

180. The respondent as a 39-year-old athletics coach entered into a relationship with a 16-year-old student whom he coached. His conduct was investigated by Athletics New Zealand and an outcome reached. When applying for a teaching position, he was asked for details about the relationship and also whether Athletics New Zealand were aware. Instead of disclosing the details about the investigation, he instead provided correspondence with Athletics New Zealand regarding his proficiency as a coach. This in our view is deliberately deceitful. The respondent's actions in that regard are likely to bring discredit to the teaching profession. We would have found serious misconduct established, albeit at the lower end.

Kupu Whakatau – Decision

181. This was a very difficult matter for the Tribunal and we have considerable empathy for Student A and her whānau.

182. However, as set out above the respondent is not a ***teacher*** for the purposes of the relevant part of the Act and therefore the matter must be dismissed for lack of jurisdiction.

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[42] *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

He Rāhui tuku panui – Non-publication

183. The respondent has sought name suppression on the following grounds:

(a) Publication of the respondent's name will lead to the identification of Student A

(b) The respondent is well known in sporting circles and publication of his name may lead to "sensationalist media stories";

(c) This is a professional conduct hearing with the purpose of ensuring student safety and should not be used as a vehicle for "misguided punishment", revenge or warning others.

184. There is also a mention of the respondent suffering from mental health challenges, but we have been provided with no detail or more importantly medical evidence confirming this.

185. Student A and her mother are opposed to name suppression.

186. The respondent submits that Student A and her mother's anger is clouding their judgement on how naming the respondent will lead to her identification also. Student A is aware that this is a possibility, but still opposes name suppression. Her evidence is that she is now in her late twenties, no longer resides in Christchurch and although challenging, can handle any publicity that may result.

187. 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) further 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.*

188. Therefore, in deciding whether to make an order prohibiting publication, the Tribunal must consider the interests of various affected parties, as well as the public interest. If we think it is proper to do so, we may make such an order.

189. In *M v Police* (1991) 8 CRNZ 14 Fisher J discusses the importance of open justice:

> *In general the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice should be seen to be done. That approach will be reinforced if the absence of publicity might cause suspicion to fall on other members of the community, if publicity might lead to the discovery of additional evidence or offences, or if the absence of publicity might present the defendant with an opportunity to re-offend.*[43]

190. The presumption in favour of open justice is again articulated by the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 at 546:

> *… the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public"…The basic value of freedom to receive and impart information has been re-emphasised by s 14 of the New Zealand Bill of Rights Act 1990.*

191. The principle of open justice therefore exists regardless of any need to protect the public. The nature of s 405 of the Act is consistent with s 95(2)(d) of the Health Practitioners Disciplinary Act 2003, which was considered in *Dr A v Director of Proceedings*[44] by Panckhurst J, who said:

> *The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable to do order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.*

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[43] *M v Police* (1991) 8 CRNZ 14, p15

[44] High Court, Christchurch, CIV 2005-409-002244, 21 February 2006, Panckhurst J.

192. In this jurisdiction, we have previously held that "proper", sits somewhere between "exceptional" as is the case in the courts and "desirable" as is required in the HPDT.[45]

193. In our view the basic tenor of the respondent's position is that as he is a well-known and highly successful sporting coach, publication of his name would tarnish his reputation. There appears to be a shallow attempt at showing concern for Student A's wellbeing should she be identified by association, but we question the genuine sincerity of this.

194. We note that all the letters filed in support of the respondent's application for name suppression confirm that knowledge of the relationship between the respondent and Student A (at varying levels of detail) are already widely known in athletics circles.

195. One of the letters suggested that publication of the respondent's name may cast a cloud of suspicion over other female athletes he has coached, with members of the public potentially drawing the wrong conclusion as to who Student A is. This could cause other female athletes that have been coached by the respondent, undue stress.

196. We have also taken into account the fact that we have dismissed the charged for want of jurisdiction. We note that in that regard, the dismissal of the case is simply another factor that we must weigh up, and is not in and of itself sufficient to overturn the presumption of publication.

197. We have considered the interests of the other female athletes coached by the respondent, and significantly the interests of Student A given that there is a real possibility that naming the respondent could lead to her being identified. Student A and her mother have acknowledged that publication of the respondent's name could lead to her identity yet still oppose name suppression.

198. The evidence before us is clear that those in the athletics world who are the ones most likely to be interested in this decision, are already aware, albeit at varying levels, of the relationship between the respondent and Student A.

199. The grounds advanced by respondent do not persuade us that the principle of open justice is displaced with respect to the respondent and we do not think it is proper to order non-publication of the respondent's name. We do so on the expressed understanding of

[45] See for example *CAC v Mackay* NZTDT 2018/69

Student A that it is possible that she may be identified as a result of the publication of the respondent's name.

200. Despite Student A's position regarding the publication of the respondent's name, the CAC seeks name suppression for Student A. We order non-publication of Student A's name and any identifying particulars including the names of her family members who have provided evidence and the school she attended pursuant to section 405(6) of the Act. Whilst we have no hesitation making an order for non-publication with respect to Student A, as noted above, there is a possibility she could be identified due to the publication of the respondent's name, however Student A via Counsel and in her victim impact statement opposed name suppression for the respondent with full knowledge of the potential risk of identification.

Utu Whakaea – Costs

201. CAC seeks a 40% contribution to costs. The following is the cost schedule provided by the CAC:

Complaints Assessment Committee Costs	**Amount**
Costs of Complaints Assessment Committee (GST exclusive)	$1,618.94
Legal Costs and disbursements for Tribunal Proceedings (GST exclusive)	$20,674.28
Total Costs	$22,293.22
Total Costs Sought (40%)	$8,917.29

202. The Tribunal costs for a hearing on the papers are $1145.00

203. The respondent has filed detailed submissions as to costs. However, given our substantive findings we invite further submissions on costs from the parties by **17 March**, following which the matter will be referred to the Deputy Chair for a decision on costs.

204. We make the following preliminary comments for consideration by the parties in their preparation of costs submissions. This matter was appropriately brought by the CAC, we do not believe the filing of the charges to be vexatious. Whilst we ultimately found that we did not have jurisdiction, it was a matter that was properly brought before the Tribunal for determination.

Rachel Mullins
Deputy 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).