

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2021/20

WĀHANGA (UNDER)

the Education Act 1989

MŌ TE TAKE (IN THE MATTER)

of charges referred by the
Complaints Assessment
Committee to the New Zealand
Teachers Disciplinary Tribunal

I WAENGA I A (BETWEEN)

**COMPLAINTS ASSESSMENT
COMMITTEE**

Referrer

ME (AND)

Teacher P

Respondent

KUPU WHAKATAU A TE TARAIPUUNARA (DECISION OF THE TRIBUNAL)

8 Hakihea 2021

HEARING: Held on 11 August 2021 on the papers

TRIBUNAL: Rachael Schmidt-McCleave (Deputy Chair)
Neta Sadlier and Nikki Parsons (members)

REPRESENTATION: E Mok, Meredith Connell for the Complaints Assessment Committee
The respondent self-represented

Hei timatanga kōrero – Introduction

1. The respondent, by notice of charge amended on 19 May 2021,¹ is charged with serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers under section 404 of the Education Act 1989 (the “Act”).²
2. In the amended notice of charge, the CAC charges that the respondent, a registered teacher of [REDACTED]:
 - (a) From around April 2018 to about 6 July 2018, while she was employed as a teacher at [REDACTED] (the “College”) in Auckland, breached professional boundaries with a Year 12 student at the College (Student A), including by taking Student A to personal farewell dinners with her friends; and/or
 - (b) From about 7 July 2018, after resigning from the College and relocating to [REDACTED], continued to breach professional boundaries by engaging in an ongoing intimate relationship with Student A, with whom she was in contact as a result of her previous position as a teacher at the College.
3. The CAC charges that the conduct alleged in paragraphs 2(a) and (b) separately, and/or cumulatively, amounts to serious misconduct pursuant to section 378 of the Act, and Rules 9(1)(e) and/or (k) of the Teaching Council Rules 2016, or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Act.
4. The matter was heard on the papers.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

5. The ASoF is set out in full below:
 1. [REDACTED] is a registered teacher in New Zealand (registration number [REDACTED] Her practising certificate expired on [REDACTED]

¹ Minute of Disciplinary Tribunal dated 19 May 2021.

² Note that the Education and Training Act 2020 is now in force. However, the alleged conduct here took place before the 2020 Act was in force, and therefore the 1989 Act continues to apply.

2. At the relevant time, [REDACTED] was employed by [REDACTED] (**College**), which is a [REDACTED] secondary school located in [REDACTED] Auckland.
3. [REDACTED] did her teacher's training in Auckland. She obtained registration as a teacher and was issued a provisional practising certificate in [REDACTED] 2016. After becoming a registered teacher, [REDACTED] started working as a teacher at the College.
4. As at May 2021, [REDACTED] is no longer working in the teaching profession.

Complaint

5. On 23 August 2019, the Teaching Council received a complaint from [REDACTED], the [REDACTED], about [REDACTED]. [REDACTED]' complaint alleged that [REDACTED] had formed an inappropriate relationship with a Year 12 student at the College (**Student A**) in 2018.
6. [REDACTED] date of birth is [REDACTED] 1992.
7. Student A's date of birth is [REDACTED] 2000.

Conduct in early 2018

8. In 2018, [REDACTED] taught [REDACTED] at the College.
9. That year, Student A was an [REDACTED] who was in Year 12. [REDACTED]
[REDACTED].
10. [REDACTED] and Student A first became acquainted in 2017 because Student A was friends with [REDACTED]. The pair spoke in passing. [REDACTED] did not teach Student A.
11. In 2018, Student A experienced difficulties in his personal and school life. This included the break-up of a short-term personal relationship with another student who had left the College. Student A also had trouble forming friendships with his classmates and was not coping with his schoolwork. Student A struggled with depression and anxiety. In a response provided to the Teaching Council, Student A stated that he was "totally collapse[d] and broken inside ...there was no friends no family and no one was around me at all ... I started to lose motivation to work, to get to school, to wake up, to

even eat". His attendance at school for some subjects was very poor. His attendance in [REDACTED] was 44 per cent.

12. On a date in or around April 2018, [REDACTED] noticed that Student A looked unhappy when he was outside the lunchtime detention room. [REDACTED] speaks [REDACTED], which is [REDACTED]. [REDACTED] asked Student A what was wrong and why he was in lunchtime detention. Student A opened up to her and told her he was unhappy about everything in his life and his recent break-up, and disclosed that he was feeling lonely because most of his friends had graduated from the College. [REDACTED] offered to help Student A. [REDACTED] invited Student A to come to lunchtime tutorials that she held along with other students who were having difficulties with [REDACTED]. In a response provided to the Teaching Council, [REDACTED] stated that this was a genuine offer of help and that, during her time at the College, she was concerned about Student A's wellbeing and did what she could to help him. [REDACTED] recalled that she had sought to raise concerns with [REDACTED] about Student A's struggles around this time.
13. In a statement later provided to the Teaching Council, Student A described this period with [REDACTED] as follows: "she came to me like a saviour to make my life goes easier [sic]". Student A also described his relationship with [REDACTED] at this time as one of "friends" and "like a brother/sister relationship", but that he "thought [he might like her somehow, but.. didn't think too much as [his] depression overtook [his] logical mind".
14. Student A started to feel more confident in his schoolwork as a result of being tutored by [REDACTED]. Student A also said that [REDACTED] provided solutions to get himself together again and widen his circle of friends.
15. [REDACTED] resigned from the College in June 2018 after obtaining a role [REDACTED]. [REDACTED] remained a teacher at the College until 6 July 2018.
16. In July 2018, when Student A was 17, [REDACTED] had two separate farewell dinners before she left New Zealand. These dinners were held at restaurant bars on the weekends with [REDACTED] friends. [REDACTED] invited Student A to attend the dinners with her, and he went to both dinners. No alcohol was consumed by those attending the dinners, including Student A, and the attendees left after dinner. No other students from the College attended these dinners aside from Student A. [REDACTED] states this was the first and only time, outside of the lunchtime tutorials, where she and Student A spent time together in New Zealand.

17. In a statement later provided to the Teaching Council, Student A described the state of the relationship at that time as the “lines of being a close friend were quite blurry” and that he thought he might like her [REDACTED] in some way. According to [REDACTED], she was also becoming confused about her feelings for Student A around this time, but she did not verbalise her feelings or act on them.

Start of personal/intimate relationship

18. [REDACTED] moved to [REDACTED] in July 2018. Student A also returned to [REDACTED] for the school holidays at this time. Student A later described being “happy...because I felt like I finally got someone who could let me lean on and support me, at the same time, I’m losing them”. [REDACTED] and Student A spent time together in [REDACTED] and began a romantic relationship. The relationship was not sexual at this time.

19. Student A later said that he “cherished the time with [REDACTED] when [he] got back to [REDACTED], we’ve been meeting each other, and we fell in love. We became couples although we knew it wouldn’t work out. We both valued the time we spent with each other but it’s never going to be enough [sic]”.

20. Student A returned to [REDACTED] for the start of Term 3 at the College. Student A started to see a psychologist at the College in September 2018. In a statement provided to the Teaching Council, Student A stated that: “On the beginning of term three, I felt really numb and I didn’t really want to stand up as I’ve been falling for too long... I was completely traumatized [sic]”.

21. Student A continued to struggle with school attendance and academic performance during Term 3. Student A’s overall attendance was around 67 per cent that term. Student A reported feeling very depressed and anxious during this time.

22. In September 2018, Student A was pulled over by the Police for speeding, and was fined for giving false details and driving on a learner licence. He was then arrested for possession of cannabis and possession of a utensil. He received a pre-charge warning for the cannabis.

23. In October 2018, Student A provided a statement to the College. In this statement, Student A claimed that he and [REDACTED] had stopped their relationship. However, in a later statement provided in 2019, Student A stated that his relationship with [REDACTED] had never ended. Student A explained that he felt like he had to say the relationship

had ended because he felt pressured due to the questioning he was receiving at school about the relationship.

Conduct later in 2018

24. ██████ and Student A continued a long-distance relationship in Term 3. ██████ was working in ██████ and Student A continued attending the College in New Zealand.
25. In November 2018, Student A returned to ██████ for the summer holidays. The relationship became “stable” from this time, according to ██████. The relationship also became sexual during the summer holidays between November 2018 and February 2019. In November 2018, Student A turned 18.
26. As at May 2021, the personal relationship between ██████ and Student A is ongoing.

School investigation and complaint

27. The College was notified of ██████ relationship with Student A after receiving a report from ██████ on 14 October 2018. This included a report requested by ██████ from Student A’s occupational therapist.
28. The College did not file a mandatory report with the Teaching Council.
29. ██████ filed a complaint with the Teaching Council on 23 August 2019 after she had ceased working at the College.

Teacher’s comments

30. In a response provided to the Teaching Council, ██████ admitted the conduct as set out above. In regards to Student A attending her two farewell dinners in July 2018, ██████ said she had invited Student A because there would be many people attending, and she thought he could socialise with others who spoke ██████ so that he could broaden his social circle and meet more friends who spoke the same language.
31. On 18 February 2021, in an interview with the Committee, ██████ stated that:
- a. She would not have pursued the relationship with Student A if she had stayed in New Zealand;

- b. When asked why she had not sought advice from her mentor (in teaching), ■■■ responded that she was “worried what her mentor might think” if she said she had feelings towards a student;
- c. ■■■ stated that her actions as a teacher at the College were professional towards Student A;
- d. ■■■ confirmed that her relationship with Student A was ongoing and has been for around two and a half years.

Te Ture - The Law

6. Section 378 of the Act defines serious misconduct:

serious misconduct means conduct by a teacher –

- (a) that –
 - (i) adversely affects, or is likely to adversely affect, the wellbeing 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 Teaching Council’s criteria for reporting serious misconduct.

7. The test under section 378 is conjunctive³, meaning that as well as meeting one or more of the three adverse consequences, a teacher's conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.
8. The CAC alleges that the respondent’s conduct falls within the following sub-rules of Rules 9(1):
- (a) Rule (9(1)(e): breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher’s position as a teacher; for example,—
 - (i) engaging in an inappropriate relationship with the child or young person:

³ *Teacher Y and Education Council of Aotearoa New Zealand*, [2018], NZTDT 3141, 27 February 2018 at [64].

- (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person.
 - (b) Rule 9(1)(k): an act or omission that brings, or is likely to bring, the teaching profession into disrepute.
9. The CAC also points to clause 2.2 of the Code for Professional Responsibility which expressly refers to the need for teachers to work in the best interests of learners by engaging in “*ethical and professional relationships with learners that respect professional boundaries*”. The guidance to the Code refers to privately meeting with students outside of the educational setting without a valid context, and treating students as a friend, as examples of conduct that involve a breach of professional boundaries. Similarly, encouraging a learner to develop an emotional dependency on the teacher is referenced as an example of conduct which will breach boundaries.

Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

10. The CAC submits that the charge of serious misconduct against the respondent relates to her conduct in blurring professional boundaries while she was still employed as a teacher at the College, and her subsequent conduct in pursuing an intimate relationship with Student A a short time after she had resigned from the College and relocated [REDACTED].
11. The CAC acknowledges that, although the respondent did not enter into an intimate relationship with Student A until after her resignation, this conduct nevertheless constituted serious misconduct. The CAC submits that entering into an intimate relationship with Student A was inappropriate because the respondent had been in contact with Student A by virtue of her previous position as a teacher at the College where Student A was a student, and the power imbalance from the teacher/student relationship remained at the time the respondent pursued an intimate relationship with Student A. The CAC further points out that Student A also remained a student at the College at the time the intimate relationship commenced.
12. The CAC also acknowledges that the majority of the relevant conduct at issue took place overseas in [REDACTED]. As pointed out by the CAC, however, this Tribunal has previously affirmed that it has jurisdiction to consider conduct that took place overseas, provided the

teacher is registered in New Zealand at the time the conduct took place.⁴ The respondent was registered as a teacher in New Zealand at the time of the relevant conduct, therefore the Tribunal considers it has jurisdiction to consider these aspects of the respondent's conduct.

13. In terms of each of the particulars in the amended charge, the CAC submits (in summary):

(a) Particular 1(a): By inviting Student A to the personal dinners on the weekends, where no other students were present, the Committee submits that the respondent displayed a lack of professional judgement and a lack of regard for the need to maintain professional boundaries with students. While the invitations may have been well-intentioned (i.e. to help Student A feel less isolated), the CAC submits that the respondent's actions were misconceived in the circumstances, given the respondent's awareness of the personal difficulties Student A was experiencing, and given the nature of the events to which Student A was being invited – personal dinners with the respondent's friends, on the weekend, with no other students present, and with no educational purpose. The CAC concludes that this reflects adversely on the respondent's fitness to be a teacher (s 378(1)(a)(ii)), and also risked bringing the teaching profession into disrepute (s 378(1)(a)(iii)), given the expectation on teachers to maintain proper boundaries with students.

(b) Particular 1(b): following the Tribunal's two-step approach:⁵

(i) Assessing whether the relationship is inappropriate is, ultimately, a factual assessment. While engaging in a relationship with a former student will not always involve a breach of a teacher's professional obligations (and there cannot be a "*blanket prohibition on intimate relationships between teachers and former students*"⁶), in some circumstances the relationship will not be appropriate, for example where the former student is vulnerable due to his or her age. That is because a teacher's professional obligations to his or her students do not end outside the classroom, and it is "*crucial that*

⁴ *Complaints Assessment Committee v Teacher* NZTDT 2018/101, 2 March 2021 at [47].

⁵ See, for example, *CAC v Teacher C* NZTDT 2016/40, 28 June 2017; *CAC v Teacher* NZTDT 2018/41, 17 June 2019; *CAC v Teacher B* NZTDT 2018/10, 8 July 2019.

⁶ See *CAC v Teacher C* NZTDT 2016/40, 28 June 2017 at [183].

teachers maintain and respect the professional boundary placed between them and their charges".⁷ Here, the CAC submits, the causal nexus is present between the student/teacher relationship and the subsequent contact. The relationship is inappropriate due to Student A's age, his emotional maturity and vulnerability, the evidence of the student/teacher relationship, and the timing of the relationship.

- (ii) If the Tribunal finds the relationship to be inappropriate, the respondent's conduct will meet one or more of the limbs of the definition of serious misconduct in section 378(1)(a), in particular the respondent's conduct was likely to have had (or at least has the potential to have had) an adverse impact on the emotional and/or psychological wellbeing of Student A, given the power imbalance between the pair and Student A's existing mental health issues, the respondent's conduct in engaging in an inappropriate romantic relationship with her former student reflects adversely on the respondent's fitness to be a teacher, and the respondent's conduct risked bringing the teaching profession into disrepute.

- 14. The respondent confirmed in an email dated 20 July 2021 that she had no submissions to make beyond those submitted with her application for permanent name suppression (addressed below).

Kupu Whakatau – Decision

- 15. In summary, we are satisfied that the respondent's conduct, considered cumulatively, meets the threshold for serious misconduct in terms of section 378 of the Act, and Rules 9(1)(e) and (k).
- 16. The Tribunal is satisfied that the conduct here reflects adversely on the teacher's fitness to be a teacher and may bring the teaching profession into disrepute.
- 17. In terms of rule 9(1)(k), the High Court in *Collie v Nursing Council of New Zealand*⁸ confirmed that the test for bringing the profession into disrepute is an objective one. In

⁷ See *CAC v Teacher C* NZTDT 2016/40, 28 June 2017 at [185].

⁸ *Collie v Nursing Council of New Zealand*, [2001] NZAR74 at [28] regularly applied by the Tribunal, for example see *CAC v Harrington* NZDT 2016/63, 6 April 2017

making its determination, the Tribunal must ask itself whether reasonable members of the public fully informed of the facts of the case could reasonably conclude that the reputation and good standing of the profession has been lowered by the respondent's actions.

18. Turning now to look at whether the respondent's conduct is also of a character or severity that makes the Teaching Council's criteria for reporting serious misconduct, we note that we only need to find contravention of one of the specific rules covered in Rule 9(1) for this limb to be satisfied. The CAC has focussed on Rules 9(1)(e) and (k) in this regard and we are satisfied that the respondent's actions cumulatively breach both of those sub-Rules.
19. The analogous cases bear out the Tribunal's conclusions above. The Tribunal expands on its reasoning below.

Particular 1(a): Conduct between April 2018 and 6 July 2018

20. The Tribunal finds particular 1(a) to amount to serious misconduct. By inviting Student A to personal dinners on the weekends, where no other students were present, the respondent displayed both a lack of professional judgement and a lack of regard for the need to maintain professional boundaries with students. The Tribunal notes that the respondent's intentions may have been positive (to help Student A with his struggles at the College). Nonetheless, the Tribunal considers that the respondent's actions were misconceived, given the respondent's awareness of Student A's intense personal difficulties, and given the type of events to which Student A was being invited, namely dinners with the respondent's friends, on the weekend, with no other students present, and with no educational purpose. The Tribunal considers this conduct reflects adversely on the respondent's fitness to be a teacher (s 378(1)(a)(ii)). It also risks bringing the teaching profession into disrepute (s 378(1)(a)(iii)), given the expectation on teachers to maintain proper boundaries with students.
21. This Tribunal has, on several occasions, discussed the rationale for the need to maintain appropriate boundaries. In *CAC v Huggard*,⁹ the Tribunal emphasised that a teacher, being in a position of power and responsibility, should model appropriate behaviour. The teacher and student are not contemporaries and should not be friends. If a student seeks

⁹ *CAC v Huggard* NZTDT 2016/33, 20 June 2017 at [21].

mentorship, counsel or comfort from a teacher, the teacher must respond in a way that has the student's well-being and safety as paramount considerations and ensures proper professional boundaries are maintained.

22. Likewise, in *CAC v Teacher*,¹⁰ the Tribunal affirmed that breaches of professional boundaries call into question whether a person should continue to be registered as a teacher even if the relationship was not a sexual relationship because maintaining appropriate professional boundaries is “*fundamental to safe and high-quality teaching and learning*”.
23. Student A himself has spoken about the confusion he experienced, and the fact he “*fell apart*” when he first returned from [REDACTED], which underlines the need to maintain appropriate boundaries. The respondent arguably knew her conduct was wrong by not raising it with her mentor. She also appears to have targeted Student A, in the fact no other students were present at the personal farewell dinners. The Tribunal is concerned there is an element of grooming occurring in the respondent's behaviour under this particular.
24. The Tribunal is therefore satisfied that the particular amounts to serious misconduct.

Particular 1(b):

25. Particular 1(b) relates to the respondent's conduct in entering into a relationship with Student A a short time after the respondent left her role at the College. The relationship became romantic and subsequently sexual.
26. This Tribunal has dealt on many occasions with cases in which a teacher's conduct in engaging in a relationship with a recent former student will involve a breach of the teacher's professional obligations.¹¹ In those cases, the Tribunal accepted that the correct approach to the analysis was:
 - (a) First, to consider whether the relationship was inappropriate for the purposes of rr 9(1)(e) and/or (k) of the Rules (s 378(1)(b));

¹⁰ *CAC v Teacher* NZTDT 2016/55

¹¹ See, for example, *CAC v Teacher C* NZTDT 2016/40, 28 June 2017; *CAC v Teacher* NZTDT 2018/41, 17 June 2019; *CAC v Teacher B* NZTDT 2018/10, 8 July 2019.

- (b) Second, to address the factors in s 378(1)(a), given these factors will only likely be engaged if the relationship is inappropriate for the purposes of Rules 9(1)(e) and/or (k).

27. Here, the Tribunal is satisfied the relationship between Student A and the respondent is inappropriate for the following reasons:

- (a) The respondent's association with Student A as a teacher at the College where Student A studied was a critical reason why the pair subsequently entered into a personal relationship. The respondent then invited Student A to personal events, at which no other students were present.
- (b) There is an 8-year age difference between the respondent and Student A. This may not be an issue in adult life but the Tribunal sees it as a significant age difference in the case of a student and teacher, where a power imbalance exists.
- (c) Student A was extremely vulnerable mentally when he met the respondent. Indeed, their connection only came about due to that vulnerability. The respondent knew about Student A's difficulties and, by her own admission, raised them with senior staff.
- (d) The Tribunal considers that professional boundaries were blurred with Student A before the romantic relationship commenced, when the respondent was still a teacher at the College. Very little time elapsed between the respondent leaving the College and the pair entering into a romantic relationship, which became sexual in the months following. The Tribunal considers there was insufficient time here for the teacher student dynamic to dissipate, and the power imbalance continued, shown by Student A describing the respondent as his "saviour" and feeling "lost" on his return to New Zealand from [REDACTED].

28. Rule 9(1)(e) "*underscores the inherent power imbalance between a teacher and his or her or students, which may persist after the professional relationship comes to an end*".¹² The Tribunal has also described the purpose of r 9(1)(e) as being "*prophylactic in nature, and thus is concerned with the prevention of harm to a student that the formation of a personal*

¹² *CAC v Teacher C* NZTDT 2016/40, 28 June 2017 at [201].

relationship with a teacher might cause".¹³ The Tribunal therefore considers rule 9(1)(e) to have been breached. The Tribunal also considers that, for the reasons articulated above, the respondent's conduct also brings the teaching profession into disrepute for the purposes of r 9(1)(k). Reasonable members of the public, informed of the nature and circumstances of the respondent's conduct, could reasonably conclude that the reputation and good-standing of the teaching profession was lowered if her conduct was condoned by others in the profession (as per *Collie*). The Tribunal in *CAC v Teacher* observed that, if there was an inappropriate relationship in contravention of r 9(1)(e), then it would almost inevitably follow that the teacher's behaviour reflected adversely on the teacher's fitness to practise, and risked bringing the profession into disrepute.

29. With respect to the next step in the approach, the Tribunal considers that the respondent's conduct meet one or more of the limbs of the definition of serious misconduct in section 378(1)(a). In particular, for the reasons already discussed, the conduct is likely to have adversely affected Student A's wellbeing, reflects adversely on the respondent's fitness to be a teacher, and may bring the teaching profession into disrepute.

Whiu - Penalty

30. Having determined that this case is one in which we consider exercising our powers, we must now turn to consider what is an appropriate penalty in the circumstances.

404 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*

¹³ *CAC v Teacher B* NZTDT 2018/10, 8 July 2019 at [11].

- (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.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under section 397 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
- (3) *A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.*

31. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.¹⁴ We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.¹⁵

32. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers¹⁶:

- (a) Protecting the public;

¹⁴ *CAC v McMillan*, NZTDT 2016/52.

¹⁵ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

¹⁶ Above n 16 at [40] – [62]

- (b) Setting the standards for the profession;
 - (c) Punishment;
 - (d) Rehabilitation;
 - (e) Consistency;
 - (f) The range of sentencing options;
 - (g) Least restrictive;
 - (h) Fair, reasonable and proportionate.
33. We do not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.
34. After analysing the comparable cases,¹⁷ the CAC submits that the respondent's conduct was highly serious, taking into account the following factors:
- (a) The respondent breached boundaries with Student A while she was still employed as a teacher at the College, outside of school grounds and outside of school hours. This occurred at least twice at the respondent's personal leaving dinners.
 - (b) The personal relationship between the respondent and Student A developed at a time when Student A was plainly vulnerable, beyond his young age, due to his isolation and mental health difficulties. The respondent was aware of Student A's particular vulnerability, as she reported her concerns about his mental health to the College, but still pursued an intimate relationship with Student A a short time after reporting these concerns, and while Student A was still a student at the College.
 - (c) The relationship is ongoing. It is aggravating that the intimate relationship is enduring in nature, and developed to a sexual relationship while Student A was still a student at the College.

¹⁷ *CAC v Teague* NZTDT 2020/11; *CAC v Teacher E* NZTDT 2017/28; *CAC v Teacher* NZTDT 2016/46; *CAC v Huggard* NZTDT 2016/33; *CAC v Teacher F* NZTDT 2018/32, 2 December 2020

35. The CAC did acknowledge that the respondent has engaged with the disciplinary process and accepted her conduct at an early stage, and that she has no previous disciplinary history (while noting that she had only been teaching two years by the time of the conduct). The CAC does not consider the respondent has shown any remorse or insight, and notes that she is no longer teaching and does not intend to teach. The CAC submits that, on the basis of *CAC v Fuli-Makaua*¹⁸, the respondent's offending is sufficiently serious that no outcome short of deregistration sufficiently reflects the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession.
36. Bearing in mind the above factors highlighted by the CAC, which the Tribunal accepts and adopts, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
- (a) Censure of the respondent under s404(1)(b) of the Act.
 - (b) Cancellation of the respondent's registration under section 404(1)(g) of the Act.

Utu Whakaea – Costs

37. The CAC submits that a 40% contribution to the CAC's overall costs is appropriate. This reflects a discount from the starting point of 50% to acknowledge the respondent's cooperation.
38. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC.
39. The CAC is to file and serve a copy of its cost schedule. Under section 404(1)(h) the respondent is ordered to pay 40% of the costs shown in the CAC schedule unless the respondent files and serves submissions as to costs within 10 days of the date the CAC has sent the cost schedule. If these submissions are received the Tribunal delegates to the Deputy Chair the task of fixing the amount of the CAC's costs.
40. The respondent is also ordered to pay 40% of the Tribunal's costs. This matter was dealt with on the papers and the schedule submitted by the Tribunal shows \$1,145.00 of total

¹⁸ *CAC v Fuli-Makaua* NZTDT 2017/40, 5 June 2018 at [54].

costs. The respondent is to pay \$458.00 pursuant to section 404(1)(i). Any objection should be filed within 10 days of receipt of the decision and referred to the Deputy Chair.

He Rāhui tuku panui – Non-publication

41. The respondent seeks permanent name suppression for herself, Student A and the College on the basis, in summary, that publication of these details will risk adversely impacting Student A's mental health. The respondent refers to Student A's history of depression (which is also referenced in the agreed summary of facts) and her and Student A's ongoing relationship (which she states a number of people are aware of) in support of her application.
42. The CAC's position is that suppression of the respondent and the College's names and identifying details is appropriate in the present case in order to prevent Student A from being identified. The CAC also seeks that the interim name suppression order in respect of Student A be made permanent.
43. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.
44. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is "proper" to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.
45. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought. Bare assertions will not suffice for displacing the principle of open justice and nor will the "ordinary" hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.
46. The Tribunal is satisfied that, in this case, there is good reason to displace the presumption of open justice by suppressing the respondent's identity, and that of the College and

Student A. In respect of Student A, this is to ensure his ongoing privacy, given his young age, his vulnerability and the nature of the conduct at issue.

47. The Tribunal also considers that permanent suppression of the respondent's name and identifying particulars, and those of the College, is appropriate. The respondent and Student A's relationship is ongoing, and the conduct occurred relatively recently in 2018. There is a "real risk" that publication of the respondent's name and the College's name in connection with these proceedings will identify Student A, and place his mental health at further risk.



Rachael Schmidt-McCleave
Deputy Chair

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

1. This decision may be appealed by the 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).