BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019- 31

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	**TEACHER R** **Respondent**

TRIBUNAL DECISION
(RECALLED AND REVISED)
DATED 2 JUNE 2020

HEARING: Held on the papers on 22 October 2019

DECISION: Issued on 16 January 2020, recalled and revised 2 June 2020

TRIBUNAL: Theo Baker (Chair)
Stuart King and Maria Johnson (members)

REPRESENTATION: Ms Lim for the CAC
Ms King for the respondent

1. The Complaints Assessment Committee (CAC) referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge was that **t**he respondent in 2018 entered into an inappropriate relationship with a Year 13 student, "Student M".

2. Before the hearing, the parties conferred and filed an Agreed Summary of Facts (ASF). This document makes no reference to a student M but does outline inappropriate conduct between the respondent and "Student A". The respondent has not taken any issue with this discrepancy, and there is no suggestion that he denies the charge. We have therefore amended the charge to read 'Student A' instead of 'Student M', on the basis that this amendment will not prejudice the respondent.

3. It was alleged that the conduct amounts to serious misconduct pursuant to s 378 of the Education Act 1989 (**the Act**) and rule 9(1)(e) and/or (o) of the Education Rules 2016 **(the Rules)** in place before 18 May 2018[1] and/or (k) of the Rules in place after the May 2018 amendment, or alternatively amounts to conduct otherwise entitling the Disciplinary Tribunal to exercise its powers under s 404 of the Act.

4. A panel of the Tribunal convened on 22 October 2019 via Skype to consider the charge based on the papers that had been filed, that is an agreed summary of facts and submissions from the CAC. The respondent did not file any submissions on the question of whether the conduct amounted to serious misconduct or penalty but did seek name suppression.

Summary of decision

5. In a decision dated 16 January 2020, we found that the conduct amounted to serious misconduct.

6. Under s 404(1)(b) we censured the respondent and we cancelled his registration under s 404(1)(g).

7. We declined to make any orders for non-publication of the teacher's name. We recognised that would lead to identification of Student A. We therefore did not make an order for non-publication of her name.

8. In a document dated February 2020, filed on or about 2 March 2020, the respondent

[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.

applied for a recall of the decision for non-publication on the basis of evidence of Student A's mental wellbeing. This evidence had not been before us when we deliberated and issued our decision.

9. After hearing from the CAC, we deliberated further and decided to recall our decision. The reasons are discussed further below.

10. We have now made an order prohibiting the publication of the name of Student A. This means that the respondent's name will also be suppressed, as identification of him would likely lead to identification of Student A. The name of the school and town centre are also suppressed.

11. This decision sets out our original decision[2] followed by our decision to recall and our revised decision on non-publication and reasons.

12. We have also now made an order as to costs, which was inadvertently omitted from the original decision. The respondent will pay 40% of the CAC costs under s 404(1)(h) and 40% of the Tribunal's costs under s 404(1)(i).

Evidence

13. The parties conferred and filed an Agreed Summary of Facts (ASF). The respondent is a registered teacher with a full practising certificate. He resigned from the school on 29 October 2018 and signed a voluntary undertaking not to teach on 5 November 2018.

14. Signs of an inappropriate relationship between the respondent and Student A first emerged on 6 July 2018 when another student witnessed "what looked like [the respondent] kissing a student". The student's suspicions were confirmed after knocking on the door when both the respondent and student jumped up and he darted across the room and opened the door. The blinds were down and it was dark inside.

15. The student then reported the incident on 26 July 2018. In a response to this allegation, the respondent said that Student A had come into the classroom after school to talk about an incident with a co-worker. Student A had become upset and began to cry and he had given her a hug to comfort her. He said that in hindsight, it might not have been the most professional thing for him to have done.

[2] From Evidence to Non-publication, now paragraphs 13 to 95

16. On 27 August 2018 the school lodged a mandatory report with the Teaching Council.[3] The respondent then resigned from his position as Whānau Leader.

17. After the incident, a number of posts were made on social media referring to the incident with images posted of the respondent and Student A. The page was removed after Netsafe were contacted and informed of the images.

18. A further mandatory report was lodged on 1 November 2018 after the respondent was seen with Student A in his car in the parking lot of the Centre on three dates in October. The respondent has acknowledged meeting Student A on three occasions and that this was a breach of the code of ethics. He did not deny the following descriptions:

    a) On 16 October he was observed getting out of the back seat of a car from which a female student also emerged;

    b) On 18 October a security guard walked past the same vehicle and saw two people in the back seat. The CCTV footage shows the girl in the back seat jumped out and adjusted her skirt. The male got out and got into the driver's seat and drove away.

    c) The next day the Deputy Principal witnessed a similar event, seeing both parties get out of the back seat of the car and then the respondent getting into the driver's seat and driving off.

19. On being invited to meet with the Principal, the respondent resigned from his position at the school.

20. The other evidence of the interactions between the respondent and Student A was a large number of WhatsApp messages and phone calls.

21. In early 2018 Student A had moved out of her family home for a period and the respondent had maintained contact with her and her parents. He continued to communicate with Student A's parents after she had moved back home. Student A's parents placed a lot of trust in him, saying that he held a great influence as a mentor teacher to her. They said that their trust has been thoroughly betrayed.

22. The phone bills for Student A's phone showed a total of 50 phone calls between 22

[3] known as the Education Council until 28 September 2018 when its name was amended to the Teaching Council by the Education (Teaching Council of Aotearoa New Zealand) Amendment Act 2018.

November 2018 and 16 December 2018.

23. Student A's father provided a number of screenshots of "WhatsApp" messages which were also provided between Student A and the respondent dating back to 13 December 2017. The messages show frequent correspondence early in the morning and at night between Student A and the respondent. They include the following messages to her:

13/12/17, 11.10pm- "At school I have to act within certain parameters. Once you leave then those restrictions change. In terms of are we friends would depend on your definition. If I was been (sic) honest I would say no on the basis that I would invite friends for dinner or go out together and be on equal standing which can't happen while you are still at school".

13/12/17, 11.22[p]m- "I guess what I'm saying is while you are at school there is a lot I can't share with you. To be a true friend there shouldn't be that barrier."

18/12/17, 10.13am - "Ok easy one. What do you actually think of me and how do you [page cut off] completely honest. No sugar coating."

3/01/18, 12.22pm - "My option is yes I'm busy. Who isn't? I'm not a big texter so yes it will be slow and yes you are a different generation when reply time is important. Doesn't mean I don't care. Just different expectations. Remember email only came out when I was at uni."

4/01/18, 10.57am - "Waking up naked in another room of girlfriend's flat after sleep walking.

5/01/18, 4.03pm- "Will be up to you if you know me or not."

5/01/18, 8.56pm - "Have you ever kissed a girl (not friends kiss),"

5/01/18, 9.09pm - "Ok miss straight. Top crush. Can be star or average person but not [name redacted]."

05/01/18, 9.21pm - "What is the worse dare 7ou (sic) have done."

5/01/18, 9.23pm - "This is why you do pe do (sic) you don't fall like a

gumpy when your [sic] *naked"*

5/01/18, 9.35pm - "Well you will have to buy me a drink when you hit 20 and all the time I have beer I will answer questions"

24. Attached to the ASF were transcripts of email correspondence which we understand to be between Student A's parents and the respondent. These appear to be discussions about Student A.[4]

25. When interviewed by a Council Investigator, Student A said that her only contact with the respondent was from her position as lead student and his position as the Dean. She stated:

> *After [Student Bl accused us, any time I had to talk to him (the respondent) about anything there would be a photo on social media so we tried to limit our time in public. I really wanted to talk to him.* [redacted] *wanted it closed so I couldn't talk to her. We had always got along. We would talk through that stuff, the fallout from [Student Bl, when we met outside of school."*
>
> *After my last exam, I got talking again. I texted him because someone said he wasn't at school anymore. So we kept talking and having meetings. We talked about how we got on really well. We discussed pursuing a relationship outside of school. We didn't do anything at school but we talked about once I'd left, possibly in the new year, pursuing a relationship."*
>
> *We started to meet while I was at school. There was a security guard who noticed us when we were in the car outside Briscoes. We got in the back of the car just to be closer, pure laziness really. This happened every time we met, we would meet in the car and talk there in a closed space where people couldn't take a photo and we could talk alone. I'd say we met maybe 5 times. We had exams and didn't have time and he had meetings."*
>
> *"I hugged him once when I told him I thought we got along really well and he was going through some mental issues at the time and* [redacted] *I got upset and hugged him then. This was separate to the classroom and the* [redacted] *issue. That time I was upset and we hugged. This time he was going*

[4] We have inferred that the person who is the subject of the exchange is Student A and that the correspondents with the respondent are respectively Student A's parents, but this is not explicit in the agreed summary.

through a hard time and I hugged him."

"All I want to say is he is a good person and so am I and we've done everything we could to make sure that everything is legal and that we stay within the law. We have breached some things by meeting which is my fault and partly his for wanting to meet and allowing it to happen but in the end I've known him for 5 years. The main thing is that I blame myself for initiating it".

26. In her interview in 2018, Student A indicated that she had a rental place lined up that would not be ready until after Christmas, and in the meantime she was sharing a room with the respondent. At the time the ASF was signed on 10 May 2019, the respondent and Student A had been living together since 17 December 2018.

27. On 1 March 2019, Student A's parents submitted a complaint to the Teaching Council alleging that the respondent had "systematically groomed" Student A between Year 9 and Year 13 of her schooling, abused his position as a Whānau leader and mentor, and formed an inappropriate relationship with Student A through contact outside of school hours.

28. The parties agreed that the respondent's conduct breached the Code of Professional Responsibility, in particular, 1.3 – demonstrating a high standard of professional behaviour and integrity; 2.1– promoting the wellbeing of learners and protecting them from harm, and 2.2 – engaging in ethical and professional relationships with learners that respect professional boundaries.

Factual findings

29. The ages of the respondent and Student A are not known. It is not explicitly stated in the ASF that in 2018 Student A was a Year 13 student, but we note that it is implicit in her parents' complaint referred to above at paragraph 24, and the respondent has not denied the charge.

30. It is accepted that since Student A left school in December 2018, she has shared a room and shared a bed with the respondent. They have been living together as a couple. The charge does not allege serious misconduct because of the formation of a sexual relationship with a former student.

31. Although it is possible that a sexual relationship developed between the two while she was still a school student, there is insufficient evidence of a full sexual relationship

having developed before the school year was ended. However, we are satisfied that there was some degree of physical intimacy while Student A was still at school. This finding is based on the various observations of the pair in the back of the car in October 2018. Had they only been talking they could have done this in the front seat of the car, and so we have inferred that there was physical contact in the back seat of the car.

32. The respondent has not admitted that he kissed Student A in July 2018. He said that he hugged her because she was upset. She has said that they hugged on two occasions: once in the classroom when she was upset and once when he was.

33. Dealing with the first of those, there is no evidence that the respondent has denied that the blinds were drawn and the room was darkened. The respondent has acknowledged that hugging Student A was inappropriate. We agree. Regardless of whether he kissed her, he hugged her when the content of their communication had gone well outside the bounds of a student/teacher relationship.

34. As early as December 2017 the couple were engaging in frequent *What'sApp?* communication, including after 11pm in December 2017 and during the school holidays in early January 2018. They were discussing the nature of their relationship and whether they were friends; he referred to waking up naked, and asked her if she had ever kissed a girl. Student A says that she comforted him in the context of a discussion about his mental health. And by July and October 2018 there was evidence of physical intimacy.

35. Finally, the fact that Student A and the respondent have been living together from the end of the school year in 2018 is evidence from which we can infer an inappropriate relationship during 2018. The allegation that the respondent engaged in an inappropriate relationship with a Year 13 student in 2018 is therefore established.

Serious misconduct

36. It appears that the respondent accepts that his conduct amounts to serious misconduct, but we must still be satisfied that the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).

37. 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.

38. The criteria for reporting serious misconduct are found in r 9 of the 2016 Rules. As noted above, the CAC relies on rr 9(1)(e) and (o) for any conduct that occurred before 18 May 2018 and r 9(1)(k) for conduct after that time.[5] The earlier rules read:

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:

…

(e) being involved in an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in contact with as a result of his or her position as a teacher:

…

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

39. The amended rules since 19 May 2018 read:

9 Criteria for reporting serious misconduct

(1) A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:

…

(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,—

[5] Clause 3 of Schedule 1 of the Teaching Council Rules 2016 provides that possible serious misconduct by a teacher that occurred before 19 May 2018 must be reported and dealt with in accordance with the principal rules that were in force immediately before that date.

(i) engaging in an inappropriate relationship with the child or young person:

(ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:

…

(o) any act or omission that brings, or is likely to bring, the teaching profession into disrepute.

CAC submissions

40. Dealing with the first part of the test for serious misconduct, the CAC submitted that the respondent's conduct adversely affected the wellbeing of Student A for the following reasons:

a) Following the first incident that was the subject of the July 2018 mandatory report, a number of social media posts were circulated regarding the respondent's relationship with Student A. These were shared among students at the school until Netsafe was contacted to remove the images.

b) The respondent's conduct has also affected Student A's relationship with her family, with Student A's parents making a separate complaint to the Council alleging that the respondent had "systematically groomed" Student A.

c) Further, Student A faces the possibility of psychological harm in the future should she form a different view regarding the respondent and his conduct. This is likely to have a significant impact on Student A as she gets older.

d) The CAC also submitted that the respondent's discussion of his own mental state will have had an impact on Student A's personal and school life, and that Student A's understanding that the relationship was her fault was evidence of an adverse impact on her.

41. The CAC also submitted that the respondent's conduct in engaging in an inappropriate relationship with Student A reflects adversely on his fitness to be a teacher. This submission was based on the frequency and volume of messaging both late at night and during school holidays. Furthermore, the respondent continued to engage with Student A during school hours after a mandatory report was lodged with the Teaching Council, and after the Principal of the School requested that he cease communication with Student A. This displays a sustained lack of professional judgment.

42. For the same reasons outlined the CAC submitted that the respondent's conduct risks bringing the teaching profession into disrepute. Members of the public have a right to expect that teachers will not engage in inappropriate relationships with students that transgress professional boundaries.

43. For the second part of the test for serious misconduct, as set out in the Notice of Charge, the CAC relies on rr 9(1)(e) (entering into 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 (o) (any act or omission that brings, or is likely to bring, discredit to the teaching profession) and), r 9(1)(k) of the amended Rules (an act or omission that brings, or is likely to bring, the teaching profession into disrepute).

44. The CAC also referred to the following observations made by the Tribunal in previous cases:

a) A teacher, being in a position of power and responsibility, should model appropriate behaviour. If a student seeks 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.[6]

b) 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.[3] That is because maintaining appropriate professional boundaries is fundamental to safe and high- quality teaching and learning. That is because maintaining appropriate professional boundaries is fundamental to safe and high-quality teaching and learning"[7]

c) In *CAC v Teacher K* NZTDT 2018-7 we said:

> 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

[6] *CAC v Teacher* NZTDT 2016-64, 16 February 2017
[7] *CAC v Teacher* NZTDT 2016-55, 2 November 2016

misconduct. Mutual emotional dependency can arise and in the worst cases sexual relationships can develop. Teachers are guides, not friends in the usual sense.[8]

d) A teacher's professional obligations do not end outside the classroom, and it is crucial that professional boundaries are maintained and respected.[9]

e) And in *CAC v Huggard NZTDT 2016-33* we said:

> 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 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.*

45. The CAC also submitted that the respondent breached the Code of Professional Responsibility, including:

a) Clause 1.3, which requires teachers to act with a high standard of professional behaviour and integrity;

b) Clause 2.1, which requires teachers to act in the best interests of learners by promoting their wellbeing and protecting them from harm;

c) Clause 2.2, which states that teachers will engage in ethical and professional relationships with learners that respect professional boundaries.[10]

Discussion

46. We accept the principles outlined by the CAC as summarised above, and emphasise the following:

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.[11]

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[8] See *CAC v Teacher K* NZTDT 2018-7, 21 August 2018
[9] *CAC v Teacher E* NZTDT 2017-28, 29 December 2018
[10] The CAC referred to examples provided under the Guidance to the Code
[11] Above, note 11 at [183] referring to discussion by the District Court in *Scully v Complaints Assessment Committee of the New Zealand Teachers Council,* Wgtn DC,CIV 2008 085 000117, 27 February 2009

b) A relationship need not be sexual for it to be improper and to cross professional boundaries.[12]

c) A boundary violation occurs if a relationship shifts to serving the needs of the teacher rather than the student.[13]

d) Teachers carry the responsibility to distance themselves from any potentially inappropriate situation.[14]

e) It is not necessary for the CAC to prove that the student suffered abuse or neglect at the hands of the teacher. [15]

f) It is not necessary for the CAC to prove that the teacher intended to actively exploit the student.[16]

Section 378 (a)

47. Turning to the definitions of serious misconduct in paragraph (a) of s 378, we repeat that there is no need for the CAC to establish that Student A has actually been harmed by the respondent's conduct. We imagine that she might say that she has not, and that any posts on social media are not the actions of the respondent.

48. In some respects, the impact of the relationship on Student's A's relationship with her parents is probably a circular argument. They are upset because they trusted not only the respondent, but <u>every</u> teacher to maintain professional boundaries. He has breached their trust not only by forming a relationship with their daughter but by doing this when they were worried about her and he was in communication with them about her. They had put even more faith in him than usual. He has utterly violated that trust.

49. We agree that the respondent's decision to discuss his mental wellbeing with Student A was wrong not only because it was a breach of the professional boundary to disclose such personal information, but also because it is unreasonable to burden a student with such issues, but we repeat: we do not have to find that the respondent's actions actually adversely affected the well-being or learning of one or more students. The existence of r 9(1)(e) in either version of the Rules is to make it clear that professional boundaries should not be crossed and it is a serious matter if they are. As

[12] Above, note 11 at [183] referring to decisions discussed in 2016-64
[13] Northern Territory Teacher Registration Guidelines discussed in CAC v Teacher B 2016-64
[14] *CAC v Teacher K*, above note 7
[15] *CAC v Teacher C* NZTDT 2016-40, 16 February 2017
[16] *CAC v Teacher C* above note 14

we said in *CAC v Teacher C* NZTDT 2016-40, r 9(1)(e) is concerned with the prevention of harm to a student.[17] It reflects a general policy that prevails across many jurisdictions: that it is wrong for a teacher to form a personal relationship with a student. The reasons are several and have been discussed in many of our decisions and in guidance issued here an in other countries. In a recent decision, *CAC v Hedivan* NZTDT 2019-40[18] which was a decision about a relationship with a former student, we said:

> A relationship with a former student does not start from an even footing. The student has been expected to respect the teacher and follow directions. There is an assumption that the teacher is more knowledgeable than the student, which can make it difficult for the former student to assert themselves within a personal relationship and be treated as an equal. The personality that a teacher projects in a classroom may be quite different from the way in which they conduct their personal relationships. A teacher may seem more attractive to a student because of their status as a teacher. If the student met the teacher somewhere other than through school, the teacher may not hold such appeal.

50. These comments equally apply to a relationship with a current student. The reality is that a teacher may exploit his or her position to appear more attractive. And as with sexual harassment in the workplace, it may be difficult for a student to reject a teacher's advances because of the power imbalance. In *CAC v Luff,* we observed:[19]

> As a teacher, [the respondent] 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). Other students or sports team members should be able to feel that they can trust their teacher as an adult who has a degree of responsibility or authority – not to view him as their teammate's boyfriend. There are enough emotional and social challenges for students without a teacher adding to their confusion...

51. In that case, the teacher formed a relationship with a student from another school, in a secondary school team that he coached in his role as a teacher. We raised the impact of that conduct on the other students.

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[17] *CAC v Teacher C* above, note 14 at [28]
[18] *CAC v Hedivan* NZTDT 2019-40, 4 December 2019 (heard on 19 July 2019) at [39]
[19] *CAC v Luff NZTDT 2016-70,* 20 July 2016 at [11]

52. In the present case, we are satisfied that the respondent's conduct was likely to adversely affect Student A's wellbeing and learning and that of other students. The test in s 378(a)(i) is therefore met.

53. We also find that the respondent's conduct reflects adversely on his fitness to be a teacher under paragraph (a)(ii). He was responsible for maintaining professional boundaries. A person who is fit to be a teacher does not spend over a year engaging in personal communication and at times physical contact with a student, and form an intimate relationship.

54. We also have no hesitation in finding that the respondent's conduct is likely to bring the profession into disrepute under paragraph (a)(iii). Children and young people do not go to school in order to date their teachers either during or immediately after they leave school. That is not the expectation of society, of the respondent's peers or of parents: As we said in *CAC v Luff*

> Parents should be able to trust that teachers of any school are fulfilling their roles and responsibilities to teach or coach their children, and not form inappropriate relationships.

55. And in this case, as noted above, the violation of the parents' trust was significant. We consider his behaviour has been disgraceful.

Section 378(b)

56. Dealing with the second part of the test for serious misconduct, we note that the CAC does not rely on r 9(1)(e) of the amended rules. We must find that the respondent's conduct before 19 May 2018 amounted to an inappropriate relationship. We have already found that his communication over the 2017 and 2018 breached professional boundaries. We are satisfied that the content, timing and frequency of their *WhatsApp?* communication is evidence of an inappropriate relationship and that it arose out of his position as a teacher. The criterion in r 9(1)(e) of the pre-amendment rules is therefore met.

57. We are also satisfied that reasonable members of the public, informed of those facts would find that the respondent's conduct has brought discredit to the teaching profession.[20] As for the conduct established since 19 May 2018, for the same reasons, including those outlined above at paragraphs 51 and 52, we are satisfied that

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

it brings the teaching profession into disrepute under r 9(1)(k).

58. In summary, the test for serious misconduct is met.

Penalty

59. Section 404 of the Act provides:

> ***404 Powers of Disciplinary Tribunal***
>
> *(1) Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
>
> *(a) any of the things that the Complaints Assessment Committee could have done under section 401(2):*
> *(b) censure the teacher:*
> *(c) impose conditions on the teacher's practising certificate or authority for a specified period:*
> *(d) suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
> *(e) annotate the register or the list of authorised persons in a specified manner:*
> *(f) impose a fine on the teacher not exceeding $3,000:*
> *(g) order that the teacher's registration or authority or practising certificate be cancelled:*
> *(h) require any party to the hearing to pay costs to any other party:*
> *(i) require any party to pay a sum to the 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.*

60. The CAC submitted that censure and cancellation were appropriate and the respondent did not dispute that.

61. The CAC referred to three comparable cases where cancellation had been imposed: *CAC v Teacher E* NZTDT 2017-28,[21] CAC v Teacher NZTDT 2016-46,[22] and *CAC v*

[21] *CAC v Teacher E* NZTDT 2017/28, 29 December 2017
[22] *CAC v Teacher* NZTDT 2016-46, 18 August 2016

Huggard NZTDT 2016-33.

62. It is difficult to consider a penalty short of cancellation where a teacher has formed an inappropriate relationship with a student, and does not argue for anything different. We consider the following matters raised in the CAC submissions as aggravating features. That is:

    a) the respondent engaged in inappropriate conduct over a long period of time;

    b) this continued despite being warned about professional boundaries after the July 2018 notification;

    c) the respondent was in frequent contact with Student A's parents who had enlisted his help to assist with problems she was having.

63. We also find that the respondent was calculating. He cultivated this relationship fully knowing what he was doing. In December 2017 he said, *"At school I have to act within certain parameters. Once you leave then those restrictions change. In terms of are we friends would depend on your definition. If I was been (sic) honest I would say no on the basis that I would invite friends for dinner or go out together and be on equal standing which can't happen while you are still at school*.

64. The respondent has no place in the teaching profession. We therefore order censure under s 404(1)(b) and cancellation under s 404(1)(g).

Non-publication

65. The respondent[23] applied for an order for non-publication of his name and that of the student.

66. The grounds for the application are that publication of his name could have a detrimental effect on Student A and on the respondent's family. Ms King submitted that there is need to ensure that the student and the respondent's family are protected from the potentially negative impact on them that publication of his name is likely to result in. She submitted that the respondent's wife and children are not responsible for his actions and should not be placed in a situation where they have to suffer embarrassment as a result of his actions.

67. In support of the application was a very brief affidavit from the respondent which

[23] Although the applicant in an application for non-publication, he has been referred to as the respondent throughout this decision.

outlined the same matters, noting that he and Student A were living together, that he had two children [redacted] and he is worried that they may be an adverse effect on them should his actions become known in the public realm. His wife works at the school he was at and he would not want her to suffer any negative feedback or embarrassment as a result of his actions.

68. Attached to the affidavit is an email from someone whom we assume is Student A.[24] She is concerned that if the respondent's name is published, she would be identified. This worries her for these reasons:

a) She has been advised that such identification "would quite possibly prove detrimental to her aspiring career in the Health Industry";

b) This would also have an unwelcome negative effect on her social wellbeing and peers;

c) She has already suffered because of her name coming out in social media as a result of rumours earlier in 2018. She has experienced the devastation and reach of social media and the effect that it had on her mental health and her sister's mental health who in 2019 was still attending the school.

69. Also attached was a letter from the estranged wife of the respondent. She confirms that she is concerned at the impact of publication on her children and herself.

70. The CAC submitted that name suppression should be ordered in respect of Student A, but at the same time did not agree that name suppression for the respondent was necessary. It adopted a neutral position, but put forward arguments as to why he had not established a proper basis for making an order for non-publication and submitted that there is a strong public interest in publication of his name. This is on the basis that the conduct is in upper range of serious misconduct by a teacher; he breached his obligations and position of trust with Student A, her family and the school; he continued to engage in inappropriate communications with Student A, despite being warned to discontinue. Ms Lim argued that this showed a complete failure to understand his professional boundaries.

71. We also received an email from Student A's father, which contained an eloquent and heart-felt plea to decline permanent name suppression for the respondent. In particular

[24] Student A's name was not included in the Notice of Charge or ASF

he said that the respondent and Student A appear together on social media and that there had been some exchanges between Student A and the respondent's estranged wife. We did not see any screenshots or evidence of this.

72. Student A's father submitted that denying name suppression to the respondent would not cause any harm to him or others because he is active on social media; and would not cause harm to Student A because she continues to live with him. He also submitted that permanent name suppression sets a poor and perverse precedent of giving the teaching community a very bad name and reputation.

Discussion

73. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public. In the present case, although the hearing of the charge was "on the papers", rather than in person, it is still a public hearing. Had a member of the public, including the media, attended, relevant information would have been made available.

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

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

75. It is under s 405(6) that we have considered these applications. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the

interests of the respondent's family, and Student A, as well as the public interest. If we think it is proper, we may make such an order.

76. In this jurisdiction, the threshold of whether it is "proper", is the same as under the Lawyers and Conveyancers Act 2006. That Tribunal has suggested that "proper" is arguably between "exceptional" and "desirable", but in any event the threshold is somewhat lower than that imposed in the courts.[25]

77. The principle of open justice[26] exists regardless of any need to protect the public. And there is a presumption in favour of publication. The tenor of s 405 is consistent with s 95(2)(d) of the Health Practitioners Disciplinary Act 2003, which was considered in *Dr A v Director of Proceedings*[27] by Panckhurst J, who said:

> *The scheme of the section means, in my view, that the publication of names of persons involved in the hearing is the norm, unless the Tribunal decides it is desirable[28] to do order otherwise. Put another way, the starting point is one of openness and transparency, which might equally be termed a presumption in favour of publication.*

Respondent's family

78. Ms Lim for the CAC observed that public speculation and gossip are ordinary consequences of disciplinary proceedings and these events have already been the subject of gossip at the school as a result of which both the respondent and Student A were identified. Ms Lim also noted that no further evidence has been provided to show that the impact of publication might be disproportionate. This submission was similarly made in relation to the respondent's children.

79. We acknowledge that the respondent's separation from his wife has no doubt had a traumatic effect on the family. We also accept that disciplinary proceedings against a teacher are likely to cause significant distress and embarrassment to his or her family.

80. In CAC v Teacher 2016-27 we considered family interests and said:[29]

> It is almost inevitable that a degree of hardship will be caused to the innocent family

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[25] *Canterbury Westland Standards Committee No.2 v Eichelbaum* [2014] NZLCDT 23
[26] *CAC v Teacher S* NZTDT 2016-69, referring to *R v Liddell* [1995] 1 NZLR 538 at 546
[27] (High Court, Christchurch, CIV 2005-409-002244, 21 February 2006, Panckhurst J)).
[28] The term, "desirable", as opposed to "proper" is used in the Health Practitioners Competence Assurance Act 2003
[29] CAC v Teacher 2016-27, 25 October 2016, at para [65].

> members of a teacher found guilty of serious misconduct. Such "ordinary hardships are not sufficient to justify suppression. However more acute forms of professional and familial embarrassment can make suppression the proper outcome.[30]"

81. In that case an order for non-publication was made on the basis of a combination of two grounds:

    a) Hardship to the teacher's husband who was a teacher at the school. It was noted that in teaching honesty and integrity were relied on, and there was a real risk that his reputation and therefore ability to discharge his duties as a teacher at the same school would be affected as a result of his wife's dishonest behaviour; and

    b) The impact of publication on the teacher's mental health, as advised by her GP.

82. In the present case, there is no evidence that the respondent's wife is a teacher and so the same considerations do not apply. We have sympathy for her situation but her interests are not sufficient to displace the presumption of open justice.

83. Similarly, the circumstances of these children are not in the same category as the teacher's son in *CAC v Teacher S* NZTDT 2016-69 who was a student at the school where his mother had performed sexual acts at the time of a leavers' dinner, and whose relationship with his mother had been significantly affected by these events.

84. We are not persuaded that it is proper to make an order for non-publication on the basis of impact on the respondent's family as a result of publication.

Student X

85. Rule 34 provides for protection for certain witnesses:

> ***34 Special protection for certain witnesses and vulnerable people***
>
> *(1) This rule applies to a person—*
>
> *(a) who is a child or young person; or*
> *(b) who is a person on whom, or in respect of whom, sexual acts are alleged to have been performed; or*
> *(c) who is alleged to have been compelled or induced to perform sexual acts; or*

[30] See ABC v Complaints Assessment Committee [2012] NZHC 1901 at [49] to [58]

> *(d) whose evidence before the Disciplinary Tribunal, in the Tribunal's opinion, relates to some other matter that may require the person to give intimate or distressing evidence.*
>
> *(2) Before a person described in subclause (1) begins to give evidence in the Disciplinary Tribunal,—*
>
> *(a) the person must be advised that he or she has the right to give evidence in private; and*
> *(b) the person must be asked whether he or she would like to give evidence in private; and*
> *(c) the Tribunal must consider whether it is proper to make an order, in accordance with section 405(6) of the Act, prohibiting publication of the name or particulars of the affairs of the person.*
>
> *(3) The Disciplinary Tribunal, in its discretion, may arrange for a person described in subclause (1) to give evidence by way of video link or any other alternative means.*
>
> *(4) If evidence before the Disciplinary Tribunal includes details relating to a person described in subclause (1), the Tribunal must consider whether it is proper to make an order, in accordance with section 405(6) of the Act, prohibiting publication of the name or particulars of the affairs of the person.*

86. Unlike its predecessor, r 34 does not provide for automatic name suppression of certain people, but instead, requires the Tribunal to consider whether it is proper to make such an order.

87. We do not know how old Student A is. Although we understand that she is now in a sexual relationship with the respondent, there is no allegation or evidence of a sexual relationship within the Notice of Charge or the ASF. However, we are considering non-publication of her name in any event because the respondent has applied for it.

88. We find Student A's concern about the impact of publication on her future career speculative and with no proper foundation. We acknowledge that there may be some discomfort and embarrassment for her but there is no evidence of any particular personal issues that might be exacerbated by publication.

89. People who know the couple already know that Student A was a student at the school where he taught, and that within weeks, if not days at the end of the school year, they were living together. The school community was aware of some degree of closeness between the two.

90. In *CAC v Teacher* NZTDT 2016-68,[31] the interests of Student X, with whom the teacher was still in a relationship were not sufficient to displace the presumption of publication of name.[32] In that case Student X described the distress and anxiety she had first felt when she had seen that teacher's name in social media. We said:

> However, without wishing to be seen to be trivializing the concerns that Student X holds, we would expect that whatever focus there is on the case will quickly ebb. We are not satisfied that publication is likely to have the more sustained (or permanent) effects on Student X's study and employment opportunities as she describes.

91. In the present case, we accept that identification of the respondent will lead to identification of Student A, there is a paradox that a teacher may use that student's interests as a basis for name suppression, when that teacher had no regard for the student's welfare at the time of the conduct that has led to the charge. As we said in *CAC v Hedivan*,

> It concerns us that a predatory teacher may groom a student, known to have certain vulnerabilities, form a sexual relationship with them and then hide behind the student's vulnerabilities as a ground for name suppression.

92. In that case the teacher and student were now married. We declined to make an order for non-publication, noting that there was no independent evidence provided of that former student's current wellbeing and the likely impact of publication on her.

93. The same factors are relevant in the present case. There is a strong public interest in publishing the respondent's name. Forming a relationship with a student is a serious matter. Teachers must not assume that if they commit this type of conduct, their name will automatically be suppressed because of risk of identification of the student.

94. The respondent continued to breach boundaries with the respondent, despite being warned to discontinue. We do not agree that this showed a complete failure to understand his professional boundaries. Rather, it is evident from his communication with Student A in 2017 and early 2018 that he knew exactly what he was doing, and that this conclusion is also supported by Student A's comments:

> *…and we've done everything we could to make sure that everything is legal and that we stay within the law. We have breached some things by meeting which is*

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[31] *CAC v Teacher* NZTDT 2016-68, 7 March 2017, recalled and reissued 24 March 2017
[32] It was the interests of another person that persuaded the Tribunal to order non-publication in that case.

my fault and partly his for wanting to meet and allowing it to happen…

95. We declined to make non-publication orders for the respondent. Although she was not named in the decision, we recognised that Student A would be identifiable. We therefore did not make an order for non-publication of her name.

Recall

96. After our decision was issued, Ms King filed an application to recall our decision on non-publication on the basis of new information regarding Student A's mental health.

Legal principles on recall

97. Ms Lim detailed the legal principles on recall. There is no express guidance in the Act or the Teaching Council Rules 2016 as to whether the Tribunal may recall one of its decisions, once issued. We set out some legal principles on recall in *CAC v Teacher NZTDT 2016-68*, where we noted that it was a high threshold before this jurisdiction could be exercised, so as to ensure that the principle of finality is not undermined.

98. Ms Lim reminded us that once a statutory tribunal has issued and promulgated its decision, the tribunal is *functus officio*. That means we have completed the task assigned to us and cannot enter into further deliberations or revisions. We have no inherent power to reopen a matter. It has been determined in other jurisdictions that once a judgment is given the court is functus officio and its powers are generally restricted to the correction or amendment of errors in its reasons for judgment, or any sealed order.[33] As noted in McGechan on Procedure at HR 11.9.01(2):

> …the underlying policy is to reconcile the broad ends of justice in relation of the particular case and the desirability of finality in litigation in first instance

99. In *CAC v Teacher NZTDT 2016-68* we proceeded on the basis that we had the inherent power to revisit a decision in exceptional circumstances. In determining whether we were able to recall our decision, we referred to *Horowhenua County v Nash (No 2)* [1968] NZLR 632[34] where Wild CJ observed the following:

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be

[33] *Valentines Properties Ltd v Huntco Corp Ltd* (2000) 15 PRNZ 6 (CA); *Prior v Parshelf 45 Ltd (in rec)* [2000] 1 NZLR 385; (1999) 15 PRNZ 262 (CA).
[34] *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633

> recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

100. In that case, and in the present case, the only ground we can consider the application for recall is on the third ground: where for some other very special reason justice requires that the judgment be recalled.

Very special reason justice requires that the judgment be recalled

101. Ms Lim referred us to Court of Appeal's decision *Unison Networks Limited v Commerce Commission* [2007] NZCA 49[35] which discussed some decisions where courts have found a very special reason that justice requires the judgment to be recalled.

102. In *Brake v Boote*,[36] the judge issued a judgement which did not consider the question of interest from the date of settlement to the date of judgment despite the fact that this had been sought by the applicants. He acknowledged that he had not applied his mind to this matter before entering judgment, and was satisfied that it was a case where for a "very special reason justice requires that the judgment failed to determine an issue". His Honour observed that: "One would hope that it would be a very special occasion when a Judge failed to determine an issue that was properly put before him. I am satisfied that it is, and I am satisfied that justice requires that error to be corrected".

103. In *Works Civil Construction v Does Not Compute Corporation Ltd*,[37] the Court found in favour of the plaintiff on the first cause of action, but against the plaintiff on the second cause of action. However, the Court gave orders only on the basis of the second cause of action, which effectively meant that the plaintiff's summary judgment application had been dismissed in its entirety, and the orders given had not reflected the Court's findings. The Court considered that it was an appropriate case for recall on the basis of the third "very special reason" limb in Horowhenua.

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[35] *Unison Networks Limited v Commerce Commission* [2007] NZCA 49

[36] *Brake v Boote* (1991) 4 PRNZ 86 (HC) 3).

[37] *Works Civil Construction Ltd v Does Not Compute Corporation Ltd* HC WN CP 46/92 19 November 1992 16 CAC v McDonald [2018] NZREADT 67 (Tab

104. In *Pine Tree Park Limited v North Shore City Council*,[38] the Court found that a condition of a resource consent should be reconsidered by the Planning Tribunal. The condition was considered to be inappropriate because of events which had occurred since the initial hearing, and the appeal was allowed to enable the matter to be reconsidered. When the Planning Tribunal reconvened to reconsider the condition, the parties did not want the Tribunal to reconsider the matter, and an application was made for recall of the Court's decision. The decision was recalled, and the appeal was dismissed, with the reference back to the Planning Tribunal removed from the decision.

105. In NZTDT 2016-68 following the Tribunal's decision further evidence was adduced that established there was a link between publication and a risk of suicidal ideation for Student Y. We concluded that it was appropriate to order suppression of the respondent's name and that of the school in order to protect Student Y's interests.

106. We also considered the question of recall in *CAC v Herbert* NZTDT 2018-81[39] where the respondent asked us to recall of the Tribunal's decision on the basis that we had misunderstood a fact: that the student concerned had been made to stand by her own desk, not the teacher's desk. Further we had not considered a memorandum dated 21 May 2019 in which the CAC sought only 25% of its costs on the basis that the costs were higher than usual for a matter which proceeded on the papers. The Chair considered that the grounds advanced by the respondent were a special reason for which justice required the decision to be recalled so that the factual matter could be established. Following receipt of a joint memorandum clarifying the fact, the Tribunal panel reconsidered our decision and confirmed our original finding of serious misconduct. The costs decision was revised to 25% of the CAC's costs.

The present applications

107. Annexed to the application were:

a) A medical certificate dated 22 January 2020 from a GP and Primary Mental Health Psychiatry Registrar who had seen Student A that day. The doctor said that Student A was suffering from generalised anxiety, depression reacting to social stresses in her life causing one attempt at suicide in 2019. At the time of

[38] *Pine Tree Park Limited v North Shore City Council (No 2)* HC Auckland HC26/96, 12 August 1996.
[39] *CAC v Herbert* NZTDT 2018-81, issued on 31 October 2019, but as yet unpublished

the letter Student A was under treatment. Any publication of her name in media relating to her relationship with her previous teacher can definitely worsen her situation.

b) A medical certificate dated 30 January 2020 from another doctor at the same medical centre. This doctor said, “Since the proceedings and updated from that, which attributed to the stress of the ongoing investigation, [Student A] started the symptoms of moderate depression and anxiety after the attempt of suicide in April 2019.” She was prescribed anti-depressants but presented in June 2019 when she attempted suicide.

c) A letter 31 January 2020 from Student A’s University Student Support Advisor who confirmed that the emotional and mental pressures connected to the proceedings involving her partner. She has engaged in a range of support via university Health and Counselling Services and has had to re-arrange her study plan and request a number of aegrotat/compassionate considerations for her assessments. She has recently expressed her concern of name suppression not being granted and is worried about discrimination against her. Her advisor has encouraged her to reengage with counselling services and develop strategies for coping with these challenges.

d) A letter dated 17 February 2020 from a consultant psychiatrist who had seen Student A that day. It was his opinion, based on her history and the assessment undertaken that day, that publication of her name would pose significant risk to both her wellbeing generally (in terms of further escalation depression) but also of worsening suicidal thinking and planning. The psychiatrist had no doubt that it would have a significant detrimental impact.

e) The psychiatrist’s clinical record of the psychiatric assessment.

CAC position

108. The CAC were invited to respond. In addition to providing a summary of the legal principles, Ms Lim noted this is not a case where the parties failed to raise a matter. The question is whether we consider the further evidence provided on behalf of Student A contains “new facts” which we consider materially alters our assessment.

109. If we recall the decision, the CAC consents to name suppression and notes that if we order non-publication, that will mean that the respondent’s name will also need to be

suppressed.

Decision

110. Having reviewed the evidence of Student A's mental health, we agree that this is an exceptional case that warrants recall and revision of our earlier decision on non-publication. In this case those two decisions are inextricably linked.[40] The evidence that we have now received is of quite a different nature from that we described above at paragraph 68. We have now been told that before we considered this matter in October 2019 Student A had already attempted suicide on at least two occasions. This information was not before us at the time. She has now seen a consultant psychiatrist who has provided his opinion on the risk of publication to her mental health.

111. This situation is very similar to that in NZTDT 2016-68. Some of the pertinent information could (and probably should) have been before us in October. The degree of Student A's ill health was not known to us. Since then (and perhaps in response to our January decision), she has consulted a psychiatrist.

112. There is no right of appeal of a decision on suppression. Section 409 provides for the right to appeal decisions regarding interim suspension under s 402 or penalty or costs under s 404. We accept that the evidence of the precariousness of Student A's mental health and the link to publication is a very special reason for which justice requires the decision to be recalled.

113. We also are persuaded that on the basis of the new information, it is proper to order non-publication of Student A's name under s 405(6)(c).

114. Publication of the respondent's name will lead to identification of Student A. In this case her personal interests outweigh the public interest in publication of either her name or the respondent's name. It is possible the name of the school and the town centre might also lead to identification of the couple and so they are also suppressed. In summary, under s 405(6)(c), we order non-publication of the names of:

a) Student A

b) The respondent

c) The school where the relationship developed

[40] Unlike *CAC v Herbert*, above note 35, where the interests of justice required us to reconsider our decision on the basis of a different fact, but did not alter our finding.

d) The town centre where the couple met while she was still at school.

Costs

115. The CAC sought a 40% contribution to costs under s 404(1)(h) of the Act.

116. This is the percentage that is usually awarded under both s 404(1)(h) and (i) where there has been agreement on the facts. The respondent's representative, Ms King, who appears regularly in this jurisdiction did not file any submission on costs. We have assumed that it is accepted that 40% is a reasonable contribution.

117. We therefore direct that the respondent contribute 40% to the CAC costs under s 404(1)(h) and 40% to the Tribunal's costs under s 404(1)(i). We make the following directions:

a) The CAC and the Tribunal Secretary will each file and serve a schedule of costs by **12 June 2020**. It will specify the 40% calculation of costs.

b) If the respondent wants to be heard on any matter of costs, a memorandum must be filed by **24 June 2020**, in which case the Tribunal delegates to the Chairperson the authority to determine the quantum of costs.

c) If the respondent does not file any memorandum by 24 June 2020, the respondent will pay the two 40% amounts specified in the schedules of costs.

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).