NZTDT 2019/103

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education Act 1989
IN THE MATTER	a charge of serious misconduct referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**THE COMPLAINTS ASSESSMENT COMMITTEE** Referrer
AND	**JEAN RAKENA-ANDREWS** Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Nicola Coe and William Flavell
Hearing:	9 December 2020
Decision:	Decision on culpability and name suppression on 15 April 2021, final decision on penalty and costs on 23 August 2021
Counsel:	N Tahana and T Paki for the referrer E Efaraimo and Mr S Foliaki for the respondent

Introduction

[1] The Complaints Assessment Committee ("the CAC") referred to the Tribunal a charge against Jean Rakena-Andrews, the respondent, alleging serious misconduct and/or conduct otherwise entitling us to exercise our powers under section 404 of the Education Act 1989. We will set out the CAC's notice of charge, which is dated 16 September 2019, in full. It alleges that Ms Rakena-Andrews:

> On 15 June 2018, using unjustified and unreasonable force, assaulted a student ("Student A")[1] while on duty, by grabbing him and kicking him on his bottom.

[2] We convened to hear the case in Auckland on 9 December 2020. At the conclusion of the hearing, the Tribunal invited the parties to file closing submissions, which we have since received and considered.

This matter's procedural history

Prior to the hearing

[3] This matter had a relatively protracted procedural history, which it is necessary to explain.

[4] The respondent did not initially have legal representation, and it took her not insignificant time to secure the services of a lawyer. The Tribunal provided several adjournments to enable Ms Rakena-Andrews to be represented at the hearing. We are grateful to Messrs Efaraimo and Foliaki for ultimately agreeing to act for Ms Rakena-Andrews.

[5] Ms Rakena-Andrews telegraphed early in the proceedings that she disputed the allegation. A hearing was scheduled to take place on 23 March 2020. However, it was vacated upon application by the CAC. This is because counsel became aware that the Police had interviewed Student A, and another student, whom we will call Student B, who said he witnessed the alleged assault. Student A was evidentially interviewed by police on 27

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[1] While the CAC adopted the term "Student X" in its notice of charge, we will refer to the complainant as Student A.

July 2018 and, Student B, on 25 July 2018. We interpolate that each student was aged 12 at the time we heard the charge. The CAC, in a memorandum dated 7 February 2020, said that:

> The Committee acknowledges that giving evidence can be a daunting and traumatic experience for young persons and wants to avoid calling the students as witnesses.
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> We are working towards obtaining the evidential interviews (the EVIs) from the Police, which will form part of the Committee's evidence. The release of the EVIs requires an application under s 119A [of the Evidence Act 2006] to the [District] Court for judicial consideration. We anticipate this process will take a few weeks.

[6] The District Court granted the CAC's application to take possession of the EVIs on 2 March 2020. It was necessary for the CAC to have the EVIs transcribed, and disclosed to counsel for the respondent. In any event, COVID-19 intervened, and the 23 March 2020 hearing had to be adjourned.

[7] On 4 May 2020, the CAC advised that it intended to apply to rely upon the EVIs as the evidence-in-chief of Students A and B, and to invite the Tribunal to make mode of evidence directions that enabled the witnesses to be cross-examined via CCTV; thus not in the respondent's presence. The CAC also explained that it was seeking the consent of the caregivers of Students A and B to give evidence in person.

[8] On 19 June 2020, the CAC formally applied to adduce the EVI of Student B as hearsay. It relied upon a judgment of the High Court, which formulated a two-step approach to the admission of hearsay.[2] Counsel for the CAC also relied upon earlier cases in this Tribunal where we have permitted the referrer to introduce hearsay. A key feature of the CAC's application was the fact that Student A remained available to give evidence and, "Accordingly the Committee will not be relying solely on hearsay at the hearing".

[9] Before the application could be determined, the parties, on 16 July 2020, filed a joint memorandum seeking that the hearing be deferred until late in 2020. The respondent had belatedly secured legal representation, and

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[2] *W v Health Practitioners Disciplinary Tribunal* [2019] NZHC 420, (2019) 24 PRNZ 662, Collins J.

Messers Efaraimo and Foliaki required time to assimilate the disclosure and respond to the extant applications. The CAC's hearsay application was formally opposed on 31 July 2020.

[10] On 10 September, the Tribunal made the mode of evidence orders sought by the CAC in respect to how Students A and B would be examined. However, we deferred determination of the hearsay application in respect to Student B to enable the CAC to seek additional information explaining his circumstances, and to explore whether the procedures might be altered to address the wellbeing concerns raised.[3]

[11] There was a further change in tack by the CAC on 23 November 2020, when it filed a new application. It now sought to introduce Student A's EVI as a hearsay statement, too. In its memorandum, counsel for the CAC relied upon the fact that:

> [It] would appear that Student A's parents are no longer consenting to Student A giving evidence.

[12] According to the CAC's memorandum, Student A's parents were initially supportive of their son giving evidence. However, the CAC relied upon the fact that Student A's parents had subsequently not responded to its emails and telephone messages, or to the letters sent by the principal of the school attended by their son.

[13] The Tribunal was required to consider the hearsay application under urgency, given that a hearing date in December had been allocated. On 24 November, the Tribunal issued a minute in which it said that Student A's statement was admissible hearsay. The Deputy Chair who issued the minute said:

> The admission of a child's evidence as a hearsay statement is not unusual in this jurisdiction, even for the actual complainant. Child witnesses, particularly in allegations such as the present, are often not happy participants. It is often not palatable to try and force them to be involved. And nor do their parents wish to put them through such a process.
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> This hearsay statement was taken in a regulated EVI setting. There is no question as to the circumstances it was made in. Whilst it is arguable whether or not Student A is "available", the

[3] It was suggested that Student B might give evidence via telephone, or that cross-examination be truncated.

> reality is he is not coming at present. Strict views of "availability" generally come from the criminal jurisdiction and are not entirely compatible with the more nuanced issues of children giving evidence in the current setting.
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> The Tribunal considers that the evidence should be admitted on a hearsay basis, however, as per any hearsay evidence the weight to be given to the evidence will likely be affected by this.
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> The Tribunal does request however that efforts to have Student A present continue to be made. If it turns out that he will not be present, which may not be known to until the hearing, then his evidence will be heard in his presence.

What happened at and after the hearing

[14] At the commencement of the hearing, we enquired whether the CAC had attempted to speak to Student A's caregivers. Ms Tahana advised that contact had been unsuccessful. We invited her to make further enquiries during the hearing.

[15] It is not in dispute that Ms Paki called Student A's mother, with no response. Ms Paki then spoke to the principal, who recommended that a nominated school administrator attempt contact. The administrator's attempts to make contact by telephone were unsuccessful. She then attended Student A's home, twice. On the second occasion, the administrator spoke to Student A's mother. The interaction was described in the following way:

> (a) [Student A's mother said] she did not want her son "to be part of the hearing or to go back over the incident again"; and
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> (b) "She would call counsel for the Committee. However, counsel did not receive a call from [Student A's mother]".

[16] After the hearing concluded, counsel for the CAC met with Student A's mother. Student A's mother said that while she had consented to her son's EVI being played during the hearing, she had declined to allow him to give evidence in person. She did not explain the reason for her reluctance to have her son participate. It is nonetheless safe to infer that Student A's parents wished to minimise the impact on their son. We interpolate that the CAC's original application for mode of evidence directions drew upon ss 103-105 of the Evidence Act 2006. While expressly applicable to criminal proceedings, we have previously endorsed the utility of the test described in s 103(4), which provides that:

> In giving [mode of evidence] directions under subsection (1), the Judge must have regard to—
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> (a) the need to ensure—
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> (i) the fairness of the proceeding; and
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> (ii) in a criminal proceeding, that there is a fair trial; and
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> (b) the views of the witness and—
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> (i) the need to minimise the stress on the witness; and
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> (ii) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence; and
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> (c) any other factor that is relevant to the just determination of the proceeding.

[17] We acknowledge that, had they given evidence, measures would have been required to minimise the detrimental impact of the experience on Students A and B.

[18] The CAC filed a memorandum on 22 January 2021 that set out its various efforts to speak to Student A's parents during the life of this proceedings, and to obtain a definitive answer whether they agreed to their son giving evidence. The respondent did not dispute the accuracy of the information contained in the memorandum, although her counsel submitted that the efforts made were inadequate and belated. We do not accept that submission. We are satisfied that the CAC made reasonable efforts to secure Student A's attendance. However, as we will go on to explain – in a point alluded to in the minute issued on 24 November – Student A's parents' reluctance for him to participate did not mean that he was "unavailable as a witness".

[19] Section 18 of the Evidence Act 2006 describes the two matters that must be satisfied before a hearsay statement may be admitted in evidence. It provides:

> **General admissibility of hearsay**
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> (1) A hearsay statement is admissible in any proceeding if—
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> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
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> (b) either—
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> (i) the maker of the statement is unavailable as a witness; or

> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
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> …

[20] "Unavailable as a witness" is defined in s 16(2) of the Evidence Act. It provides:

> For the purposes of this subpart, a person is **unavailable as a witness** in a proceeding if the person—
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> (a) is dead; or
>
> (b) is outside New Zealand and it is not reasonably practicable for him or her to be a witness; or
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> (c) is unfit to be a witness because of age or physical or mental condition; or
>
> (d) cannot with reasonable diligence be identified or found; or
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> (e) is not compellable to give evidence.

[21] We conclude that none of the alternatives provided in s 16(2) apply to Student A. He was both eligible and compellable to give evidence.[4] The rule of universal eligibility means that previous prohibitions, such as the fact that the witness is a child, no longer apply. The CAC's diligence meant that Student A's parents' opinion on him giving evidence was known. As Student A could be found, this disengages s 16(2)(d) of the Evidence Act.

[22] The CAC had the invidious task of deciding whether to summons Student A to give evidence notwithstanding his parents' reluctance for him to attend the hearing. While we are sympathetic to its reasons not to seek the issuance of a summons, the CAC's decision meant that it could not satisfy the Tribunal that Student A was "unavailable as a witness". The CAC conceded that Student A was "technically 'available'".[5] As a corollary, Student A's EVI was not admissible as hearsay under the Evidence Act,

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[4] Section 71 of the Evidence Act 2006 provides the general rule that all persons are compellable to give evidence unless falling within one of the exceptions contained in ss 72-75. who are eligible to give evidence are compellable to do so. Except for the relatively inconsequential exceptions to this proposition, which are dealt with in pt 3, subpart 1, the major exception to the universal rule of compellability is a defendant in criminal proceedings.

[5] We have considered the recent Supreme Court judgment in *Haunui v R* [2020] NZSC 153, which discussed the obligation on an eligible person to attend court and be sworn in as a witness if summonsed.

given the requirement contained in s 18(1). However, this is not the end of the matter, as the Tribunal recognised in its 24 November minute.

[23] At the hearing, we invited the parties to turn their minds to the Court of Appeal's recent judgment in *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal*,[6] which addressed the admission of hearsay evidence in the context of disciplinary proceedings. In a recent decision, we adapted the principles described in the judgment to apply in the context of disciplinary proceedings under the Education Act.[7]

[24] We acknowledge that r 31 of the Teaching Council Rules 2016, which governs admissibility,[8] does not state that the Tribunal must apply the Evidence Act as though we are a court. In this regard, r 31 can be distinguished from its equivalent under the Health Practitioners Competence Assurance Act 2003, which was specifically addressed in *Health Practitioners Disciplinary Tribunal* by the Court of Appeal. However, as the Chair of the Tribunal said in an earlier case:[9]

> I do not see the lack of reference to the Evidence Act in r 31 of the Teaching Council Rules implies that that the Tribunal has a wider discretion to admit evidence, as submitted by the CAC. Admissibility of evidence in a court would usually involve reference to the Evidence Act.

[25] Section 18 of the Evidence Act applies to "any proceeding". Section 4 of the Evidence Act defines "proceeding". It means:

> (a) A proceeding conducted by a court; and
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> (b) Any interlocutory or other application to a court connected with that proceeding.

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[6] *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435, which was an appeal from the High Court's decision in *W v Health Practitioners Disciplinary Tribunal* [2019] NZHC 420, (2019) 24 PRNZ 662, Collins J.
[7] In *CAC v Shortcliffe* NZTDT 2018/72, 18 February 2021.
[8] It provides, "At a hearing, the Disciplinary Tribunal may receive as evidence any document, record, or other information that may in its opinion assist it to deal with the matter before it, whether or not the document, record, or information would be admissible in a court of law".
[9] *CAC v Bidwell*, minute dated 24 September 2019.

[26] "Court" is defined in s 4 of the Evidence Act, which says, "Court includes the Supreme Court, the Court of Appeal, the High Court, and the District Court". There is authority that says that because tribunals are not included in the definition of "court" in the Evidence Act, they do not conduct a "proceeding" and are therefore not governed by the rules of evidence contained in the Evidence Act unless it is explicitly stated in the relevant legislation.[10] While we have telegraphed the issue, we will leave for another day whether the Tribunal is a court. We simply observe that the definition of "court" is not exhaustive, and s 405(2) of the Education Act obliquely refers to the Tribunal as a court when it states that, "A hearing before the Disciplinary Tribunal is a judicial proceeding for the purposes of section 109 of the Crimes Act 1961 (which relates to punishment for perjury)"; albeit this is solely focused on criminalising perjury by witnesses during tribunal proceedings.

[27] We return to the (adapted) principles described by the Court of Appeal in *Health Practitioners Disciplinary Tribunal*. It said:[11]

> (a) While evidence may be inadmissible under the Evidence Act 2006, this does not in and of itself make it inadmissible before a disciplinary tribunal.
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> (b) Notwithstanding the principle above, the Tribunal must consider whether evidence would be admissible under the Evidence Act before considering whether to exercise its discretion to admit it.
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> (c) [Adapting what the Court of Appeal said about the Health Practitioners Competence Assurance Act 2003 to fit the Education Act] That general admissibility standard is broad and reflects the principal purpose of the [Education] Act, of protecting members of the public by providing for mechanisms to ensure that teachers are competent and fit to practise their profession.
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> (d) The discretion reflected in that standard is limited by what the Judge [in the High Court] referred to as the "hard limit" regarding

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[10] See *Craig v Visiting Justice at Auckland Prison* HC Auckland CIV-2007-404-5156, 6 June 2008.
[11] At [47].

> natural justice found in [the equivalent to r 24 of the Teaching Council Rules 2016, and s 398 of the Education Act].[12] Moreover, for that discretion to be properly exercised, the Tribunal needs to be aware of, and assess the significance of, the reasons [that the equivalents to r 24 and s 398] apply. Hence the importance of a question as to the admissibility of a hearsay statement being assessed by reference to the relevant provisions of the Evidence Act, informed by the natural justice interests those provisions reflect, and in the specific context in which the issue arises.

[28] We accept that there will be cases in which serious harm may be caused to a child or young person if he or she is required to appear before the Tribunal.[13] We nonetheless emphasise a point made by the High Court in *W v Health Practitioners Disciplinary Tribunal* that was repeated in the Court of Appeal's judgment, and which has particular application in this case, given the nature of the allegation against Ms Rakena-Andrews is essentially one of assault:[14]

> [Although] the right to confront one's accuser is usually associated with criminal trials, it is a protection that should normally also be afforded to a person who is facing serious professional disciplinary charges, particularly where the stakes for the professional person are high and the allegations equate to criminal offending.

[29] Returning to the facts of this case, we have concluded that Student A's statement (and that of Student B, too) was inadmissible under the rubric of the Evidence Act. However, the Deputy Chair who determined admissibility on 24 November held that the EVI should nevertheless be admitted. As we set out earlier, the CAC, when it made its hearsay applications, referred the Tribunal to the judgment of the High Court in *W v Health Practitioners Disciplinary Tribunal,*[15] which, as we said earlier, was the decision under review in the Court of Appeal, in *Health Practitioners Disciplinary Tribunal.*

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[12] Which provides that, "The Disciplinary Tribunal may, subject to the Act and these rules, regulate its own procedure in relation to hearings as it thinks fit", provided it meets the duty in s 398(7) of the Education Act, which provides that, "When performing their functions and exercising their powers, the disciplinary bodies must act in accordance with the rules of natural justice".
[13] Which was a point made by the High Court in *W v Health Practitioners Disciplinary Tribunal* above n 6 at [72].
[14] At [80].
[15] *W v Health Practitioners Disciplinary Tribunal* above n 6.

While no reference was made in our minute to the admissibility test formulated by the High Court (and effectively endorsed by the Court of Appeal), we are not satisfied that this provides a basis upon which we can legitimately revisit our earlier decision to admit the EVIs as hearsay, despite the respondent's invitation that we do so.

[30] In the criminal context, a court's discretion to revisit its earlier ruling is not enlivened unless there is a material change in the facts or the law relied upon on the earlier occasion.[16] Applying that test, we are not satisfied that there has been a material change of the type described. As such, we concluded that our ruling stands.

[31] We will go on to explain our evidential findings. However, as was said in the 24 November minute admitting Student A's EVI, "… as per any hearsay evidence the weight to be given to the evidence will likely be affected by this".

A further evidential issue that arose during the hearing

[32] Counsel for the respondent challenged the accuracy of the transcripts of Student A and B's EVIs during the hearing. Counsel for the CAC subsequently reviewed the transcripts and submitted that there are "only minor differences" between the transcripts filed and the updated versions filed after the hearing.

[33] For completeness, we observe that the evidence is the EVIs, not the transcripts. Having watched the EVIs, we are satisfied that the transcripts do not contain any material errors.

The evidence

The CAC's evidence

[34] As well as the EVIs of Students A and B, the CAC filed evidence from six witnesses.[17] Two were required for cross-examination.

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[16] Discussed in *Winders v R* [2018] NZCA 277, [2019] 2 NZLR 305. While the concept of issue estoppel does not apply, the test recognises the finality principle.
[17] Including the two specialist interviewers who spoke to Students A and B. We will say no more about their evidence, given it was not in dispute.

The evidence of Student A and Student B

[35] Student A told the interviewer that he was there to speak to her about "Teacher kicking me". He clarified that the respondent was not his teacher. Student A said that the first person he told was his father, that afternoon after school finished. According to Student A, his father got upset and drove to the school.

[36] Student A said that the "kicking" happened at his class. He explained that it happened at lunch time, and that he was skipping, whereas his friends were sitting down. He also said that "She pulled me back then kicked me and that was it". Later, he expanded by saying that that the respondent, "… just wrapped her hand around my arm and then just went to go pull me. And kicked me". Student A described the pull as "hard" and a "big pull". Later in his interview, Student A said that he was about to walk into class when the alleged assault happened.

[37] Student A said that the respondent kicked him on the bottom, which left him feeling sore. He said that the respondent had high heels on.

[38] Student A said that the respondent had lied by telling the principal that she had broken up a fight with other boys.

[39] Student B said that he was present when the respondent allegedly assaulted Student A. He said that Student A was banging on the door of the classroom, telling the girls inside the room to open it. He said that the respondent "came and grabbed him" and "moved him away from the door".

[40] Student B said that the respondent told Student A to move away from the door, and that she "pushed him away and kicked him and then just pushed him away again". Student B said that the respondent grabbed Student A by the back of the tee-shirt, before pushing him away and that she kicked Student A to the bottom.

[41] Student B said that the respondent had high heels on.

The evidence of staff members of the school

[42] Student A's teacher at the time of the alleged incident gave evidence in person. The witness said that when he returned to his classroom, Room Four, on 15 June 2018 after the lunch break, a group of students ran up to

him. As a consequence of what he was told, he met with Student A in his classroom.

[43] The witness said that he was told that the alleged incident had happened outside his classroom.

[44] The witness said that Student A was "extremely upset. He was crying, shaking and very distressed. He cuddled into me when I spoke to him".

[45] The witness said that "for a while after the incident", Student A was not his usual self and that, at lunch time when the witness was on duty, he would "hang around myself or the staff room area and would avoid the respondent and passing her classroom". The witness also said that, "Every day [Student A] would ask for reassurance that the respondent would not be coming into our classroom and that he would not have to go near the respondent".

[46] The witness acknowledged that he is "an emotional person" and the incident remained "raw in my mind". He told us that, "For the following two weeks that child did not want to be in the playground …" Later, the witness said that he was "shaking like a damn leaf" giving his evidence about events from two years' earlier.

[47] The witness said that Student A "had goals around controlling his anger and becoming a solution seeker". He clarified what he meant by this, and said that, "It was more about playground, the environment of the school and the changeover of principals and direction we were heading … that was a goal of Student A's mostly in the playground where a lot of sort of negative behaviour or things that were not welcome in our school anymore had continued. So his goal was to work on more or less using his wits …"

[48] In cross-examination, the witness acknowledged that both Students A and B were in a programme that, amongst other things, was directed at managing anger.

[49] In cross-examination, the witness was asked whether he had witnessed many fights between boys during his 14 years teaching and acknowledged that he had. He was also asked if he had ever witnessed a participant injured, and accepted that he had. The cross-examination then segued into a question about whether Student A had any injuries when the

witness dealt with hm on 15 June, and he confirmed he did not. The proposition was that the witness's description of his strong emotional reaction was not proportionate, given that he accepted he had witnessed children injured in other incidents. It was suggested to the witness that he was exaggerating, which he strongly denied. As we understood it, counsel for the respondent was exploring whether it was plausible that the witness, as a teacher in a low decile school, was not insulated against the shock of hearing that a student had been assaulted.[18]

[50] In re-examination, the witness explained that the degree of emotional response the allegation and Student A's distress invoked was heightened by the fact that the alleged assault was committed by a teacher, not another student, which made it "totally different".

[51] Counsel for the respondent asked the witness his opinion regarding Student A's truthfulness. There was the following exchange:

> Q. Now you may or may not be able to answer the question, and my question is this, does Student A, is he known to you to be a person who tells fibs, for lack of a better word, that kids sometimes do? Is he that sort of student, in your opinion?
>
> A. Yes.

[52] Neither party explored with the witness the nature and seriousness of the "fibs" he had heard Student A tell.

[53] The principal of the school gave evidence in person. He said that he was on duty during lunchtime on 15 June, refereeing a rugby league match. He was told by a child that Student A had allegedly been kicked in the bottom.

[54] The principal spoke to the respondent soon afterwards. She denied kicking Student A, but accepted that she had dealt with him during the lunch break. The respondent told the witness that Student A had tried to enter the classroom, which the girls inside were tidying up. According to the witness,

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[18] Counsel for the respondent put to the witness that he had a motive to lie. He was asked whether he went to school with the respondent's husband and whether he had been bullied. At that point, the respondent was stopped and asked the relevance of his questions, and whether he had an evidential foundation for his proposition. Counsel did not take the issue further. Also, we prevented counsel from exploring the way in which the witness himself interacted with students. As we said at the time, that had no bearing on the decision we were required to make.

the respondent also told him that she had dealt with a separate bullying incident with a student from another room during the lunch break.

[55] The witness said that the respondent provided him with a written response later that day. In it, Ms Rakena-Andrews said that she had been told by Student B that the students in the classroom would not let them enter. She spoke to the students in the room, who told her that they had permission to be there. The respondent said that Student A wanted to enter the room and she told him he was not allowed to. He glared at her, and then turned and walked away, going behind the classroom. The respondent said that Student A then returned and kicked the door. The genesis of this behaviour, according to what Student B told the respondent, was that the girls in the classroom were "getting smart" to Student A.

[56] While there was no mention by the respondent in her letter of using force towards Student A, the principal, in his oral evidence, said that the respondent had disclosed to him that Student A had tried to push past her to get into the classroom, "… very much fitting in with my comments around students at that stage lacking respect and not following what the teachers had asked them".

[57] The principal spoke to Student B and another student, and asked Student A's teacher to record his version of events. The principal spoke to Student A too.

[58] The principal submitted his mandatory report on 15 October 2018. He delayed doing so until he had been advised by the Police that the respondent was not to be charged.

[59] The principal emphasised that the incident in June 2018 happened against the backdrop of violence by students during breaks. He said, "[I'd] like to say that going back to June 2018, at the school I'd just started off as principal in October 2017. This school playground was very much out of control. Our kids were extremely violent, they didn't know about respect and every single interval there were incidents that happened. And so, I happened to be on duty teaching kids rugby on this particular day..." He later candidly stated that, "The school was out of control" when asked to comment on the fact that the respondent had, before the alleged incident involving

Student A, been required to address a confrontation between another group of students where violence had been used.

[60] The principal acknowledged that Student A is relatively strong and skilled at sports.

[61] We were provided with a brief of evidence for the relief teacher who was on duty alongside the respondent during the lunch break on 15 June 2018. We will refer to her as "Teacher A". While Teacher A was spoken to as part of the investigation undertaken by the CAC, the prosecution did not include her amongst its witnesses. The reason for not doing so, recorded in the Tribunal's 24 November minute, was that, "[Teacher A] did not advance the prosecution case". As such, counsel for the respondent prepared a brief for Teacher A, with the intention of calling her as a witness. As explained in the Tribunal's minute, counsel for the respondent sought a summons for Teacher A to attend the hearing, as she appeared reluctant to give evidence.

[62] The Deputy Chair who issued the 24 November minute said that:

> It concerned the Tribunal that the CAC was advancing its case on that basis [relying on hearsay from Student A and Student B] yet not calling Teacher A. She is presumedly available (although apparently reluctant), she is an adult, and she was standing at the scene. As noted above, she can give relevant evidence of what she saw happen and her perception of the incident. Although she concedes that she cannot be adamant the incident did not happen, her evidence could not be more relevant to the task at hand. The case cries out for her to be called especially when the only other evidence is hearsay evidence.

[63] The Tribunal criticised the CAC for not calling Teacher A, and commented that it was unreasonable to expect the respondent to do so. Faced with that, counsel for the CAC fairly accepted that it ought to call Teacher A. However, as neither party anticipated having any questions for Teacher A, the Deputy Chair recorded that her brief would be "read".

[64] We will pick up Teacher A's narrative at the point that she and the respondent dealt with Student A at the classroom. Teacher A said that she and the respondent were walking past Room Four, where three or four boys were standing around the door, kicking it, but not hard.[19] They were telling

[19] The witness said that she did not know the names of any of the boys. However, we did not take it to be in dispute that Students A and B were present.

the room's occupants they should not be inside, and the boys were attempting to open the door. She said that she was "no more than a metre away from [the respondent]", who approached "the boys at the door". The respondent told the boys to "move out of the way" and she then grabbed the door. Teacher A said that one of the girls inside the room, who was standing on the other side of the door, must have unlocked it. Teacher A said:

> I was facing the direction of the door during this time, the seat that the older boys were on is next to the door. I didn't have to look away from where Jean was to look at the seated boys and I don't think I took my eyes off where Jean was although I may have been scanning the grounds at the same time, as teachers do.
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> I think that if someone had been hit or kicked, I would have known because the boys would have said something. This is based on my experience working with the boys over the years. In this instance, nobody made a fuss or said anything. Nobody was upset, there was kafuffle, it just seemed a perfectly normal lunchtime and when the allegation came out after that, it seemed to come out of nowhere.
>
> I can't categorically say there's absolutely no way that Jean could have assaulted one of the children during that time, but I can't see how it could have happened for the reasons I've mentioned above.

The involvement of police

[65] Police investigated the respondent's alleged use of violence towards Student A, and we were provided, as part of the agreed bundle, with correspondence to and from police that formed part of the CAC's "evidence file". That came in via the brief of evidence of the Teaching Council's Senior Investigator, Thomas Eathorne, who outlined the procedural history of this matter. He was not required to give evidence in person.

[66] Police spoke to Ms Rakena-Andrews and, according to an email sent from the officer in charge to the Teaching Council on 29 October 2018:

> Andrews … admitted to grabbing Student A by the arm claiming that she was fearful that he would knock her or other students over as he pushed past her in a doorway. She acknowledged that the school had a "no hands" policy. She denied kicking Student A.

[67] We also took notice of the fact that Teacher A was spoken to by police. Consistent with what was recorded in Teacher A's brief, the email said:

> A relieving teacher [Teacher A] who was present at the time did not observe an assault take place but could not say categorically that there was no opportunity for it to occur.

[68] Police elected to issue the respondent with a formal warning rather than to prosecute her for assault.

The respondent's evidence

[69] Ms Rakena-Andrews told us that she has been teaching, on and off, for "over 11 years". She primarily teaches Te Reo Maori me ona Tikanga. The respondent taught at the school between 2017 and 2019, and her practising certificate expired in August 2020.

[70] The respondent was on duty at lunchtime on 15 June 2018. Room Four fell within the area that the respondent was designated to patrol. Teacher A brought to the respondent's attention that a student was shadowing her because he had been involved in an altercation. This preceded them going to Room Four.

[71] The respondent and Teacher A saw that students were walking on Class Four's window ledge. As she approached to investigate, the respondent saw that there were students inside the classroom, without adult supervision.

[72] Student B was outside the room and told the respondent that its occupants would not let them in. The respondent enquired why the students were in the class and were told they had permission.

[73] The respondent said in her brief:

> "When talking to the students inside, I was standing in the doorway and I was holding on to the door with my left hand and my right hand was holding onto the door entrance. When all of a sudden, I was pushed from behind by Student A who was trying to get in.
>
> When I was pushed from behind by Student A, my right arm came off the door entrance causing me to lose balance. I moved a little forward and I managed to grab his arm with my right arm which prevented us both falling through the doorway."

[74] The respondent asked Student A what he was doing and he said he was trying to enter the room. The respondent said, "No you're not". According to the respondent, this led to the other boys, including Student B, laughing at Student A. Student A became upset and ran to the back of the

classroom. The respondent said she could hear Student A kicking the back door in anger.

[75] In her oral evidence, the respondent said that the door to the classroom opened outwards, which is why she gripped the handle in her left hand. There was the following exchange between the respondent and her counsel:

> Q. What happened at the point?
>
> A. I was clearing the students that were inside the classroom, the reasons they were in the classroom, and I felt a pressure coming from behind me that caused my hand to lose balance and myself to lose balance at the time. I felt it was a student coming behind me out of the doorway entrance.
>
> …
>
> A. With the fact that we were both going to fall.

[76] The respondent said that Student A made contact with the right side of her body and she grabbed him under his left arm with her right hand. The respondent was asked how quickly the event occurred and said, "Quickly enough for me to consider safety". She said that "It feels like I'm losing balance and yeah", and that this was forward. Next, the respondent said that, "Grabbed him by the arm to bring him inside – take him outside".

[77] In cross-examination, the respondent was questioned about why she had not, when she wrote her letter to the principal on 15 June, mentioned that she and Student A had lost their balance in the doorway:

> Q. Do you accept that it's a serious allegation, kicking a student?
>
> A. Of course I do, and given the no hands policy but that wasn't properly defined until 2019 in February. To my understanding, I thought at that time, my actions were for the safety of the student falling through the doorway.
>
> …
>
> Q. Just so I understand, is your position all that you had done was preventing Student A being harmed? That's all that happened that afternoon, is that essentially what you are saying?
>
> A. Yes.
>
> Q. Have I got that right?
>
> A. Yes.

[78] The respondent said that "When I took him outside", Student A argued with her about going into the room, and then walked away.

[79] The respondent said that Teacher A was about a metre away when she made physical contact with Student A.

[80] In a detail included in a supplementary brief filed on the day of the hearing, the respondent said that, after Student A and his friends walked away from the classroom, she witnessed Student B "boot Student A up the backside". In cross-examination, the respondent acknowledged that this was not something that she had disclosed to the principal, and nor had she mentioned the fact that she had taken hold of Student A because she lost her balance. When asked whether she thought the fact that she witnessed Student A kicked by another was something she should have disclosed, the respondent said "no".

[81] The respondent said that she and Teacher A walked away after the incident.

[82] The respondent confirmed that she denied having kicked Student A when the allegation was first put to her by the principal on 15 June. The respondent said that the allegation had made her extremely upset, and it had been difficult to complete the written incident report, which explains the fact some details were missing.

[83] The respondent said that she was confronted by Student A's family after school finished, on 15 June. She was waiting to be picked up in the staff carpark and said that Student A's family "started abusing and threatening me". The respondent's husband arrived, and deescalated the situation. In her oral evidence, the respondent added a detail – that she had told Student A's father, "… he did get kicked, but not by me".

[84] The respondent categorically denied wearing high heels on 15 June. She said that she was wearing sneakers, as, "I have a medical condition … which causes marked pain and scars at the bottom of my feet". The respondent produced a medical certificate dated 4 November 2019 addressing this condition, although it did not make clear how long Ms Rakena-Andrews had been afflicted.

[85] The respondent said that she met with the principal several times following the allegation and:

> We identified a few professional development courses that I could do. This included a safe and safety workplace training

> session and training in dealing with potential aggressive students in class. However, the school had difficulty in locating providers in this exact professional development.

[86] Ms Tahana explored with the respondent why she had told police that what she had done was wrong. The respondent said:

> Apparently, according to the training services when you look at it, yes, because you did mention no hands policy and that's basically what they trained us, no hands. However, if a life of another student is involved, that is the only time you are able to handle students or touch another student.

[87] Ms Rakena-Andrews said in cross-examination that she was not able to say how hard she grabbed Student A's arm.

[88] The respondent was asked by Ms Tahana whether her evidence was that Student A, as at 15 June, was "bigger and stronger" than her. She did not directly answer the question posed, but said that Student A is "physically adept".

Our factual findings

[89] The burden rests on the CAC to prove the charge. While the standard to which it must be proved is the balance of probabilities, we must keep in mind the consequences for the respondent that will result from a finding of serious professional misconduct.[20]

[90] In a relatively recent High Court decision, *Cole v Professional Conduct Committee of the Nursing Council of New Zealand*,[21] Gendall J said that while the burden rests on the prosecution throughout, in disciplinary proceedings there is an expectation that the practitioner "must be prepared to answer the charge once a prima facie case has been made out".[22] Ms Rakena-Andrews met this expectation by giving evidence.

The allegation that the respondent kicked Student A

[91] We are not satisfied that the CAC has discharged its burden by proving that it is more probable than not that Ms Rakena-Andrews kicked Student A.

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[20] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).
[21] *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, 31 May 2017, referring to *Auckland District Law Society v Leary* HC Auck, M1471/84, 12 November 1985.
[22] At [36].

We wish to emphasise that this is not to say that we have concluded that the evidence of Students A and B is not credible and reliable. Rather, our finding reflects the way in which the evidence of Students A and B was presented, which affects the weight we can safely place on it given that neither could be directly challenged about his version of events.

[92] As will be apparent, the parties took diametrically opposed positions towards the allegation that the respondent kicked Student A. Ms Rakena-Andrews denied the allegation in her evidence. Ultimately, she left us in a position where we were unable to prefer the CAC's evidence over hers, which is what was required to enable the prosecution to satisfy us that the particular is proved on the balance of probabilities.

[93] In Student A and B's absence, we have assessed the consistency of what each said in his EVI with what is shown by other evidence.[23]

[94] First, in reaching our decision, we considered the evidence of Student A's teacher, who described his emotional state soon after the event, and Student A's apparent relatively enduring reluctance to be in close proximity to the respondent. We accept the witness's evidence that Student A was distressed on 15 June. The issue, however, is *why* Student A was distressed? Put another way, is it safe for the Tribunal to conclude that Student A's emotional state (or change in behaviour) was caused by the respondent kicking him?

[95] There is an alternate explanation in the respondent's evidence. The respondent said that Student A was teased by his friends, which left him distressed. In her evidence before us, Ms Rakena-Andrews added a

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[23] The Court of Appeal helpfully said in *E (CA799/2012) v R* [2013] NZCA 678 at [44] and [45] that the wider assessment of both credibility and reliability can be undertaken by reference to: "The consistency of the witness's evidence with what is agreed, or clearly shown by other evidence, to have occurred; the internal consistency of the evidence of the witness; consistency with what the witness has said or deposed on other occasions; the credit of the witness in relation to matters not germane to the litigation; the inherent plausibility of the evidence of the witness (does it make sense?) and, where appropriate, consistency with any contemporaneous documentary evidence." To be clear, we have not relied upon an assessment of demeanour, given its limitations as a tool to assess truthfulness.

significant detail – that Student B kicked Student A to the bottom, which was an allegation that happened to match that she faced. We did not find the respondent's explanation why she did not report this event on 15 June, or at a point prior to completing her supplementary brief handed up at the hearing, persuasive. According to the respondent, she witnessed one student perpetuate a relatively serious act of violence towards another – and she chose to disregard her professional obligations, and intervene. However, despite our scepticism, it is not safe to conclude that the behavioural change exhibited by Student A bolsters the evidence contained in the EVIs to the point where the particular is proved.

[96] We have considered the fact that police provided Ms Rakena-Andrews with a warning, but do not accept that strengthens the CAC's case. As is apparent from police's correspondence with the Council, Ms Rakena-Andrews denied kicking Student A when spoken to. The fact of the warning does not, in and of itself, corroborate the evidence of Students A and B.

[97] Finally, for completeness, we add that we have not placed any weight on the bland evidence adduced from Student A's teacher that he had previously told "fibs". We do accept that this evidence can be elevated to the point that it shows that Student A has a disposition to lie.[24]

The allegation that the respondent "grabbed" Student A

[98] We reach a different view in respect to the other particular of the CAC's charge. Ms Rakena-Andrews did not dispute that she took hold of Student A under the arm. We therefore accept that the physical element of the particular is proved on the balance of probabilities. Moreover, the respondent's evidence that this happened in the doorway broadly mated that of Students A and B (which tends to undermine Teacher A's statement that she did not witness any physical contact between Ms Rakena-Andrews and Student A). However, that is not the end of our factual assessment. While the physical act was not disputed, it is necessary to scrutinise the respondent's justification for the use of force.

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[24] To utilise the definition of "veracity" contained in s 37 of the Evidence Act 2006.

[99] The Education Council Rules 2016 (the Rules) describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.[25] We have turned our minds to r 9(1)(a), which prohibits a teacher from using "unreasonable and/or unjustified force" against a child or young person. Rule 9(1)(a) mirrors the limitation on the use of restraint by teachers contained in s 139AC of the Education Act 1989, which provided:[26]

> **Limits on use of physical restraint in schools**
>
> (1) A teacher or authorised staff member must not physically restrain a student unless—
>
> (a) the teacher or staff member reasonably believes that the safety of the student or of any other person is at serious and imminent risk; and
>
> (b) the physical restraint is reasonable and proportionate in the circumstances.

[100] We find that the respondent, for the purposes of s 139AC, "restrained" Student A when she took hold of his arm. The first question, therefore, is whether the respondent held a reasonable belief that the safety of Student A, or that of anyone else, was in serious and imminent risk? Second, if there was a reasonably held belief, was the physical restraint reasonable and proportionate in the circumstances as Ms Rakena-Andrews perceived them to be?

[101] Ms Rakena-Andrews described being taken by surprise by Student A's attempt to enter the classroom. When he pushed past her, they both lost their balance. According to the respondent, she took hold of Student A to prevent him, and herself, from falling forward. What the respondent told us in evidence broadly matches what she told police – which was that Student A pushed past her in the doorway and she was fearful that he would knock her or other students over. While we acknowledge the CAC's submission that Ms Rakena-Andrews did not expressly mention to police that she had

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[25] Which came into force on 1 July 2016 and had a name change to the Teaching Council Rules 2016 in September 2018. The Rules were amended in May 2018, and it is that iteration that applies to the respondent's behaviour.
[26] Section 139AC was enacted on 19 May 2017. The Education Act 1989 was repealed on 1 August 2020, but remains applicable to these proceedings.

been concerned for Student A's safety, we do not place much significance on the difference in accounts.

[102] The respondent did not describe this as a spontaneous reaction to Student A's act. Rather, Ms Rakena-Andrews said that she made the deliberate decision to take hold of Student A because she held concerns for his safety. However, we found Ms Rakena-Andrews' evidence about why she used force on Student A to be somewhat contradictory. This is because she also told us that she grabbed Student A by the arm to "take him outside".

[103] Section 139AC describes a high threshold – there must be a reasonably held belief that there is a serious *and* imminent risk to safety. We have some reservations about whether Ms Rakena-Andrews' belief, even if honestly held, was reasonable given the threshold described in s 139AC. However, we will afford the respondent the benefit of the doubt on this point, and accept that she held a genuine belief that there was a degree of risk to Student A's safety, and her own, in the circumstances.

[104] We are satisfied that it is more probable than not that Ms Rakena-Andrews maintained her grip on Student A after the risk to safety she described had abated. We say this because of her evidence that she held Student A by the arm to take him outside. As such, considered against s 139AC's second requirement, we conclude that the respondent's physical restraint of Student A was not reasonable and proportionate in the circumstances that she described. Indeed, we consider that Ms Rakena-Andrews implicitly recognised that she had used unjustified force when she told us that she was not aware of her employers "no hands" policy at the time, and why it is that she was receptive to learning alternative ways in which to address any similar scenario, in the future.

Our findings regarding the test for serious misconduct

[105] Section 378 of the Education Act defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes; namely that which:

(a) Adversely affects, or is likely to adversely affect, the wellbeing or learning of one or more children: s 378(1)(a)(i); and/or

(b) Reflects adversely on the teacher's fitness to be a teacher: s 378(1)(a)(ii); and/or

(c) May bring the teaching profession into disrepute: s 378(1)(a)(iii).

[106] The test under s 378 is conjunctive.[27] As such, as well as having one or more of the three adverse professional effects or consequences described, the act or omission concerned must also be of a character and severity that meets the Council's criteria for reporting serious misconduct. The Rules describe the types of acts or omissions that are of a prima facie character and severity to constitute serious misconduct. As we have already said, r 9(1)(a) is that which requires scrutiny.

[107] Starting with the first limb of the definition of serious misconduct, we accept that the respondent's behaviour fulfils each of the three criteria in s 378(1)(a) of the Education Act.

[108] We observe that s 378(1)(a)(i) does not require proof of actual harm to a student's wellbeing or learning; only that the behaviour is of a type "likely" to have one or both of those effects.[28] As we have already addressed, it is not in dispute that Student A was in a state of distress after his interaction with the respondent on 15 June. The respondent attributes this to the fact that Student A was teased by his friends and on the receiving end of a kick by Student B. However, we do not find that the way in which Student A was supposedly treated by his peers adequately explains why he was reluctant to be in close proximity to the respondent for some time after 15 June. Also, it is an explanation that does not sit comfortably with the evidence we heard that Student A's parents confronted the respondent on the same day. While we did not accept that Student A's distress proved he had been kicked, we are satisfied that it demonstrates that the respondent behaved in a way that adversely affected his wellbeing. We are satisfied that it is likely that Ms

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[27] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.
[28] In *CAC v Marsom* NZTDT 2018/25, we adopted the meaning of "likely" used in the name suppression context - 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.

Rakena-Andrews' "grab" of Student A's arm adversely affected him and, at least in part, explains his distress.

[109] Turning to s 378(1)(a)(ii), we are satisfied that the respondent's use of force towards Student A adversely reflects on her fitness to teach. We have previously said on numerous occasions that it is incumbent on those in the teaching profession to have a clear appreciation of the limited circumstances in which restraint can be justified. In this case, the respondent exceeded the boundaries established by s 139AC of the Education Act.

[110] We also accept that the respondent's conduct is of a nature that brings the teaching profession into disrepute. The High Court said in *Collie v Nursing Council of New Zealand*[29] that there 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. We consider that there is an element of risk to the profession's standing in the eyes of the public given the way that the respondent treated Student A.

[111] Having fulfilled the first step in the test for serious misconduct, we must be satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules.[30] We accept that Ms Rakena-Andrews' use of force was not proportionate. However, while finely balanced, we are not satisfied that it was sufficiently grave to meet the second stage of the test for serious misconduct, given the element of justification we have found existed.

Penalty

[112] Counsel for the respondent requested the opportunity to file submissions addressing penalty should we making an adverse finding. We record Mr Efaraimo, in his closing submissions, said that "a penalty of censure and conditions is appropriate", should the Tribunal find the

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[29] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[30] The Court of Appeal, in *Evans v Complaints Assessment Committee of the Teaching Council of New Zealand* [2021] NZCA 66, recently described the two-step approach we have used as "settled".

respondent guilty of serious misconduct. It seems that the parties are not far apart, as Ms Tahana submitted on the CAC's behalf that the penalty should comprise censure, annotation and conditions.

[113] In our decision dated 15 April, we outlined our preliminary assessment of the commensurate penalty to assist the parties to determine whether it was necessary to file further submissions. We said:

> The primary motivation regarding the establishment of penalty in professional disciplinary proceedings is to ensure that three overlapping purposes are met. These are to protect the public through the provision of a safe learning environment for students, and to maintain both professional standards and the public's confidence in the profession.[31] We are required to arrive at an outcome that is fair, reasonable and proportionate in the circumstances in discharging our responsibilities to the public and profession.[32]
>
> We agree with counsel that the respondent's misconduct can be met by censure and annotation for a specified period.
>
> The issue is whether we are required to impose any additional penalty to achieve the disciplinary purposes standing behind our powers contained in s 404 of the Education Act? A key function of the Tribunal is to assess whether a practitioner has sufficient insight into the cause of the behaviour to abate the risk of repetition.[33] In this regard, we are required to take into account Ms Rakena-Andrews's rehabilitative prospects and needs.
>
> As things stand, we are not satisfied that the respondent has a complete appreciation of why she erred by using force towards Student A. What concerns us is that the respondent said that she would have adopted a different approach had she been aware on 15 June of the school's "no hands" policy. However, that information should not have been an epiphany. As an experienced practitioner, Ms Rakena-Andrews should not have needed to be told the rules regarding the use of force towards students.
>
> We recognise that Ms Rakena-Andrews told us that she completed professional development following this incident. However, the details of the type and intensity of the course were vague.

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

[32] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].

[33] See what we said in *CAC v Fuli-Makaua* NZTDT 2017/40 about the interplay of risk and insight. Those principles were recently endorsed by the District Court in *Rachelle v Teachers Disciplinary Tribunal* [2020] NZDC 23118.

> We consider it necessary to impose a condition on the respondent's practising certificate to ameliorate the risk of repetition. Any such condition will need to be completed to the satisfaction of the Council.

[114] We stated that we intended to provide the parties with the opportunity to make supplementary submissions, asked counsel to liaise to determine whether consensus can be reached regarding the type of professional development that Ms Rakena-Andrews should undertake to mitigate the risk we have described.

[115] Ms Rakena-Andrews does not currently hold a practising certificate. As such, we anticipated directing the Council to impose the condition on any subsequent practising certificate issued to her.[34] We said that, upon being issued with a new practising certificate, we expected that the respondent should be provided with six months to fulfil the condition.

[116] We also said that, to accord with usual practice, we expect that we will impose a condition that the respondent must provide a copy of our final decision to any employer or prospective employer until such time that she has met the professional development condition imposed on her practising certificate. We propose directing that the respondent's censure will expire, and reference to it can be removed from the register, once Ms Rakena-Andrews has satisfactorily completed the professional course we ultimately select.

[117] We received supplementary submissions. Counsel for the CAC submitted that the Tribunal should impose a condition requiring Ms Rakena-Andrews to complete professional development addressing her classroom management. Counsel for the respondent concurred.

Non-publication orders regarding Student A and Student B

[118] Rule 34(4) of the Teaching Council Rules 2016 obliges the Tribunal to consider making a suppression order whenever it receives evidence from anyone who falls into one of four specified categories of persons deemed to be vulnerable.[35] Rule 34(1)(a) applies to Students A and B.

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[34] Under s 404(1)(j) of the Education Act 1989.
[35] Rule 34(4) of the Education Council Rules 2016 is headed "Special protection for certain witnesses and vulnerable people". It obliges the Tribunal to consider whether

[119] We make an order under s 405(6) of the Education Act for the permanent suppression of the names and identifying particulars of Students A and B.

[120] We have chosen not to name the school or the teachers who gave evidence. That will increase the efficacy of the suppression order we have made to protect the interests of the students.

The respondent's application for name suppression

[121] The respondent sought permanent name suppression. The CAC opposed the application.

The applicable principles

[122] On 1 July 2014, the default position became for Tribunal hearings to be conducted in public and the names of teachers who are the subject of these proceedings to be published.[36] The Tribunal's powers around non-publication, for the purposes of this proceeding, are found in s 405 of the Education Act. We 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.

[123] The purposes underlying the principle of open justice are settled and thoroughly enumerated. It forms a fundamental tenet of our legal system. As we said in *CAC v McMillan*,[37] the presumption of open reporting, "exists regardless of any need to protect the public".[38] 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 2016/27,[39] we described the fact that the transparent

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it is proper to make an order for suppression under s 405(6) of the Education Act whenever it has evidence before it that "includes details relating to a person described in subclause (1)".

[36] That open justice principle is contained in s 405(4) of the Education Act, found in Part 32, which came into force on 1 July 2015.

[37] *CAC v McMillan*, above n 31. See, too, *CAC v Teacher I* NZTDT 2017/12, where we summarised the relevant legal principles at [41].

[38] *McMillan*, at [45].

[39] *CAC v Teacher* NZTDT 2016/27.

administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[40]

[124] In *CAC v Teacher (NZTDT 2014/52P),*[41] we considered the threshold for non-publication and said that our expectation is that orders suppressing the names of teachers (other than interim orders) will only be made in exceptional circumstances. In a subsequent decision, we said that we had perhaps overstated the position.[42] More recently, we observed in *CAC v Finch*[43] 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, we 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.[44]

[125] In NZTDT 2016/27, we acknowledged what the Court of Appeal said in *Y v Attorney-General*:[45] 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".[46]

[126] In *Finch,* we 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.[47] In deciding whether there

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[40] See, too, *CAC v Teacher S* NZTDT 2016/69, at [85], where we recorded what was said by the High Court in *Dentice v Valuers Registration Board* [1992] NZLR 720, at 724-725.
[41] *CAC v Teacher* NZTDT 2014/52P, 9 October 2014.
[42] *CAC v Kippenberger* NZTDT 2016/10S, at [11].
[43] *CAC v Finch* NZTDT 2016/11, at [14] to [18].
[44] See our discussion about the threshold in *McMillan*, above n 16 at [46] to [48].
[45] *Y v Attorney-General* [2016] NZCA 474.
[46] Above, at [32].
[47] 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"

is a real risk, we must come to a judicial decision on the evidence before us. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal's discretion to forbid publication is engaged. At this point, the Tribunal must determine whether it is proper for the presumption in favour of open justice to yield. 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".[48]

The respondent's grounds

[127] The respondent advanced six grounds, some of which overlapped. Ms Rakena-Andrews contended that, (a) naming her "would add to [the] emotional load and stress" she has suffered since her husband passed away in late 2019; (b) that her late husband's mana and reputation would be tarnished; that her late husband was related to Student A, and naming her "may well affect wider family relationships"; (c) that "the standing and acceptability" of a film that the respondent acted in would be affected if she is named; (d) and there would be "rift and polarisation" amongst those in the community the school serves; and, finally, (e) "the best outcome to the matters under consideration needs to be significantly relational. Publication of my name will not contribute to such an outcome". In addition, the respondent applied for suppression of the school's name and its locality, which, we observe, was not something the CAC sought, but which we addressed when we suppressed the names of Students A and B.

Our decision

[128] We are not satisfied that several of the repercussions of publication described by the respondent are real risks.[49] More fundamentally, we are not satisfied that any of the consequences described by the respondent will be more severe than those that ordinarily flow from an adverse disciplinary finding being made public.

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are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.

[48] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].

[49] Specifically, (b), (c) and (d).

[129] We have turned our minds to whether it is proper to exercise our discretion solely on the basis that we found misconduct instead of serious misconduct. In an earlier decision, we considered the submission that the public interest in publication is relative to the seriousness of the misconduct.[50] In that decision, *CAC v Evans*, we said:[51]

> In the criminal context, the seriousness of the offending concerned is a relevant factor when weighing the competing interests of the applicant and the public to decide whether to exercise the discretion to order suppression.[52] We accept that the relative seriousness of the conduct concerned is also a relevant consideration under s 405. However, Mr Evans does not suggest that the consequences of publication for him will be more severe than those that ordinarily flow from an adverse finding,[53] and we are not satisfied that it is proper to exercise our discretion solely on the basis that the charge before the Tribunal comprises an allegation (and finding) of misconduct instead of serious misconduct. That would invite a somewhat arbitrary approach, which risks undermining the presumption of open [justice].

[130] We went on to conclude in *Evans* that granting name suppression simply because we had made a finding of misconduct simpliciter "would invite a somewhat arbitrary approach, which risks undermining the presumption of open justice". The District Court, on appeal, subsequently agreed that a finding of misconduct cannot, in itself, result in non-publication of name.[54]

[131] We do not accept that the respondent's charge, in the disciplinary context, is "truly trivial".[55] Therefore, we are not satisfied that the public interest in publication is overridden by virtue of the fact that we have found simple misconduct proved, rather than serious misconduct.

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[50] *CAC v Evans* NZTDT 2018/43, which was upheld on appeal in *Evans v New Zealand Teachers Disciplinary Tribunal of the Teaching Council of Aotearoa New Zealand* [2020] NZDC 20062.
[51] At [85].
[52] Per *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [42], in which the Court said that where the charge is "truly trivial", particular damage caused by publicity may outweigh any real public interest.
[53] We note that, in the criminal context, the second stage of the enquiry can be undertaken "only if" the applicant has fulfilled the first stage: see *Robertson v Police* [2015] NZCA 7, at [40]. It is not necessary for us to decide if a similar approach is required under s 405's two-stage test.
[54] *Evans* above n 49 at [88].
[55] To adopt the term used in *Lewis v Wilson.*

[132] We decline the respondent's application. However, while we cannot suppress our reasons, we make a non-publication order in respect of Ms Rakena-Andrews' grounds in support of publication, set out at paragraph [132].

Costs

[133] We said in our 15 April decision that we would address costs at the same time as penalty. We directed that a schedule of the Tribunal's costs be prepared and provided to the respondent. We also directed the CAC to file and serve a schedule of its costs on the respondent. We invited Ms Rakena-Andrews to file a response, along with any evidence she wanted us to consider, when she filed her submissions on penalty.

[134] The Tribunal's costs come to $6,905, which accounts for members' fees, travel disbursements, venue costs and registrar's fees.

[135] We received a memorandum from counsel for the CAC, which provides a breakdown of its costs. The CAC's total costs are in the amount of $41,493.81, exclusive of GST. The CAC clarified that while two counsel appeared at the hearing, and also at several of the pre-hearing conferences, it was not seeking a contribution from the respondent to reflect the additional expense.

[136] The CAC accepted that a reduction from the standard contribution of 50 per cent is appropriate. It candidly acknowledged that its costs are "exceptionally high". It pointed to the fact that its procedural burden was significant, as a consequence of the fact that Ms Rakena-Andrews was initially assisted by a Mackenzie Friend rather than a lawyer. Counsel also emphasised the costs associated with liaising with Students A and B and their whanau, and facilitating the release of the EVIs from police. It nonetheless submitted that:

> There are no circumstances that displace the approach that costs should follow in favour of the successful party. The Committee has actively participated in the proceedings against the Respondent and has incurred actual costs of $40,183.97 excluding GST. However in light of the circumstances above and the Tribunal's finding of misconduct, the Committee considers it fair and appropriate that the costs contribution should fall below the standard 50%.

[137] Mr Efaraimo, in comprehensive submissions, asserted that it is not appropriate to sheet home to the respondent the fact that she was unable to secure legal representation earlier in the proceedings. Also, he emphasised that Ms Rakena-Andrews had offered to take responsibility for that aspect of the CAC's charge that we found proved.

[138] Mr Efaraimo submitted that the way in which the charge was framed, by including two discrete allegations of assault, prejudiced the respondent. He submitted that:

> [The] charges were not properly laid, there should instead have been two separate charges for each allegation. If they were left separate, the Respondent would have a claim herself for costs against the Committee in relation to the more serious charge which was not made out. Therefore, given that the charge which was not made out was more serious, it would be the case the Respondent would have a greater claim for costs against the Committee than the claim they currently have against her.

[139] The submission is not correct. It does not reflect the principle that, unless there is good reason to do so, costs should not be ordered against a professional regulator that is advancing the public interest to ensure that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint.[56] However, we accept the respondent's point that the order we make must reflect the fact we found her guilty of misconduct, rather than serious misconduct.

[140] Mr Efaraimo submitted that Ms Rakena-Andrews, "is living hand to mouth, benefit to benefit and is struggling to make ends meet. She is not able to pay anything further such as cost [sic] for this matter". The respondent provided us with financial accounts that supported this submission. It was submitted that we would be setting the respondent up to fail if we ordered costs.

[141] Mr Efaraimo submitted that the consequences that being charged brought the respondent have been "extreme". Mr Efaraimo referred to Te Ao Māori, and the stigma attached to the finding of misconduct. He said:

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[56] Per *Baxendale-Walker v Law Society* [2007] EWCA Civ 233. See NZTDT 2017/3C at [5]-[10]. "Good reasons" include where the prosecution was misconceived, without foundation, or borne of malice or some other improper motive.

> [Please] note that we are not submitting the obligations made under Te Tiriti excuse [the respondent's] actions, we are instead providing context and reiterating the fact that she has already been affected mentally, emotionally, spiritually, psychologically, financially and cannot start to move on with her life until she can resolve this case.

[142] We turn to the relevant principles regarding costs. The Tribunal's power to order costs is found in s 404(1)(h) of the Education Act 1989, which confers a discretion. It states:

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

[143] The Tribunal issued a Practice Note on costs in 2010, which sought to achieve an "objective and predictable" approach to costs applications. However, we emphasised that costs must be considered on a case-by-case basis to ensure that a fair result is achieved, but:

> That said, the purpose of this Practice Note is to signal – so that it does not come as a surprise to anyone – that, in the future, the Tribunal's starting point will be to consider in each case whether it is fair and appropriate, having regard to the circumstances, that it make an award in favour of the successful party reflecting 50% of all three categories of costs.

[144] The Practice Note reflects the general principle that the burden of costs of disciplinary proceedings ought to fall on the practitioner found to be at fault, rather than on his or her professional body.

[145] There is no applicable formula or scale when assessing the reasonableness or otherwise of costs.[57] This is a fact-specific assessment and a fair balance must be struck. However, while there is not a tariff, we accept that, in assessing the reasonableness of costs incurred, the Tribunal must bear in mind the need for consistency with the general level of costs incurred in this forum.

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[57] *CAC v Teacher C* NZTDT 2016/40C, at [6].

[146] We acknowledge that the sum involved here is very substantial. However, we do not accept that this means the CAC's costs are, prima facie, unreasonable. An assessment of the circumstances is required.

[147] Parties are afforded a degree of latitude regarding how the case is conducted and the enquiry regarding reasonableness should not unduly dwell on whether, with the benefit of hindsight, certain decisions or tasks might have been made or approached differently. Costs are not meant to be punitive, as a practitioner has the right to defend him or herself and should not be deterred from doing so by the risk of a costs order.[58] This is a reason why the presumption in ordinary civil proceedings - that properly incurred costs should follow the "event" and be paid by the unsuccessful party - has no direct application to disciplinary proceedings.

[148] The fact remains that the CAC chose to rely upon the hearsay statements of both Students A and B to prove its most serious allegation, and was on notice regarding the risk this posed to it succeeding. It explains why we ultimately found that the gravity of the respondent's conduct was less than that alleged by the CAC. On our estimation, about $11,500 of the CAC's costs were incurred in relation to the hearsay applications and associated attendances. This is something that requires a substantial adjustment and, accordingly, we will reduce the quantum against which we assess costs to $30,000.

[149] We accept that Ms Rakena-Andrews found it difficult to locate counsel, and we are reluctant to hold that against her. Given the complexities of the case (in particular, the hearsay issue) we are of the opinion that the CAC's costs would have been far more significant if Messrs Efaraimo and Foliaki had not been available to represent the respondent. Whilst somewhat arbitrary, we reduce the sum to which our order will apply from $30,000 to $15,000 to reflect the consistency principle, and to ensure that Ms Rakena-Andrews is not unduly penalised for the delay caused while she located legal representation.

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[58] *Vatsyayann v PCC* [2012] NZHC 1138.

[150] We treat the respondent's offer to take responsibility for that aspect of the charge ultimately found provided as a neutral factor. This is because Ms Rakena-Andrews put the CAC to proof at the hearing.

[151] Mr Efaraimo's submission regarding the relevance of Te Ao Māori when assessing costs is not something we have factored into our costs order. We mean no disrespect to the argument, but are not prepared to address it without the benefit of submissions from the CAC.

[152] In previous cases we have reduced awards of costs from 50 per cent to one-third where the Tribunal has been provided with evidence by a respondent that he or she is impecunious. It is important that we avoid our order being punitive, and we accept that Ms Rakena-Andrews has limited means. We consider that this requires a substantial reduction in the order we make, although we do not accept that we should make no order whatsoever.

[153] The modified sum against which the order will be made is therefore $15,000, exclusive of GST. We order the respondent to pay $3,500 to the CAC pursuant to s 404(1)(h) of the Education Act, which is below the 30 per cent contribution that we tend to make when a teacher claims impecuniosity.

[154] We accept that it may be necessary for Ms Rakena-Andrews to pay in instalments. She can make arrangements with the Council to do so.

[155] We order the respondent to make a contribution towards the Tribunal's costs, in the amount of $1,500.

Orders

[156] The Tribunal's formal orders under the Education Act are as follows:

(a) Pursuant to s 404(1)(b), the respondent is censured for her misconduct.

(b) Pursuant to s 404(1)(j), we direct that the following condition be imposed on any practising certificate issued to the respondent. The respondent must undertake a course selected for her by the Teaching Council that focuses on classroom management. She is to fulfil the condition within six months of being issued with a new practising certificate.

(c) The matters referred to in (a) and (b) will be annotated on the register until the condition referred to in (b) is fulfilled, at which point the censure will expire.

(d) The respondent is to provide a copy of this decision to any school that either offers her employment or relief work, until such time as the condition in (b) is fulfilled.

(e) The respondent is to pay $3,500 to the CAC pursuant to s 404(1)(h).

(f) The respondent is to pay $1,500 to the Council pursuant to s 404(1)(i).

(g) Pursuant to s 405(6)(c) and r 34 of the Teaching Council Rules 2016, there is an order permanently suppressing the names and identifying particulars of Students A and B.

Nicholas Chisnall
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).