BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2020-15

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

Decision on Charge, Penalty and Publication

Tribunal Members:	T J Mackenzie (Chair) S Walker W Flavell
Date of Hearing:	29 September 2020
Final submissions received:	9 November 2020
Representation:	Mr Neild for the CAC Mr Hope for the respondent
Date of decision:	4 December 2020

Introduction

1. As a result of two separate incidents, the Complaints Assessment Committee (CAC) charges the respondent with conduct that it says is serious misconduct, or at the least, conduct that would entitle the Tribunal to exercise disciplinary powers.

2. The parties have reached an agreed factual position, supplemented with further evidence.

3. Liability for the charge is contested.

4. This decision will consider whether the charge (or alternative charge) has been proven, if so what penalties should issue, and whether non publication orders should be made. Costs will be reserved.

Summary of this decision

5. The following findings and orders are made in this decision:

    a) The charge of serious misconduct has been made out.

    b) The respondent has been censured, the register annotated, a direction made to notify employers of this decision, and a mentoring programmed directed.

    c) Publication of the respondent's name has not been prohibited.

    d) Student A's name and the names of the respondent's family members have been prohibited from publication.

    e) Likewise all evidence advanced in support of the publication arguments has been prohibited from publication (and a redacted version of this decision will issue).

    f) The interim publication prohibitions will continue until 12 pm 29 January 2021, enabling the respondent to consider any further proceedings/appeals regarding this proceeding and publication.

    g) Costs are reserved.

Charge

6. The charge reads as follows:

> The CAC charges that the teacher has engaged in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
>
> **Particulars of the Charge**
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> 1. The CAC charges that **DANIEL MARK MATHIE** registered teacher, of Auckland:
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> a) during a PE class at the College in 2018, struck a student multiple times across his head with an open hand, as part of a planned class activity; and/or
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> b) at a school camp for College students in the Abel Tasman National Park in April 2019, made a racist statement and/or statements to a Student And/or students.
>
> 2. The CAC charges that the conduct alleged in paragraph 1a amounts to serious misconduct and the conduct alleged in paragraph 1b amounts to misconduct. The conduct in paragraph 1a and 1b, cumulatively amounts to serious misconduct, pursuant to section 378 of the Education Act 1989 and Rule 9(1)(a) and/or (b) and/or (j) and/or (k) of the Teaching Council Rules 2016 (as drafted after the amendments on 18 May 2018) and/or and Rule 9(1)(a) and/or (c) and/or (n) and/or (o) of the Teaching Council Rules 2016 (as drafted prior to the amendments on 18 May 2018), or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

Agreed facts

7. The parties have agreed on the following facts:

Background

1. The respondent, **DANIEL MARK MATHIE**, is a registered teacher. The respondent had been employed at ACG Parnell College (**the school**) for 18 years. He had worked as Head of Department for Physical Education (**PE**) and as a PE Teacher. He also worked as Dean of Years 9 – 11 for 16 years. The respondent resigned on 15 May 2019. His practising certificate is due to expire on 26 May 2020.

Striking Student A across the head

2. In 2018, as part of a PE lesson on Psychological Theory, the respondent organised an "experiment" where two students would play a game of paper, scissors, rocks. The respondent asked for volunteers. Student A volunteered after no other student did.

3. The respondent advised Student A that as part of the "experiment" there would be physical activity, but Student A did not know what was going to

happen.

4. As Student A played paper, scissors, rocks with the other student, he received a lolly every time he picked rock. Every time Student A picked scissors or paper, the respondent struck him across the back of the head with an open hand. Student A did not suffer any physical injuries.

5. Over the course of the "experiment", the respondent struck Student A across the back of the head multiple times.

6. A student watching the "experiment" recorded a video of it on his cell phone.

Teacher's response

7. As part of the school's investigation, the respondent provided the principal with a written statement in which he said that this incident was, in hindsight, ill advised. He also said that it was inappropriate and unacceptable. The respondent has said that this incident felt like a continuation of other contact games where there was "an element of intentional and controlled physical contact".

8. The respondent also said in his written statement that he "has not been violent towards a student, struck a Student as punishment or in anger or lack of self-control". The respondent said that Student A was aware, before the "experiment" started, that it would involve physical contact from the respondent but they were not advised where, when, how or why the physical contact would occur. The respondent said this was for Student A to work out as part of conditioned behaviour that was to be developed through the "experiment".

9. The respondent said that he had a good relationship with Student A and that Student A never mentioned the incident in a negative way, but now acknowledges that this could have been due to the respondent being in a position of power.

Racist statements

10. In April 2019, during a school camp in the Abel Tasman National Park, the respondent was speaking with students about their dinner choices. When Student O, an Asian student, told the respondent that he was eating noodles, the respondent said words to the effect of "you're so Asian."

11. The respondent's statement made some students feel uncomfortable. The respondent then said that the students should not worry about it and said something to the effect of "it's just like one African-American calling another one a Nigger." This comment also shocked students.

Teacher's response

12. In his written statement to the school's principal, the respondent said that

the reference to Student O being "so Asian" was a "a bit of an in-class joke" due to a prior class discussion about the make-up of the school's roll and a student's comment that the respondent was "more Asian" than Student O because he had taught at the school for such a long time. The respondent says that his use of the word "nigger" was done in an "educational sense and was referring to how African Americans often use it in songs and movies and are able to do so as they are the same race."

13. In his written statement, the respondent said that making these "jokes" was a passive, casual form of racism and that he will not do this again. The respondent has also now said that saying the word "nigger" in any context is inappropriate and that he will not do so again.

Further evidence

8. In addition to the agreed evidence, we have received briefs and heard in person further evidence from the respondent, from Student A and from Dr Barrie Gordon, expert witness for the CAC.

9. The evidence of Dr Gordon was objected to by the respondent prior to the hearing on the basis that it was served too late to fairly respond to and was largely irrelevant or hypothetical.

10. The Tribunal convened a conference on Friday 25 September 2020 to discuss the evidence. The respondent opposed its admission, but at the same time did not seek to adjourn the proceedings to enable more time to respond (due to the respondent's desire to have the proceedings determined).

11. After hearing from the parties the Tribunal advised that the evidence would be provisionally admitted and heard further at the hearing. If it was to be finally admitted, the respondent would be given an opportunity to provide any opinion evidence in response after the hearing, and a further hearing could be arranged (whether in person or by audio or internet).

12. Having now considered the evidence further, and the respondent's own responses to it, the Tribunal has determined to admit the evidence of Dr Gordon. We have taken into account the admissibility tests from the Evidence Act 2006, which at s 25 provide that the evidence should be substantially helpful in understanding other evidence or ascertaining any fact that is of consequence in this case. We have also taken into account the wider evidence admissibility provisions that apply in this Tribunal.

13. An occupational tribunal will often not need expert evidence on its own subject matter. However, there is no general presumption one way or the other. Each case will turn on the issues at hand and the actual evidence being offered. Here, we have a very unusual set of facts. The act of a physical experiment involving hitting of a student

in a classroom by a teacher is something unfamiliar to the Tribunal. Likewise, the respondent's explanation that he considered it to be a legitimate teaching activity is at issue, and is likewise unfamiliar to this Tribunal. We are therefore interested to hear more on these issues from someone qualified to discuss research and give an opinion on them, which we consider Dr Gordon to be. In other words, we consider that we will obtain substantial assistance on matters of fact that are of consequence in this case. Ultimately whether it is serious misconduct or not will be a matter for the Tribunal.

14. We also note that the respondent himself had an opportunity to respond to Dr Gordon's evidence, which he has done at the hearing of this matter in person via a supplementary brief. The respondent has subsequently advised that he will not be advancing any separate opinion evidence.

Legal principles to be applied to the evidence

15. Section 378 of the Education Act defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes. Under s 378(1)(a)(i) to (iii), it is that which:

> i) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or
>
> ii) Reflects adversely on the teacher's fitness to be a teacher; and/or
>
> iii) May bring the teaching profession into disrepute.

16. Regarding the first limb. In *CAC v Marsom* this Tribunal said that the risk or possibility is one that must not be fanciful and cannot be discounted.[1] The consideration of adverse effects requires an assessment taking into account the entire context of the situation found proven. Direct evidence from the child as to affects is not mandatory and indeed is rare. Nor does the ambit of s 378(1)(a)(i) call for direct evidence. The use of the term "likely" permits the Tribunal to draw reasonable inferences as to affects or likely affects, based on the proven evidence in a case and its own knowledge.

17. The second limb has been described by the Tribunal as follows:[2]

> We think that the distinction between paragraphs (b) and (c) is that whereas (c) focuses on reputation and community expectation, paragraph (b) concerns whether the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers or by the community. The views of the teachers on the panel inform the view taken by the Tribunal.

[1] *CAC v Marsom* NZTDT 2018/25, referring to *R v W* [1998] 1 NZLR 35.
[2] *CAC v Crump* NZTDT 2019-12, 9 April 2020.

18. The third limb of the test is assisted by reference to the High Court decision in *Collie v Nursing Council of New Zealand.*[3] The Court held that a disrepute test is an objective standard for deciding whether certain behaviour brings discredit to a profession. The question that must be addressed is whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the conduct of the practitioner.

19. The Court of Appeal recently affirmed that the test for serious misconduct in s 378 of the Education Act 1989 (the Act) is conjunctive with the Teaching Council Rules 2016 mandatory reporting criteria (the Rules).[4] The Rules describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.

20. Therefore for serious misconduct to be made out, as well as meeting one or more of the three limbs set out above, the conduct concerned must at the same time meet one or more of the Teaching Council's criteria for reporting serious misconduct. These rules make the following behaviour mandatory to report:

> (a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:
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> (b) emotional abuse that causes harm or is likely to cause harm to a child or young person:
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> (c) neglecting a child or young person:
>
> (d) failing to protect a child or young person due to negligence or misconduct, not including accidental harm:
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> (e) breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher; for example,—
>
> > (i) engaging in an inappropriate relationship with the child or young person:
> >
> > (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:
> >
> > (f) viewing, accessing, creating, sharing, or possessing pornographic material while at a school or an early childhood education service, or while engaging in business relating to a school or an early childhood education service:
> >
> > (g) acting dishonestly in relation to the teacher's professional role, or committing theft or fraud:

[3] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[4] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

(h) being impaired by alcohol, a drug, or another substance while responsible for the care or welfare of a learner or a group of learners:

(i) permitting or acquiescing in the manufacture, cultivation, supply, offer for supply, administering, or dealing of a controlled drug or psychoactive substance by a child or young person:

(j) an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:

(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

21. In this case, criteria (a) is relied on – that the force was unjustified or unreasonable. This requires a context specific analysis.[5]

22. The burden rests on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in mind. [6]

23. The charge has two particulars. In theory the charge could be made out on one or the other being proven.

Our findings

First particular (classroom incident)

24. The parties have referred us to various cases involving allegations of violence by teachers. Whilst each case is different, intentional violence is an area that will nearly always result in a finding of serious misconduct.

25. This case however presents a set of facts and circumstances new to the Tribunal. Ultimately we must apply the legal tests to the facts, and apply our own knowledge of standards in this area as a specialist tribunal.

26. In doing so we are satisfied that the conduct in particular one amounts to serious misconduct. The Tribunal is not surprised by Dr Gordon's evidence that he could find no examples of this type of activity in any research. Nor has the respondent been able to put any before us. The conduct is likewise novel to the Tribunal.

27. The respondent explains the background to the incident. He explains that the lesson was an experiment to demonstrate behavioural theories of learning based on positive and negative reinforcement. This comes from well-known studies of Thorndike and Skinner. In this example there were lollies for positive reinforcement and strikes to

[5] *CAC v Teacher* NZTDT 2016/50, *CAC v Mackey* NZTDT 2016/60 and *CAC v Whelch* NZTDT 2018/4.
[6] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

the head for negative reinforcement.

28. We note, and we agree with Dr Gordon's observations, that there were other equally valuable and quite obvious ways to carry out this lesson that did not involve the use of force.

29. A consistent theme of the respondent's submissions and evidence is that this conduct is justifiable (and hence the charge is denied). The respondent considers that it should be seen simply on a continuum of more common physical interactions between a teacher and a student in a physical education setting, for instance basketball, dodge ball or rugby tackling.

30. We reject that proposition. It is within the spirit of those activities that there will be blocking, ball contact, or tackles. That is both expected and implied. But even within those there would be a line that could be crossed, so as to make the legitimate become illegitimate. For instance, a teacher could demonstrate rugby tackling in a mechanical manner. But a heavy head high tackle by that teacher would likely cross the line.

31. Here however we have a classroom setting. It is not a physical contact sport. There is no line to cross. This is because in our view (similar to Dr Gordon's view) it is not an expected or implied part of a classroom sports psychology lesson that a student will be struck in the head seven times, with reasonable force, by their adult male teacher. Indeed, even in a contact sport setting, this would stand out just as much. There is no "physical sports lesson" continuum to place this behaviour on. It stands out on its own and does so quite strikingly to this Tribunal.

32. In making that finding we note that the respondent had good intentions. We accept that he genuinely considered he was carrying out a productive exercise. He exercised poor judgment however. That lack of judgment belies his otherwise excellent experience and the Tribunal is surprised that the respondent did not reconsider this experiment before carrying it out.

33. We are satisfied that all three limbs of the serious misconduct test are made out. The incident, in our view, was likely to have affected or adversely affected a student. It does not matter that Student A gives evidence that he was not affected. That is not the test. The issue of the likely affect versus actual affect is a matter to be considered on penalty (if even relevant to penalty). It does not affect liability for the charge. Standing back we consider that an adult teacher carrying out this activity on a student meets this test. We also accept Dr Gordon's evidence that there is potential impact on other students. Dr Gordon notes that research has shown that witnessing acts of violence can have a negative impact on students (and he gives examples of family violence, corporal punishment and non-curriculum violence in schools). Whilst the present situation has not been specifically addressed in any of those studies, we agree

that it too could cause a negative impact.

34. We consider that this behaviour could only reflect adversely on a teacher's fitness. How adversely may be a matter for penalty.

35. We also consider that the conduct would bring the profession into disrepute. Any reasonable observer would be left questioning the profession if this behaviour was seen. We do not ignore the wider context, and do not make that judgement purely on the head strikes in isolation. However the explanation for the apparent necessity of this experiment, and the (not fully informed) consent of Student A, does not give the conduct more credibility. It is questionable if the wider context gives it more credibility at all given the lesson need not have occurred in this way.

36. We also consider that the Teaching Council criteria for reporting serious misconduct are met – particularly para (a), unjustified or unreasonable physical force. We do not consider it was a justified act, and even if it were, the force used was unreasonable. The video indicates that the strikes are of a moderate force. The Tribunal was surprised to see the level of force that was used. To be candid, the Tribunal had been expecting something less before seeing the video. Therein lies the inherent flaw with this experiment being conducted in this setting – to "send the message" to the student, some force was required. A gentle touch would have been futile and confusing. The respondent somewhat committed himself to having to use unreasonable and unjustified levels of force by the very design of this "experiment".

37. We note finally that various matters were raised by the respondent regarding the reasons for the complaint coming out, alleged motives of people behind the complaint, delays in the complaint being made, and what was described in counsel's submissions as "a risk that the evidence was cross contaminated and potentially biased".

38. We do not need to make findings on these issues as they are not relevant. In this hearing the essential facts were agreed, as set out in the agreed summary facts recorded above. Who by, when, how and why a complaint was made are not at all relevant to considering liability or penalty on agreed facts. Likewise we do not understand how "cross contamination" has a foundation making it appropriate to raise the issue given the agreed evidence for the two incidents – there were no witnesses who gave evidence of disputed factual matters for us to determine.

Second particular (camp incident)

39. Although the charge of serious misconduct has already been made out, we will go on to consider the second aspect of the charge.

40. We have considered the agreed evidence and the further factual context given by the respondent.

41. There are two aspects to this incident. First is the “you’re so Asian” incident, seen in the summary of facts above. The particular of the charge is that this was “racist”.

42. The respondent has explained the context of this incident. In a recent lesson with students they had examined different physical traits of particular races, in relation to physical exercise. There is nothing untoward in that. There had also been a misconception discussed at the school that the school roll was made up mostly of students of Asian descent. This has led to what seems to be portrayed by the respondent as a context of classroom banter, with the respondent stating to students in the past that if the portrayal was accurate then indeed he might be “more Asian” than others given his length of time at the school. The respondent says that the noodle comment was within and followed this context. The respondent was not challenged on that evidence directly or by other evidence and it is also found in the agreed summary.

43. We do not consider this comment to be “racist”, particularly in the context which the respondent gives to it. That however is how the charge is framed. In the way it was said and the context it was said in, the words stated by the respondent did not contain or mean anything prejudicial, adverse or antagonistic, based on race.

44. The remaining issue is the discussion that followed, as set out in the summary of facts. We consider that this discussion lacked judgment. Whilst there may be a place for careful discussions about the origin and use of such terms in an educational setting, this was not it.

45. We do not however consider that this discussion of its own reaches a serious misconduct or a misconduct level. And in even if it had, we do not consider that it would take us further in this case or assist us in reaching the appropriate penalty outcomes, which are already able to be determined based on the serious misconduct finding made.

46. This view somewhat reflects the reality of this case, where the majority of the parties’ energies have been spent on the first aspect of the charge. Given that the serious misconduct charge has been made out, we will now put the camp incident to one side and consider the appropriate outcomes.

Penalties – general principles

47. Section 404 of the Act provides:

> **404 Powers of Disciplinary Tribunal**

(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:

(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):

(b) censure the teacher:

(c) impose conditions on the teacher's practising certificate or authority for a specified period:

(d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:

(e) annotate the register or the list of authorised persons in a specified manner:

(f) impose a fine on the teacher not exceeding $3,000:

(g) order that the teacher's registration or authority or practising certificate be cancelled:

(h) require any party to the hearing to pay costs to any other party:

(i) require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:

(j) direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.

48. In *CAC v McMillan* this Tribunal summarised the role of disciplinary proceedings in this profession as: [7]

> … to maintain standards so that the public is protected from poor practice and from people unfit to teach. This is done by holding teachers to account, imposing rehabilitative penalties where appropriate, and removing them from the teaching environment when required. This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved.

49. The primary motivation is to ensure that three overlapping purposes are met. These are:

I. to protect the public through the provision of a safe learning environment for students;

II. to maintain professional standards; and

III. to maintain the public's confidence in the profession.[8]

50. The Tribunal is required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and

[7] *CAC v McMillan* NZTDT 2016/52, 23 January 2017, (at [23]).

[8] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.

profession.[9]

51. The Act provides for a range of different penalty options, giving this Tribunal the ability to tailor an outcome to meet the requirements that a proven case presents. Penalties can range from taking no steps, to cancellation of a teacher's registration.

52. In *CAC v Fuli-Makaua* this Tribunal has noted that cancellation may be required in two overlapping situations:[10]

> a) Where the conduct is sufficiently serious that no outcome short of deregistration will sufficiently reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession; and
>
> b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. Therefore, there is an apparent ongoing risk that leaves no option but to deregister.

53. The Tribunal has had the opportunity to see and hear the respondent give evidence, and to ask him further questions. The Tribunal is not entirely convinced that the respondent has seen the error of his ways. For instance, there is the continued attempt at justifying the physical conduct as being on a continuum. Such a view is difficult to reconcile with any insight. Second, when asked by the Tribunal whether he thought reasonable bystanders would consider that the actions in the video reflect adversely on the profession, the respondent answered to the effect that he "would have to think about it".

54. The CAC however does not seek cancellation, and the Tribunal agrees that cancellation is not called for.

55. Despite the reservation above, having considered the unusual and probably one off nature of the incident, the respondent's otherwise excellent history and contribution to the profession, and the clear impact that this disciplinary proceeding has had on him, the Tribunal considers that the following penalty orders meet the needs of this matter:

    a) The respondent will be censured.

    b) The register will be annotated.

    c) The respondent will provide a copy of this decision to any future education sector employer for 18 months from the date of this decision.

    d) Both parties agree that the imposition of a mentoring regime would be

[9] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[10] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54], citing *CAC v Campbell* NZDT 2016/35 (at [27]).

appropriate. The Tribunal agrees. A period of 12 months would be appropriate, with an interim report to the Teaching Council at six months and a final one at 12 months. We invite the parties to agree on particular content and terms, including who the mentor would be (and their appropriateness by virtue of experience, and distance from the respondent). If there is disagreement the parties can return to the Tribunal for directions.

Publication orders

Student A

56. Student A seeks prohibition of the publication of his name and identifying details. If this was to be considered purely on the basis of a risk of identification of the respondent, we would consider that to be a tenuous link. Student A has since left the school, and the respondent has taught hundreds of students. However, we see no public interest in Student A being named and it is common, indeed regular, for this Tribunal to suppress the names of student witnesses (even in this case where the child has since graduated from the High School). The order is supported by the CAC.

57. We will therefore make an order prohibiting all publication of Student A's name and any details that might identify him.

Evidence advanced by the Respondent

58. The respondent seeks permanent prohibition of the publication of his name and identifying details. A raft of submissions and evidence have been filed, much since the hearing of this matter. Overall this aspect of the proceeding is now competing in size with the material filed on charge and penalty. We will summarise the evidence before considering the application.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Submissions - respondent

65. The respondent argues that the cumulative effect of the evidence is that the test for non-publication orders has been met. The respondent urges the Tribunal to make the orders sought.

66. Much of the respondent's submissions were directed at the meaning of "proper" from s 405 of the Act. The respondent cited this Tribunal's decision in *CAC v McMillan*. *McMillan* in turn referred to a Lawyers and Conveyancers Disciplinary Tribunal decision of *Canterbury Westland Standards Committee No. 2 v Eichelbaum*, which had considered the term "exceptional" in the publication context.[11] That Tribunal had noted that the term "proper" was somewhere between "exceptional" and "desirable".

67. Counsel for the respondent then proceeded on a journey in an attempt to define what "exceptional" means (despite exceptional not being a test in the Education Act publication provisions). The respondent referred to *Creedy v Commissioner of Police*, a decision in which Mr Hope, counsel for the respondent in this case, was counsel for Mr Creedy.[12] Mr Hope refers to the Supreme Court stating (at [30] – [31] of the Court's

[11] *Canterbury Westland Standards Committee No. 2 v Eichelbaum* [2014] NZLCDT 23, discussing s 240 of the Lawyers and Conveyancers Act 2006 which has a similarly worded publication test to the present Act.
[12] *Creedy v Commissioner of Police* [2008] ERNZ 109.

decision) that:

> "exceptional circumstances are those that are unusual, outside the common run".

68. The argument then is that as exceptional is only "unusual and outside the common run", and proper is falls under exceptional, that we should interpret "proper" as something less than "unusual and outside the common run".

Submissions - CAC

69. The CAC opposes a non-publication order for the respondent. The CAC considers that the evidence advanced does not displace the presumption of open justice. The CAC considers that the situation for the respondent [redacted] is a natural consequence of disciplinary proceedings, is similar to that seen in other cases, and is not at the level where the Tribunal should make a non-publication order.

Discussion – legal principles

70. The default position under s 405 of the Act is that Tribunal hearings are to be conducted in public. Consequently the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication specified in the section if we are 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.

71. The purposes underlying the principle of open justice are well settled. As the Tribunal said in *CAC v McMillan*, the presumption of open reporting "exists regardless of any need to protect the public".[13] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In *NZTDT v Teacher* the Tribunal described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[14]

72. In *CAC v Finch* the Tribunal noted that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, the Tribunal confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term "proper" that imports the standard that must be met in the criminal context.[15]

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[13] *CAC v McMillan* NZTDT 2016/52.
[14] *NZTDT v Teacher* 2016/27,26.
[15] *CAC v Finch* NZTDT 2016/11, at [14] to [18].

73. In *Finch,* the Tribunal described a two-step approach to name suppression that mirrors that used in other disciplinary contexts. The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[16] In deciding whether there is a real risk, the Tribunal must come to a judicial decision on the evidence before it. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal must determine whether it is proper for the presumption to be displaced. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[17]

74. In NZTDT 2016/27, we acknowledged what the Court of Appeal said in *Y v Attorney-General*.[18] While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[19]

75. The Court of Appeal in *Y* referred to its decision *X v Standards Committee (No 1) of the New Zealand Law Society*, where the Court had stated:[20]

> The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*.

76. Gwynn J in the High Court recently considered the applicable principles for suppression in professional disciplinary litigation, in a Chartered Accountant's disciplinary decision.[21] Although the specific statutory wording in that legislation used the term "appropriate" (instead of "proper"), we consider little turns on such semantics and the observations of the Court are of application here. Gwynn J stated:

> [85] Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interests of any

[16] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.
[17] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].
[18] *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911, [2016] NZAR 1512, (2016) 23 PRNZ 452.
[19] At [32].
[20] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].
[21] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

> person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.
>
> [86] I do not consider the use of the word "appropriate" in r 13.62 adds content to the test usually applied in the civil jurisdiction or sets a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.
>
> (citations omitted).

Our decision on publication

77. We will deal firstly with the legal argument advanced by the respondent. We do not accept the argument as to what proper should mean, with reference to "exceptional" from *Creedy*, as set out above.

78. The meaning of an enactment is to be ascertained from its text and purpose.[22] Definitions found within a related group of statutes can be utilised in that exercise.[23] But we do not consider that meanings can be ascertained by a tortured exercise of locating the same word from a different Act, jurisdiction and context, locating a judicial interpretation of that word from that arena, and then cross referencing that interpretation back to this jurisdiction for use in the way attempted here (particularly given we are not even considering the term "exceptional").

79. *Creedy* was an employment case considering the test at s 114 Employment Relations Act 2000 for "exceptional circumstances" to extend time beyond the limitation period for personal grievances. The Court had to consider what that test meant, within the text of that Act and its purpose. That is an entirely different exercise in fact and law than the consideration of publication in a disciplinary matter.

80. Just as employment courts do not look to professional tribunal name suppression decisions to interpret their respective limitation period provisions, professional tribunals do not look to employment jurisdiction decisions to interpret their respective publication provisions.

81. Turning to the evidence. We do not consider that the evidence displaces the presumption of open justice. The effects being felt, and to be felt, are (and with

[22] Section 5 Interpretation Act 1999.
[23] Section 34 Interpretation Act 1999.

respect to all involved) not uncommon to this Tribunal.[24]

82. Firstly, we put to one side any issue of private vs. public school employment, if that is what is being advanced. We do not consider a perceived difficulty to be employed at one type of school over another (if one were to have higher levels of scrutiny) as being relevant to publication issues.

[redacted]

[24] See for instance *CAC v Teacher* NZTDT 2016/27; *CAC v Teacher E* NZTDT 2018-84; *CAC v Teacher S* NZTDT 2016-69.

89. Overall therefore we consider that the presumption for open reporting should remain. We do not consider that the evidence displaces this. The Tribunal has sympathy for the concerns of the respondent [redacted]. However, these issues are common for practitioners facing disciplinary proceedings. Indeed it would be uncommon to find a practitioner, on the eve of a potential serious misconduct finding, to be nonchalant about publication. If these concerns were enough to reach the non-publication threshold, the vast majority of professional disciplinary proceedings would be subject to these orders. [redacted] To accept that level of concern as the test for non-publication would undermine the principles of open justice.

90. We will however prohibit from publication all of the evidence that was advanced in support of the publication argument. It is one thing to have the publication of the primary charge, facts and penalty. That is in the public interest. It is another however to have the more personal information discussed being available for publication. That information really is no person's business but the respondents and those involved in this process. A redacted version of this decision will be released outside of the parties.

91. The respondent may wish to consider any appeal or other proceedings. There is a 28 day appeal period. However, the Christmas holiday period is nearly upon us. In order to ensure a reasonable period for consideration, we make an order continuing the current interim publication orders until 12 pm 29 January 2021. If notification has not been provided to the Tribunal by the respondent of any proceedings being taken, those interim orders will lapse.

Costs

92. Assuming that the parties cannot agree on costs and that the CAC seeks costs, the CAC should file submissions within five working days of receiving this decision. The respondent should respond within a further five working days. This is with the hope of resolving all issues before the working year ends. If the parties need more time, they should advise the Tribunal by email and that will not be an issue.

93. The CAC should address in its costs submissions:

    - Time spent and hourly rates (full time sheets are not sought).

    - If counsel changed through the life of the file, whether and why costs for the next counsel to familiarise themselves with the file are sought (i.e. "double handling").

    - As Mr Neill was not from Auckland, if travel costs and disbursements are sought, why these should be met/why out of town counsel was required.

94. If either party has pre hearing costs/settlement correspondence that they wish the Tribunal to consider, that should also be included.

95. The Tribunal will then issue a decision as to costs.

T J Mackenzie

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).