

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-38

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
DATED 2 SEPTEMBER 2020

HEARING: Held on 10 December 2019 (on the papers)

TRIBUNAL: Theo Baker (Chair)
Tangi Utikere and Simon Walker (members)

REPRESENTATION: Mr La Hood and Ms Brosnan for the CAC
Ms Anderson for the respondent

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The charge was that Teacher R (**the respondent**) engaged in inappropriate relationships with four different students or recent former students over a four-year period between 2014 and 2018. The detailed allegations are set out below with the relevant facts.
2. It was alleged that the conduct either separately or cumulatively amounts to serious misconduct pursuant to section 378 of the Education Act 1989 (**the Act**) and rules 9(1)(d) (e) and (o) of the Education Rules 2016¹ (**the Rules**). Alternatively, it amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers under section 404 of the Act.
3. The parties conferred and filed an Agreed Summary of Facts (**ASF**) as well as a joint memorandum in which they agreed that the conduct amounted to serious misconduct and that the appropriate penalty was cancellation.

Summary of decision

4. We found that the respondent:
 - a) engaged in an inappropriate relationship with Student D, who was either a student or recent former student of his;
 - b) engaged in inappropriate relationships with Student A and Student B while they were students at the school where he taught; and
 - c) breached professional boundaries with Student C, also a student at his school
5. We found that the respondent's behaviour with each of the students amounted to serious misconduct.
6. We censured the respondent and cancelled his registration. We ordered him to contribute 40% towards the costs of the CAC and the Tribunal.
7. We made permanent orders for non-publication of the names and identifying details of:
 - a) The respondent;
 - b) All students referred to in the decision;

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.

c) The school where the students attended

Evidence

8. Before the hearing the parties conferred and filed an Agreed Statement of Facts (**ASF**), signed by their representatives.
9. According to the ASF, the respondent is 27 years old. He started teaching in 2014 at (**the School**) and became fully registered in 2016. He worked at the School until the end of 2017 when he took a year's leave. Teacher R was dismissed from the school on 27 August 2018
10. The other facts are set out below beneath each relevant particular of the charge.
- 1.1 ***in or about December 2014, [did] engage in an inappropriate intimate relationship with Student D, who was a learner, or recent learner at the school***
11. According to the ASF, in 2014 Student D was in the respondent's form class. In December 2014, and after her final year 13 exams, Student D added the respondent as a 'friend' on Facebook. They began a relationship shortly thereafter in January 2015. Student D was studying in another city until she returned to the city in mid-2016.
12. At some stage in 2015 both the respondent's colleague and Head of Department expressed their concerns about the relationship and instructed the respondent to speak to the Principal about it. The Principal indicated to the respondent that starting this relationship with a student who had just left school, did appear concerning, but there was no evidence or complaints that this relationship had been initiated during her time at school.
Finding
13. It is accepted that the respondent began a relationship with Student D in January 2015, and that this lasted until at least mid-2016. We are satisfied that in January 2015 Student D was a recent learner. The respondent is charged with engaging in an inappropriate relationship with a learner or recent learner in or about December 2014. Based on the agreed facts, it might have been preferable if the charge read slightly differently: either that the respondent "commenced" an inappropriate relationship in December: or that he engaged in an inappropriate relationship between December 2014 and mid-2016.

14. The parties agreed that the School has a document entitled "Procedures on Professional Boundaries" (**the document**). It states teachers are bound by the professional standards contained in the Secondary Teachers' Collective Agreement, an important element of which is maintaining professional boundaries between students and teachers. The document emphasises the important distinction between being "friendly with students", which is commendable, and "being their friend" which is to be avoided. The document identifies behaviours and practices that should be avoided which include:
- a) hugging or touching students without direct or implied consent, any contact to be initiated by the student and to occur only in public;
 - b) having existing students on Facebook for social purposes;
 - c) texting students with personal comments, particularly in the evenings, weekends or school holidays;
 - d) making inappropriate comments or engaging in conversation with students on topics such as dating, their attractiveness and social life;
 - e) discussing personal problems with students; and
 - f) socialising with students or allowing them to visit a teacher's home.
15. It was also generally understood that it was the School's policy that teachers should become 'friends' with students on Facebook only after the student has left school.
16. According to the ASF the student had finished exams at the time of the Facebook contact, but we were not told if she had formally left school. Therefore, it is not certain that the respondent had breached the policy by being friends on Facebook with the student. However, by commencing a relationship with a recent former student in January 2015, the respondent engaged in an inappropriate relationship "in or around December 2014". The particular is therefore established.

- 1.2 Between September 2017 and January 2018 [did] form an inappropriate relationship with Student A, a 16-year-old, while she was a learner at [the School] including by;**
- (a) engaging in inappropriate communications with Student A via text messaging and other various social media platforms;**
 - (b) making inappropriate physical contact with Student A, including by touching her leg, arm, shoulder and back;**
 - (c) driving Student A to her home and offering to drive her to her home and elsewhere;**
 - (d) arranging to meet with student A at places outside of [the school] and outside of the school's hours;**
 - (e) engaging with sexual activity and having sexual intercourse with Student A.**
17. It is agreed that in 2017 Student A, aged 16, was in the respondent's subject class.
18. According to the joint memorandum, there were two facts about Student A that were in dispute. The first one concerns particular 1.2(b), and the second is relevant to particular 1.2(e). These are discussed below.
19. It was agreed that one day after the end of the 2017 school year, and during the summer holidays, Student A was at the beach with friends. Student A and the respondent exchanged text messages after which the respondent arrived at the beach. He later offered to drive Student A and her friends to the house of one of the students as it was on his way home. The students were going on to a party but the respondent says he declined an invitation to go to the party.
20. In late November or early December 2017 Student A went to another city for a subject event. The respondent sent text messages to Student A to ask how it had gone. In a later conversation with her the respondent said "stuff that you wouldn't say in a professional relationship ". He spoke to Student A about his interactions with his colleagues and said he had been badly treated in the subject Department.
21. Before the respondent was due to travel overseas on 11 December 2017 on long term leave, there was a text conversation between the respondent and Student A. They arranged to meet. Student A told her parents she was going to a friend's house. Instead, the respondent picked Student A up and they went to the beach alone together. Student A's understanding was that afterward the respondent would then drop her at her friend's house.
22. When they left the beach, the respondent drove them both to his house. Student A felt unable to ask the respondent to drive her to her friend's house. Student A stayed the

night and slept in the respondent's bed. In the morning the respondent drove Student A back to her street so she could walk home and appear to her parents as having just returned from the feigned sleepover at her friend's house.

23. That day the respondent left to go overseas. He continued to exchange messages, calls and video calls with Student A from abroad, sometimes very late at night. The defendant told Student A not to tell anyone and that it would be bad for both him and her. In the course of that messaging the respondent and Student A eventually exchanged explicit messages of a sexual nature.
24. Student A's mother confronted her with some intimate messages between the respondent and Student A. Student A told the respondent her mother had seen messages and blocked him on most social media platforms. The respondent contacted Student A once further through Snapchat, asking how she was.
25. On 17 January 2018, Student A's parents exchanged several messages with the respondent asking him to explain correspondence between him and Student A. The respondent explained he was trying to comfort Student A because "she was super depressed" and that he was sick "with a heavy cough" and "not thinking straight".
26. The school learned of the allegation in July 2018 when a teacher at the School received two anonymous emails indicating Student A had been bullied as a result of rumours that she had a sexual relationship with the respondent.
27. The experience has had a profound impact on Student A who, during the time of the respondent's conduct, was moody , irritable, lacked focus and was difficult to deal with at School owing to rumours circulating she has been subject to bullying via social media.
28. The respondent says that he made contact with Student A after giving assurances in February 2018 that he would not because he wanted to know if Student A was all right. The respondent accepts that his entire contact with Student A from the time he agreed to meet her and her friends at the beach was inappropriate. The respondent also accepts that his messages and communications with Student A after he left for overseas were not appropriate.
29. The respondent accepts that his conduct in relation to student A was a breach of professional standards and that it is appropriate that his registration can be cancelled. He deeply regrets the hurt and confusion he caused Student A.

30. Particular 1.2(a) requires us to find that the respondent engaged in inappropriate communications with student A via text messaging and other various social media platforms. As outlined above the parties agree that communication in November and December, during the summer holidays and while the respondent was overseas included text messaging, calls and video calls, sometimes very late at night. They exchanged explicit messages of a sexual nature.
31. We are satisfied that the messaging between the respondent and Student A was inappropriate. Particular 1.2(a) is therefore established.
32. It was agreed that the respondent occasionally offered students, male and female, a ride home after subject practices. Student A accepted such a ride on one occasion. The respondent also drove Student A to the beach and to his place. Particular 1.2(c) is therefore established.
33. We are satisfied that the respondent and Student A arranged to meet outside school hours when he picked her up and took her to the beach. Particular 1.2(d) is therefore established.
34. The evidence in support of particular 1.2(b) is not accepted. Student A said that in late 2017, in either term 3 or 4, she began noticing the respondent would unnecessarily make physical contact with her leg, arm shoulder or back while at school. The respondent denies that he made unnecessary physical contact with Student A, that he had no interest in her at that time and that she was a relatively bright student which meant her would give her tasks, she would go to a computer or studio, do the work and need minimal help. He estimates that he communicated less with her than with other students due to others needing help more.
35. The other dispute is that Student A says that when she stayed at the respondent's house in December 2017 the respondent initiated consensual intimate physical contact with Student A which proceeded to full sexual intercourse. The respondent denies that he had sexual intercourse.
36. The parties agreed that the disputed facts did not need to be proven because they will not make any difference to the outcome; that even without these matters the respondent agrees that his remaining conduct amounts to serious misconduct warranting cancellation. The CAC did not seek to prove the disputed facts to avoid re-traumatisation of Student A by having her give evidence.

37. We appreciate the CAC's reason for not calling Student A to give evidence, but given these matters are not accepted by the respondent, we do not understand why these statements remained in an agreed summary of facts.
38. We were referred to *CAC v Teacher L NZTDT 2018-23*² where an application to amend a charge to reflect the facts admitted by the respondent was declined. In that case the teacher faced two allegations: massaging a student's shoulders during class time in 2015 and 2016 and engaging in inappropriate, intimate online contact with Student E from the end of 2016 to 2017. The latter part of the charge was not in contention.
39. The teacher in that case admitted that he light-heartedly shook the student's shoulders in jest and it only occurred a few times in 2016, not 2015. The CAC wanted to amend the first part of the charge to inappropriately touching the shoulders. This was opposed. The Tribunal agreed with the teacher's submission that the way in which the particular was initially framed accurately reflects what "Student E" described.
40. That matter was heard on the papers and so the Tribunal was not in a position to resolve the factual dispute. We noted that because the teacher accepted the allegation in the second particular, it did not make a difference to the outcome.
41. In the present case, we cannot resolve these factual disputes. There is no application to amend the charge, but given that the respondent has denied both of these matters, we would have thought that if the CAC had wanted to amend it to delete particulars 1.2(b) and 1.2(e), there would have been no objection from the respondent.
42. We are satisfied that the respondent's agreed conduct including the established particulars amounts to an inappropriate relationship.
- 1.3 ***Between about June 2016 and December 2017, engage in an inappropriate relationship with Student B, learner at [the School], including by:***
- (a) visiting Student B at her home;***
 - (b) communicating with Student B via Facebook Messenger and sending inappropriately intimate messages;***
 - (c) making inappropriate comments to Student B, including that he "liked her" and wanted her to go overseas with him;***
 - (d) flirting with Student B at the school;***
 - (e) driving Student B home; and***
 - (f) isolating student B in practice rooms at the school.***

² *CAC v Teacher L NZTDT 2018-23*, 17 December 2018

43. The parties agreed that during the latter half or end of 2016 while the respondent was teaching subject at the School he began sending electronic messages to Student B a Year-12 student at the school. Initially, Student B was comfortable with the messages, because of the friendly atmosphere within the School's subject Department. The respondent and Student B started conversing as friends as the respondent was initially friendly with her family.
44. The messages became flirtatious, with the respondent signing of messages with "x" (kiss) symbols. The respondent began flirting with student B at school. He told her he planned to travel and that he wanted Student B to go with him.
45. Student B became uncomfortable with the relationship but was unsure how to manage it given the respondent was a teacher and an older male. Student B felt he had power over her. After speaking with a friend, Student B confronted the respondent about his inappropriate behaviour. The respondent said he understood that Student B did not want that type of contact with him.
46. At the beginning of the following year, 2017, Student B avoided the subject department because she felt uncomfortable in the respondent's presence. Some time that year, Student B was alone practising in a subject room. The respondent entered the room and closed the door behind him. He asked Student B why she was being "awkward" with him.
47. There were occasions when the respondent would tell Student B and other students he was unhappy with the way his colleagues were treating him by minimising his interactions with some subject groups at the School. On one occasion the respondent complained he was not permitted to attend an extra-curricular event.
48. At some point in late 2017 the respondent told Student B in person that he "liked" her and never had strong feelings for his then-girlfriend. Student B turned him down. The respondent said he understood that Student B did not want that type of contact with him.
49. Eventually matters between Student B and the respondent again became friendly. Student B felt reassured that the respondent was in a relationship at that stage.
50. At some stage during 2017 the respondent began driving Student B home. He also began learning a language from Student B's younger sister, Student C, at school and

- going to Student B and C's home to learn a language as he was travelling to a country.
51. Student B's discomfort with the respondent greatly affected her enjoyment of school in her years 12 and 13. She was also upset in 2018 by the respondent's behaviour, particularly given that, as set out below, she came to learn that her younger sister had been messaging Teacher R on a variety of platforms.
 52. Despite assuring a colleague in February 2018 that he was deleting all student contacts, the respondent then made contact with Student B. The respondent says that he made contact with Students B and C on Facebook messenger around April 2018 to ask if the family were around to catch up.
 53. The respondent deeply regrets the position that he put Student B in and the effect that his actions will have had on the family.
 54. The respondent accepts that his conduct in relation to Student B was a breach of professional standards and that it is appropriate that his registrations
 55. The respondent accepts that his conduct in relation to Students B and C and the family was a breach of professional standards and that it is appropriate that his registration is cancelled.
 56. Turning to the charge, we are required to find that between June 2016 and December 2017 the respondent and Student B had an inappropriate relationship. An inappropriate relationship with a student may be sexual, but that is not what is alleged here. Rather, the CAC has listed some of the ways in which the relationship was inappropriate. We appreciate that the CAC has further "particularised" the allegation by setting out the evidential basis. This has the advantage of clarifying for a respondent answering a charge how the relationship was inappropriate. It also means that as the finder of fact, we must consider whether there is evidence to support each of those allegations.
 57. The respondent visited Student B's home and so the factual allegation in particular 1.3(a) is established.
 58. There is evidence that the respondent sent Student B electronic messages. The evidence that the respondent communicated with Student B via Facebook Messenger is found in his explanation above. Therefore particular 1.3(b) is established.
 59. As outlined above in paragraph 45, it is agreed that in the latter part of 2016 the

respondent told Student B that he planned to travel and that he wanted Student B to go with him. In late 2017 he told her that he liked her. We are satisfied that particular 1.3(c) is established.

60. The parties agree that the respondent flirted with Student B at school during 2016. Particular 1.3(d) is therefore established.
61. The parties agree that during 2017 the respondent began driving student B home. Particular 1.3(e) is therefore established.
62. According to particular 1.3(f) the respondent “isolated” Student B in practice rooms at the school. The evidence is that on one occasion when Student B was alone practising in a subject room the respondent entered the room and closed the door behind him. We were not told if the door was closed before he entered, but we assume that the door would be closed while a student was playing a subject. While it may have been inappropriate for the respondent to ask Student B why she was being awkward with him, but the particular requires us to find that he isolated her. We are not satisfied that that this particular is established.
63. The respondent is charged with having an inappropriate relationship with Student B. We have found the allegations in particulars 1.3 (a) to (e) established. Some of these behaviours are examples of inappropriate behaviour, but we have questioned whether the conduct is best described as an inappropriate relationship.
64. The respondent had a friendship with Student B’s family and so in some circumstances the context of his visits to the home might be quite innocent. However, in this instance the respondent was also making advances on Student B. In combination with the flirtation and inappropriate communication, it appears he used his friendship with the family and position of trust as a teacher to attempt to seduce at least one, if not both of their daughters. There is evidence of attempting to form a relationship. His conduct might be better described as “grooming” or “sexual harassment”. That said, there was clearly a relationship with Student B that went outside the student/teacher professional relationship, as evidenced by the electronic messaging and flirting. In that sense there was an inappropriate relationship and particular 1.3 is established.

- 1.4 Between about September 2017 and April 2018, breach professional boundaries and/or engage in an inappropriate relationship with Student C, who was a learner at the school including by:**
- (a) Visiting Student C at her home;**
 - (b) Sending a message to Student C asking how she would feel if he married her sister, (Student B);**
 - (c) Sending a message to Student C asking if she wanted to meet outside the school and outside of school hours.**
65. According to the ASF, Student C is Student B's younger sister and also a student at the School. At some point toward the end of 2017, when Student C was in Year 10, the respondent sent her a message asking how she would feel if he married her sister (Student B). Both Student B and the students' mother were shown the message.
66. In Term 1 2018, Student C received a message from the respondent stating he would be in town and asking to catch up. She showed the message to the Assistant Head of Subject at the School. He instructed her to delete the message and not reply. Student C stated she was concerned the respondent would turn up at her house.
67. The ASF included the respondent's earlier statement that he does not recall asking Student C how she would feel if he married Student B, that it is highly unlikely he had done so and that student C "over exaggerates things". However, unlike particulars 1.2(b) and (e) the respondent has not denied this fact.
68. The respondent's view was that the relationship with Students B and C developed in the context of a relationship with the family that was initially friendly. He says he contacted Students B and C because he understood from his conversation with his colleagues that the matters being investigated did not relate to Students B and C, whose family he had been friendly with. He was returning to New Zealand briefly and wanted to know if they wanted to catch up.
69. We are satisfied that the allegations in particulars 1.4(a), (b) and (c) are established. For particular 1.4 to be proved, we must also be satisfied that the conduct amounted to either a breach of professional boundaries and/or an inappropriate relationship. We do not think his conduct can be accurately described as an inappropriate relationship, but it was inappropriate conduct. There was no reason for the respondent to contact either student. A professional mature teacher who was friendly with a family might contact parents.
70. We agree that the combination of the three sub-particulars amounts to a breach of his

professional boundaries. This is discussed further below under “Serious Misconduct.” Particular 1.4 is established.

Serious misconduct

71. We must now decide if the established conduct amounts to serious misconduct (or conduct otherwise entitling the Tribunal to exercise its powers).
72. 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 Teaching Council’s criteria for reporting serious misconduct.

73. The criteria for reporting serious misconduct are found in rule 9 of the Rules.³ The CAC must establish at least one ground under section 378 and one under rule 9 for the test for serious misconduct to be met. The CAC relies on rules 9(1)(d), (e) and (o).

Criteria for reporting serious misconduct

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

...

(d) *an inappropriate relationship with a person under the age of 16 years:*

(e) *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:*

...

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

³ The amendments made by the Education Council Amendment Rules 2018 do not apply to conduct before 18 May 2018. See Schedule 1 Part 2.

Joint submissions

74. The CAC and respondent agreed that the respondent's conduct amounts to serious misconduct and that the appropriate penalty is cancellation. They noted that the definition in paragraph (a)(i) of section 378 does not require actual harm to the student, and it is common that students involved in inappropriate relationships with teachers do not realise the full impact of such contact until they reach a sufficient level of maturity to do so.
75. The parties submitted that the clear and detailed guidance in the Code of Professional Responsibility regarding the importance of boundaries between teachers and students illustrates how important it is for teachers to avoid inappropriate relationships with students in order to protect students' emotional, physical, social and spiritual well-being and to maintain the trust of students, their families and the wider community.
76. It was agreed that the actions met the other two definitions in paragraph (a), that it reflects adversely on the teacher's fitness to practice and may bring the teaching profession into disrepute.
77. The parties also agreed that a teacher's inappropriate (sexual or non-sexual) relationship with a student is conduct that is of both a character and severity to engage rules 9(1)(d), (e) and 9(1)(o).
78. The parties referred to other cases where the Tribunal has found serious misconduct as a result of inappropriate relationships with students and former students.⁴

Discussion

79. We emphasise the following principles that have been set out in several Tribunal decisions:
- 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.⁵
 - b) A relationship need not be sexual for it to be improper and to cross professional boundaries.⁶

⁴ *CAC v Teacher C* NZTDT 2016-40, 16 February 2017; *CAC v Teacher B* NZTDT 2016-64

⁵ *Scully v Complaints Assessment Committee of the New Zealand Teachers Council*, Wgtn DC, CIV 2008 085 000117, 27 February 2009

⁶ See decisions discussed in 2016-64

- c) A boundary violation occurs if a relationship shifts to serving the needs of the teacher rather than the student.⁷
 - d) Teachers carry the responsibility to distance themselves from any potentially inappropriate situation.⁸
 - e) It is not necessary for the CAC to prove that the student suffered abuse or neglect at the hands of the teacher.⁹
 - f) It is not necessary for the CAC to prove that the teacher intended to actively exploit the student.¹⁰
80. We have found that the respondent engaged in an inappropriate relationship with Student D. The relationship began at about the same time as the end of year, and by January 2015 was an intimate, physical relationship. The parties have not specified whether the relationship started when Student D was a student or former student. We do not know how or why it ended 18 months later. We have not been told how Student D and her family feel about the matter now.
81. As we said in *CAC v Hedivan*, 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. Rule 9(1)(e) is concerned with the prevention of harm to a student.¹¹ 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 in New Zealand other countries. In *CAC v Hedivan* NZTDT 2019-40¹² 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

⁷ Northern Territory Teacher Registration Guidelines discussed in *CAC v Teacher B* 2016-64

⁸ *CAC v Teacher K*, *CAC v Luff* NZTDT, 2016-70

⁹ *CAC v Teacher C* above

¹⁰ *CAC v Teacher C* above

¹¹ *CAC v Teacher C* above, note 14 at [28]

¹² *CAC v Hedivan* NZTDT 2019-40, 4 December 2019 (heard on 19 July 2019) at [39]

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.

82. In *CAC v Teacher NZTDT 2019-31*, we noted that these comments equally apply to a relationship with a current student. We said:

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.

83. In *CAC v Luff*, we observed:¹³

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...

84. We accept that we do not need to find that Student D was actually adversely affected by the conduct, but we agree that any student is likely to be adversely affected by a relationship with a teacher. The parties have agreed that Students A, B and C were adversely affected by the respondent's conduct.

85. Although Student C did not experience the full extent of the respondent's unethical behaviour, he clearly overstepped the bounds of the teacher/student relationship and an adult/teenager relationship. A teacher who is also friendly with a student's family must be careful to set professional boundaries and maintain the integrity of the profession. In the presence of students, the teacher is a teacher at all times. The teacher does not lower the standing of the profession or compromise the integrity of the teacher/student relationship by actions such as discussing students or colleagues, or personal issues. The teacher must put the student's needs first. We appreciate that Student C would have felt very uncomfortable with the comments and contact from the respondent and therefore her wellbeing and learning were likely to be adversely

¹³ *CAC v Luff NZTDT 2016-70*, 20 July 2016 at [11]

affected.

86. We also agree that the respondent's conduct reflects adversely on his fitness to be a teacher and is likely to bring the teaching profession into disrepute.
87. For the second part of the definition of serious misconduct we must find that the conduct is of a character or severity to meet one or more of the criteria in rule 9 of the Rules.
88. Rule 9(1)(d) refers to an inappropriate relationship with a person under the age of 16. We understand that Students D, A, and B were not under 16 at the time of the events. Student C was a year 10 student and so was likely to be under that age. Although we have found that there was a breach of professional boundaries, we have not found an inappropriate relationship. Therefore, none of the conduct meets the criterion found in rule 9(1)(d).
89. The criterion in rule 9(1)(e) is that the teacher has engaged in 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.
90. We have found that the respondent engaged in an inappropriate relationship with Student D in about December 2014, and with Student A between September 2017 and January 2018, and also with Student B between June 2016 and December 2017. We are satisfied that at that time these students were in contact with the respondent as a result of his position as a teacher. Rule 9(1)(e) is therefore met.
91. The established wrongdoing in particular 1.4 is not as serious as the other three particulars, but even in isolation, sending a message to a Year 10 student, asking how she would feel if he married her Year 13 sister is a serious breach of his professional responsibilities and would be viewed by most reasonable members of society as disturbing or "creepy".
92. We are satisfied that the respondent's conduct in each case, including Student C is of a character and severity that is likely to bring discredit to the teaching profession under rule 9(1)(o). It meets the test in *Collie v Nursing Council of New Zealand*,¹⁴ where the High Court was considering the meaning of discredit to the nursing profession under

¹⁴ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28]

the Nurses Act 1977:¹⁵

[28] To discredit is to bring harm to the repute or reputation of the profession. The standard must be an objective standard with the question to be asked by the Council being whether reasonable members of the public, informed and with knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the nursing profession was lowered by the behaviour of the nurse concerned.

93. We have no hesitation in finding that reasonable members of the public, informed and with knowledge of the facts outline could reasonably conclude that the reputation and good-standing of the teaching profession is lowered by the respondent's behaviour.
94. Until 30 June 2017 teachers' conduct was covered by the Code of Ethics for Certified Teachers which espoused the development and maintenance of professional relationships with learners based on the best interests of those learners, and the promotion of the physical, emotional, social, intellectual and spiritual well-being of learners. Similar aspirations are found in the Code of Professional Responsibility that replaced the Code of Ethics. Teachers commit to promoting the wellbeing of learners and protecting them from harm and engaging in ethical and professional relationships with learners that respect professional boundaries. The respondent's conduct was the antithesis of these values and expectations and clearly lowers the reputation of teachers.
95. We find that each particular, 1.1, 1.2, 1.3 and 1.4 amounts to serious misconduct.

Penalty

96. 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:*

¹⁵ Now repealed and superseded by the Health Practitioners Competence Assurance Act 2003

- (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.*

97. We agree that the only suitable penalty for the respondent is cancellation.

98. We gained the impression that the respondent is someone who repeatedly abused his position as a teacher to exploit the young women and girls whom he taught. It is exactly this type of conduct that earns the name of sexual predator. We therefore impose the following penalty:

- a) The respondent is censured under section 404(1)(b);
- b) The respondent's registration is cancelled under section 404(1)(g).

Costs

99. On the basis of the respondent's full co-operation throughout the CAC's investigation, and hearing of this matter on the papers, the CAC sought a 40% contribution to costs. Subject to the review of a CAC costs schedule, the respondent agreed with this position.

100. We direct the CAC and the Tribunal Secretary to file and serve a schedule of costs within 14 days of the date of this decision. The respondent will have a further 14 days to respond.

101. The Tribunal delegates to the Chairperson the authority to fix the final amounts of costs for the CAC under section 404(1)(h) and the Tribunal under section 404(1)(i).

Non-publication

102. The CAC does not oppose permanent name suppression for the respondent in order to protect the students, but requests that the Tribunal note that the fact of name suppression will not prevent the release of the identity of the respondent to persons who objectively genuinely need to know his identity .
103. The CAC and respondent agree that permanent suppression of the students' names is appropriate.
104. No application for permanent name suppression of the respondent's was received. We reviewed the respondent's application for interim name suppression and an application by the school. One concern was that if the school were named, the students would be easily identified.
105. Section 405(3) of the Act provides that hearings of this Tribunal are in public. This is consistent with the principle of open justice, which as we noted in *CAC v Jenkinson*,¹⁶ is a "fundamental tenet of our legal system." While protection of the public is an important function of open justice, the presumption exists regardless of any need to protect the public.¹⁷ The primary purpose behind the open justice principle in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.¹⁸
106. Section 405(3) is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:
- (6) *If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
- ...
- (c) *an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*
107. Therefore, in deciding if it is proper to make an order prohibiting publication, the Tribunal must consider the interests of the applicants, as well as the public interest. If

¹⁶ *CAC v Jenkinson* NZTDT 2018-14 at paragraph 33

¹⁷ *CAC v McMillan* NZTDT 2016-52 at paragraph 45

¹⁸ *CAC v Teacher* NZTDT 2016/27 at paragraph 66

we think it is proper, we exercise our discretion to make such an order.

108. In *NZTDT 2016/27*, we acknowledged what the Court of Appeal said in *Y v Attorney-General*:

While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".¹⁹

109. Given the respondent's predilection for young students, we are concerned about the risk of other young women who may come under his influence. Although he may no longer be a registered teacher in New Zealand, he may still find other roles working with young women. However, we accept that publication of the respondent's name could lead to identification of the students and former students. Student A's name has already been associated with him. We are satisfied that it is in their best interests that this sorry chapter in their lives is put to rest and so we make an order for non-publication of the name of the respondent on the basis that taking into account the interests of Students D, A, B and C, it is proper to do so. We also recognize the public interest in not deterring students from speaking up if teachers engage in inappropriate behavior.
110. The school has applied for non-publication on several grounds. The one that holds the most weight is that publication could lead to identification of the students. The school has not elaborated on the likelihood of that occurrence, but again, the fact that there has already been speculation about the teacher and Student A, we recognize that if the school's name is published, there is a risk of identification of students.
111. We add that it is unfortunate that in 2015 when the Principal became aware that the respondent was in a relationship with a former student, no action was taken. Section 394²⁰ of the Act requires an employer to immediately report to the Teachers Council if it has reason to believe that the teacher has engaged in serious misconduct. A relationship with an immediate past pupil is a basis for a mandatory report.
112. Subject to paragraph 113, we make orders for non-publication of the following names:

¹⁹ *Y v Attorney-General* (2011] NZCA 676

²⁰ Until July 2015 this requirement was contained in section 139AM of the Act.

- a) The students
- b) The school
- c) The respondent
- d) and any identifying details

113. We confirm that the order for non-publication of the respondent's name will not prevent the release of the identity of the respondent to persons who objectively genuinely need to know. This might include a place of education in New Zealand or abroad.



Theo Baker
Chair

²¹ *ASG v Hayne* [2017] NZSC59; [2017] NZLR 777.

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).