NZTDT 2021/25

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education and Training Act 2020
IN THE MATTER	of 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	**IMDAAD SHAH** Respondent

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall KC (Deputy Chair), Lyn Evans and Rose McInerney
Hearing:	7 and 8 September 2022, with closing submissions received on 31 October 2022
Decision:	7 February 2023
Counsel:	S McMullan for the referrer G Steel for the respondent

Introduction

[1] The Complaints Assessment Committee ("the CAC") referred to the Tribunal a charge against Mr Shah, the respondent, alleging serious misconduct and/or conduct otherwise entitling us to exercise our powers under section 500 of the Education and Training Act 2020 (the Act). We will set out the CAC's notice of charge, which is dated 14 June 2021, in full.[1] It alleges that Mr Shah:

(a) Between around 2017 and around 2019 (inclusive), breached professional boundaries with a student, Student A (between Year 11 and Year 13), including by:

i. Making inappropriate comments, including of a sexual nature, towards Student A;

ii. Going to Student A's workplace to visit Student A on several occasions and/or asking Student A's work colleagues to speak to Student A at her workplace;

iii. Providing Student A with his phone number without valid educational context;

iv. Asking Student A for her personal mobile number and/or calling her personal mobile number on one occasion in the evening without valid educational context; and

v. Regularly telling Student A to remain behind with him alone after class and/or in an adjacent classroom without valid educational context.

(b) Between around 2017 and around 2019, during technology class, regularly swore at or in the presence of students, including Student A;

[1] We have not included a particular that the CAC elected not to pursue. It was described as particular "c". In this decision, what we have described as particular "c" was, in the notice, particular "d".

(c) Between around 2017 and around 2019 (inclusive), during technology class, regularly:

i. Hit students on the legs with a stick and/or ruler; and

ii. Threatened to hit students with a stick and/or ruler.

[2] We convened to hear the case in Auckland on 7 and 8 September 2022. At the conclusion of the hearing, the Tribunal invited the parties to file closing submissions addressing liability, which we have since received and considered.

The evidence

The CAC's evidence

[3] The CAC filed evidence from five witnesses, all of whom were required for cross-examination.

Student A

[4] The primary evidence came from Student A, who was born in 2002. Student A attended the School between 2016 and 2020. The respondent was Student A's "tutor teacher" during Years 9 to 13. This meant that the respondent and Student A would meet at the beginning of each school day for around 15 minutes for "tutor time", during which Mr Shah would, amongst other tasks, take the class role. Student A said that her initial impression of Mr Shah was that he was "pretty cool" and "super friendly". Student A said that there were three inter-connected rooms that Mr Shah utilised, and where most of the relevant events discussed in her evidence happened.[2]

[5] As well as being Student A's tutor teacher, the respondent taught her technology in 2018.[3] Student A asserted that the respondent afforded her special treatment and that he would treat her differently to others in her technology class. According to Student A, the respondent regularly

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[2] Attention was given to a floorplan provided in the joint bundle. Student A acknowledged that the diagram confused her, and, based on our impression, was not definitive regarding which room was which.

[3] In her brief, Student A said that the respondent was her technology teacher between 2017 and 2019, but accepted in cross-examination that Mr Shah only taught her during the one year.

requested that she remain behind after tutor class, and at the end of the school day, alone with him in the empty classroom adjacent to that in which he taught. Student A said that, "It seemed like he was seeking out opportunities to have contact with me".

[6] Student A estimated that Mr Shah asked her to stay behind once or twice a month to talk to him. She said that," I agreed to this initially because Mr Shah was my teacher, but I started to feel weird about it after a while (particularly when Mr Shah started making comments that I felt were inappropriate, as address below) and so I stopped agreeing to stay back as often by 2019. I would tell Mr Shah that I had to go to class". Student A said that she did not remember the reason(s) Mr Shah provided for keeping her back. She asserted that she enquired why he asked her to stay back, and to meet in private, but could not recall the reason he provided. In cross-examination, the witness said that Mr Shah never provided her with a reason why he was asking her to remain.

[7] Student A said that, "The whole thing made me feel uncomfortable". One of the reasons that Student A contended that the respondent's request made her uncomfortable was because he would make it in front of other students, and she was concerned that observers would think that she was in trouble.

[8] Student A said that these conversations tended to last between five and 10 minutes.

[9] Student A said that Mr Shah "sometimes" let her, and her cousin (who we will refer to as Student B), sit in his classroom and "wag" other classes. She modified her evidence in cross-examination, saying that she only avoided a scheduled class by staying in Mr Shah's room once.

[10] In terms of particular (a)(i), Student A said that when she was in Years 10 and 11 and aged "around 16", the respondent asked her how old she was and when she was to turn 18.[4] According to Student A, when she disclosed that she was 16, the respondent said that he would have to "wait two more years". Student A said that she enquired why her turning 18 was relevant,

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[4] Student A was tested on why she said she was 16 when this happened, and said that she might have been 15.

and Mr Shah told her “it won’t be illegal”, and “that’s when your legal”. Student A asserted that her cousin overheard this comment.[5]

[11] On a separate occasion before the school holidays, Mr Shah allegedly told Student A that there was a room at the back of the classroom to which he was going to take her and “give her a nice kiss”. This comment was allegedly made by the respondent when he visited Student A at her workplace.

[12] Student A said that Mr Shah would often talk to her about sexual relationships and ask her personal questions. Student A told us that at one point she fictionalised having a boyfriend so that, “He may lay off and stop being creepy”. The witness said this was triggered by Mr Shah asking Student A if she had a boyfriend. She said that, on what appears to have been a separate occasion, Mr Shah told her that she needed an older guy to satisfy her, and that “these young boys are not experienced”. Student A said that her cousin, Student B, was present when this comment was supposedly made, as were other members of her tutor class; albeit they may not have heard what Mr Shah said because he “had a habit of saying things under his breath”. Student A said that Mr Shah did not initiate the conversation, but rather overheard a discussion about her boyfriend that was being held with other students. According to Student A, Mr Shah would often make such comments, which made her uncomfortable. Again, Student A perceived there to be an obvious sexual connotation.

[13] The impression that Student A formed as a consequence of the respondent’s cumulative behaviour was that he wished to pursue a sexual relationship with her when she turned 18. Student A accepted in cross-examination that the respondent did not say anything overt about wishing to begin a sexual relationship with her when she reached that age.

[14] Student A said that Mr Shah would often comment on the fact that he found her mother attractive and good-looking. Student A said that on two or three occasions she told Mr Shah that she would disclose to her father what he had said, and he responded that her father was, “all shit, that he can’t do

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[5] Which was something the witness repeated during cross-examination.

anything". Student A said that no one else was present when these comments were made.

[15] Student A said that when she was in Year 9 or Year 10, Mr Shah invited her to visit Fiji with him. Student A said that, at the time, she and the respondent were discussing a Flight Centre poster depicting Fiji pinned to the wall of the empty classroom next to Mr Shah's room.

[16] Mr Shah, according to Student A, regularly swore during both tutor and technology classes. She said that, many times, the respondent referred to her as "you bitch", which he would mutter under his breath. Student A said that if other students were present, then the respondent would mumble. In contrast, respondent would swear out loud if it was only Students A and B present. Student A said that while she considered the respondent's use of swear words to be unprofessional, his language did not faze her.

[17] In terms of particular(a)(ii), Student A said that Mr Shah visited her at her workplace, a McDonald's in a mall, after school had finished for the day and during the school summer holidays, several times "around" 2018 and 2019. Student A asserted that the respondent, on one occasion, asked her not to disclose the fact that he had visited her workplace and told her, "just keep it between us". Student A said that she was on a break on this occasion, having a drink at one of the tables next to the cafeteria. Mr Shah sat down next to her at the same table. Student A was puzzled by the respondent's comment, and said that, "teachers come to my work all the time it's a public place, the fact he doesn't want others to know about his intentions and why he was there shows he came with the wrong intentions".

[18] Notwithstanding Mr Shah's apparent desire to keep his visit secret, Student A said that on one occasion he approached one of her colleagues and asked if Student A was working. He allegedly asked Student A's colleague to tell her that he had come to her work to visit. On a separate occasion, Mr Shah allegedly told Student A that she was getting "really fat", after he approached her while she was on a break, imbibing a fizzy drink. He allegedly told the witness to stop drinking that "type of stuff", or she would "get fatter".

[19] Student A initially asserted that Mr Shah never ordered food when he came to McDonald's. However, during cross-examination Student A

accepted that Mr Shah placed an order for food on one occasion, and she served him. Student A also said that she provided the respondent with free food. In cross-examination, the witness said that she provided Mr Shah with two free burgers, and that, exercising her managerial discretion, she routinely provided free food, as "there's a lot of food that goes to waste at McDonald's and if there is extra food I always give it to people". Student A's clarification nullified the suggestion that Mr Shah was the recipient of special treatment.

[20] Student A said that, "I felt like Mr Shah was coming to McDonald's to visit me, because he would ask after me, even if I wasn't at work that day when I wasn't there he just left, he didn't order any food, so I thought he had the pure intention of wanting to talk to me. He also asked me which days I was working".

[21] Mr Shah allegedly disclosed to Student A that his wife had died during one visit to McDonald's. She said that the respondent asked her to keep it confidential. On this occasion, Mr Shah provided his mobile telephone number to Student A and said that he was going to contact her. Student A said that she provided her phone number to Mr Shah because he told her that he owned a beauty salon, and her mother worked in the beauty industry. Student A said that, "Mr Shah also gave me his cell phone number by giving me a card to his family's business … , which is a beauty salon, and told me to visit. Mr Shah also asked me to ask my aunties or parents if they wanted a job at the salon. I can't remember what I did with that card. I told my mum about it, but she was working at her own salon and didn't need a job at the time". In cross-examination, Student A said that Mr Shah provided the card to her while at school, but did not accept that the respondent kept cards in the classroom that he handed to students in advance of "formal times".

[22] Student A said one evening, after she provided Mr Shah with her number, he called her on her mobile at around 9 p.m. Student A said that she did not recognise the number, because she had not saved it upon receipt.[6] She said that she was at her aunt's house when Mr Shah called. The respondent allegedly asked when Student A was next working and who

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[6] The witness could not say how long after she gave Mr Shah her number that this occurred.

she was with at that moment. Student A asked the respondent why he always came into McDonald's when she was working and said that she was with her mother at her aunt's place. Mr Shah asked Student A not to tell anyone about the phone call, and said that he would call her later. Student A said this made her feel uncomfortable, and that the call was "strange" because the respondent was whispering. This was the only occasion that Mr Shah allegedly telephoned Student A. In her brief, Student A said that she blocked Mr Shah's number, which was said to explain why information about the call was not in her phone's history. She was less definitive about whether she blocked the number in cross-examination, but added that there was no record that corroborated her evidence that Mr Shah had called because she had not accessed the list of blocked numbers, only the call history, when she was spoken to by the school about her complaint.

[23] In respect to particular (c), Student A said that the respondent, during technology classes, possessed a stick or piece of wood, and struck her with it five or six times. The witness said that while the respondent did not discriminate between male and female students, he tended to hit the boys more often and that she witnessed Mr Shah strike other students around the calf area on 10 occasions. Student A said that the respondent would hit the boys harder than the girls, and his actions tended to invoke a humorous response from the male students, which would spur Mr Shah to repeat his behaviour. On other occasions, Mr Shah allegedly provided the stick to one student, and invited him or her to use it on a class mate who was being "cheeky".

[24] Student A said that the respondent used sufficient force to redden the legs of those he struck. Nonetheless, Student A described the respondent's mood as jovial during the times he used force. She said that, "Mr Shah would do this when he was joking around or in a good mood. I think he did it as a joke but I still thought it was something he shouldn't be doing". Student A described the fact that the respondent would tell students "I will fuck you up", and chase them from class.

[25] Student A approached one of her teachers, Roydon Agent, on 3 May 2019. She said that she did so because she had a good bond with Mr Agent. Student A said that she was a "bit confused" by Mr Shah's behaviour towards her, and "wanted another professional teacher's opinion". According to

Student A, Mr Agent "confirmed what was happening with Mr Shah wasn't okay". While Student A accepted that Mr Shah had flagged her poor attendance by threatening to place her on a "green report", she denied that this motivated her to complain.[7] Indeed, she said that, given Mr Shah's preferential treatment, she did not take the threat seriously. Student A said that she ultimately approached Mr Agent because, "… I was leaving school by the end of the following year, and I was worried for the other students at the school, including my younger sister. I felt like, if I didn't raise the way Mr Shah had behaved towards me, it could happen to someone else. No student should go through that, you should feel safe with your teachers". She added that her poor attendance was the consequence of Mr Shah's behaviour.

[26] Student A rejected the proposition put to her in cross-examination that she had concocted her complaint because Mr Shah had said he intended to place her on report, and that she had, "taken a bunch of rumours about Mr Shah and shaped those into a story of him having contact with you, whispering swear words to you, and seeking to spend time with you alone, for the purpose of getting him into trouble".

[27] Student A was interviewed by the principal, Grant McMillan, on the same day that she approached Mr Agent. Later, she was spoken to by police.

[28] Student A was asked by Mr McMullan in re-examination whether she could provide any examples of the "special treatment in class" she had alluded to during cross-examination. Student A referred to a time when she was in Mr Shah's technology class, and did not want to complete a particular project (making a vice, which the respondent later described as an "F-clamp"). Student A said that the respondent provided her with the vice completed by a "previous student" upon which she could place her name, and present as her own work to get the relevant NCEA credits. Student A also said that the respondent empowered her to take her vice home

[7] In re-examination, Student A described this as a green report card that a student has to take to each class, to have his or her attendance affirmed by the relevant teacher.

(presumedly to work on outside class hours), which was not something other students were allowed to do.

[29] After Student A finished her evidence, the parties provided an agreed statement of facts addressing the way in which the respondent recorded the assessment for the F-clamp unit standard in the School's computer system. On 5 September 2018, Mr Shah made five separate entries for the assessment. First he recorded "standard not assessed", then "not achieved", which he changed to "achieved", then back to "not achieved" and, finally, to "achieved", which was the published result.

Student B

[30] Student B's brief of evidence was filed belatedly, and she was the first witness called by the CAC. She attended the School for three years, overlapping with when her cousin was a pupil there. Student B was a year ahead of Student A.

[31] Student B was not taught by the respondent. Student B candidly admitted that she failed to attend her classes because she was facing difficulties in her personal life, and that she was prone to absentia. Indeed, in cross-examination Student B accepted that she failed to attend her designated classes, or school for that matter, "most of the times". She attended Mr Shah's tutor class, "… to basically wag".[8] Student B said that Mr Shah "didn't mind" if she and Student A stayed in his room "when we were meant to be in our actual classes"; albeit there were "a few times" when the respondent told them they had to attend. Student B also said that the respondent was receptive to Student A's younger sisters remaining in his room during class time (although neither Student A nor Student B encouraged this), but that Mr Shah, on one occasion, prevented Student B's brother from remaining. Student B said that, "It was clear to me based on this that Mr Shah would allow girls to stay in his class, but not boys. This was something that stood out to me". In cross-examination, Student B clarified the frequency of her attendances in Mr Shah's class, saying it was, "Almost all of the times". In cross-examination, Student B accepted that she

[8] Student B said her tutor class was on the other side of the school, and that she often failed to attend that class, as well as others.

"stayed back because [she] wanted to", and it was fun. The witness accepted that Mr Shah did not expressly invite her to remain. She also accepted that she never witnessed Mr Shah ask Student A to stay.

[32] Witness B denied Mr Shah's proposition that he never allowed her, or any student for that matter, to avoid class by remaining in his room.

[33] Student B said that she was "often" present when Mr Shah and her cousin conversed in the classroom, and that the respondent "would treat [Student A] differently from other students". In cross-examination, Student B said that a point of difference in terms of how the respondent treated her cousin compared to others was that he would often allow her to leave class early, without challenge. Student B said that while not a member of the respondent's tutor class, Mr Shah allowed her to sit in the room, and it was on these occasions that she overheard conversations between her cousin and the respondent. Student B said that, "When I was a student at James Cook, I would see Mr Shah and [Student A] alone many times, either during tutor times or lunchtime in his classroom. I didn't see Mr Shah make any moves towards Student A in the class". In cross-examination, Student B affirmed that she did not hear the respondent comment on Student A's appearance, or talk to her cousin about having a boyfriend. When asked if the respondent had talked about "sexual matters", Student B said she did not recall any conversation in this vein, and she never witnessed anything that suggested that Mr Shah had a sexual interest in Student A. Student B nonetheless described the fact that Student A had disclosed to her that Mr Shah made her feel uncomfortable.

[34] Student B expanded on what she said in her brief, and stated that she witnessed the respondent and Student A conversing at lunchtime, when he was on duty. When asked to describe the topic(s) of conversation, Student B said, "just honestly just random things". Student B said that, with the benefit of hindsight, "It was like Mr Shah was trying to vibe with the students and to get to know them". Student B said that she often told Mr Shah to "fuck off and leave her [Student A] alone".

[35] Student B accepted that the respondent's classroom, and the adjacent spaces that he used, were not private, as many students attended or used one of the rooms as a thoroughfare.

[36] Student B said that, when she was in Year 10 or Year 11, she was present during a conversation between Student A and the respondent during which, “Mr Shah told [Student A] [in reference to a Flight Centre poster on the wall of Fiji], if you come with me, I’ll take you all [to Fiji]”. Student B said that the poster was hung in the room next to Mr Shah’s “main classroom”, and that the conversation was generated by a discussion about travelling to Fiji when Students A and B finished school. Student B accepted that she could not say whose poster it was, or whose room it was in. Student B denied knowing that Mr Shah was from Fiji.

[37] While not tolerably clear whether the conversation was on the same or a different occasion to that described earlier in Student B’s evidence, she said that Mr Shah told Student A that he travelled to Fiji “often” and that she could go with him if she wanted to. Student B observed, “I laughed because I didn’t take Mr Shah serious [sic] at the time, but I can see why it might make [Student A] uncomfortable”. Student B said that she did not tend to take the respondent seriously, as “I had quite a lot of fun interacting and joking with Mr Shah”. She did not accept that it was possible that Mr Shah was “just talking about himself going to Fiji”, or that this conversation did not happen.

[38] Student B corroborated Student A’s evidence that Mr Shah often swore in class, and said that he had sworn in front of her, and at her. The witness said that Mr Shah called her a “stupid bitch”, which was generated by Student B “mocking” the respondent. He also told her to “shut up” in response when she teased him. The witness said, “I used to swear at him quite a bit, we used to mock each other so when he was swearing at me, I thought it was a joke, so it didn’t really affect me”.

[39] Student B described an occasion in early May 2019 when she and the respondent interacted in a store in the same mall in which Student A worked. She was with her mother and brother, and Mr Shah asked Student B why she was not attending school. Student B disclosed that she and her family were living in emergency accommodation. In response, Mr Shah provided Student B with his phone number and email address. He did this in the presence of Student B’s mother and brother. Mr Shah told Student B that he had a friend who worked in real estate, who could help her family find a house. The respondent said that he would arrange for the agent to call Student B if she disclosed her number to him. She did so. There was no

evidence whether the agent subsequently spoke to Student B or one of her family.

[40] Student B rejected the proposition that Mr Shah never disclosed his number and email to her, but instead may have provided the contact information for the real estate agent. She accepted that Mr Shah was trying to help her and her brother "get back to school".

[41] On a separate occasion, Mr Shah told Student B and her brother that he could get them work in his spa business. Student B said, "Mr Shah told me he wanted me to work as a receptionist at one of his businesses to make money for my mother, he was trying to help me get a job".

The CAC's remaining witnesses

[42] The CAC adduced evidence from Roydon Agent, who was the teacher to whom Student A made her complaint. Mr Agent taught Student A history in 2018 and 2019.

[43] Mr Agent said that Student A approached him at 10:40 am on 3 May 2019, after he completed a period two history class. She asked to speak to him privately. Mr Agent said that, from memory, Student A was concerned about Mr Shah, "paying her undue attention in class, wanting to talk to her after class and visiting her relative's barber shop and asking questions about her that the relative thought was inappropriate for a teacher". We interpolate that Student A said nothing in her evidence about Mr Shah having approached a relative in his or her place of business, which was something made clear when Mr Steele examined the consistency of Student A's complaint.

[44] According to Mr Agent, Student A disclosed that, "Mr Shah also gave her credits for a piece of hard metal work that she had not completed or submitted for grading".

[45] After speaking to Student A, Mr Agent spoke to the School's principal, Grant McMillan. Having done that, Mr Agent uplifted Student A from her class and took her to Mr McMillan's office. Student A agreed to Mr Agent remaining while she spoke to Mr McMillan, and, at the end of the interview, he countersigned Mr McMillan's notes to endorse their accuracy.

[46] Mr Agent provided an opinion about Student A's truthfulness, and the reasons why he held that position were explored and tested in cross-examination. To be clear, we did not find that evidence to be substantially helpful to our assessment of Student A's veracity, and placed no weight on it.[9]

[47] Mr McMillan gave evidence. He stated that Mr Agent approached him during the interval break on 3 May 2019. He subsequently interviewed Student A, in the presence of Mr Agent, during periods three and four. Mr McMillan took notes, which Student A signed.

[48] On 5 May 2019, Mr McMillan wrote to Mr Shah to inform him that a complaint had been received. Mr Shah was placed on what Mr McMillan described as "discretionary leave".[10] Mr McMillan met with Student A and her mother on 8 May and, on 9 May, engaged an independent investigator. Mr Shah was provided with a copy of Student A's statement on 13 May. The investigator's report was received on 6 June 2019.

[49] Mr Shah resigned on 16 August, which was before the disciplinary procedure was completed.

[50] Mr McMillan submitted a mandatory report to the Teaching Council on 21 August, having provided a summary report on 13 August. Also, the matter was referred to police.

[51] Mr McMullan asked Mr McMillan supplementary questions about the School's security cameras. He said that cameras were installed during the relevant period, but most were not functional during the first two years of his principalship. He said that there was, "from memory", an outward-facing camera in the technology area, but it was not operational. Mr McMillan said that he was not contacted by police and asked whether there was CCTV footage. Rather, Mr McMillan enquired whether there was footage and was told that there was not. He said that, had there been functioning cameras,

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[9] Relying upon the test regarding the admissibility of veracity evidence in s 37 of the Evidence Act 2006.
[10] Mr McMillan was cross-examined on the basis that this was a suspension. Given our focus, that is not something with which we needed to grapple.

he would have accessed the footage. Mr McMillan said that he never discussed the cameras with Mr Shah.

[52] Mr McMillan explained the pastoral functions imbued in a tutor teacher. He acknowledged that tutor teachers would ordinarily contact the parents or guardians of students with problematic attendance, before escalating the issue to the dean. He said that a "green report" was the "lowest level" of intervention.

[53] Mr McMillan addressed the respondent's F-clamp assessment. He said that he, with Student A's assistance, "sourced the piece of work" and "Mr Shah found the other piece as well".[11] In cross-examination, the witness said that the first clamp did not work and the second item had Student A's name on it, but "that was written over the top of over names below it did work but, yeah, once again the fact that there were several student names on it and at least one other name underneath it …" The witness said that he had reviewed the paperwork, and was confident that the standard had not been met because, "The workbook was incomplete and the teacher hadn't signed any of it off in terms of the official documentation". He also described the respondent's recording of the grade as a "highly unusual pathway" (he described it as "ping-ponging"). Mr McMillan concluded that the nature of the grading process lent "considerable weight to the student's assertion that she'd never actually done the work herself or completed [it] herself fully".

[54] We heard from the CAC's lead investigator, [redacted], who adduced the key documents contained in the agreed bundle and provided an outline of the relevant chronology. It is not necessary, for the purposes of this decision, to set Mr [redacted] evidence out in detail. However, for clarity's sake, we emphasise that while Student A's complaint was investigated by police, "no criminal offences had been disclosed".

[55] Mr Steele asked Mr [redacted] whether, based on his perusal of the Police file, a draft application for a production order was finalised, to interrogate the phone records for Mr Shah's mobile number. The witness

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[11] Mr McMillan did not dispute the fact that the item that Student A identified as her F-clamp did not have her name on it, and that Mr Shah located it when given access to the classroom.

was not able to provide a definitive answer, and affirmed that he had not seen anything on the file that "showed any evidence of Mr Shah having telephoned [Student A]".

The evidence for the respondent

[56] Mr Shah provided a brief and a supplementary brief of evidence. The latter was filed the day before the hearing.

[57] Mr Shah was born in Fiji, which is where he qualified as a teacher in 1983. He commenced his career in 1984, and taught technology, mathematics and physics. Mr Shah moved to New Zealand in 2002, and, having completed a diploma, began teaching in 2004. During his first decade in New Zealand, the respondent was employed by Skills Update Training and Education Group. He joined the School in 2014, and resigned in 2019. He predominantly taught metal work and automotive engineering.

[58] Mr Shah told us that he used four different spaces for his classes at the School, which he described by reference to a floorplan that he annexed to his brief. It was not in dispute that there were two spaces that were used by other teachers, too. He also stated that there were security cameras located "around these classrooms". In his evidence before us, Mr Shah said that the previous principal installed the cameras, and that two operated inside the space in which he taught. He did not accept Mr McMillan's evidence that the cameras faced outwards, and therefore did not provide coverage of the internal spaces.

[59] Mr Shah did not dispute that Student A was in his tutor class from 2016 until 2019, inclusive. He explained that, "Generally, students remain in the same tutor class throughout their time at the school and as such have the same tutor teacher for their entire period at the school". The respondent taught Student A metal work in 2018, when she was in Year 11.

[60] Mr Shah described the end of 2018 and the beginning of 2019 as a difficult period of time, as his mother and wife died in rapid succession. We will not detail the specific ailments and hardships that Mr Shah suffered. We accept that this was a very challenging period in Mr Shah's life, during which he was absent from time-to-time.

[61] Mr Shah responded to Student A's specific allegations, which he denied. We will adopt the order that Mr Shah responded to the allegations in his brief.

[62] Mr Shah said that it is not true that he ever asked Student A to remain behind after class. Indeed, he went further and said, "I have never asked Student A to remain behind with me. I do not recall any time that I was ever alone with Student A or alone with her and her cousin [Student B]. I did not meet with any students after school".

[63] Mr Shah asserted that there was simply no window of time in which he could have met alone with any student between classes, given the movement of pupils to and from rooms. He also observed that the areas within which he worked in the technology block were covered by security cameras and therefore, "If I had tried to meet alone with a student in an empty classroom this would have been recorded on the JCHS security camera system". In cross-examination, Mr Shah was less adamant about whether he ever spoke to students after class, and said he would do so "if there was any need, but most of the time we tried to discuss everything during the class, whatever the things are, and after that we give them an opportunity to leave the class when the bell rings". He nonetheless maintained that he never spoke to Student A one-on-one after a class ended.

[64] Mr Shah denied affording Student A special treatment. He specifically said that, "I did not provide special treatment of assisting Student A to do her work or accepting a lower standard from her".

[65] The respondent disputed that he ever manufactured opportunities to be with Student A. His contact with Student A and members of her family were strictly for education-related purposes. He said that he recalled occasions upon which he was required to discuss her attendance, and "regarding her attitude and participation in class". However, he emphasised that these discussions were never conducted when he was alone with Student A.

[66] Mr Shah stated that he did not allow either Student A or Student B to remain in his room when they should have been in other classes. In his supplementary brief, Mr Shah said that he did not allow Student B to attend his tutor classes. He said that the exception was a student we shall

describe as “Student C”, who gave evidence on behalf of Mr Shah. Student C “did not like any subjects other than metalwork and automotive”, and other teachers sent him to Mr Shah when he got in trouble, which often happened. As such, Student C spent “a lot” of time in Mr Shah’s classroom, but with the connivance of his other teachers.

[67] Mr Shah denied making any sexual comment – subtle or overt – to Student A that could have entitled her to form the impression that he wished to commence a relationship with her. He said that he never asked Student A her age or enquired when she would turn 18. He observed that her age was a matter of school record, and “as such I had access to this information if I had needed it”. He never discussed relationship matters with Student A, and never said that she required an older man to sexually satisfy her.

[68] Mr Shah did not offer to take Student A to Fiji. He said that he did not “recall” the Flight Centre poster Students A and B described, and never discussed Fiji with either. During cross-examination, Mr Shah went further and said that there had been no Fiji poster, and that Students A and B had concocted its existence.

[69] The respondent flatly denied ever swearing at, or in the presence of, students. He said, “Swearing is not in my nature and I do not do it”. As a corollary, he denied he swore at Student A. In his supplementary brief, Mr Shah confronted the veracity of Student B’s evidence that she witnessed him swearing, and said that this could not have happened, as “[Student B] was not in any of my classes and as such would not know what happened in my classes”.

[70] Mr Shah accepted Student B’s evidence that he offered her family assistance to locate accommodation. He accepted that he spoke to Student B, her mother, and her brother at the mall, and that they discussed “their living situation”. He offered to put the family in touch with a real estate agent he knew, and said that he believed he gave Student B the agent’s number and email address. He said that while he did not “recall” taking Student B’s number, or providing the family with his own contact details, “If I did then it was in the hope of assisting them with their living situation”. However, Mr Shah denied that he discussed Student B or her brother working at his wife’s salon.

[71] In response to a question posed by the Tribunal, Mr Shah could not provide a reason why Student B and her family had sought assistance from him, given that he said he did not, and had never, taught her.

[72] Mr Shah acknowledged speaking to Student A at McDonald's when he visited the restaurant. He did not accept that he knew before then that Student A worked there. Mr Shah explained that his wife and daughter operated a business "a short distance away from the McDonald's restaurant", and he would purchase food to take to his family while they were at work from time-to-time, and he sometimes attended the restaurant with members of his family to eat.

[73] Mr Shah said that he did not recall sitting with Student A at a table while she was on a break. As such, he denied telling her that she was getting fat. He did not ever discuss her employment with her; ask Student A when she was working; or attend the restaurant for the purpose of speaking to her. It follows that the respondent denied that he spoke to one of Student A's colleagues about her, or asked Student A to be secretive about his visits. The respondent did not recall telling Student A that his wife had died, but said that it was openly known.

[74] Mr Shah, while he accepted that Student A had correctly described his order (a fillet of fish), denied that Student she ever provided him with free food.

[75] Mr Shah did not accept that he had offered to secure Student A's mother work at his family's spa. He emphasised that employment decisions rested with his wife and daughter; not him.

[76] Mr Shah said that he never asked Student A for her number, or spoke to her on the telephone.

[77] Mr Shah flatly denied ever striking any student with a stick or piece of wood. He said that he did not keep a stick on his desk, as alleged, as he did not work with wood "and had no reason to have a wooden stick or ruler in my classrooms". During cross-examination, he denied having anything wooden in his workspace.

[78] Mr Shah ended his brief by postulating that Student A may have made her complaint because "of [his] threat to put her on report and my earlier report to the dean about her attendance", which he said happened in 2018.

[79] Mr Shah addressed Student A's evidence about the "F-clamp" assessment. In supplementary questions from his counsel, Mr Shah explained that the assessment had both practical and theoretical components. Mr Shah denied providing Student A with any assistance beyond that expected of his role. When asked whether he had provided Student A with another student's F-clamp to pass off as her own work, Mr Shah, instead of responding directly, outlined a convoluted complaint that his privacy had been breached because Mr McMillan and Student A had entered his office to identify the item concerned. He said that, upon being allowed access to his office six or seven weeks after the complaint was made, he located a clamp with Student A's name on it, which was not the item that she had asserted was the one he had provided to her. In response to a question from the Tribunal, Mr Shah said that the F-clamp he located was completed by Student A herself. He disagreed with Student A's self-assessment of her competence and confidence working with metal, and said that she had the requisite skills to achieve the grade he gave her.

[80] In cross-examination, Mr Shah maintained that Student A had met the standard required. Notwithstanding that the fact had been agreed, Mr Shah also asserted during questioning by the prosecutor that the assessment described in the agreed facts did not pertain to the F-clamp.

[81] In response to a question from the Tribunal, Mr Shah denied that he provided Student A with preferential treatment in the way she described. Specifically, he disputed that he had invited her to pass off another student's work as her own.

[82] The respondent said that the reason he altered the standard assessment five times on 5 September 2018 was because he had been advised that morning that his mother was on the verge of dying, and he was "really shaken". He said that he used the laptop to enter the grade, and, immediately after doing so, left school.

[83] Student C gave evidence. He attended the School between 2015 and 2019. He was in the year ahead of Student A, but said that he was present

during many of her technology classes in 2018. The witness said that he spent “a lot of time” with Mr Shah during his time at secondary school and stated, “I think I probably saw him teaching in more classes than any other student and I got to see how he acted in those classes”.

[84] Student C candidly admitted that he did not enjoy school, with the exception of technology and automotive classes, and “I would often get into trouble with the teachers”. The witness said that other teachers sent him to Mr Shah when he got into trouble, and “sometimes I wouldn’t even go to my own classes but would go to Mr Shah’s classes instead”. He explained in re-examination that Mr Shah was able to control his behaviour because he was “calm”, and treated his students like he was a “father in school”.

[85] In re-examination by Mr Steele, Student C said that he was not in Mr Shah’s tutor class. However, he added that he would “get ticked off in my class” and go to the respondent’s tutor class of his own volition.

[86] Student C said that while he did not know Student B, and was not “familiar” with her, he never saw her in any of the respondent’s classes.

[87] Student C said that Student A was not given “special treatment” by Mr Shah. He said that he never witnessed Mr Shah ask Student A to remain behind after class. He asserted that he never saw Student A and Mr Shah alone together.

[88] Student C refuted that Mr Shah ever swore in class, or that the respondent possessed a stick or piece of wood that he used to strike students. Student C disputed the veracity of Student A’s evidence that the respondent struck him, too.

[89] In contrast to what Mr Shah said during cross-examination, Student C denied that he and the respondent had any sort of contact whatsoever after he left school in 2019. Mr McMullan closely tested Student C about whether he wrote his brief of evidence himself, or whether he received it in draft form and adopted the content. The latter approach is not, strictly speaking, improper. However, as Mr McMullan identified for Student C, and asked him to explain, his brief was identically worded to those filed for two other former

students (who ultimately did not give evidence in person).[12] Student C maintained that the words contained in his brief were a verbatim account of what he told the respondent's counsel, who typed the brief. He could not explain why the same words were used in other briefs, but denied that he had simply signed a brief prepared by someone else. Student C denied that he was simply following a script prepared for him by the respondent.

[90] In cross-examination, Student C volunteered that he was always the last person to leave Mr Shah's class, and when he left, "the next class comes in", which meant that the respondent could not have been alone with Student A. However, he subsequently conceded that he did not really pay attention to what was happening in class "generally", and he would not have necessarily noticed if Student A was having an interaction with the respondent.

Our factual findings

[91] 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 should we find he committed serious professional misconduct.[13]

[92] We have approached our assessment on the basis that each particular must be established on the balance of probabilities.

[93] It is not possible to reconcile the diametrically opposed narratives provided by the parties. Given this clash, a principled approach to the assessment of the veracity and reliability of witnesses is required. We have kept in mind the limitations associated with a demeanour-based assessment of truthfulness, and that demeanour is "best not" considered in isolation.[14] What is required is a broader assessment of a witness's evidence. The following factors may, depending on the particular circumstances of the case, be relevant: Whether the witness's evidence is consistent with the evidence of other witnesses who we have accepted are truthful and reliable; whether the witness's evidence is consistent with objective evidence such

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[12] We were not asked to admit their briefs as hearsay statements, and therefore have not taken the content of their briefs into account.
[13] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).
[14] *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116.

as documents or text messages, and if it is not, what explanation is offered for any inconsistencies; whether the witness's account is inherently plausible (does it make sense, is it likely that people would have acted in the way suggested?); and whether the witness has been consistent in his or her account over time and, if not, why not?[15]

[94] Another point requires elucidation. The High Court has cautioned against finding that a departure from a profession's code of ethics or practice will automatically constitute professional misconduct. Rather, such codes and standards should be regarded as a guide to be considered by the Tribunal when determining whether, in the particular circumstances of the case, there has been serious misconduct (or misconduct, for that matter).[16]

Particular (a): The allegation that the respondent breached professional boundaries with Student A

[95] As a starting point, it is beyond doubt that teachers are required to act with a high standard of professional behaviour and integrity; to act in the best interests of learners by promoting their wellbeing and protecting them from harm; and to engage in ethical and professional relationships with learners that respect professional boundaries.[17] This is self-evident.

[96] Our assessment of whether Mr Shah breached the professional boundary between him and Student A must be undertaken by reference to the way in which the CAC framed its notice of charge. With (a), the CAC particularised the specific ways in which the respondent is alleged to have "breached professional boundaries". Therefore, in terms of each of particulars (a)(i) to (v), we have considered whether the CAC has satisfied us on the balance of probabilities that:

(a) The respondent behaved in the way described in each of the particulars; and

(b) If the specific behaviour is proved, whether this constitutes a breach of professional boundaries.

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[15] *Taniwha* at [38] and [45].
[16] *Staite v Psychologists Board* (1998) 18 FRNZ 18 (HC) at 34, Young J.
[17] These obligations are articulated in clauses 1.3, 2.2 and 2.3 of the Code of Professional Responsibility.

[97] We will begin by stating our general findings regarding the reliability and credibility of Mr Shah's evidence. This is because, if we accept that he told us the truth, or there is a reasonable possibility that his evidence was truthful, then that would provide a complete answer to the CAC's case. In saying that, we emphasise that while Mr Shah postulated a reason why he said Student A had lied (in response to the threat she would be placed on report to address her poor attendance), he bore no onus to identify a possible motive. In other words, the fact that Mr Shah elected to nominate a potential reason why Student A might have lied did not shift the burden of proof away from the CAC. That being said, we do not accept that Student A's allegations were born from malice.

[98] We did not find Mr Shah to be generally truthful. We will explain that conclusion by reference to three specific factual disputes, and why it is that we did not resolve them in his favour.

[99] First, while on its face a relatively innocuous factual dispute, there was conflict between, on one hand, Students A and B, and, on the other, the respondent, regarding whether there was a travel poster of Fiji present in the technology block, and which, on the CAC's account, precipitated an offer by Mr Shah to take Student A with him to that country. Mr Shah adamantly denied that there was any such poster. He suggested that Students A and B concocted the presence of the poster, based on the fact they knew he was from Fiji. We found that assertion implausible, and an example of the respondent's reluctance to make reasonable concessions.

[100] The second example involves the evidence we heard about the way in which the respondent allegedly dealt with Student A's F-clamp unit standard assessment in 2018. This evidence came in, to a degree, by sidewind. As we emphasised during the hearing, it was not a particularised example of the way in which Mr Shah allegedly breached professional boundaries (through the preferential treatment of Student A), and the CAC did not apply to include it in its charge. We observe behaviour that undermines the integrity of the assessment of scholastic achievement is a discrete and inherently serious form of misconduct.[18] However, we have not treated it as evidence going

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[18] See the discussion in *CAC v Teacher* NZTDT 2014/33, *CAC v Leyden* NZTDT 2014/72 and *CAC v Teacher* NZTDT 2016/27.

directly towards proof of the charge, but instead have used it to gauge the credit of the primary witnesses. Given the seriousness of the allegation, we have determined whether it is more probable than not that the respondent encouraged Student A to submit another student's work as her own. We conclude that the respondent did.

[101] Notwithstanding the preponderance of evidence proving otherwise – namely what Student A said, the presence of the clamp with Student's A name superimposed on that of other students, the convoluted way in which the respondent recorded the grade, and Mr McMillan's opinion that the paperwork did not support the "achieved" grade recorded - Mr Shah denied that he had allowed Student A to submit another student's work as her own. Having agreed the facts addressing the way in which he entered Student A's grade for the F-clamp, Mr Shah then asserted that it related to a different unit standard. This about-turn dented his credibility. We have also relied upon the fact that Student A, by admitting that she passed-off another student's work as her own, disclosed something personally discreditable, and which would have remained unknown but for her candour. This bolstered her veracity. In conclusion, Mr Shah's testimony on the topic was not consistent with what the other evidence showed.

[102] The third example is the inference we have drawn from Student B's uncontested evidence that the respondent offered to assist her family to find suitable accommodation. We pause to say that we do not criticise Mr Shah for assisting Student B and her family in this way. However, the evidence begs the question *why* Mr Shah involved himself in Student B's family's affairs? This highlights another significant divergence in the evidence. To recapitulate, Student B said that she was a regular attendee in Mr Shah's classroom, notwithstanding the fact he was not her teacher. She described being well-acquainted with the respondent. On the other hand, Mr Shah categorically denied that Student B attended his tutor classes, or that they enjoyed the kind of camaraderie described in the CAC's evidence. If Mr Shah was truthful that he neither taught Student B, nor allowed her (or her siblings) to routinely remain in his teaching space as an alternative to going to class, it invites the question why Student B (and her mother and brother) confided in him, and sought to solicit his assistance? On this point, we found that the respondent's evidence did not have the ring of truth.

[103] Our conclusion that we did not find Mr Shah to be a truthful narrator does not provide an automatic pathway to a finding that the charge is proved. We must, and have, scrutinised the CAC's evidence. We now turn to the particulars.

[104] We are satisfied that the CAC has discharged its burden by proving that it is more probable than not that Mr Shah made "inappropriate comments" to Student A. However, we are not satisfied that the CAC proved its allegation that the respondent made comments of a "sexual nature". This is not to say that we concluded that Student A was not credible. Indeed, we found her, in general, to be a truthful and reliable narrator. However, we applied what was said by the Supreme Court about the need for disciplinary tribunals to ensure their qualitative assessment of the evidence reflects "the seriousness of matters to be proved and the [professional] consequences [for the practitioner] of proving them".[19] Student A's sexual allegations were inherently serious, and required careful scrutiny.

[105] We have assessed Student A's testimony by reference to what emerges from the other evidence. This is not to suggest that the CAC was required to corroborate Student A's account. Rather, we have relied upon the fact that Student A was adamant that Student B was present when the respondent allegedly made his most sexually-loaded comments in class. Our conclusion that the particular is not proved turns on the fact that Student B did not, in this respect, support her cousin's account. We add that we found Student B to be a truthful witness, and reject the suggestion that her familial link to Student A provided a motive to lie.

[106] Next, we turn to Student A's allegation that Mr Shah, at McDonald's, told her he wanted to kiss her. Notwithstanding this being an allegation that, if proved, would constitute a serious departure from the standards expected of a teacher, Student A provided little detail explaining the context in which this improper comment was supposedly made. That poses difficulties testing the plausibility of the evidence. Exercising due restraint, we do not find it proved to the requisite standard.

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[19] *Z*, above, at [112].

[107] Finally, the comment that Students A and B said Mr Shah made when in the presence of the Fiji poster. As we have already explained, we accept that there was a poster. Given the consistency of Students A and B's account, we are satisfied on the balance of probabilities that the respondent offered to take Student A with him to Fiji. We pause to observe that this comment, in isolation, may not have had any particularly sinister overtone, but it nonetheless encroached on the professional boundary between student and teacher.

[108] We turn to particular (a)(ii), which we do not find proved. The pith of the particular is that the respondent "went to" Student A's place of work, McDonald's, with the express purpose of visiting her. Student A acknowledged that it was not uncommon for teachers from the school to buy food from McDonald's. After all, it is a mall, and there is nothing improper about teachers conversing with those they teach in a public setting. Mr Shah's wife and daughter operated a business in the mall. This was not in dispute. His explanation that he purchased food for his family and employees of the business is plausible. Student A acknowledged during cross-examination that Mr Shah had bought food the first time she served him.

[109] The infrequency of Mr Shah's visits meant that there was not a pattern that enabled us to infer that he had an improper motive. Rather, the CAC's case turned on Student A's evidence that a colleague (not colleagues, as specified in the charge) had been told by Mr Shah to convey a message that he had visited. We did not hear from Student A's colleague. For that reason, we were not prepared to rely upon what Student A said she was told. This means that we are not satisfied that the CAC had proved the second limb to the particular – that Mr Shah asked, "Student A's work colleagues to speak to Student A at her workplace".

[110] Turning to particular (a)(iii), we are not satisfied that the CAC has proved that it is more probable than not that Mr Shah provided his phone number to Student A. Student A's evidence on this point was not particularly clear. While the witness said that Mr Shah provided her with his mobile number, she also said that he provided her with a business card. There was no evidence to contradict Mr Shah's testimony that his personal contact details were not recorded on business cards associated with his wife and daughter's business. There is a theme in the evidence of Mr Shah offering

to secure employment for Students A and B, or their relatives. Logic dictates that Mr Shah provided a business number, rather than his own, to Student A when this offer was made. This is consistent with Student B's evidence. The particular is not proved.

[111] We find particular (a)(iv) proved to the requisite standard. We are satisfied that the respondent asked Student A to provide her number to him, and that she did so. What Student B said about Mr Shah taking her contact details when he offered aid to her family to address their residential crisis, lends support to Student A's account. Mr Shah tentatively accepted that he might have asked for Student B's details. This consistency overcomes the evidential gap referred to by Mr Shah – that the CAC had not adduced telephonic records proving the call was made. As a matter of logic, if Mr Shah asked for Student A's number, he did so because he intended to call her, and followed through in the way described by Student A. We accept that the call had no valid educational purpose; albeit, in isolation, it presents as more clumsy than sinister.

[112] Finally, particular (a)(v). We are satisfied that it is more probable than not that Mr Shah regularly told Student A to remain behind after class to speak to him, and that these conversations tended to be five to 10 minutes in duration. Student B corroborated Student A's evidence about conversations held in private with Mr Shah. Mr Shah categorically denied that he ever extended such a request to Student A. However, we found that Mr Shah's evidence that he never invited students to remain back to speak to him after class lacked the ring of truth. The reason he provided for not doing so was not logical, which may explain why he took a less absolute position during cross-examination, and acknowledged that this was something he would do on occasion in the small window of time between classes.

[113] The CAC used the word "alone" in its charge. Therefore, the respondent focused on that fact that it was implausible (if not impossible) for him to have ever spoken to Student A in a private setting. We accept that such conversations would have taken place while other students were in close proximity. However, we do not accept this prevented Mr Shah from speaking briefly to Student A outside the direct presence of others.

[114] While not a particular of the charge, we are satisfied on the balance of probabilities that Students A and B truthfully described Mr Shah enabling them to avoid their scheduled classes by remaining in his room(s). Student B was clearly a far more frequent transgressor than her cousin, on the accounts of each of Students A and B. The former said the respondent allowed her to skip class on a single occasion only. As a corollary, we rejected Mr Shah's evidence that he never allowed Student B to attend his tutor classes, and to "wag" those she was meant to be in. On this point, Student C's evidence supported what Students A and B said. He said that he often went to Mr Shah's room instead of attending the class he was meant to be in. This seems to have been countenanced by Mr Shah in the same way that happened in respect to Student B.

[115] We will now address the relevant principles that apply when assessing if there has been a breach of professional boundaries.

[116] The Tribunal, in a series of cases, has described the obligation resting on teachers to maintain a professional boundary between them and their charges that respects the position of power and responsibility they hold. It is axiomatic that a teacher's professional obligations do not end outside the classroom, and it is crucial that boundaries are maintained and respected.[20] We said in *CAC v Teacher K* that:[21]

> Maintaining appropriate professional boundaries is a fundamental skill, obligation and professional discipline for all teachers. Teachers who lack the ability to maintain appropriate professional boundaries are likely to step onto a "slippery slope" of tangled relationships with students which ultimately are highly likely to be damaging to students, will be confusing, will set poor role models and may result in even more serious misconduct. Mutual emotional dependency can arise and in the worst cases sexual relationships can develop. Teachers are guides, not friends in the usual sense.

[117] We will repeat what we said in *CAC v Huggard*:[22]

> Even if this student had wanted to continue the contact at this level, it would have been unacceptable for the teacher to do so. As the adult and a teacher, the respondent has a responsibility

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[20] *CAC v Teacher E* NZTDT 2017/28.
[21] *CAC v Teacher K* NZTDT 2018/7.
[22] *CAC v Huggard* NZTDT 2016/33. See, too, *CAC v Teacher L* NZTDT 2018/23 and *CAC v Teacher I* NZTDT 2017/12.

> to maintain professional boundaries. The two were not contemporaries. They could not be friends. He was in a position of power and responsibility, where he should role model appropriate behaviour. His actions should attract esteem, not discomfort or fear. Students and parents should be able to trust that when a student seeks mentorship, counsel or comfort from a teacher, the teacher will respond in a way that has the student's wellbeing as paramount.

[118] To similar effect is what we said in *CAC v Luff*:[23]

> As a teacher, he had a responsibility to exercise some self-discipline and restraint and maintain professional boundaries. The reasons for this are many. Students should be free from any type of exploitation, harassment or emotional entanglement with teachers. In other words, they should be free from having their learning or well-being adversely affected, as contemplated in the definition of serious misconduct in s 378(1)(a)(i) … There are enough emotional and social challenges for students without a teacher adding to the confusion.

[119] We are satisfied that the respondent's behaviour that we have found proved under particular (a) breached the professional boundary with Student A. We will briefly explain why that is so, but return to the topic when we address the test for serious misconduct.

[120] A common theme in the evidence was that the respondent was perceived by his students to be "cool", and his classes "fun" (to use Student C's word). Notwithstanding his evidence to the contrary, we find that Mr Shah blurred the professional divide with Student A – and Student B, too. While perhaps well-meant, the frequency with which Mr Shah communicated with Student A (inside and outside of school hours), and the attention he afforded her, lacked any apparent pedagogical purpose.

Particular (b): The allegation that the respondent regularly swore at or in the presence of students, including Student A

[121] We are satisfied that it is more probable than not that the respondent swore at, and in the presence of, his students. While the charge described a date range "between around 2017 and around 2019", it emerged in the evidence that Mr Shah taught Student A technology in 2018, which seems to be where he predominantly transgressed. Student B described the respondent swearing at and in her presence, too. We iterate that we found

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[23] *CAC v Luff* NZTDT 2016/70, at [11].

Student B to be a truthful and reliable narrator, who did not present as prone to exaggeration. We find that the consistency between her account and that of Student A means that the CAC meets its burden.

[122] We acknowledge that Student C's evidence that he never heard Mr Shah swear had the potential to provide a complete answer to the particular. For several reasons, we did not find Student C to be a truthful witness. We appreciate why he feels a sense of loyalty to Mr Shah, who was clearly a positive influence, and whose commitment enabled Student C to complete his education and secure a place in a trade. However, we did not find Student C's evidence that he has had no dealings with Mr Shah since leaving school to be convincing. It contradicted what the respondent himself said. Further, Student C did not acquit himself well when answering questions from Mr McMullan about the form of his brief. All of this left the impression he was lying to assist his favourite teacher.

Particular (c): The allegations that the respondent, during technology class, regularly hit students on the legs with a stick and/or ruler, and threatened to hit students with a stick and/or ruler

[123] We find both limbs to this particular proved on the balance of probabilities. We are satisfied that the intent behind the respondent's use of force mirrored the reason why Students A and B said Mr Shah used bad language – as a way in which he ingratiated himself with his students. As such, this is a feature that particular (c) had in common with (b), which is a consistency that strengthens the CAC's case.

[124] We found the evidence of Mr Shah and Student C - that what Student A described could not have happened because there were never any wooden objects present in the classroom - to be of dubious credibility. Common sense dictates that a wooden ruler could be of utility in a metal work technology area. For the reasons we explained in relation to particular (b), we did not accept that Student C was a reliable and credible witness and rejected his evidence.

Our findings regarding the test for serious misconduct

[125] We have found the following particulars proved: (a)(i) (in part), (iv) and (v), (b) and (c). To be clear, we were not satisfied that the CAC had proved

that Mr Shah made inappropriate comments to Student A with a sexual element.

[126] Section 10 of the Act is drafted in identical terms to its predecessor, s 389 of the Education Act 1989.[24] The Act defines "serious misconduct" as behaviour by a teacher that:

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

[127] The test under s 10 is conjunctive, as s 10(1)(b) of the Act makes clear.[25] Therefore, 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 Teaching Council Rules 2016 (the Rules) describe the types of acts or omissions that are of a prima facie character and severity to constitute serious misconduct.[26] Those relied upon by the CAC in its notice of charge were:[27]

> (a) For particular (a), r 9(1)(e), which, between 1 July 2016 and 18 May 2018 encompassed, "an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in contact as a result of his or her position as a teacher" and, from 19 May 2018, "breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher for example, (i) engaging in an inappropriate relationship with the child or young person, (ii) engaging in, directing, or encouraging behaviour or communication of a sexual

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[24] The Act came into force on 1 August 2020, thus before the CAC referred its notice of charge.
[25] See *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.
[26] Which came into force as the Education Council Rules on 1 July 2016 and had a name change to the Teaching Council Rules 2016 in September 2018.
[27] Unfortunately, the submissions we received addressed the evidence we heard, but not the test for serious misconduct or the applicable authorities.

nature with, or towards, the child or young person" and/or the catchall in r 9(1)(o)/9(1)(k), which encompasses "any act or omission that brings, or is likely to bring, discredit to the teaching profession".[28]

(b) For particular (b), r 9(1)(o)/(1)(k); and

(c) For particular (c), r 9(1)(a), which between 1 July 2016 and 18 May 2018 described, "physical abuse of a child or young person" and, from 19 May 2018, described "using unjustified or unreasonable physical force on a child or young person". The CAC also cited r 9(1)(c), which describes, "neglecting a child or young person" in both its pre and post 19 May 2018 iterations.

[128] We observe that s 10(1)(a)(i) of the Act does not require actual proof of harm to a student; only that the behaviour is of a type "likely" to have that effect. Student A addressed the sense of increasing discomfort that Mr Shah's unwanted attention brought her. We are satisfied that Student A was detrimentally affected by the cumulative effect of Mr Shah's various behaviours, and that it had a negative bearing on her wellbeing and learning.

[129] We are also satisfied that the respondent's conduct, considered in totality, reflects adversely on his fitness to teach: s 10(1)(a)(ii). It fell below the standard of professional behaviour and integrity expected of, and by, the profession. Mr Shah did not "[engage] in ethical and professional relationships with learners that respect professional boundaries", which meant that he failed to act in Student A's best interests.[29] For the same reasons, we are satisfied that the respondent's behaviour is of a nature that brings the teaching profession into disrepute when considered against the objective yardstick that applies under s 10(1)(a)(iii) of the Act.[30]

[130] Remaining on s 10(1)(a)(ii) of the Act for a moment, there is no doubt that the respondent's use of force towards Student A and others in his class

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[28] The CAC's notice reflects the fact that the Rules were amended on 19 May 2018, and therefore different iterations of the relevant rule applied during the timeframe covered by the charge. We add that while r 9(1)(o) became r 9(1)(k) with the May 2018 amendment, the wording remained the same.
[29] *Code of Professional Responsibility* at p 10 [1.3] and [2.2]. This was the relevant professional code for most of the time during which the respondent's behaviour occurred.
[30] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].

adversely impacts his fitness to teach. As we said in *CAC v Rangihau*,[31] it is incumbent on all in the teaching profession to have a clear appreciation of the prohibition on the use of corrective and disciplinary force contained in s 139A of the Education Act 1989, which applied in 2018.[32] It provided that no teacher is entitled to:

> Use force, by way of correction or punishment, towards any student or child enrolled at or attending the school …

[131] Moreover, we said in *CAC v Whelch* that s 139A, "makes it clear that a teacher has no unique right to use force" and that "teachers must be careful not to abuse the position of authority that they have in a classroom".[33]

[132] Turning to the second stage of the test for serious misconduct, we will address each particular in turn.

[133] We canvassed the relevant principles behind the version of r 9(1)(e) of the Rules that applied until 19 May 2018 in *CAC v Teacher B*.[34] The decision was upheld on appeal in the District Court, which endorsed the Tribunal's approach to r 9(1)(e).[35] For convenience, we will repeat some of what we said in *Teacher B*, as well as what we have said in other decisions addressing the formation of inappropriate relationships. The discussion is pertinent to the iteration of r 9(1)(e) that came into force on 19 May 2018, too.

[134] We described the purpose of r 9(1)(e) of the Rules in *Teacher B* in the following way:[36]

> It is important to emphasise that [the rule] is prophylactic in nature, and thus is concerned with the prevention of harm to a student that the formation of a personal relationship with a teacher might cause.

[135] In a case that preceded *Teacher B*, *CAC v Teacher C,* we said that:[37]

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[31] *CAC v Rangihau* NZTDT 2016/18, at [58].
[32] Now found, in an updated form, in s 98 of the Education and Training Act 2020.
[33] *CAC v Whelch* NZTDT 2018/4 at [16].
[34] *CAC v Teacher B* NZTDT 2018/10, 8 July 2019 [*Teacher B*].
[35] *Complaints Assessment Committee v Teacher* [2021] NZDC 23667, 2 December 2021.
[36] We said this in NZTDT 2016/64, and endorsed it in *Teacher B*.
[37] *CAC v Teacher C* NZTDT 2016/40 at [183] [*Teacher C*].

(a) The long-settled position is that, for a teacher to have a sexual relationship with a student at the school at which he or she teaches, is serious misconduct at a high level.[38]

(b) A relationship need not be sexual for it to be improper and to cross professional boundaries.[39]

[136] In *Teacher B*, we endorsed what we said earlier in *Teacher C* about the need for teachers to vigilantly maintain a professional boundary with students. In our earlier decision we said:

> [192] [We] emphasise that whether a relationship is inappropriate is a context-specific enquiry and not amenable to prescriptive regulation. It is essential that practitioners exercise personal judgement and ask themselves whether their behaviour towards, or interactions with, a student or former student may risk blurring the teacher-student boundary. Teachers carry the responsibility to distance themselves from any potentially inappropriate situation.

[137] *Teacher C* was the first decision in which the Tribunal considered international guidelines. We looked at the approach taken in other jurisdictions because the CAC submitted that the Council's then-applicable Code of Ethics for Certified Teachers did not "provide clear guidance" on the issue of relationships between teachers and students.[40] However, we subsequently said in *CAC v Teacher L*[41] that, "we consider that whatever opacity previously existed has been remedied by the [Teaching] Council's Code of Professional Responsibility (the Code), which came into effect in June 2017". The Code was in force during most of the time that Mr Shah taught Student A.

[138] The Code emphasises the need for practitioners to work in the best interests of learners by:

> 2.2 Engaging in ethical and professional relationships with learners that respect professional boundaries.

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[38] As the District Court said in *Scully v the Complaints Assessment Committee of the New Zealand Teachers Council*, Wgtn DC, CIV 2008 085 000117, 27 February 2009.
[39] See NZTDT 2016/64 and the decisions it discussed.
[40] *Teacher C*, at [185].
[41] *CAC v Teacher L* NZTDT 2018/23, at [20].

[139] The Code provides examples of behaviour that may breach the "boundaries of ethical and professional relationships with learners".[42] As we said in *Teacher L*, the standards expected of teachers, as described in the Code, are not new. While there may not have been prescriptive rules addressing the formation of relationships with students prior to the Code's introduction, the Tribunal has said many times that a teacher's professional obligations to his or her students do not end outside the classroom, and it is crucial that practitioners maintain and respect the boundary between them and those for whom they are responsible.

[140] While a teacher-student relationship may initially be appropriate, a boundary violation occurs if the relationship shifts to serving the needs of the teacher and not the needs of the student.[43] Furthermore, the Guidelines explain that when teachers become confidants, friends or counsellors of students,[44] a dual relationship is created that may blur the teacher-student relationship, and these interactions "help to foster inappropriate relationships with students".

[141] In *Teacher B*, we endorsed the point that:[45]

> The teacher-student relationship is not equal. Teachers are in a unique position of trust, care, authority and influence with their students, which means that there is always an inherent power imbalance between teachers and students.

[142] Parents, and the public in general, place a very high degree of trust in teachers and rely upon those in the profession to interpret right from wrong. Regarding relationships with pupils, we emphasise what we said in *Teacher B* - that it is teachers, and not students, who bear the duty to distance themselves from any potentially inappropriate situation.[46] This is because students can find it difficult to extradite themselves from the situation. Student A's reticence bringing her concerns about Mr Shah's behaviour to

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[42] These include: Fostering online connections with a learner outside the teaching context (for example 'friending') or privately meeting with them outside the education setting without a valid context; communicating with them about very personal and/or sexual matters without a valid context; and engaging in a romantic relationship or having sexual or intimate contact with a learner or with a recent former learner.
[43] See *CAC v Teacher* NZTDT 2016/64 at [26].
[44] Where counselling is not part of the teacher's legitimate role in the school.
[45] *Teacher B*, at [19].
[46] *Teacher B* at [23].

the attention of authorities demonstrates the inherent power imbalance between teachers and pupils.

[143] While the version of r 9(1)(e) that applied until May 2018 describes the formation of an "inappropriate relationship", we do not suggest that Student A welcomed or reciprocated Mr Shah's behaviour. Nonetheless, we are satisfied that Mr Shah formed a bond with Student A, even if it was somewhat one-sided, that meets the definition in the rule. The reformulation of the wording of r 9(1)(e) in May 2018, which focuses on whether there has been a breach of professional boundaries (and provides a non-exhaustive list of the ways in which this might occur) is a more natural fit to the facts in this case. Again, for the reasons we traversed earlier in this decision when addressing the elements of particular (a), we are satisfied that Mr Shah breached the duty of care he owed to Student A. The ways in which he impinged on the professional boundary was of a character and severity to constitute serious misconduct in its own right.

[144] We can address particular (b) briefly. We have previously said that swearing at students is "inexcusable" conduct that lowers the reputation and good standing of the profession.[47] It is finely balanced whether Mr Shah's use of bad language is serious misconduct in its own right. We accept that it lends modest weight to the overall gravity of the respondent's behaviour, and affirms that he seriously misconducted himself.

[145] Regarding particular (c), we have kept in mind the need for the Tribunal to undertake a context-specific assessment of the facts.[48] Mr Shah's use of force, even if it was an ill-conceived way to bond with his students rather than to simply correct or punish (although that was also a reason why the respondent used the stick/ruler), was a clear breach of s 139A, and not commensurate with modern teaching practices. It is behaviour that meets the definition of "physical abuse" contained in the original iteration of r 9(1)(a) of the Rules that applied until 18 May 2018.[49] It also meets the definition of

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[47] In *CAC v Webster* NZTDT 2016/57, at [46].
[48] *CAC v Teacher* NZTDT 2016/50, *CAC v Mackey* NZTDT 2016/60 and *CAC v Whelch* NZTDT 2018/4.
[49] The meaning of "physical abuse" was considered in some detail in *CAC v Teacher* NZTDT 2016/50, 6 October 2016 and *CAC v Teacher* NZTDT 2016/26, 10

"unjustified force" contained in the version of r 9(1)(a) that came into effect on 19 May 2018.

[146] Due to the repetitive nature of the behaviour concerned, we are satisfied that the character and severity limb of the test for serious misconduct is met in respect to particular (c) in its own right.[50]

Penalty

[147] We advised the parties at the end of the hearing that we did not expect them to address penalty unless and until we had determined whether the CAC had proved the charge. As such, we will provide the parties with the opportunity to file submissions on penalty.

[148] The Tribunal is required to consider the range of powers available to it under s 500 of the Act, and to impose the least restrictive penalty that can reasonably be imposed in the circumstances. To be clear, while we accept that any breach of the professional boundary between a teacher and student that engages r 9(1)(e) of the Act is inherently serious, our preliminary view is that a penalty short of cancellation of Mr Shah's registration to teach is commensurate. Shorn of the sexual element, which we did not find proved, Mr Shah's behaviour towards Student A was ill-conceived, but lacked the kind of overtly sinister features that tend to make cancellation a foregone conclusion.

[149] We would be assisted by the parties turning their minds to the issue of whether it may be possible to impose, alongside other penalties, conditions

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November 2016. We will not repeat that analysis. However, we have kept in mind what we said in NZTDT 2016/26, which we consider apposite in the instant case:

> "[54] We acknowledge that s 139A contains an important prohibition on the use of force by teachers for a disciplinary purpose. However, had the Council expected that the use of force in such circumstances to be sufficient in its own right to constitute serious misconduct; then we would have expected that to have been made plain in the Rules. Whatever the purpose behind it, a teacher's use of force constituting an assault must be of sufficient severity to meet the threshold for "physical abuse" in r 9(1)(a). Put another way, something more than an objectively tolerable use of force will not automatically equate to physical abuse. That being said, it is likely that in most cases behaviour amounting to an assault will reach the threshold for physical abuse, but not always."

[50] The CAC also relied upon r 9(1)(c). Our conclusion that r 9(1)(a) is engaged means that we have not addressed whether the respondent's behaviour also contravened r 9(1)(c).

on the respondent's practising certificate that will address and mitigate the professional failings we have identified, and the wording of any such condition(s).

[150] The parties are to liaise and propose a timetabling order for the filing of submissions on penalty and costs.

Name suppression

[151] At the end of the hearing, we ordered suppression of Student A's name and identifying particulars.[51] To ensure that order has efficacy, given the familial link between Student A and Student B, we also suppress the latter's name and identifying particulars.

[152] Mr Shah seeks permanent name suppression. We will determine his application when we address penalty and costs. In the meantime, the interim order for suppression remains in effect.

Costs

[153] We will address costs at the same time as penalty.

[154] We direct that an updated schedule of the Tribunal's costs be prepared and provided to the respondent. The CAC is to file and serve a schedule of its costs on the respondent at the same time it files its submissions on penalty. Mr Shah can file a response, along with any evidence he wants us to consider, when he files his submissions on penalty.

Nicholas Chisnall KC
Deputy Chair

[51] Pursuant to s 501(6)(c) of the Education and Training Act 2020 and r 34 of the Teaching Council Rules 2016.

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 498(2) or 500 of the Education and Training Act 2020 may appeal to a District Court under section 504 of the said Act.

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) of the Education Act 1989 apply to every appeal as if it were an appeal under section 356(1).

NZTDT 2021/25

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER	the Education and Training Act 2020
IN THE MATTER	of 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	**IMDAAD SHAH** Respondent

DECISION OF THE TRIBUNAL ON PENALTY, NAME SUPPRESSION AND COSTS

Tribunal:	Nicholas Chisnall KC (Deputy Chair), Lyn Evans and Rose McInerney
Hearing:	7 and 8 September 2022
Decision:	10 May 2023
Counsel:	S McMullan for the referrer G Steele for the respondent

Introduction

[1] The Tribunal, in a decision dated 7 February 2023, found Mr Shah guilty of serious misconduct. We deferred imposing penalty. We said in our decision:

> We advised the parties at the end of the hearing [in September 2022] that we did not expect them to address penalty unless and until we had determined whether the CAC had proved the charge. As such, we will provide the parties with the opportunity to file submissions on penalty.
>
> The Tribunal is required to consider the range of powers available to it under s 500 of the Education and Training Act 2020, and to impose the least restrictive penalty that can reasonably be imposed in the circumstances. To be clear, while we accept that any breach of the professional boundary between a teacher and student that engages r 9(1)(e) of the Act is inherently serious, our preliminary view is that a penalty short of cancellation of Mr Shah's registration to teach is commensurate. Shorn of the sexual element, which we did not find proved, Mr Shah's behaviour towards Student A was ill-conceived, but lacked the kind of overtly sinister features that tend to make cancellation a foregone conclusion.
>
> We would be assisted by the parties turning their minds to the issue of whether it may be possible to impose, alongside other penalties, conditions on the respondent's practising certificate that will address and mitigate the professional failings we have identified, and the wording of any such condition(s).
>
> The parties are to liaise and propose a timetabling order for the filing of submissions on penalty and costs.

[2] We received the CAC's submissions on 3 March 2023 and those on behalf of Mr Shah on 6 April 2023.

Penalty

[3] For convenience, we set out the particulars in the CAC's notice of charge in full and the findings we made in relation to each, which we have italicised. The CAC alleged that Mr Shah:

> (a) Between around 2017 and around 2019 (inclusive), breached professional boundaries with a student, Student A (between Year 11 and Year 13), including by:
>
> i. Making inappropriate comments, including of a sexual nature, towards Student A. *We found that Mr Shah made inappropriate*

comments towards Student A, but were not satisfied that these included "sexual comments";

ii. Going to Student A's workplace to visit Student A on several occasions and/or asking Student A's work colleagues to speak to Student A at her workplace. *We did not find this particular proved*;

iii. Providing Student A with his phone number without valid educational context. *We did not find this particular proved*;

iv. Asking Student A for her personal mobile number and/or calling her personal mobile number on one occasion in the evening without valid educational context. *We found this particular proved*; and

v. Regularly telling Student A to remain behind with him alone after class and/or in an adjacent classroom without valid educational context. *We found this particular proved*.

(b) Between around 2017 and around 2019, during technology class, regularly swore at or in the presence of students, including Student A. *We found this particular proved*;

(c) Between around 2017 and around 2019 (inclusive), during technology class, regularly:

i. Hit students on the legs with a stick and/or ruler. *We found this proved*; and

ii. Threatened to hit students with a stick and/or ruler. *We found this particular proved*.

Penalty

[4] 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.[1] 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.[2]

[5] The Tribunal is required to consider the range of powers available to it under s 500 of the Act, and to impose the least restrictive penalty that can reasonably be imposed in the circumstances. This requires us to consider "alternatives available to [the Tribunal] ... and to explain why lesser options have not been adopted in the circumstances of the case".[3] In doing so, the Tribunal must try to ensure that the maximum penalty of cancellation is reserved for the worst examples of misconduct.

[6] In *CAC v Fuli-Makaua*[4] we endorsed the point that cancellation is required in two overlapping situations, which are:

(a) Where the conduct is sufficiently serious that no outcome short of deregistration will reflect its adverse effect on the teacher's fitness to teach and/or its tendency to lower the reputation of the profession; and

(b) Where the teacher has insufficient insight into the cause of the behaviour and lacks meaningful rehabilitative prospects. Therefore, there is an apparent ongoing risk that leaves no alternative to deregistration.

[7] We must seek to ensure that any penalty we institute is comparable to those imposed upon teachers in similar circumstances, as consistency is the bedrock of fairness. We have considered the three cases the CAC cited in support of its submission that Mr Shah's misconduct, considered on a cumulative basis, was "moderately serious". Mr McMullan emphasised that there were repeated professional boundary breaches over a relatively

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[1] The primary considerations regarding penalty were discussed in *CAC v McMillan* NZTDT 2016/52.
[2] See *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, at [51].
[3] *Patel v The Dentists Disciplinary Tribunal* HC Auck Reg AP77/02, 8 October 2002, Randerson J at [31].
[4] *CAC v Fuli-Makaua* NZTDT 2017/40, at [54]. These principles were affirmed by the District Court in *Rachelle v Teachers Disciplinary Tribunal* [2020] NZDC 23118, 11 November 2020.

lengthy duration; that Mr Shah's use of inappropriate language and force targeted a cohort of learners; there was the actual use of force and the invitation extended to students to use force on other learners; and the detrimental effect Mr Shah's behaviour had on Student A. We accept that these constitute the features that must be taken into account when establishing penalty.

[8] We will briefly summarise each of the cases referred to us by the CAC. Mr McMullan's submission was that the behaviour in each was less serious than that with which we are dealing here:

(a) In *CAC v Clarke*,[5] the Tribunal suspended the practitioner's practising certificate for two months, and put in place conditions. The teacher made a series of inappropriate comments to a secondary school student; several of which were sexually loaded but not overt. He also grabbed the back of another student's dress and, on another occasion, entered a room while students were in a state of undress. He remained in the room, which made the students present very uncomfortable. A factor that had a bearing on the penalty imposed was that the practitioner had been the subject of previous complaints that he had behaved inappropriately. The teacher admitted that he had seriously misconducted himself and acknowledged that his professional boundary breaches stemmed from a desire to be liked by those he taught. He accepted that he would benefit from professional development and mentoring. The period of suspension reflected that there was an 18 month gap between the referral and the hearing, and a further three month gap between the hearing and the decision being released. During that time, the teacher was not working. While the Tribunal did not explicitly say so, we assume that the period of suspension was also attenuated to reflect that the teacher had admitted his misconduct.

(b) *CAC v Teacher A*,[6] in which the practitioner was censured and had conditions placed on her practising certificate for admitted conduct, which comprised several breaches of professional

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[5] *CAC v Clarke* NZTDT 2019/62, 19 December 2019.
[6] *CAC v Teacher A* NZTDT 2020/5, 10 July 2020.

boundaries and the use of inappropriate / racist language. There was no predatory or sexual element to the behaviour. Like Mr Clarke, Teacher A's behaviour was an attempt to secure her student's approval.

(c) *CAC v Mathie,*[7] which involved the teacher striking a student across the forehead during an ill-conceived "social experiment". The conduct was admitted and the Tribunal censured the teacher and imposed, amongst others, a condition requiring mentorship. The Tribunal observed that the penalty reflected that the incident was a "one-off" by a longstanding and well-regarded member of the profession.

[9] We acknowledge the inevitable factual distinctions between these earlier decisions and the present, but agree that Mr Shah's misconduct, considered cumulatively, is more serious than that addressed in each of the cases we were provided. In the same vein as the practitioners whose misconduct was addressed in *Clarke* and *Teacher A*, we are satisfied that the different forms of behaviours particularised in the notice of charge comprised ways in which Mr Shah sought to ingratiate himself with his students. The comparison with earlier cases affirms that this is a case sitting on the cusp of cancellation of the respondent's registration to teach, given the gravity and extent of his serious misconduct. The question is, can we step back from cancellation? Is it reasonable to impose a less restrictive outcome that will enable Mr Shah to continue to teach?

[10] We have considered the respondent's very significant experience and the societal value in allowing him to remain a teacher. We accept that the respondent has positive professional attributes, and this is the first time he has faced disciplinary action. However, the counterpoint is that teachers are expected to maintain public trust and confidence by demonstrating a high standard of professional behaviour and integrity. The respondent has substantially undermined these values and expectations.

[11] As we said in *Fuli-Makaua*, a practitioner's degree of insight into the cause of behaviour will be important when assessing his or her rehabilitative

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[7] *CAC v Mathie* NZTDT 2020/15, 4 December 2020.

potential. Knowing what motivated the conduct is a way to gauge the risk of repetition. Cancellation is less likely to be required where the practitioner understands what led him or her to commit serious misconduct and is taking, or has taken, meaningful steps to reduce the risk of it happening again.

[12] This is by no means a straightforward exercise. We accept that Mr Shah has no record of prior misconduct during his lengthy career, which is a strong mitigating factor. However, Mr Shah cannot rely upon a complete acknowledgement of responsibility in mitigation, although, through his counsel, "he accepts that he should undertake further professional development on maintaining professional boundaries both to ensure he clearly understands the requirements and to demonstrate that the profession can have confidence in him". Mr Steele submitted that Mr Shah "has already commenced taking steps to complete such professional development", although we were not told what that involves.

[13] We accept that Mr Shah was under a high degree of personal stress when some of the behaviour happened. However, the strain he was under, regardless of its intensity, neither excused nor justified his conduct. He exhibited very poor decision-making by blurring the professional boundary. That being said, we consider that Mr Shah's receptiveness to professional development indicates that he has some insight into his shortcomings. While finely balanced, we accept that a penalty short of cancellation is open.

[14] It is not in dispute that censure is warranted. However, it is not sufficient on its own to deter and denounce Mr Shah's behaviour. Nor are we satisfied that conditions, in combination with censure, will adequately achieve the relevant purposes and principles.

[15] Insofar as s 500 of the Act provides a penalty hierarchy, suspension is the step below cancellation. We have decided that suspension, in combination with censure and professional development conditions, is the least restrictive way in which to maintain professional standards and the public's confidence in the profession. It is necessary that Mr Shah's penalty highlights the standard of probity teachers are required to meet and the consequences of the failure to do so. We are satisfied that suspension will achieve this, while also providing Mr Shah with the opportunity to remain in the profession.

[16] The CAC submits that the term of suspension should be between six and 12 months. The respondent says that it should be in the range of three to six months.

[17] We consider that Mr Shah's misconduct was graver than that dealt with in the most comparable case cited, *Clarke*. This necessitates a lengthier term of suspension that the two months imposed in that case. Unlike in *Clarke*, there is no basis to reduce the length of the suspension to reflect that the charge was admitted. However, like in *Clarke*, we accept that we should modestly reduce the suspension period to reflect the length of time that has passed since the mandatory report was made to the Teaching Council on 21 August 2019.

[18] In the absence of the procedural delay we have described, we would have suspended Mr Shah's practising certificate for six months. However, we are of the opinion that the commensurate period of suspension is four months.

[19] We consider it necessary to impose a condition that requires Mr Shah to undertake and complete professional development that focuses on establishing and maintain professional boundaries. This is not something that Mr Shah opposes, and nor does he resist the appointment of a mentor, who will keep the Council apprised of his progress. We will also impose a candour condition.

Name suppression

[20] At the end of the hearing, we ordered suppression of Student A's name and identifying particulars.[8] To ensure that order has efficacy, given the familial link between Student A and Student B, we also suppressed the latter's name and identifying particulars.

[21] Mr Shah seeks permanent name suppression.[9] Before turning to the specific grounds, we will briefly address the relevant principles that apply when determining whether to make a non-publication order under s 501(6)

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[8] Pursuant to s 501(6)(c) of the Education and Training Act 2020 and r 34 of the Teaching Council Rules 2016.
[9] In an application dated 21 September 2022, with an affirmation from Mr Shah dated 19 September 2022.

of the Act. The default position is for Tribunal hearings to be conducted in public and the names of teachers who are the subject of these proceedings to be published. 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.

[22] The purposes underlying the principle of open justice are well enumerated. It forms a fundamental tenet of our legal system. As we said in *CAC v McMillan*,[10] the presumption of open reporting, "exists regardless of any need to protect the public".[11] 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,[12] we described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[13]

[23] In *CAC v Teacher (NZTDT 2014/52P),*[14] 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.[15] More recently, we observed in *CAC v Finch*[16] 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

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[10] *CAC v McMillan*, above. See, too, *CAC v Teacher I* NZTDT 2017/12, where we summarised the relevant legal principles at [41].
[11] *McMillan*, at [45].
[12] *CAC v Teacher* NZTDT 2016/27.
[13] 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.
[14] *CAC v Teacher* NZTDT 2014/52P, 9 October 2014.
[15] *CAC v Kippenberger* NZTDT 2016/10S, at [11].
[16] *CAC v Finch* NZTDT 2016/11, at [14] to [18].

place a gloss on the term "proper" that imports the standard that must be met in the criminal context.[17]

[24] The Tribunal has in recent times tended to adopt a two-step approach to name suppression that mirrors that used in other disciplinary contexts.[18] 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 501(6) of the Act, this simply means that there must be an "appreciable" or "real" risk.[19] While we must come to a decision on the evidence regarding whether there is a real risk, this does not impose a persuasive burden on the party seeking suppression. The Tribunal's discretion to forbid publication is engaged if the consequence relied upon is likely to eventuate. This is not the end of the matter, however. 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".[20]

[25] We now turn to the respondent's ground for suppression. The specific grounds relied upon are that:

> (a) There is a risk that publication will detriment the respondent's health. [redacted]

[17] See our discussion about the threshold in *McMillan*, above n 16 at [46] to [48].
[18] See *CAC v Jenkinson* NZTDT 2018/14 at [36].
[19] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.
[20] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3]. Also, the Court of Appeal said in *Y v Attorney-General* [2016] NZCA 474 at [32] that 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".

(b) There is a real risk that the respondent's elderly father's health will be affected if Mr Shah is named.

(c) Publication will cause the respondent reputational damage in the eyes of his community and risks his ability to continue in a senior representative role that he values.

(d) Publication will cause harm to his daughter's business, due his association with it.

(e) There is a real risk that Student A (and Student B) will be identified if Mr Shah is named.

[26] In our view, the two grounds that require the closest scrutiny are those pertaining to the potential risk to the respondent's health, and that of his father, should his name be published. We accept that it may be proper to order suppression where there is a real risk that publication will either exacerbate an existing condition, or adversely affect a practitioner's rehabilitation and recovery from an illness or disorder.[21] The same can be said when publication is likely to detriment an associated person's health or wellbeing.

[27] We turn to the letter from Mr Shah's [redacted] It is dated 19 June 2019, and thus predates these proceedings by a significant margin. While we accept the [redacted] opinion that Mr Shah previously suffered [redacted], the letter does not squarely address the risk publication carries. In NZTDT 2016/27 we said that:

> [63] We start by addressing the ground that the respondent's mental health may be jeopardised if suppression is not ordered. Without wishing to sound unsympathetic to its sufferers, anxiety (and associated mental conditions) is not an unexpected consequence of a proceeding involving allegations of serious professional misconduct. It is important that the nature and effects of any such condition are carefully scrutinised when it is put forward as a ground for name suppression. A bare assertion that a condition exists, or that it may render an applicant seeking suppression more vulnerable to harm, will not suffice.

[21] A case in which we ordered suppression for this reason, and where we were provided with evidence from the teacher's clinician setting out the risks associated with publication, is *CAC v Teacher B* NZTDT 2017/35, 25 June 2018.

[28] While the possibility that the respondent's wellbeing may deteriorate if his name is published gives the Tribunal cause for anxious consideration, we have concluded that he is presupposing that publication will generate a series of adverse outcomes similar to those he experienced in 2018/2019. We are not satisfied that the consequences described by Mr Shah in his affirmation are likely to happen, given the staleness of the [redacted] letter, and the paucity of information it contains.

[29] We turn to the respondent's father. We accept that [redacted]

[30] Again, we are being asked to assess whether publication poses a real risk in an informational vacuum. "Could" is not a synonym for "likely", and the doctor does not explain what he means by "very bad news", and whether the risk can be proactively moderated. Mr Shah does not address whether he has taken steps to mitigate the risk to his father by telling him about the disciplinary proceedings and the result, which would be a commonsensical way in which to reduce the possibility of harm stemming from reading about the case, unprimed, in the news. We are not satisfied that it is proper to order suppression on this basis.

[31] We consider that the type of reputational damage that Mr Shah describes in ground (c) is an ordinary consequence of publication stemming from a finding of serious misconduct. It is not proper to order suppression on this basis.

[32] We can briefly address the concerns raised regarding the effect that publication might have on the respondent's daughter's business, which is addressed in ground (d). We said in NZTDT 2016/27 that it is almost inevitable that a degree of hardship will be caused to the innocent family members of a teacher found guilty of serious misconduct, although we acknowledged in that decision that more acute forms of professional and familial embarrassment may make suppression of a teacher's name a proper

outcome.[22] As Mr Shah fairly conceded in his affirmation, it is not possible to gauge what impact, if any, publication will have on his daughter's business. We took from his affirmation that while he holds a directorship in the company, he does not work in the business. We are not satisfied that it is proper to order suppression on the speculative basis that naming Mr Shah will negatively impact his daughter's business.

[33] We now turn to ground (e). This is an argument that we are often required to address. Our primary concern is whether naming the respondent and/or the School carries an appreciable risk of identifying Students A and B.

[34] In the usual course of events where serious misconduct involved behaviour directed at a student or students, naming the teacher and school will tend to result in suspicion falling on a cohort of learners. However, as we said in NZTDT 2016/68:[23]

> [It] is unlikely that this possibility escaped the attention of Parliament when it opened the Tribunal's proceedings to the public and, had this degree of connection between the teacher and affected student been enough of a concern to require blanket suppression in every case, it would have legislated for that.

[35] We are not satisfied that blanket suppression is required to protect the interests of Student A.[24] Rather, we are satisfied that the orders we made suppressing Student A and Student B's names will meet the risk addressed in Mr Shah's affirmation. To further reduce the risk of Students A and B being identified, we took the step of anonymising our references to another student who was a witness – who we referred to as Student C in the substantive decision.

[36] For clarity's sake, we emphasise that the suppression orders we made enable our substantive decision, as well as this decision, to be redacted to

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[22] NZTDT 2016/27, at [65]. See, too, *McMillan*, above at [50] to [53].
[23] At [50].
[24] Compare with *CAC v B* NZTDT 2015/68, where we ordered suppression to protect a student who attended a small school in a small town, and where we were provided with comprehensive evidence by the school outlining its reasons why the student might be identified if it and the teacher were named.

ensure that Students A and B are not identified. If necessary, the parties can address us on the implementation of this order if dispute arises.

[37] The application for name suppression is declined. However, we order suppression of the evidence underpinning Mr Shah's application, given its personal nature.

Costs

[38] The CAC's total costs are in the amount of $39,595, exclusive of GST.

[39] The Tribunal's costs come to $18,683.16, which accounts for members' fees, travel disbursements, venue costs and registrar's fees.

[40] Mr Shah filed an affirmation outlining his expenses and outgoings. He told us that he has not held a fulltime teaching position since he resigned from the School in 2019, and has been working as a reliever since then. [redacted]

[41] The Tribunal's power to order costs is found in s 500(1)(h) of the Act, which confers a discretion. The Tribunal issued its first 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.

[42] The 2022 practice note, like its predecessor, 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.

[43] There is no applicable formula or scale when assessing the reasonableness or otherwise of costs.[25] 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.

[44] The CAC took the unusual step of inviting the Tribunal to make an order that Mr Shah meet 60 per cent of its costs, rather than the usual (starting point of) 50 per cent. Mr McMullan submitted that, "a higher award is justified because Mr Shah prolonged the proceeding by producing, and relying on, perjured evidence in his defence". He referred to the evidence given by Student C, but also the briefs from two others previously taught by Mr Shah that were filed, but which we put to one side given neither ultimately gave evidence at the hearing. Mr McMullan also submitted that this tranche of evidence obliged Student A to be "re-briefed", which added to the CAC's costs.

[45] Mr Steele submitted that costs award should be attenuated because the CAC "failed to prove some of the most serious aspects of the charge, and in particular that there was a sexual element to Mr Shah's conduct". He submitted that this justified a starting point of 50, not 60 per cent.

[46] Mr Steele also submitted that costs of "almost $40,000 are excessive for a relatively simple matter involving less than two days hearing time".

[47] We acknowledge that the sum involved here is substantial, although it is broadly comparable to those incurred in earlier cases.[26] While an assessment of the circumstances is required, we were not provided with a breakdown of the CAC's costs. This meant we could not assess Mr Steele's point that there must have been a degree of preparatory duplication because the CAC changed counsel close to the hearing.

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[25] *CAC v Teacher C* NZTDT 2016/40C at [6].
[26] For example, we ordered a 50 per cent contribution to costs in the following cases: *CAC v Northwood* NZTDT 2016/32C, where the CAC's costs were $33,000 and the Tribunal's $23,000; and *CAC v Teacher C* NZTDT 2016/40C, where the CAC's costs were $36,492.34 and the Tribunal's $10,340.

[48] Mr Shah's decision to defend the charge was vindicated to a degree, because we were not satisfied that he made inappropriate comments of a sexual nature. However, the CAC proved most of its particulars. The fact remains that this was a fully contested hearing held over two days, without concessions from Mr Shah that materially reduced the volume of evidence that we were required to consider. The respondent's choice to put the CAC to proof in the way he did explains the length of our decision, as we were required to traverse the evidence in detail.

[49] We have nonetheless chosen not to adopt the CAC's argument that Mr Shah should bear a higher costs burden because he allegedly presented perjured evidence. 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.[27] 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.

[50] We observe that 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. We accept that Mr Shah is currently in a financially difficult position. However, his central concern is that he would not be able to meet a costs award if he is deprived of his ability to teach. That concern has not eventuated, given our decision to suspend the respondent's practicing certificate rather than to cancel his registration. We will make a modest adjustment to reflect Mr Shah's existing financial position, and to take measure of our decision regarding proof on particulars (a)(i)-(iii). Also, while we do not accept that the CAC's costs are unreasonable, we have reduced the order to reflect that there was a change in counsel. For these reasons, we require Mr Shah to make a 40 per cent contribution to the CAC's costs.

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

[51] We order the respondent to pay $15,838 to the CAC pursuant to s 500(1)(h) of the Act.

[52] For consistency's sake, we order the respondent to make a 40 per cent contribution towards the Tribunal's full costs. We make an order under s 500(1)(i) of the Act for $7,473.26.

[53] We accept that it may be necessary for Mr Shah to pay in instalments. He can make arrangements with the Council to do so. Also, we defer the start date for payment of costs until Mr Shah's period of suspension ends.

Orders

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

(a) The respondent is censured for his serious misconduct pursuant to s 500(1)(b).

(b) The respondent's practising certificate is suspended for a period of four months from the date of this decision under s 500(1)(d).

(c) Pursuant to s 500(1)(j), we direct that the following conditions be imposed on the respondent's practising certificate:

i. The respondent, before his suspension ends, is to enrol in a professional development course approved by the Teaching Council that addresses the establishment and maintenance of professional boundaries and is to send the certificate of completion to the Council.

ii. The respondent is to undertake mentoring, on a monthly basis, for a period of three years. It is to commence from the date he resumes teaching, and the mentor is to provide a report to the Council every six months, which addresses the respondent's ongoing fitness to teach. While Mr Shah may propose a mentor, the Council must approve the person to fulfil that role.

iii. The respondent is to provide any prospective employer with a copy of this decision. This condition will lapse after three years.

(d) Under s 500(1)(e), the register is annotated until such time as the conditions imposed, above, are fulfilled.

(e) We affirm the order we made on 7 February 2023 under s 501(6)(c) permanently suppressing the names and identifying particulars of Students A and B.

(f) We make an order under s 501(6) prohibiting publication of the evidence referred to in Mr Shah's affirmation in support of his application for name suppression and suppressing the financial information contained in his affirmation addressing costs.

(g) Under s 500(1)(h), the respondent is to pay $15,838 towards the CAC's costs. This order to is take effect on the date upon which Mr Shah's suspension ends.

(h) Under s 500(1)(i), the respondent is to pay $7,473.26 to the Teaching Council. This order to is take effect on the date upon which Mr Shah's suspension ends.

Nicholas Chisnall KC
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 498(2) or 500 of the Education and Training Act 2020 may appeal to a District Court under section 504 of the said Act.

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) of the Education Act 1989 apply to every appeal as if it were an appeal under section 356(1).