**TEACHING COUNCIL**

NEW ZEALAND | Matatū Aotearoa

## Complaints Assessment Committee (CAC) v Teacher A

## 2018-16

*Teacher A was referred to the Disciplinary Tribunal on a charge that he used a school-issued laptop to access pornographic material and attempted to 'clean' it prior to returning it to the school.*

*The result: the Tribunal found that Teacher A's conduct amounted to serious misconduct and ordered a penalty of censure and conditions. The Tribunal granted Teacher A's application for non-publication of his name.*

At the time of the conduct, Teacher A was employed as a teacher at a secondary school. In March 2017, the principal of the school received a complaint alleging that Teacher A had been accessing pornographic material and dating sites on a school laptop. Following the school's investigation, Teacher A was dismissed.

Forensic examination of the school laptop revealed that Teacher A had used the laptop to undertake extensive web surfing, including pornographic websites, adult pornographic dating websites and chat sites. None of the images or videos found had been intentionally saved to the hard drive by Teacher A but many of the websites accessed were not secure websites and could cause considerable harm to the school computer network.

Teacher A regularly removed the history of his internet activity, and when the laptop was uplifted from him by the school, Teacher A had tried to erase any trace of the material and 'clean' it.

Teacher A admitted to using pornography on a school-issued laptop and stated he "accepts with hindsight that it would have been better if he had not viewed pornography on the school laptop". However, he denied that he did so from the school location at any time. He admitted to attempting to conceal his access by cleaning his viewing record from the school laptop.

Teacher A accepted that it was "such a stupid decision" and apologised for his actions. However, he struggled to see his conduct as serious misconduct and said that he did not bring the material into the school environment because he not bring his school laptop to school. The Tribunal accepted that there was no evidence that Teacher A accessed pornographic material on school premises, and that the risk of children being exposed to the material was remote.

The Tribunal found that viewing pornography at home on one's own computer is unlikely to amount to serious misconduct (unless the content is "objectionable"), and that the reason Teacher A was referred to the Tribunal is not because he viewed pornography, but because he used school equipment to do so.

The Tribunal found that the reasonable members of the public could reasonably conclude that the reputation and good standing of the teaching profession was lowered by the behaviour of Teacher A.

The Tribunal ordered a penalty of censure and conditions (for the next two years) to (a) inform current and prospective employers of the decision, and (b) immediately hand over any school-issued electronic devices to the school on request, and a further condition (c) to attend a professional development course addressing the safe use of electronic devices within six months of the decision.

The Tribunal ordered Teacher A to pay 40% of the Tribunal's costs and 40% of the CAC's actual and reasonable costs.

Teacher A applied for name suppression on the basis that publication would adversely affect his son, his daughter and himself. The Tribunal granted non-publication of his name.

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2018-16**

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|---|---|
| **IN THE MATTER** | of the Education Act 1989 |
| **AND** | |
| **IN THE MATTER** | of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal |
| **BETWEEN** | **COMPLAINTS ASSESSMENT COMMITTEE** |
| **AND** | [redacted] |
| | **Respondent** |

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**TRIBUNAL DECISION**

**8 JULY 2019**

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**HEARING:** Held on 5 March 2019 at Wellington, with the respondent joining via Skype

**TRIBUNAL:** Theo Baker (Chair)

David Hain and Simon Williams (members)

**REPRESENTATION:** Ms R Kós for the Complaints Assessment Committee

[redacted] represented himself

1. The Complaints Assessment Committee (**CAC**) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge reads:

    1. *The CAC charges that [redacted], registered teacher, of Hastings used a school-issued laptop to access pornographic material and attempted to 'clean' it prior to returning it to the School.*
    2. *The conduct alleged in paragraph 1, cumulatively or individually, amounts to serious misconduct pursuant to section 378 of the Education Act 1988 and Rule 9(1)(k) and/or (o) of the Education Council Rule 2016, or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989.*

2. The parties conferred and agreed on a Summary of Facts **(ASF)**. The CAC filed submissions in advance of the hearing. [redacted] wished to be heard and so a hearing was convened with a panel in Wellington. Ms Kós appeared for the CAC, and [redacted] joined by Skype video conference. He was sworn in and was available for questioning.

## Summary of decision

3. We found that the respondent had used a school-issued laptop to access pornographic material and attempted to 'clean' it prior to returning it to the School.

4. We found that his conduct amounted to serious misconduct on the basis that it was likely to bring the profession into disrepute under the third limb of the definition of serious misconduct under s 378 and we found it was likely to bring discredit to the profession under r 9(1)(o) of the Education Council Rules.

5. We imposed a penalty as outlined paragraph 51 of this decision and ordered a contribution of the CAC costs of 40%.

6. We made an order for non-publication of the respondent's name on the basis that publication would cause harm to his daughter's health.

## Findings on factual allegations contained in charge

7. The agreed facts were contained in the ASF, which is set out in full:

    1. *The respondent, [redacted] is a registered teacher who was working at Flaxmere College ("the school").*

2. *On 24 and 27 March 2017, the principal of the school received a complaint alleging that the respondent had been accessing pornographic material and dating sites on a school laptop.*

3. *Following the school investigation the respondent was dismissed from the school on 26 May 2017.*

***Material accessed from school laptop***

4. *Forensic examination of the school laptop revealed that the respondent had used the laptop to undertake extensive web surfing, including pornographic websites, adult pornographic dating websites and web chat sites.*

5. *The respondent accessed pornographic websites regularly. These included:*

    a. *www.maturealbum.com*
    b. *www.viptube.com*
    c. *www.maturepie.com*
    d. *www.tubeplasure.com*
    e. *www.analdin.com*
    f. *www.freshpornclips.com*
    g. *www.iwank.com*
    h. *www.porn.com*
    i. *www.tntmature.com*
    j. *www.hqboobs.com*
    k. *www.momxxxclips.com*
    l. *www.ripemom.com*
    m. *www.grannycinema.com*
    n. *www.freeporng.com*
    o. *www.tendermom.com*
    p. *www.xhamster.com*
    q. *www.dailymotion.com*
    r. *www.chaturbate.com*

6. *The search terms used include "sexting site", "compilation porn" and "doggystyle compilation porn".*

7. *One of the pornographic videos located was titled 'Big Tits at School Compilation', which had been accessed by the respondent on 27 March 2017 at 4.23am.*

8. *None of the pornographic images or videos found had been intentionally saved to the computer hard drive by the respondent.*

9. *From 9 May 2015, the respondent also used the laptop to access adult dating websites. In particular:*

    a. *Nzdating.com: there was considerable access of this website. This allows users to communicate with people who are actively looking for a partner or purely meeting for sexual activities.*

    b. *Adultfriendfinder.com: is a pornography adult dating site containing images and videos of an explicit sexual nature, including some that may be classified as objectionable under the Act, which means they are illegal images. There was also considerable access of this site by the respondent, including watching live cam sessions.*

10. *Many of these websites accessed by the respondent were not secure websites and could cause considerable harm to the school computer network, as they download extremely intrusive cookies. This created the risk that the cookies would migrate to the school server if the school's firewalls and virus detection software did not detect them.*

***Erasure of material***

11. *During the time he used the laptop, the respondent regularly removed the history of his internet activities.*

12. *On 27 March 2017, the school principal asked the respondent to return his school laptop to the school. By 3 April 2017, the respondent had not returned his school laptop as requested.*

13. *On 31 March 2017 the respondent used the laptop to google "Does deleting your browser history really work".*

14. *On 3 April 2017, the school principal uplifted the school laptop from the respondent's home address.*

15. *On 3 April 2017, prior to the laptop being uplifted, the respondent attempted to erase any trace of the material. He removed the material from the laptop's recycle bins and ran the following programs or systems utilities:*

    a. *Defrag;*

*b. Disc Clean-up; and*

*c. Clean manager.*

***Teacher's response***

*16. In explanation to the Education Council, the respondent admitted to using pornography on the school-issued laptop and stated he "accepts with hindsight that it would have been better if he had not viewed pornography on the school laptop". The respondent, however, denied that he did so from the school location at any time.*

*17. The respondent does admit to attempting to conceal his accessing of pornography from investigation by 'cleaning' his viewing record off the school laptop. He admitted to the Education Council that this was driven by his embarrassment as a result of his actions.*

8. We are satisfied that the ASF supports the factual allegations in the charge. However, we must now decide if the established conduct amounts to serious misconduct. Although in the CAC's submissions filed before the hearing, it was understood that the parties agreed that the conduct amounted to serious misconduct, at the hearing, the respondent said he did not think it did.

## Serious misconduct

9. Section 378 of the Act provides:

> ***serious misconduct*** *means conduct by a teacher—*
>
> *(a) that—*
>
> *(i) adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or*
>
> *(ii) reflects adversely on the teacher's fitness to be a teacher; or*
>
> *(iii) may bring the teaching profession into disrepute; and*
>
> *(b) that is of a character or severity that meets the Education Council's criteria for reporting serious misconduct*.

10. The criteria for reporting serious misconduct are found in r 9 of the in the Education

Council Rules 2016 (**the Rules**).[1] The CAC relied on rr 9(1)(k) and (o):

***Criteria for reporting serious misconduct***

*(1) The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:*

*…*

*(k) viewing, accessing, or possessing pornographic material while on school premises or engaged on school business:*

*…*

*(o) any act or omission that brings, or is likely to bring, discredit to the profession.*

11. At the hearing, the respondent told us that he realised that what he had done was wrong. He said that it was "such a stupid decision". And he said he had put his family "into a hellish couple of years". He also said that he wanted to attend the hearing to say that he is really sorry for his actions. However he said that he struggled to see it as serious misconduct. He noted that no children were exposed to the material, and no material was in the school environment because he did not use the laptop at school.

12. The respondent said that the school laptop did not synchronise with the school server. He did not use the laptop for school business. He added that he was silly enough to delete his history. He said he did not bring the material into the school environment because he did not bring his school laptop to school. He acknowledged that the purpose of the laptop was to do school work, but he did all of his schoolwork at school. When asked about an agreement about computer use, he said that there was an agreement there, but it was never signed. No copy of an agreement was in any of the materials before us.

13. The respondent did not think that he had brought the teaching profession into disrepute because his conduct had not affected anyone but himself. No children were exposed, and no staff were involved. He agreed to an extent that it might bring the character of teaching into disrepute, but that needed to be looked at alongside his own character and history and what he could bring to education, and the conduct was not typical of his

[1] The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

character.

14. Under cross-examination, the respondent denied accessing the school intranet through the laptop. He said that he could not access the server. He was not aware that his teacher profile was on the laptop but he wasn't 100% sure about that. The respondent acknowledged that the purpose of the laptop was for doing schoolwork, but that he used it for personal matters.

15. Ms Kós put to the respondent a finding of a forensic consultant, who had examined the laptop. We received a Computer Forensic Report as an exhibit. This was a report dated 18 April 2017 completed for the Board of Trustees by Michael Chappell, a forensic consultant and managing director of New Zealand Forensics, Computer-Cell Phone Forensics and Investigation Consultants.

16. Ms Kos asked the respondent about one of the findings which was that the respondent had used the laptop to access the school intranet via the "Teachers" user profile and also the [redacted]' user profile. The respondent said, "As far as I am concerned it is incorrect because it was incorrect." He added, "I do remember the last time I used the laptop was at a whānau." He conceded that would have been for school business. He said he used the laptop for school business a couple of occasions when it worked in 2015.

17. The respondent denied that he accessed school reports at home, and said that he did most of his schoolwork at school. He acknowledged that there would have been a time when he had access to the intranet.

18. Ms Kós put to the respondent that on 2 February 2017 at 7.22am the laptop attempted to connect to the school server. He acknowledged that it is possible that he used to connect to the school server, but he couldn't remember. He said, "My thinking is that I hadn't been using the laptop and so to my thinking, that is incorrect"

19. The respondent acknowledged that he visited pornographic websites, adult pornographic dating websites and chat sites, but he did not think his actions brought the profession into disrepute. He said, "It hasn't affected anyone but myself."

20. The CAC referred us to the Code of Ethics for Registered Teachers, which was in place until June 2017. It required teachers to demonstrate their commitment to learners, family and whānau, society and the profession in general. Under paragraph 1(f) teachers were expected to promote the physical, emotional, social, intellectual and spiritual wellbeing

of learners, and under paragraph 3(c) to teach and model those positive values which are widely accepted in society and encourage learners to apply them and critically appreciate their significance. Ms Kós further reminded us that there was an expectation that teachers would strive to advance the interests of the teaching profession through responsible ethical practice under paragraph 4 (a); and to contribute to the development of an open and reflective professional culture under paragraph 4 (e).

21. Ms Kós invited us to consider the respondent's conduct in light of 1.3, 1.5 and 2.1[2] of the Council's Code of Professional Responsibility, which was introduced in June 2017, arguing that it was still instructive in an assessment of professional standards.

22. Ms Kós submitted that the respondent's conduct engaged all three of the criteria in s 378 and is of a character and severity addressed by rr 9(1)(k) and (o) of the Rules. She referred to two previous Tribunal decisions which involved viewing pornography: *CAC v Witana* NZTDT 2016-34,[3] and NZTDT 2015-20,[4] which we have discussed further below. She referred to the following passage:

> *"As the Tribunal has said in any number of previous decisions, for a teacher to use a school computer system to access pornographic material virtually always constitutes serious misconduct."*[5]

23. The CAC accepted that there was no evidence that the respondent accessed pornographic material on school premises.

24. It was submitted that the respondent's actions in attempting to clean up the laptop is an aggravating feature of this case. The respondent's actions were not consistent with the expectation in the Code of Professional Conduct to conduct themselves professionally and honestly.

*Discussion*

25. The act of viewing pornography at home on one's own computer is unlikely to amount to serious misconduct. Unless the content is "objectionable" within the meaning of the Films, Videos, and Publications Classification Act 1993 it is not illegal for a teacher to view, access or possess pornographic material. The definition of "objectionable"

[2] Discussed below
[3] *CAC v Witana* NZTDT 2016-34, 30 January 2017
[4] NZTDT 2015-20
[5] Above n 4, paragraph 29

includes images involving nude children and publication that supports or promotes the sexual exploitation of children or violence. A wide range of content that some might find offensive or distasteful does not fit into those categories and is not illegal.

26. In considering why accessing pornography might amount to serious misconduct, we might ask 'How does anyone outside the teacher's home know about the viewing?' It is that extra act or circumstance that means that the Council is aware of the viewing, which is likely to raise questions about the teacher. In most cases this is because the teacher has used school equipment, but it might also be that sharing or publishing such material so that a teacher is identifiable is seen as conduct likely to bring the profession into disrepute (s 378(a)(iii)) and bring discredit to the profession (r 9(1)(o)). It is still not the viewing, accessing or possessing itself that brings it under r 9.

27. The reason that the respondent has been referred to us is not because he viewed pornography, but because he used school equipment to do so. We must find that the conduct meets one of the definitions under s 378 and amounts to conduct described in r 9(1)(k) or r 9(1)(o). If it meets the third limb under s 378 (conduct that may bring the teaching profession into disrepute*)* it will also amount to conduct likely to bring discredit to the profession under r 9(1)(o).

*Section 378(a)(i) - adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students*

28. In order to show that the respondent's conduct adversely affected or was likely to adversely affect the well-being or learning of one or more students, the CAC needed to show that there was a risk of a student being exposed to the pornographic material.

29. Ms Kós referred us to two cases. *CAC v Teacher* NZTDT 2015-20 involved a principal who lived in a schoolhouse. He disabled the school's internet content filtering system, used the school's computers to access pornography sites, accessed "hard-core" (but not objectionable) pornography, sometimes accessed pornography during school hours, and used "proxy services" (to provide anonymity or defeat content filters) and "torrents" (which are used to download material in breach of copyright agreements).

30. In *CAC v Witana* a teacher viewed and retained pornographic images on school computers. The images were described as "hardcore"[6] and "objectionable" in the

[6] Paragraph 34

ordinary sense of the word,[7] rather than as defined in the Films, Videos and Publications Classifications Act 1993. Unlike the teacher in 2015-20, Mr Witana had received the images in emails from others, rather than seeking them out, but he had forwarded some on to others, and had retained the emails sent to him. It was not the CAC's case that the respondent had altered the filters. The respondent had four school-issued devices that his emails were synchronised to, and he had exchanged pornographic images by email with other members of staff. We accepted that this increased the risk of students being exposed to this material. We accepted the CAC's submission that the reason for r 9(1)(k) is because bringing the material into the school environment creates a risk of such exposure.

31. In the present case, although the respondent did not accept that he had used the laptop at school, he did not actually deny it. The respondent did not accept the forensic consultant's finding that he had accessed the school intranet via the "Teachers" user profile and also the [redacted] user profile, saying that was incorrect, but he acknowledged that at one time he had been able to access the Intranet.. The forensic consultant was not available to explain his findings and answer questions.

32. If the laptop was not used at school or connected to the school system at all, then it is difficult to ascertain the risk of exposure of children or young people to the material. The facts in this case are different from 2015-20. By downloading material on a laptop that was on occasion on school premises, it is arguable that the respondent "possessed" pornographic material while on school premises. This would be similar to a teacher having a pornographic magazine at school even if it was locked in a briefcase or cupboard. However, this was not an argument pursued by the CAC. According to the ASF,[8] "None of the pornographic images or videos found had been intentionally saved to the computer hard drive by the respondent." If we assume that someone found the respondent's school laptop (at school), it is not clear to us how easily someone else could log on to the laptop and then how easily they might have found either intentionally or unintentionally the content that the respondent had accessed. Although interested in this argument, we are not satisfied on the evidence presented to us that the respondent viewed, accessed or possessed pornography material while on school premises.

33. Although there may have been the facility to link to the school system, in fact there is

[7] Paragraph 77
[8] ASF, paragraph 8

little evidence of that happening. We feel that the risk of children being exposed to this material was remote. We are not satisfied that his conduct was likely to adversely affect the learning or wellbeing of one or more students.

*Section 378(a)(ii) - reflects adversely on the teacher's fitness to be a teacher;*

34. The respondent said that he did not actually use his school-issued laptop for school-related work. We have found that on occasion he did do so, but we find that most of the time he simply used the laptop for his personal interests, including accessing a significant amount of pornography. A perusal of the list of sites, outlined in paragraph 5 of the ASF raises questions about the respondent's fitness to practise. Several include "mom" in the URL, and one, "granny". One of the videos, referred to paragraph 7 of the ASF is called "Big Tits at School Compilation".

35. The CAC has referred to the Code of Ethics and the Code of Professional Responsibility. In a recent decision of *CAC v Teacher*, NZTDT 2018-2, the CAC argued that the later Code is still instructive in an assessment of professional standards. We accepted that argument had some merit, adding:

> *"… particularly if we were being required to make a finding on a novel or uncommon matter, which had not previously been considered under the relevant law. Examples might be conduct involving obligations towards a teacher's colleagues or the whānau of a student. Those cases do not fall always fall neatly into most of the criteria under r 9."* [9]

36. As we said in *CAC v Northwood*:

> *High standards of conduct are expected of teachers, but it is accepted that even where it is found that a teacher's conduct falls below expected standards, not every single shortcoming or breach of the Education Council Code of Ethics necessarily constitutes serious misconduct.* [10]

37. We note that the content of the clauses quoted from the Code of Professional

[9] CAC v Teacher, NZTDT 2018-27, 28 March 2019, at paragraph 39. We also acknowledge that conduct that has occurred on or after 19 May 2018 will be covered by the amended Rules, which include reference to the Code of Professional Responsibility. (Sch 1, cl 3 Teaching Council Rules 2016)
[10] *CAC v Northwood 2016*-32, 18 January 2017, paragraph 200. The Code of Professional Responsibility had not been developed at that time.

Responsibility[11] are very similar to the intent of the earlier Code of Ethics, and so we do not think that this assists our assessment.

38. It is not clear how the clauses in either code apply to the viewing of pornography in one's own home. We would expect that the school would have had a policy on acceptable use of a school laptop. We have not been shown one. However, in many respects this would reflect the expectations of the respondent as an employee. Breach of this expectation would be more of an employment issue than a professional conduct issue.

*Section 378(a)(iii) - may bring the teaching profession into disrepute;*

39. When considering whether the conduct brings the teaching profession into disrepute, we have applied the same test as found in *Collie v Nursing Council of New Zealand* [2001] NZAR 74.[12] We are satisfied that reasonable members of the public, informed of all the facts and circumstances, could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the behaviour of the respondent. In particular:

- The nature of some of the sites visited by the respondent, as outlined above at paragraph 34 is of concern;
- Parents and the community at large do not expect school property to be used for accessing pornography.
- The respondent lacked integrity by using school equipment for something which he knew, or ought to have known was not acceptable. This knowledge is evidenced by his decision to try to wipe the evidence.

40. In order to make a finding of serious misconduct, we also need to find that it was of a "*character or severity that meets the Education Council's criteria for reporting serious misconduct"* under r 9. The CAC relies on r 9(1)(k) and 9(1)(o).

[11] 1. Commitment to the Teaching Profession: I will maintain public trust and confidence in the teaching profession by:
   3. demonstrating a high standard of professional behaviour and integrity
   5. contributing to a professional culture that supports and upholds this Code.
2. Commitment to Learners: I will work in the best interests of learners by:
   1. promoting the wellbeing of learners and protecting them from harm

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

*Rule 9(1)(k)*

41. The wording of r 9(1)(k)[13] is:

> *viewing, accessing, or possessing pornographic material while on school premises or engaged on school business*

42. The CAC has accepted that the respondent did not access the material while on school premises.

43. The next possibility is that the respondent viewed, accessed or possessed pornographic material while "engaged on school business." This was not fully explained by the CAC. Ms Kós appropriately explored evidence that the school network could be accessed from the laptop.

44. We find that the respondent did occasionally use the laptop for school business, as he acknowledged,[14] but there is no evidence that he viewed or accessed pornographic material while engaged on school business. Therefore, we are not satisfied that the conduct meets the criterion set out in r 9(1)(k).

*Rule 9(1)(o)*

45. We find that for the same reasons as this conduct amounts to conduct that may bring the profession into disrepute, it is likely to bring discredit to the profession. Therefore, it meets the criterion in r 9(1)(o).

## Penalty

46. Section 404 of the Act provides:

> ***404 Powers of Disciplinary Tribunal***
>
> *(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
>
> *(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):*

[13] Under the new Rules, this provision is amended and contained in r 9(1)(f): *viewing, accessing, creating, sharing, or possessing pornographic material while at a school or an early childhood education service, or while engaging in business relating to a school or an early childhood education service*. It has been expanded to include the creation and sharing of pornographic material and also early childhood centres, but otherwise is not materially altered. In particular, it does not refer to the use of school equipment

[14] See para 14 above

*(b) censure the teacher:*

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

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

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

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

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

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

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

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

47. In *CAC v McMillan*[15] we summarised the role of disciplinary proceedings against teachers as:

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

48. The CAC submitted the following penalty is appropriate:

- Censure
- Annotation of the register
- Conditions as follows:

[15] NZTDT 2016/52, 23 January 2017, paragraph 23.

a. For the next two years:

i. To inform any prospective employer of the profession disciplinary proceedings and to provide that employer with a copy of the decision;

ii. To immediately hand over any school-issued electronic device to the school on request.

b. To attend a professional development course, as agreed with the CAC, addressing the safe use of electronic devices and the like.

49. In response to the CAC submissions on penalty, the respondent said he was happy to undergo professional development, but that censure would stop his career. He accepted that he had done wrong, and professional development was appropriate.

50. We agree that the penalty proposed by the CAC is appropriate. We do not believe that the censure will prevent him from teaching, but we do think that there should be conditions on his practice. Although we have found that it was unlikely that any students would be adversely affected by the respondent's actions in this instance, a prospective employer should know about this inappropriate behaviour and be able to randomly check electronic devices. We have not ordered annotation.

51. We therefore make the following orders:

51.1 The respondent is censured under s 404(1)(b).

51.2 The following conditions are on the respondent's practising certificate:

(a) For the next two years:

(i) He must inform any current or prospective employer of this Tribunal decision and provide a copy of it to them;

(ii) He must immediately hand over any school-issued electronic device to the school on request

(b) Within six months from the date of this decision, to attend a professional development course, as agreed with the CAC, addressing the safe use of electronic devices and the like

## Costs

52. In submissions dated 23 October 2018, the CAC sought a 40% contribution to their costs. This totalled $2,276.98. The respondent advised that he was relief teaching, not

in fulltime employment and so costs would be difficult.

53. Since filing that schedule, there has been a hearing and the CAC has had to file more submissions, on name suppression. This was because the respondent had not filed his application and evidence in support in accordance with the timetabling directions. We expect that 40% of the CAC costs would now be considerably more.

54. The Tribunal orders the respondent to pay 40% of the costs of conducting the hearing, under section 404(1)(h) and (i), that is 40% of the Tribunal's costs and 40% of the CAC's actual and reasonable costs. The Tribunal delegates to the Chairperson authority to determine the quantum of those costs and issues the following directions:

a) Within 10 working days of the date of this decision:

i. The Secretary is to provide the Chairperson and the parties a schedule of the Tribunal's costs

ii. CAC to file and serve on the respondent a schedule of its costs

b) Within a further 10 working days the respondent is to file with the Tribunal and serve on the CAC any submissions he wishes to make in relation to the costs of the Tribunal or CAC. That may include information about his own income and outgoings.

55. The Chairperson will then determine the total costs to be paid.

## Non-publication

56. At the hearing on 5 March 2019, the respondent advised that he wanted permanent name suppression.

57. At a pre-hearing conference on 18 September 2018, a direction was made that if the respondent wishes to apply for permanent name suppression, he should file an application by 9 October 2018. He did not do so but at the hearing, he advised that he did seek a permanent order for non-publication of his name, and we heard some evidence on this matter in private.

58. For the CAC, Ms Kos sought the opportunity to file submissions in response. It was also agreed that the respondent might file supporting evidence for his application. We therefore made some timetabling directions and received evidence and submissions from the parties. The interim name suppression was extended until further order of the

Tribunal.

*The application*

59. The respondent has applied for name suppression on the basis that publication of his name would adversely affect his son, his daughter and himself. He describes his mood swings over the past two years, since this case "reared its head" and says that they have put a strain on his relationship with his daughter.

60. In support of his application he has provided statements from his parents, his former wife, two close friends, his mother and his brother. The essence of these is that they have seen him become very low in mood at times over the past two years and admire the efforts he has made to push through. He is warmly regarded by students where he has been relief teaching.

61. The respondent's former wife spoke of her concerns that the impact would have on their teenage children. In particular, their daughter has developed a medical condition which is not yet controlled by medication. Major triggers are stress and lack of sleep. Any further stress would have a major impact on her physical and mental health. The respondent provided a letter from her specialist outlining her condition and confirming that stress is a factor which can impede its control.

62. The respondent also provided a very brief note from his doctor stating that the respondent is depressed and would benefit from counselling. There is no evidence of the respondent having undertaken any counselling to date, something which we would have thought would be beneficial to him.

*The CAC's response*

63. The CAC helpfully set out the legal principles relevant to the question of name suppression. The CAC adopts a neutral position, having regard to the possible impact of publication on the respondent's daughter's health.

## Discussion

64. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

> *(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
>
> *…*
>
> *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

65. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the applicants, as well as the public interest. If we think it is proper, we may make such an order.

66. It would have been preferable for the statements provided in support of this application to have been signed. We accept that the respondent's mental health will have been affected by the Teaching Council's investigation and the Tribunal hearing. It is almost inevitable that these proceedings will cause some distress. However, neither the respondent nor his GP describe any therapeutic intervention (medication or counselling) having taken place, or even any consultations. We would have thought the respondent might have consulted his GP or another health provider if his moods have been as bad as described.

67. It appears that the respondent's daughter knows about this disciplinary proceeding, but that the son does not. We recognise that publication of the disciplinary finding will cause him distress. On its own that might not amount to a ground for name suppression, but we find the evidence in support of the respondent's daughter more compelling.

68. Having considered her interests and the public interest, we think it is proper to make an order for non-publication of the respondent's name. That order does not preclude persons with a genuine interest knowing about this decision. For example, if a prospective employer asks the Council about the respondent's disciplinary history, this decision may be disclosed. The details of the respondent's daughter's condition have not been included in this decision in order to protect her privacy.

Theo Baker
Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).