BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2020/39

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

TRIBUNAL DECISION

DATED 30 APRIL 2021[1]

HEARING: 2 March 2021 (on the papers)

TRIBUNAL: Theo Baker (Chair)

Puti Gardiner and Kiri Turketo (members)

REPRESENTATION: Ms Tahana and Ms Grant for the CAC

[1] This decision was amended on 11 May 2021 by the Chairperson to correct the respondent's first name and to ensure consistency between paragraphs 15 and 90

The respondent is representing himself

1. In a Notice of Charge dated 10 November 2020, the Complaints Assessment Committee (**CAC**) charged that the GREGORY WILLIAM ROBINSON (**the respondent**) had engaged in serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers. In particular it was alleged that on 16 November 2019 the respondent:

   (a) removed and broke the headphones of a Year 10 student (**Student A**); and/or

   (b) then failed to appropriately de-escalate the situation.

2. The CAC alleged the conduct amounted to serious misconduct under the definition in section 378 of the Education Act 1989 (**the Act**) and rules (9)(1)(a) and/or (b) and/or (k) of the Teaching Council Rules 2016 (**the Rules**) or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.

3. The respondent denied the charge and so directions were made for filing evidence and an Agreed Bundle of Documents and the matter was set down for hearing in Tauranga on 2 March 2021.

4. An agreed bundle of documents was filed in accordance with directions. In his statement in response the respondent repeated his position that a hearing was not required. The CAC also then filed a memorandum suggesting a hearing on the papers would be appropriate in the interests of reduction of costs.

5. A teleconference was convened on 25 February 2021 and the parties agreed:

   a. The “headphones” referred to in the evidence are the “earbud” type.

   b. The student had one of the earbuds in his ear.

   c. The respondent pulled the headphones out of the student’s ear.

   d. Somehow the headphones ended up broken, and it is not known how. It was not done intentionally.

6. There was not agreement on the evidence on the second particular (failure to de-escalate the situation), and the parties were given a further opportunity to confer and see if agreement could be reached.

7. The CAC filed a memorandum setting out further discussions with the witnesses and acknowledged there was not agreement between the CAC witnesses or with the respondent. Nonetheless the CAC agrees to the Tribunal dealing with the matter on the papers. Mr Robinson has also filed a further email.

8. We must therefore make findings on the basis of statements of the witnesses and the respondent. This is not a satisfactory position. In the absence of an in-person hearing, we would normally as a minimum require sworn or affirmed statements. Usually where there is a dispute on the facts, we would hear from the witnesses in person and allow them the opportunity to respond to comments and contrary evidence.

9. In agreeing to consider the matter on the papers, we have taken into account the parties' desire to reduce stress for student witnesses as well as time and cost for all concerned. There is also little dispute on the first particular. We have reached a decision based on the information before us. That means that we have not been able to make findings on all matters.

10. There is some evidence that the respondent hit Student A. The respondent is not charged with this. We would prefer not to have had this evidence before us, but we understand the respondent wanted it included because it shows inconsistencies in the students' evidence.

Kupu Whakatau - decision

11. We amended the charge to read "16 October 2019" as that is consistent with the evidence of the students and the respondent.

12. We found that the allegations in the charge were proved.

13. We have found that the respondent's conduct in pulling Student A's headphone from his ear amounts to serious misconduct for the following reasons:

    a. It was likely to adversely Student A's wellbeing and that of other students;

    b. It is conduct that reflects adversely on his fitness to be a teacher;

    c. It may bring the teaching profession into disrepute;

d. Pulling Student A's headphone from his ear was an unjustified and unreasonable use of physical force and therefore is a breach of rule 9(1)(a) of the Teaching Council Rules 2016.

14. The respondent's failure to de-escalate this matter in a timely manner is conduct that reflects adversely on his fitness to be a teacher, but does not meet the criteria in rule 9. It is better characterised as misconduct.

15. We impose a censure under section 404(1)(b) and for a period of two years, it is a condition that he provide any employer with a copy of this decision under section 404(1)(c) the register is to be annotated for a period of two years under section 404(1)(e) of the Act.

16. The respondent is to pay 50% of the CAC costs and the Tribunal costs.

17. We have declined the respondent's application for non-publication of his name.

18. Our reasons are set out below.

Korero Taunaki – *Evidence*

The CAC evidence

19. The CAC's evidence was from 6 students, who were all Year 10 students in 2019, the Deputy Principal who undertook the initial investigation and the Principal who outlined the respondent's employment with the school and produced the respondent's previous statements. There was also a statement from the Teaching Council investigator.

20. [redacted] (**Student A**) is 16 years old and in 2019 he was a Year 10 student. He said that on 16 October 2019 he was in Maths class and the respondent was the relieving teacher. The students were working on computers.

21. Student A was sitting between his friends [redacted] (**Student B**) and [redacted] (**Student C**). They were in the front left-hand corner of the classroom. He said that while they were doing their work, he and Student B were listening to music on Student A's phone, through headphones. He said they were dancing in their seats but still doing work. The respondent came up behind them and tried to grab Student A's phone. Student A said he grabbed it out of the respondent's hand. He said the respondent grabbed the headphone out of his ear and started pulling hard. Then the headphones snapped.

22. Student A said he got out of his seat and started yelling and swearing at the respondent. The respondent said, “What are you going to do?” and Student A kept yelling. He said to the respondent, “You are going to buy me new ones”, and the respondent said, “No I’m not.”

23. Student A sat down again and the respondent left the room.

24. Student B also said that he and Student A were listening to music on Student A’s phone. Student B had one of the headphones in his right ear. He heard the respondent tell them to do more work, but that they could carry on listening to the music.

25. Student B said that Student A was being “over the top” with the music, and that the respondent repeated the instruction. Student A did not listen. He was bumping and drumming on the table.

26. Student B said that he could see that the respondent was fed up. He went over to the boys and tried to grab Student A’s phone, but Student A “refused”. He said that the respondent got aggressive and ripped the headphones. Student A got up and was angry and swore at the respondent. He said, “Buy me new headphones.” The respondent said, “No, I won’t.” The respondent left the classroom.

27. [redacted] (**Student C**) is also16 years old and was a Year 10 student at the time of these events. He said that Student A and Student B both had headphones in and were listening to music. Student A started to play the drums on the desk. The respondent asked him to stop and he did.

28. Ten minutes later Student A was doing it again. The respondent asked him to stop but Student A didn’t. The respondent tried to take Student A’s phone from him but Student A refused. Student C said that he saw the respondent rip the headphones out of Student A’s ears, ripping them in the process. Student A stood up and started swearing at the respondent.

29. Student C said that Student A told the respondent he would have to buy him new headphones, and the respondent said, “Maybe I will.” He also said, “No, you are.” Student C looked away because he was giggling.

30. Later Student C saw a teacher, Loretta, come in and take Student A out of the classroom. He heard Student A, as he was going out, tell the respondent would still have to buy him new headphones and the respondent replied, “No.”

31. [redacted] (**Student D**) was in the back left-hand corner of the room. She said she had a “10/10 view” and could see the side of Student A’s face. Student B was sitting next to him. She heard the respondent yelling Student A’s name continuously and then pull Student A’s headphones out of his ears and away from him.

32. Student D heard Student A swearing at the respondent who replied, “What are you gonna do about it”. Student A then stood up and said, “You’re gonna pay me five bucks for them” and the respondent said, “Make me”. Student A continued to swear at the respondent, saying, “Just f*** up c***”. Student A sat down. Student D said that the respondent backhanded the left-hand side of the Student A’s head. The respondent then said, “I’m getting Loretta. You’re leaving.”

33. Student E was also sitting at the back left-hand side of the classroom. Her attention was drawn to the incident by Student E saying, “He’s touching [Student A]”. Student E heard yelling. She then saw the respondent pull Student A’s headphones out and break them.

34. Student E said that Student A then got really angry and was yelling and swearing at the respondent, who said, “What are you going to do about it?”. Student A then stood up and the respondent was yelling at him. Student A yelled back saying that the respondent needed to pay him for the new headphones or get him new ones.

35. Student E said that the respondent told Student A to “sit the f*** down”. Student A sat down and told the respondent to “f*** off”. She saw the respondent hit Student A on the back, right side of his head with the back of his hand. The respondent then left the classroom.

36. [redacted] (**Student F**) was also on the back left-hand side of the classroom. She said she could see Student A listening to music and skipping songs on his phone. She saw the respondent go to Student A and told him to get off his phone. Student A got off his phone but was still listening to music.

37. Student F said the respondent grabbed Student A’s phone. Student A held the phone and tried to put it in his pocket. The respondent grabbed Student A’s headphones, pulled on them and they broke. Student A told the respondent he would be buying new headphones and the respondent said, “No, I won’t be”. This caused Student A to get angrier and answer back. She heard the respondent “continuing to answer back to [Student A] in a loud tone.”

38. Student F said that she heard Student A say “shut up” and the respondent replied, “Make me”. Student A then said, “F*** up you c***” and the respondent again said, “Make me”.

39. Student F described the respondent starting to walk closer to Student A and the exchange between the pair continued. Student A stood up and they both kept yelling at each other. Student A sat back down and the respondent walked away.

40. Brendon-Ray Horlock is the Deputy Principal. On 16 October 2019, as a result of students coming him to tell him that there had been an incident in their classroom, he separated the students and asked them to write down what they had seen and heard. He went to the classroom and invited the respondent to have a break. The respondent continued to teach for the next class but then Mr Horlock asked him to go home and write down exactly what had happened. At the end of the school day the respondent came back to school with his statement, which Mr Horlock produced.

41. In that statement, which is headed Wednesday 16 October, the respondent said,

Class took a little settling but had done so reasonably well with mathematics showing on computer screens. [Student B] started banging his arms on desk and head motions in a way that disturbed class and looked a danger to computers. [Student A] was sitting next to him I went over to warn him that I would allow listening to music as long as they were reasonable about it and getting on with their maths.

For a few minutes this happened.

Then both [Student B] and [Student A] were doing the same motions as before.

I again went over and said I would take the phone if they did not comply as above. Relative peace for a few minutes. The third time it started I went over and stated that I would take the phone or send them to B6. They ignored me. I was surprised to see the phone they were listening to was [Student A’s].

I reached between the two to grasp the phone. [Student A] grabbed it just before me and my hand went over his. It was the only contact (physical) we had, and was momentary. [Student A] started swearing at me. As I straightened up I snatched the earphone from his ear, about 1 foot away from the ear, intending to pull it away from the phone.

It broke off. [Student A] jumped up and said that I would be replacing it, I said I just might do that if he started to co-operate. He then called me an "f– ing old c–" so I had no choice but to fetch Loretta. …

42. Mr Horlock also produced handwritten copies of his notes of interview with the students. We have not considered the content of those in our deliberations.

43. From some hand-drawn diagrams, we understand that students were at desks facing the side and back walls of the class-room, in a U-shape. The three boys were at the front left-hand side, facing the left wall, with Student C at the front, then Student A, then Student B. The girls were further back, also facing the left wall.

44. Alastair Sinton is the Principal of the College. He described the school's investigation. In an email dated 30 October 2019 the respondent said,

> *1) Yes I attempted to remove the student's phone and broke his earphones. This was unintentional – an accident*
> *2) The student jumped up and shouted words to the effect that I would be replacing them. Knowing I had made a mistake, I offered to do so in a conciliatory fashion. There followed a string of foul-mouthed abuse so I turned on my heels and left the room to get Loretta. From the time the aggressive situation started to me leaving the room was probably less than 10 seconds. I de-escalated the situation immediately by removing myself from it.*
> *…*

45. Mr Stinton also produced a copy of the school's investigation summary, which we have not taken into account.

46. Kane Mullen is an investigator for the Teaching Council of Aotearoa New Zealand (**the Council**). He described the Council's investigation of a mandatory report received on 29 November 2019.[2] The report included the allegation that the respondent had hit Student A. Mr Mullen produced the Council's letter of 27 January 2020 in which the respondent was notified of this allegation.

47. Mr Mullen produced a copy of an email dated 3 June 2020 that he received from the respondent, who said:

[2] Under section 394 of the Act, and employer must report to the Council any matter that might possibly be serious misconduct.

With the clarity of time and distance these are the bare facts of what happened. Students were in a room on computers all facing the wall. Two students near me were sharing earphones and banging hard on the desk with their arms in a way potentially dangerous to the computers. I reached over one's shoulder to take the phone. He lunged forward and grabbed the phone before I did. I pulled the earphone out of the phone and broke it, also pulling the earphone out of his ear. He was shocked and wondered if I hit him which I assured him I hadn't. He then realised that earphone was broken and jumped to his feet in anger and abused me. I backed off and left the room…

48. In a further email dated 24 June 2020 the respondent addressed the allegation of hitting. This is not relevant to our consideration.

The respondent's evidence

49. The respondent made a statement and produced his earlier statements. His statement is a mixture of evidence, submission in the evidence of others and opinion.

50. His evidence of the incident was:

…

5. In this case [Student A] and [Student B] had been warned several times about their extreme behaviour – described as 'over the top' by other students. I was sitting behind them in the centre front of the classroom and when I looked up they were banging their arms and the side of their heads on the desk in front of them centimetres from the computers. From my perspective they looked in serious danger of damaging both themselves and the computers. I reacted instinctively to stop the music – there was no time to examine half a dozen different courses of action. I crossed the few metres to where they were and reached over [Student A's] shoulder to take the phone.

…

8. I reached from behind [Student B] over [Student A's] right shoulder with my right hand in an attempt to grab the phone. He was too fast for me and his hand beat mine to the phone. My hand closed over his – the only time there was any physical contact between us and that was no intended. I moved my hand and grasped the earphone at desk level a few inches away with a view to pulling it out of the phone and stopping the music which was driving his behaviour. The phone jack was facing away from me and I had no further purchase to pull it out. … I let the earphone go and straightening up grasped the

earphone again about a foot from his ear in a last effort to stop the music in his ear. All this was in a split second. Neither of us know exactly what happened to the earphone. We were both startled…

…

11. We then both saw the broken earphone. He then jumped to his feet and the shouting and abuse started. The earphone was certainly not in my hand…Neither the phone nor part of the earphone were ever in my possession. …

…

14. [Student A] then jumped to his feet, shouting the most obscene abuse. He demanded I replace the headphones, to which I replied something like. "I just may do that" or "Maybe I will if you sit down and behave yourself in a reasonable manner" … He ignored this and continued his obscene abuse. So I said, "Alright then I won't." The abuse continued and I turned on my heels and left the room to get Loretta from the Time Out room as I felt by now I had no choice but to do so. I had raised my voice in an attempt to get him to listen to me …

…

51. The respondent has then traversed the evidence of each of the student witnesses and commented on it. We have treated this with some caution, because those witnesses have not had an opportunity to respond to him as would be usual in a defended hearing. As was noted in a minute dated 12 January 2021, the respondent "…is obliged to put his case to relevant witnesses so that they can comment on it. If he disputes any aspect of a witness's evidence, he must tell that witness at the hearing what the contrary evidence will be and invite their comment. Failure to do so my mean a witness is recalled to respond after [his] case is closed.

Findings

52. There is no dispute that the headphones were broken. Although Student B said that the respondent ripped the headphones, Ms Tahana for CAC confirmed at a pre-hearing conference on 26 February 2021,[3] that it was not part of the CAC's case that the respondent intentionally broke them.

[3] Recorded in a minute of the same date

53. The evidence of Students A, B and C does not differ markedly from the statement the respondent gave to Mr Horlock. We have not placed much weight on the evidence of the three girls because they have described the respondent hitting Student A, an allegation that Student A, as the purported victim has not made. Neither have the two boys who were closest to him. We therefore question the reliability of the girls' evidence.

54. Students A and B were listening to music on Student A's phone. Student A says they were dancing in their seats. Student B says that Student A was being "overtop" with the music and he was bumping and drumming on the table. Student C says that Student A was playing the drums on the desk.

55. The respondent says they were banging their arms and the side of their heads on the desk in front of them centimetres from the computers, and they were in "serious danger" of damaging both themselves and the computers.

56. We are skeptical that the students' actions were likely to cause damage to computers, but we accept that they were moving in response to music they were listening to on a phone and they were behaving in a way that was disruptive and not conducive to learning, either for themselves or others. It reasonable to require the boys to stop. It is his approach to correcting that behaviour is the issue. A 14-year-old boy needs to be coached and give some reasons for modifying his actions, not backed into a corner. This can be summarised as "connection before correction."

57. The respondent accepts that he reached for the phone and then pulled the earbud out of Student A's ear. Given that Student B said he was listening at the same time, we do not know why no-one described the respondent as pulling the earphone out of Student B's ear. We presume it must have already fallen out. Because we did not hear from the witnesses we have not been able to clarify this. There is no dispute that the headphones broke.

58. Particular 1 a) is therefore established.

59. Particular 1 b) alleges that the respondent failed to appropriately de-escalate the situation.

60. There is no dispute that Student A was angry that his headphones had been broken and got up and started yelling and swearing at the respondent and demanding that the respondent fix the headphones.

61. We acknowledge that the respondent left the classroom and got assistance. The question is whether he should have done that sooner.

62. The respondent says that he replied, “Maybe I will, if you sit down and behave yourself in a reasonable manner”. After Student A continued his abuse, the respondent said, “Alright then, I won’t”. The abuse continued and then the respondent went to get another teacher. The respondent said he had raised his voice in an attempt to the student to listen to him.

63. The CAC evidence did not set out how the respondent should have managed this situation. However, as a specialist tribunal, our view is that the respondent’s response to Student A’s outburst fell short of the standard expected of a reasonable teacher in his position.

64. There are other responses that would have been appropriate such as: apologising for the breakage, explaining it was unintentional, using a calm voice and backing away rather than having a “stand-off”. Under the Code of Professional Responsibility, teachers are expected to demonstrate a high standard of professional behaviour and integrity (clause 1.3) and engage in professional and ethical relationship with learners (clause 2.2).

65. We find that the respondent failed to appropriately de-escalate the situation and so particular b) is established.

Whanonga he taumaha - Serious misconduct

66. The CAC contends that the established conduct amounts to serious misconduct. Section 378 of the Act is an interpretation section. Serious misconduct is defined as follows:

> ***serious misconduct*** *means conduct by a teacher –*
>
> *(a) that –*
>
> *(i) adversely affects, or is likely to adversely affect, the well-being or learning of one or more students;*
>
> *(ii) reflects adversely on the teacher’s fitness to be a teacher; or*
>
> *(iii) may bring the teaching profession into disrepute; and*
>
> *(b) that is of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct.*

67. The criteria for reporting serious misconduct referred to in section 378 (b) are found in rule 9 of the Rules and the CAC relies on rule 9(1)(a) and/or (k):

> ***9 Criteria for reporting serious misconduct***
>
> *(1) A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following*:
>
> *(a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:*
>
> *…*
>
> *(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute*.

68. The CAC submitted that Student A's reaction of swearing and yelling demonstrates that he was distressed, and it was likely that he was experiencing considerable angst from embarrassment that this exchange had occurred in front of his peers. Therefore the conduct adversely affect Student A's wellbeing.

69. The respondent accepted that his attempt to remove the headphones was unhelpful and inappropriate but did not accept that his behaviour adversely affected Student A's wellbeing because there is no evidence that was the case and in particular there was no complaint from the boy's parents. He acknowledged that Student A was angry but that it is speculation that he was distressed or embarrassed. He said that Student A was seeking attention rather than avoiding it and that Student C said he was giggling.

70. We do not need to find actual harm, only that the conduct was likely to adversely affect the learning of wellbeing of one or more students. In our view the act of pulling ear buds out of someone's ears unexpectedly is reckless and is likely to adversely affect that person's wellbeing. The fact that Student A was angry about this act is evidence of the affect on his wellbeing. That does not mean that if a student is upset with their teacher, an adverse finding against the teacher is warranted, but the respondent's actions were not within the acceptable range of classroom management and were likely to adversely affect Student A's wellbeing. We find that the definition in section 378(a)(i) is therefore met.

71. The CAC also submitted that the conduct reflected adversely on the respondent's fitness to teach by using excessive force in an attempt to remove the headphones and his continued "banter" was inappropriate and demonstrated a complete disregard for de-escalating the situation. His conduct showed a lack of professional judgement, control and insight which led to property being broken and an explosive reaction from Student A.

72. The respondent said that although his attempt to remove the headphones was inappropriate, he did not believe that the force used was excessive and it is unclear whether the headphones broke as a result of my pulling on them or Student A's response. He did not accept that it was of sufficient seriousness as to call into question his overall fitness to teach.

73. When we consider whether an action, omission or an episode of conduct amounts to serious misconduct, we look at that event in isolation from the teacher's background. A teacher's history and otherwise unblemished record are relevant to our assessment of penalty. We need to look at the incident before us and decide if that incident reflects adversely on a teacher's fitness to teach. This is the sort of action that meets that description. We find that the second definition in section 378 is therefore met (section 378(a)(ii)).

74. The respondent did not agree that his conduct met the reporting criteria in Rule 9. He strongly believed that he was acting in the best interests of the students in attempting to stop Student A's behaviour. He did not accept that "reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and standing of the profession is lowered by the behaviour of the practitioner".[4]

75. We find that pulling a student's earphones out of his ears is an unreasonable use of force on a student under rule 9(1)(a). Having reached for the student's phone, he "pulled hard" on the headphones. The respondent said that he "snatched" it and also that he grasped the earphone at desk level with a view to pulling it out of the phone, but had no further purchase to pull it out. He said he let it go and straightening up, he grasped the earphone again about a foot from his ear. We are satisfied that this was an unjustified and unreasonable use of physical force and so rule 9(1)(a) is met.

[4] The test for bringing discredit to the profession in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]

76. We find that the respondent's failure to de-escalate appropriately was not so serious. We acknowledge that he did not allow the exchange to become protracted and he did seek teacher help, but his engagement with Student A reflects adversely on his fitness to be a teacher. It therefore amounts to misconduct. It does not meet the threshold for serious misconduct. We do not find that it is likely to bring the profession into disrepute or is a serious breach of the Code of Professional responsibility. It therefore does not meet the second part of the definition of serious misconduct. Had it been of longer duration that might have been a different case.

Whiu - penalty

77. 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 Teaching Council in respect of the costs of conducting the hearing:*
> *(j) direct the Teaching Council to impose conditions on any subsequent practising certificate issued to the teacher.*

78. The CAC acknowledged that the respondent has provided long service to the profession and this is his first appearance before the Tribunal. However it was submitted that he appears to lack insight and continues to justify his actions by claiming that the breaking of the headphones was an accident; he suffered a “string of foul mouthed abuse” from Student A; he de-escalated the situation immediately by removing himself and that the CAC is adopting an “excessively student-centred approach”.

79. The CAC submitted that because the respondent lacks insight, there will be limited scope for rehabilitation. The CAC sought a penalty of censure and a condition to notify future employers of these proceedings.

80. The CAC referred to several cases involving manhandling, assault, threatening or swearing at students. We agree with the respondent that his conduct was not as serious.

81. The respondent strongly objected to the submission that he lacked insight. He said that he acknowledged early on that he should not have attempted to remove the headphones. He very early realised that the choice he had made was not helpful and attempted to rectify the situation by saying that he might pay for them and later by leaving the room.

82. The respondent did not accept the CAC submission that by saying that the damage to the headphones was accidental that he was justifying his actions. It was a simple statement of fact.

83. He also explained that his comment that the CAC was adopting an “excessively student-centred approach” was an expression of his frustration at the extent to which the false accusation that he hit Student A has destroyed the end of his career and resulted in the stress and distress of these proceedings and a total loss of expected income.

84. The respondent submitted that the appropriate penalty (for a finding of misconduct) is censure and professional development.

Ngā korero

85. Although this conduct is not at the most serious end of the scale, it does meet the definition of serious misconduct and it was reasonable that the CAC referred the case to us.

86. We accept that maintaining that he did not intentionally break the headphones should not count against the respondent. The CAC agreed he had not done so.

87. It is understandable that in his initial responses, the respondent was focused on the allegation that the had hit Student A. His use of the words “student-centred approach” is unfortunate. Where students have made allegations, they must be listened to and investigated. They cannot be dismissed without proper consideration.

88. The CAC’s decision not to proceed on that allegation seemed to distract the respondent’s focus on what was before us. It was relevant to him that this allegation and not been established and he wanted to use this to discredit the students’ accounts, and yet he did not want them to give evidence in person.

89. We acknowledge that undergoing an investigation and disciplinary action is a very stressful situation and teachers may be passionate in their responses. Our concerns about the respondent’s insight stem from his continued explanation for grabbing the earphones was to prevent harm to the computers or students. This is a very fragile justification for his actions which seemed to be borne out of irritation or frustration with the students.

90. We agree that we should mark our disapproval of the respondent’s conduct with a censure. We also think it is important that future employers know about this incident and therefore it is a condition on his practising certificate that he provide a copy of this decision to any prospective or future employer. The condition is for two years from the date of this decision. The register is also to be annotated for two years.

He Rāhui tuku panui – Non-publication

91. There are two applications for non-publication of name: one from the respondent and one from the College.

Te Ture – The Law

92. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public.[5]

93. Section 405(3) is subject to the following subsections (4) to (6) which provide:

[5] Section 405 was inserted into the Act on 1 July 2015 by section 40 of the Education Amendment Act 2015.

> *(4) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may hold a hearing or part of a hearing in private.*
>
> *(5) The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.*
>
> *(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
>
> *(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
>
> *(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
>
> *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

94. Therefore, if we are to make an order for non-publication, we must first have regard to:

- the interest of any person;
- the privacy of the complainant;
- the public interest.

95. Open justice forms a fundamental tenet of our legal system and "exists regardless of any need to protect the public",[6] but the public interest in publication of a teacher's name may include the need to protect the public. This is an important consideration where a profession is brought into close contact with the public. It should be known that based on a teacher's previous conduct, that teacher may pose a risk of harm. The public is entitled to know about conduct that reflects adversely on a person's fitness to teach.

96. Where a person argues that harm would be caused by publication of a name, we must be 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.[7]

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[6] *CAC v MacMillan* NZTDT 2016/52, 23 January 2017
[7] See C*AC v Jenkinson* above, note 11 at [34]; CAC v Teacher NZTDT 2016/68, at [46]; *R v W* [1998] 1 NZLR 35 (CA).

97. 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". [8]

The respondent's application

98. The respondent[9] was granted interim order for non-publication of his name on 19 November 2020. As recorded in a minute of that date, any application for permanent suppression was to address the required grounds and be accompanied by evidence. This was repeated in a minute of 12 January 2021.

99. The respondent's application is included in his submissions. His grounds are that he has a 40-year unblemished teaching record and he believes it is unfair to destroy his reputation without a strong basis for doing so. Because of the investigation process, he lost the relieving work he would have undertaken and this has had an impact on his supplementary retirement income. If the Tribunal finds serious misconduct, her seeks name suppression until any appeal is filed.

100. The respondent's grounds for name suppression are commonly advanced in cases before us and have routinely been dismissed as not rebutting the presumption in favour of publication. If the existence of this decision would deter a prospective employer, then that tends to indicate that there is a there is a public interest in publication that must have some weight in our considerations.

101. We have not been persuaded that it is proper to order non-publication of the respondent's name under section 405(6) and the application is declined. An interim order is made to allow the respondent to lodge an appeal with the District Court, who may decide to grant interim suppression pending the outcome of the appeal. If no court order is made, the Tribunal's interim order will lapse 6 weeks from the date of this decision.

The School's Application

102. The College has applied for non-publication on the following grounds:

[8] *Y v Attorney-General* [2016] NZCA 474, at [32]
[9] Although he is the applicant in the application for non-publication, for the sake of continuity, he is referred to as the respondent throughout this decision

a. It is likely that the students will be identified by publication of the school's name, especially given the number of students interviewed as part of the school investigation.

b. Impact on the reputation and standing of the school;

c. Potential serious adverse speculative implication on the school and other teachers if the respondent is granted suppression, but the school is not.

d. Disruption to the learning environment arising from media interest and publicity.

e. No public interest in identifying the school.

103. Applications by schools for non-publication are fairly common in this jurisdiction. In NZTDT 2016/27 we said:[10]

> [When] a teacher commits serious misconduct in the course of his or her duties, it is inevitable that there will be a degree of fallout for the school concerned. However, in light of the central role that schools have in disciplinary proceedings, it is safe to assume that their potential to suffer detrimental reputational (and potentially financial) impact through open publication was factored in when Parliament introduced the presumption of open justice. We do not rule out the possibility that in rare cases suppression may be required to protect a learning institution's interests. In the majority of cases, however, the principle of open justice places the interests of the educational community at large ahead of those of an individual school.

104. We have previously noted that there is an inevitable element of hardship to the student body of a school that has its name published because of a teacher's misconduct. Whether that hardship progresses beyond the "ordinary" must be considered on a case-by-case basis.[11]

105. In the present case, we do not understand how identification of the teacher would lead to identification of the students beyond those who were in the classroom and witnessed the events.

[10] CAC v Teacher NZTDT2016/27, at [69]
[11] CAC v Teacher NZTDT 2016/68, at [67].

106. The College took appropriate action. It referred the incident involving its relief teacher to the Council and also undertook its own internal processes. Clearly the College did not find the conduct acceptable.

107. The teacher is being named and so there is no risk of speculation about any other teacher.

108. We are not persuaded that there would be disruption to the learning environment. If this case is presented in the media, there may be some talk, but we cannot see that it would be prolonged or that learning would be disrupted.

109. We do not find it is proper to order non-publication of the school's name and the application is declined.

Theo Baker, 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).