NZTDT 2020/33

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER THE	Education Act 1989
IN THE MATTER	a Notice of Referral by the Complaints Assessment Committee
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**TEACHER X**, Teacher Respondent

DECISION OF THE TRIBUNAL

Hearing:	1 December 2020 on the papers
Tribunal:	Jo Hughson (Deputy Chairperson), Nichola Coe, Lyn Evans (Members)
Counsel:	Mr D P Neild and A F Oliver for the Complaints Assessment Committee Mr R Harrison for the respondent
Decision:	14 December 2020

Introduction

[1] The Respondent is a registered teacher. He became provisionally registered in June 2003 and obtained his full practising certificate in September 2006. At the time of the relevant conduct, he worked as a [redacted] teacher at a secondary school (the School) in Northland.

[2] By Notice of Referral dated 30 July 2020 the Complaints Assessment Committee (CAC) referred a complaint about the conduct of the Respondent, pursuant to section 401(3) of the Education Act 1989 (the Act). It was alleged that during 2016 the Respondent had mimicked sounds made by Student A, put a piece of clear Sellotape on Student A's top lip but did not secure the tape to the bottom of his lip, and that he used the word "piss" when he spoke to Student A regarding his behaviour.

[3] This conduct was alleged to amount to misconduct, entitling the Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989 (the Act).

[4] Student A is the son of person who initiated the complaint to the Teaching Council of Aotearoa New Zealand (the Council) (the initiator). The initiator is also a teacher and at the relevant times in 2016 he was the [redacted] at the School where the respondent worked. The Respondent reported to the initiator.

[5] The hearing proceeded on the papers based on an Agreed Summary of Facts signed by the CAC and the Respondent[1].

[6] The Respondent admitted the alleged conduct and accepted that his behaviour constitutes misconduct. Despite the Respondent's admissions it was for the Tribunal to reach its own view as to whether the conduct, if established, amounts to misconduct; and if so, what, if any, penalty should be imposed.

[7] Helpful written submissions were received from both Counsel for the CAC and Counsel for the Respondent, addressing the issues of both liability and penalty. The Tribunal considered these submissions carefully when it assessed the agreed evidence and made findings. The Respondent also made an application for the permanent suppression of his name and any details which may identify him. For reasons given below, the Tribunal concluded that it is proper to permanently prohibit from publication the Respondent's name and identifying details.

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[1] Signed and dated 24 September 2020.

Legal Principles - Liability

[8] The onus of proof of the charge rests on the CAC.

[9] As to the standard of proof, the appropriate standard is proof to the reasonable satisfaction of the Tribunal on the balance of probabilities. This is a static standard. However, as the seriousness of an allegation rises, so does the cogency of the evidence required to satisfy the standard[2].

[10] In the context of a section 401(3) referral for misconduct the appropriate approach is for the Tribunal to consider whether it can make an adverse finding that would justify exercising its powers under section 404, adopting a similar approach to the referral of criminal convictions.

[11] In conviction referrals, the Tribunal's approach is to determine whether an adverse finding can be made based on whether the conviction reflects adversely on the respondent's fitness to be a teacher, or whether the teacher's conduct adversely affects or is likely to adversely affect the wellbeing or learning of one or more students.[3] Another criterion against which the Tribunal is able to make an adverse finding is if the conduct may bring the teaching profession into disrepute. These tests form part of the conjunctive test for "serious misconduct" in section 378(1)(a) of the Act.

[12] Whether or not there has been misconduct and the severity of any such misconduct is to be assessed by objective standards.

[13] It is well established, by previous decisions of the Tribunal, that when considering whether particular conduct would bring the teaching profession into disrepute the question to be asked is whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the behaviour of the teacher concerned.[4] This standard is based on the statement of

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[2] *A v A Professional Conduct Committee of the Medical Council of New Zealand* [2018] NZHC 1623 at paras [11] – [16] and as confirmed in *Z v Dental Council Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) endorsing the comments of Dixon J in *Brigginshaw v Brigginshaw* (1938) 60 CLR 336.

[3] *CAC v White* NZTDT 2017/29, 28 November 2017 at [17] citing *CAC v S* DC Auckland CIV-2008-004-001547, 4 December 2008 at [47].

[4] Being the standard stated by the High Court (Gendall J) in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28] in relation to the test of "likely to bring *discredit* to the [nursing] profession", adopted by the Tribunal in previous decisions including *CAC v Webster* NZTDT 2016-57, 6 April 2017 at [46] and *CAC v Harrington* NZTDT 2016/63, 6 April 2017 at [17].

Gendall J in *Collie v Nursing Council of New Zealand*, adopted by this Tribunal as the test for bringing the teaching profession into disrepute.

[14] Previous Tribunal decisions demonstrate that the term "fitness to be a teacher" extends beyond competence issues and includes conduct that, when considered objectively, will have a negative impact on the trust and confidence which the public is entitled to have in the teacher and the teaching profession as a whole, including conduct which falls below the standards legitimately expected of a member of the profession, whether of a teaching character or not.[5]

[15] For conduct to warrant a professional disciplinary response on the basis that it brings the teaching profession into disrepute, the conduct must bear some direct relationship to the professional behaviour or standing of the teacher, or arise out of, or have some connection with his or her professional position.[6] The Tribunal recognises that it cannot be that every departure from accepted professional standards or every immoral or unwise act by a teacher in his or her professional (or personal) life should amount to misconduct[7]. As has been said in previous cases, the principal purpose of the disciplinary regime provided for under the Act does not require a disciplinary response to minor human errors that inevitably occur in professional practice.

[16] Subjective matters personal to the practitioner are not to be considered in any significant way when objectively assessing whether there has been serious misconduct or misconduct[8]. Personal factors are given full consideration at the penalty stage if a charge is found to have been established.

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[5] This is the approach taken to "fitness to practise" for the purposes of the Health Practitioners Competence Assurance Act 2003. See G *(HPDT* 771/Nur15/330P); *Mr E* (HPDT 245/Nur09/116P) where a nurse had been convicted of indecent assault under section 135(a) of the Crimes Act 1961. In that case the conduct occurred in a domestic context. Finding the disciplinary charge established the Health Practitioners Disciplinary Tribunal stated that that was beside the point; *"it is serious misconduct which should never have occurred at all. It diminishes the reputation of the profession."*

[6] See *Collie* at [18] and [25].

[7] See *Martin v Director of Proceedings* (High Court, CIV-2006-404-005706) Courtney J at [23].

[8] See *Martin v Director of Proceedings* [2010] NZAR 333 and *C v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, at [126]-[130].

Relevant standards

[17] The Teaching Council's Code of Professional Responsibility (the Code) sets out the standards for ethical and professional behaviour that are expected of every registered teacher. The Tribunal may seek guidance from the Code as to the standards against which the conduct it is reviewing should be assessed on an objective basis.

[18] The Code makes it clear that teachers are expected to behave in ways that promote a culture of trust, respect, and confidence in them as a teacher and in the profession. Clause 1.3 of the Code relates to:

> "maintaining public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity".

[19] By acting with integrity and professionalism, teachers and the teaching profession maintain the trust and confidence learners, families and whanau, and the wider community place in teachers to guide their children and young people on their learning journey and to keep them safe[9].

[20] Conduct that damages this trust and confidence breaches the expectation set out in Clause 1.3. That may include conduct that affects the trust and confidence that others have in them as a teacher, or that reflects badly on the integrity or standing of the teaching profession.

[21] However, quite apart from any express provision in the Code the Tribunal can and should apply its own judgement to the facts of the matter before it, as may be established, and whether these meet the criteria for misconduct that would justify an adverse disciplinary finding.

[22] The Tribunal is required to undertake a context-specific assessment of the established facts in each case, as it has done in this case.

Facts

[23] The Tribunal is satisfied the following facts are established on the agreed evidence before it[10]:

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[9] Clause 1.3 Code of Professional Responsibility.

[10] (Agreed) Summary of Facts signed on 24 September 2020, Common Bundle pages 7-10.

(a) In 2013 the Respondent was employed at the secondary school where the conduct occurred. He resigned from his position as a [redacted] teacher at that school in July 2016 and commenced employment at another secondary school.

(b) At the beginning of 2016 Student A relocated from England to New Zealand with his family. He was approximately 14 years-old and was in Year 10.

(c) The Respondent taught Student A in his [redacted] class in 2016.

(d) Student A's father, Teacher B, was the [redacted] at the School in 2016. The Respondent reported to Teacher B.

(e) Teacher B submitted a complaint to the Teaching Council in March 2019 about the Respondent's conduct towards his son, Student A in 2016.

Incident A

(f) One day during Term 1 in 2016, Student A was being disruptive and interrupting the Respondent constantly.

(g) The Respondent stated, "I think I know what is needed here".

(h) The Respondent walked towards the Sellotape dispenser and removed a piece of clear Sellotape approximately 4-5 cm long.

(i) Student A stated, "go on then" and leaned over his desk towards the Respondent.

(j) The Respondent placed the piece of sellotape on Student A's top lip but did not secure the tape to his bottom lip.

(k) Student A then said, "that's not going to stop me" and blew the unattached end to make it flap.

(l) A student interviewed during the CAC investigation stated that the class environment was "quite chilled" at the time of Incident A.

Incident B

(m) In early April 2016 Student A was in the Respondent's class.

(n) The Respondent asked his class to copy some text off the screen.

(o) Student A did not understand one of the words being copied and asked for clarification.

(p) The Respondent told him that the class should copy in silence and questions could be asked later.

(q) Student A continued to ask the Respondent questions about the assigned work and other matters such as: “why do we have to do this”; “why can’t you print it” and “when does the bell go?”

(r) The Respondent then asked Student A to move and sit at the back of the classroom by way of response.

(s) Student A complained about having to move and the Respondent mimicked Student A complaining.

Incident C

(t) Following the second incident Student A was moved to Teacher B’s classroom.

(u) When talking to Student A and Teacher B about Student A’s behaviour, the Respondent stated to them both in the course of discussion, “I am a human being and you piss me off” in front of Student A and Teacher B.

[24] The following facts were agreed as to the Respondent’s response[11], and the Tribunal found as follows:

(a) Following the three incidents the Principal of the School arranged a meeting between the Respondent, Student A and Student A’s parents.

(b) At this meeting that took place towards the end of Term 1, 2016 and in the presence of the School Principal, Teacher B and his wife, the Respondent formally apologised to them for all three incidents. The Respondent subsequently resigned from the School, accepting that it was not tenable

[11] Summary of Facts at [24]-[30].

to continue his employment there following these three incidents and with Teacher B being his [redacted].

(c) Prior to resigning from his position at the School, the Respondent completed a professional development course: "Using Attachment Principles to Improve Relationships and Challenging Behaviours", presented by Joseph Driessen.

(d) A formal complaint to the Teaching Council was made by Teacher B in March 2019, almost three years after the incidents.

(e) The matter was referred to the CAC and during the CAC investigation, the Respondent admitted to his conduct outlined under the sub-headings Incident A, Incident B, and Incident C above.

(f) The Respondent accepted the findings of the CAC that the three incidents cumulatively amounted to misconduct because the conduct reflected adversely on his fitness to be a teacher and may have brough the teaching profession into disrepute. The CAC proposed a censure for this conduct. The Respondent signed a censure agreement on 25 October 2019.

(g) Almost six months after the CAC's proposed outcome was notified to him, Teacher B, the initiator, advised the CAC that he did consent to the outcome proposed by the CAC under section 401(2)(d). He suggested that the Respondent had engaged in "sustained emotional abuse" of Student A and that he (the initiator) views this case as an opportunity to start a public conversation about the Teaching Council's protection of students from bullying.[12]

(h) As agreement could not be reached on the CAC's proposed resolution the CAC referred the matter to the Tribunal by its Notice of Referral pursuant to section 401(3).

[12] "Having sought advice from different sources, it is our intention to take this matter up with Chris Hipkins MP directly, as it is clear that there are serious flaws in New Zealand's systems of safeguarding their students. Since this incident, [Student A] has become a high-profile Social Media Influencer both in New Zealand and globally. He has become an advocate for teenage mental health issues and anti-bullying campaigns. It is his intention to engage in a media campaign about this incident in a way to shine a spotlight on the failures of an entire system in supporting him."

(i) Since the Respondent's resignation from his position at the School four years ago, as far as the CAC is aware, no additional issues have arisen with his conduct.

Findings on the charge

[25] The Tribunal has considered the agreed evidence and the parties' submissions carefully. The Tribunal undertook a context-specific assessment of the facts[13] when assessing the conduct.

[26] The Tribunal is satisfied the agreed evidence establishes that in 2016, on one occasion the Respondent mimicked sounds made by Student A, on one occasion he put a piece of clear Sellotape on Student A's top lip but did not secure the tape to the bottom of his lip, and on one occasion he used the word "piss" when he spoke to Student A regarding his behaviour.

[27] It was submitted for the CAC:

(a) Even if humorously intended, the Respondent's actions in placing Sellotape on Student A's lips and mimicking Student A's behaviour was demeaning and reflected adversely on the Respondent's judgement and his general fitness to be a teacher. The Respondent's decision to make Student A appear foolish in front of the entire class has the appearance of condoning bullying behaviour towards Student A and other students. The Respondent departed from the standard of professionalism expected of teachers, which requires them to maintain appropriate boundaries with students and to model appropriate behaviour even when students are behaving in a challenging way.

(b) Placing a piece of Sellotape on student's mouth, however lightly, is inconsistent with the non-physical behaviour management techniques and standards expected of teachers. Given the societal expectations surrounding a teacher's use of behavioural management techniques, the Respondent's actions may bring the teaching profession into disrepute. Furthermore, the Respondent's use of the word "piss" in front of both Student A and Teacher B demonstrates a general disrespect and lack of

[13] *CAC v Teacher* NZTDT 2018/4; *CAC v Mackey* NZTDT 2016/60 and *CAC v Whelch* NZTDT 2018/4.

professional courtesies towards both a student and a colleague, thereby bringing the teaching profession into disrepute.

(c) While the Respondent and Student A's classmates may have found the interactions humorous, the Respondent's behaviour likely adversely affected Student A's sense of self-worth and confidence through making Student A the butt of the Respondent's joke.

[28] The Tribunal agreed with those submissions.

[29] The Tribunal was satisfied that the established conduct is sufficiently serious to warrant an adverse finding that it was misconduct when the particulars are considered cumulatively. The Tribunal was entitled to exercise its powers pursuant to section 404 of the Act, on that basis. Considered objectively the Respondent's actions were a falling short of the high standards of ethical and professional behaviour expected of teachers. It was conduct that did not reflect well on the Respondent personally, as a member of the teaching profession. However, the Tribunal was satisfied the established conduct was relatively low-level in terms of gravity and, in any event, not at the level of seriousness that would just a finding of serious misconduct.

[30] The Tribunal's adverse finding is, necessarily, limited to these three discrete incidents. There was no evidence before the Tribunal beyond the agreed evidence in relation to those three incidents, which was suggestive of the Respondent having engaged in sustained bullying or the "sustained emotional abuse" of Student A in 2016.

Penalty

[31] Having made an adverse finding of misconduct the Tribunal was entitled to exercise its powers pursuant to section 404 of the Act. The Tribunal may do one or more of the things set out in section 404(1). This includes but is not limited to "any of the things that the Complaints Assessment Committee could have done under section 401(2)" if there has been made a finding of misconduct that is not serious misconduct.

[32] It is well established that the primary purposes of disciplinary penalties under the Act is to maintain professional standards (through general and/or specific deterrence) so that the public is protected from poor practice and people unfit to teach; and to maintain the public's confidence in the teaching profession. An overlapping purpose

is protection of the public through the provision of a safe learning environment for students[14]. As was said by the Tribunal in *CAC v McMillan*[15]:

> "…This process informs the public and the profession of the standards which teachers are expected to meet, and the consequences of failure to do so when the departure from expected standards is such that a finding of misconduct or serious misconduct is made. Not only do the public and profession know what is expected of teachers, but the status of the profession is preserved,"

[33] The Tribunal's task is to identify the least restrictive option which meets the seriousness of the case and discharges the Tribunal's obligations to the public and the profession.[16]

[34] In previous cases the Tribunal has accepted as the appropriate sentencing principles those contained in *Roberts v Professional Conduct Committee of the Nursing Council*[17] where Collins J identified the following eight factors as relevant whenever an appropriate penalty is being determined. In particular, the Tribunal should consider what penalty:

(a) Most appropriately protects the public and deters others;

(b) Facilitates the Tribunal's important role in setting professional standards;

(c) Punishes the practitioner (although this is not a primary purpose[18]);

(d) Allows for the rehabilitation of the practitioner;

(e) Promotes consistency with penalties in similar cases;

(f) Reflects the seriousness of the misconduct;

(g) Is the least restrictive penalty in the circumstances; and

(h) Looked at overall, is the penalty which is "fair, reasonable and proportionate in all the circumstances".

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[14] As discussed in *CAC v McMillan* NZTDT 2016/52.

[15] Above fn. 13 at [23].

[16] *CAC v Teacher* NZTDT 2015-1.

[17] [2012] NZHC 3354 at [44]-[51].

[18] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 (SC) at [128].

[35] Counsel for the CAC submitted that given the "low-level nature" of the Respondent's misconduct it is difficult to identify comparator cases. The Tribunal was referred to three previous Tribunal cases which were submitted to be most relevant[19] The conduct reviewed in those cases included a teacher placing a piece of Sellotape on a four year old child's mouth after the child repeatedly put toys in his mouth, the use of offensive and abusive language in response to a high school student's refusal to complete his work, and a "sustained verbal attack' of a Year 9 student misbehaving in class which involved the teacher using multiple expletives and threats of violence towards the student in an approximately two minute diatribe. Those cases show that the penalties imposed in broadly similar cases (and where the teacher had insight into his or her conduct and had undertaken rehabilitative efforts) are predominantly censure, together with annotation of the register, and a condition requiring the teacher to provide a copy of the Tribunal's decision to any prospective employer for two years.

[36] The CAC submitted that a penalty of censure alone is appropriate and sufficient to meet the primary considerations of sentencing in this case. The CAC acknowledged that had this matter come before the Tribunal in 2016, annotation of the register, imposition of a condition to tell future employers and a condition to undertake professional development would arguably have been highly appropriate. However, it was submitted that given the passage of time and the Respondent's own rehabilitative efforts (including a professional development course), a penalty of censure was all that was required.

[37] The Tribunal considered that two of the three cases referred to by the CAC, are comparable. In *CAC v Whiu*[20], the teacher's use of offensive and abusive language in response to a high school student's refusal to complete work was found to border on or just cross the line of serious misconduct. The Tribunal imposed a censure, annotation of the register and the imposition of a condition that the teacher provide a copy of the Tribunal's decision to any prospective employer for two years. In *CAC v Henare Hutana* [21]the teacher's sustained verbal attack on a Year 9 student was found to be serious misconduct. Identical penalties to those in *Whiu* were imposed. However, the Tribunal accepted the submission for the CAC that there are features

[19] *CAC v Roy* NZTDT 2015-1; *CAC v Whiu* NZTDT 2018/86*;* and *CAC v Henare Hutana* NZTDT 2018-58.

[20] Above fn. 18.

[21] Above fn. 18.

of the conduct reviewed in this case which distinguish the conduct from that in *Whiu* and *Henare Hutana* as follows:

(a) It was accepted by the CAC that the Respondent's conduct was humorously intended, even if a poor decision. In contrast, in *Henare Hutana* the Respondent's conduct could not be described as aggressive or verbally violent. Similarly, in contrast to *Whiu* there is no indication that the Respondent's actions can be characterised as a frustrated outburst against Student A. The Tribunal accepted that the Respondent's underlying motivation decreases the seriousness of his conduct, and that his conduct can most properly be classed as a lapse of judgement.

(b) In contrast to both *Whiu* and *Henare Hutana*, four years have passed without subsequent concerns about the Respondent's conduct. This distinguishes the Respondent's conduct from the conduct in those cases where annotation of the register and imposition of a condition to report the Tribunal's decision was appropriate given the Tribunal's lack of knowledge about the teachers' likelihoods of acting in a similar way in the future.[22]

[38] The Respondent accepted the CAC's submission of a penalty of censure in the circumstances.

Findings on Penalty

[39] The Tribunal has considered the relevant sentencing principles including the mitigating factors and comparative cases. The Tribunal is satisfied that it is appropriate to impose a formal penalty. The Tribunal considers that the least restrictive penalty which meets the seriousness of the case and discharges its obligation to the public and the teaching profession is a censure to express the Tribunal's disapproval of the conduct which occurred in this case (section 404(1)(b)).

[40] The Tribunal does not consider there are any aggravating features which warrant a more serious penalty than was sought by the CAC. No other orders are considered necessary to protect the public and maintain the standards of the teaching profession. In the Respondent's case, the lack of subsequent concern about his

[22] In *Whiu* the hearing took place two years after the misconduct, but unlike in the Respondent's situation, most of the delay was not attributable to the period between the conduct and the complaint to the Teaching Council.

conduct satisfied the Tribunal that annotation of the register and the imposition of a reporting condition are not necessary to prevent harm to students.

Costs

[41] It is usual for an award of costs to be made against a teacher once a charge is established.

[42] The CAC did not seek a contribution to its own costs.

[43] It was submitted for the CAC that it would not be appropriate for the Respondent to bear the costs of the matter being referred to the Tribunal given the circumstances, including that the Respondent had apologised to the student, had engaged in rehabilitation and the complaint was made to the Council almost three years after the incident. The Tribunal agreed. As the CAC identified, that approach is consistent with previous cases in which the CAC has referred a complaint to the Tribunal after the initiator did not agree to the resolution agreed by the CAC and the respondent teacher.[23] Accordingly there is to be no order in respect of the CAC's costs.

[44] The Tribunal must also consider whether to make an order that the Respondent contributes to the Tribunal's own costs (section 404(1)(i)).

[45] The Tribunal's costs are estimated to be $1,145 excluding GST.

[46] The Tribunal tends to order a 40% contribution instead of the usual 50% where a teacher has accepted responsibility for his or her misconduct and has agreed to the matter being dealt with on the papers[24]. That has occurred in this case.

[47] On that basis the Tribunal orders the Respondent to make a 40% contribution towards the Tribunal's own costs, being the sum of $458.00. The Tribunal considered that it was not unreasonable to make an order for what is a modest sum given that the Tribunal's process has resulted in an adverse finding which ultimately arose from the Respondent's failure to meet acceptable professional standards. The teaching profession as a whole should not be expected to fund all the Council's costs associated with the Tribunal's hearing, in those circumstances.

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[23] *CAC v Teacher N* NZTDT 2018-90, 28 July 2020; *CAC v Teacher S* NZTDT 2018-5, 21 August 2018.

[24] Tribunal's Practice Note, June 2010.

Publication of Name

[48] The Respondent made an application for a permanent non-publication order in respect of his name and identifying details under section 405(6)(c) of the Act[25].

[49] The default position is for the names of teachers who are subject to Tribunal proceedings to be published. The Tribunal's jurisdiction to make non-publication orders is found in section 405 of the Act. An order can only be made if the 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 the public interest.

[50] The starting point in any consideration of name suppression is the fundamental principle of open justice, as reflected in section 405(3). Various High Court and Court of Appeal decisions have confirmed this approach. The Court of Appeal in *Y v Attorney-General*[26]observed:

> "Given the almost limitless variety of civil cases and the fact that every case is different, the balancing exercise must necessarily be case dependent. Sometimes the legitimate public interest in knowing the names of those involved in the case (either as party or as witnesses or both) or knowing the details of the case, will be high. *Hart v Standards Committee (No. 1) of the New Zealand Law Society* was such a case. As this Court observed:
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> > "the public interest in open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well-established in the disciplinary context…."
>
> Consequently, a professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure."

[51] However, as the High Court observed in *Director of Proceedings v Johns*[27] every decision will necessarily be case and fact dependent and will require the weighting of the public interest with the particular interests of any person in the context of the

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[25] Hearing Bundle, page 37.

[26] [2016] NZCA 474, (2016) PRNZ 452 at [32].

[27] [2017] NZHC 2843, at [169] – [171].

facts of the case under consideration. As previous decisions of the Tribunal demonstrate there may well be cases where there are private factors that outweigh the public interest considerations at stake, and which displace the presumption in favour of disclosure of name and identifying details. This may include cases where it can be demonstrated that publication would not serve the objectives of the Tribunal, including protection of the public (for example, where publication would stand in the way of the teacher's rehabilitation and therefore be counterproductive)[28] and the maintenance of professional standards.

[52] As recorded below, Counsel for the CAC submitted that there is a two-step approach to be taken by the Tribunal when determining the issue of name suppression. This approach has been adopted by the Tribunal in previous cases[29]. The two-step approach has been stated to involve a first step threshold question, which requires deliberative judgement on the part of the Tribunal, whether, having regard to the various interests identified in section 405, it is "proper" to make non-publication orders. If it is then at the second step the Tribunal may exercise its discretion and make the order sought.

[53] The Tribunal in NZTDT 2020-7 called into question whether this is the correct approach to the assessment of applications for non-publication orders under section 405(3) of the Act. The Tribunal as it was constituted in this case was of a similar view.

[54] In *Dr N v A Professional Conduct Committee of the Medical Council* [30] the High Court considered the issue of the proper approach to appeals against the Health Practitioners Disciplinary Tribunal's decisions on name suppression. That Tribunal's power to make an order suppressing the name of a practitioner who is before it is found in section 95(2) of the Health Practitioners Competence Assurance Act 2003. Section 95 contains a similar provision to section 405 except that the Health Practitioners Disciplinary Tribunal must be satisfied it is "desirable" to make an order rather than be of the opinion that it is "proper", as this Tribunal is required to be. Mallon J stated at [45]:

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[28] See the discussion of Moore J in *Director of Proceedings v Johns* above at [173]-[178].

[29] Above, NZTDT 2016/27, at [67],

[30] [2013] NZHC 3405.

> In my view the two-step approach is not the correct one. I agree with the submission for the PCC that the requirement of desirability is inevitably subsumed into the overall discretion of the Tribunal (that is, whether the Tribunal "may" make the order is determined by whether it is "desirable" to do do). It is difficult to envisage any case where the Tribunal would consider that the threshold of desirability is met and yet then go on to decline to make an order. That is because anything relevant to the discretion will have already been considered as part of the private and public interest considerations that are relevant to whether suppression is desirable.[31]…"

[55] For the same reasons, the Tribunal considers that the requirement in section 405(3) that it must be of the opinion that it is "proper" to make a non-publication order, is subsumed into the overall discretion of the Tribunal (that is whether the Tribunal "may make the order" is determined by whether it is "proper" to do so). Like the High Court in *Dr N* the Tribunal cannot imagine any case where the Tribunal would consider that the threshold of "proper" is met and yet then go on to decline to make an order.

[56] In summary, there are relevant factors (the public and private interests at stake) that must be considered. Those factors are balanced by the Tribunal to form a view about whether non-publication is "proper". If the Tribunal, having balanced the competing interests, forms the view that non-publication is "proper" then it follows that it may make an order.

[57] In *Director of Proceedings v Johns* [32]the High Court (Moore J) accepted Counsel for the practitioner's submission that the threshold of desirability under section 95(2) of the Health Practitioners Competence Assurance Act 2003 is considerably lower than the 'exceptional' test commonly used in the Courts. Adopting the same reasons as those adopted by other Judges of the High Court Moore J at [166] stated he was:

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[31] As Mallon J went on to state in footnote 20. of her decision, "In *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZHC 933, [2013] NZAR 1055 at [32], at [38] Wylie J noted that, while there might be some overlap, "the threshold question [of desirability] focuses more on matters of general principle, for example, the public interest and the interest of others, including complainants, and the discretionary element to the decision will focus more on matters personal to the applicant arising out of the charge, and the Tribunal's findings in relation to it". But the factors personal to the applicant will be considered as part of the Tribunal's regard to "the interests of any person". That was how the Tribunal (in my view, correctly) took those factors into account in relation to Dr N.

[32] Above, with reference to the comments of Chisholm J in *ABC v Complaints Assessment Committee* [2012] NZHC 1901, [2012] NZAR 856 at [44]. It is noted that in the *Johns* case the High Court did not refer in its decision to *Dr N* case referred to above.

> satisfied that the test under s 95 invokes a considerably lower threshold than the usual civil test. It does not require exceptionality nor even something out of the ordinary. And while it is a concept not readily amendable to precise definition it does require evaluating the competing considerations of the interests of any person and the public interest. Attempts to refine the definition further are fraught because the analysis will always be case dependent.

[58] The Tribunal adopts the same approach to the threshold of "proper" for the purposes of section 405(3)[33]. Exceptionality is not required[34] and nor even something out of the ordinary. However, there must be sound reasons for finding that the presumption favouring publication is displaced.[35] What must be struck is a balance between considerations of open justice and the interests of the person in respect of whom non-publication orders are sought.[36]

[59] It was submitted for the Respondent that:

(a) Publication would cause harm that would be disproportionate to the conduct and circumstances of the complaint.

(b) While it was not contended that the Respondent would lose his current position as the Principal of his current employer is aware of these proceedings, this does not discount the possibility of:

59.b.1 Others within the school community agitating for the Respondent's removal depending on how the case is reported in the local media and across social media.

59.b.2 Colleagues viewing the Respondent differently or negatively.

59.b.3 Harm to the Respondent's family from having the matter reported in the media and being across social media.

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[33] In previous decisions this Tribunal has commented that the thresholds of "proper" and "desirable" are not considered to be dissimilar.

[34] As was recognised in *CAC v Finch* NZTDT 2016-11.

[35] *Y v Attorney-General* above fn. 26 at [29].

[36] *Y v Attorney-General* above fn. 26 at [31].

59.b.4 Future career prospects being affected as the publication will remain online and searchable for the remainder of his career.

(c) It is not just a matter of embarrassment, but reputation. There is a risk not just of reporting in local media but also the Respondent being the subject of a campaign across social media that has been signalled by the initiator and his son.

(d) The power to prohibit publication of name is discretionary and is not fettered by the presumption in favour of disclosure. There are several reasons why publication of name should be prohibited in this case:

59.d.1 The matter would have been resolved through a censure agreement (without publication) if it were not for the initiator's refusal to agree. The initiator's actions have not been fair or reasonable.

59.d.2 The initiator did not make a formal complaint to the Council until almost three years after the incidents and then, after the Respondent agreed to the CAC's proposed outcome on 25 October 2019, he took a further six months to notify of his disagreement. In the meantime, the Respondent has had to work and live under the stress and anxiety associated with an application of this nature.

59.d.3 One of the reasons for the initiator's refusal to agree the proposed outcome was because Student A, as a "high profile social media influencer, both in New Zealand and globally" intends to "engage in a media campaign about this matter in a way to shine a spotlight on the failures of the entire system in supporting him" (as referred to in the initiator's letter to the CAC in which he gave reasons for declining to agree the CAC's proposed outcome).

59.d.4 Google searches of Student A confirm that he has become a high-profile social media influencer and his posts can be found on Twitter and YouTube.

59.d.5 The threat to engage in a media campaign is real and will most likely be a harmful social media campaign against the Respondent and his family, and his career. As with much social

media in these times there will be no balance in the reporting or in the allegations/claims made and every likelihood of misinformation and hyperbole directed at the Respondent.

59.d.6 There is every chance the initiator has weaponised the complaint process, which he can do with relative impunity. He has been able to use the process by continuing through to prosecution, without cost to him, and may further "punish" the Respondent with a social media campaign after the decision is published.

59.d.7 Given the indication from the initiator to the CAC and the reference to his son's social media influence, there can be little doubt that the Respondent will be personally targeted through social media to Student A's local, national and international audience.

59.d.8 In these circumstances it is just and fair that the Tribunal does not enable the initiator to further harm the Respondent in this way and makes a non-publication order.

[60] The following submissions were made for the CAC:

(a) Referring to the principle of open justice in section 405(3) of the Act, the primary purpose behind this principle in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law[37].

(b) There is a two-step approach to be taken when the Tribunal is determining the issue of name suppression. The first is a threshold question which requires deliberative judgement on the part of the Tribunal, whether having regard to the various interests identified in section 405, it is proper to make a suppression order. If it is then at the second stage the Tribunal may exercise its discretion and make the order sought.[38]

(c) While a balance must be struck between open justice considerations and the interests of the party seeking suppression, the Court of Appeal decision in *Y v Attorney-General* stated that "a professional person facing a

[37] *CAC v Teacher* NZTDT 2016/27 at [66].

[38] Ibid at [66]

disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure"[39].

(d) The Respondent has not provided any evidence of what harm (other than embarrassment and potential unspecified detrimental impact on his current employment) may be incurred through publication. Insufficient evidence has been produced by the CAC to rebut the presumption of open justice.

(e) Given the lack of evidence of hardship experienced as a result of publication and the presumption of open justice, grounds for non-publication have not been made out although ultimately this is a decision for the Tribunal.

[61] Prior to the hearing the Tribunal invited Counsel for the Respondent to provide evidence to the Tribunal in support of the Respondent's application and Counsel's written submissions. The Tribunal considered it would be assisted were it to receive evidence of Counsel for the CAC's Google searching about Student A as to his social media influence, as the Tribunal was unable to Google search for itself. The Tribunal also invited the Respondent to provide evidence of Student A's threat to engage in a social media campaign.

[62] The Respondent produced to the Tribunal a copy of the initiator's letter to the CAC dated 10 March 2020 notifying of his refusal to agree to the outcome that had been proposed by the CAC. Student A's intention to run a social media campaign about the issues raised by this case was made clear in this letter. Counsel for the Respondent also produced an article from a local newspaper published in December 2019 entitled [redacted]: as well as a link to Student A's YouTube channel. The local news article showed that Student A is "greatest" on TikTok which has "[redacted] followers, [redacted] on Instagram and [redacted] on YouTube."

[63] By letter dated 27 November 2020 Counsel for the CAC advised that the CAC had no difficulty with this material being included in the Common Bundle. However, the CAC noted that the letter from the initiator declining to consent to the CAC's proposal included several allegations that the CAC had determined were unsubstantiated and which had not been put before the Tribunal for that reason. The Tribunal considered the initiator's letter only at the stage in the hearing when it came to determining the

[39] Cited in NZTDT 2016/27, at [67].

Respondent's application for name suppression and then solely for the purposes of verifying for itself Counsel for the Respondent's references in his written submissions to Student A's intention and threat to engage in a social media campaign.

[64] The Tribunal considered all the submissions carefully. In the end, having regard to the interests of the Respondent, the Tribunal considered that it is proper the Respondent's name is suppressed permanently to protect his privacy interests in the likely event of a social media campaign being initiated by Student A. The Tribunal is of the view that any such campaign can be run without reference to the Respondent's name if there are issues that Student A wishes to canvass in that way. However, the Tribunal considers there is no public interest in the Respondent being named in such a campaign and the potential harmful consequences to the Respondent, his family and his career that would likely arise from that would be out of proportion to the conduct and circumstances of the complaint (and having regard to the approximate four year period that has elapsed since the conduct occurred and the fact that there is no evidence of any concerns having been raised with the Council about the Respondent's conduct in that period). The Tribunal has determined to exercise its discretion to make a permanent order for those reasons.

[65] There is direct evidence of Student A's social media influence before the Tribunal. The Tribunal considered that it was entitled to make the order sought on the basis that potentially harmful consequences are a logical outcome or may well occur for the Respondent because of publication of his name in that forum. The Tribunal cannot predict the level of publicity or discussion this case is likely to receive, however the initiator's indication about his son's intentions was a significant factor in the Tribunal's decision to make a permanent order in respect of the Respondent. In the Tribunal's view the privacy and career interests of the Respondent are significant and outweigh the competing public interest factors at play in this case.

[66] Accordingly, it was for those reasons the Tribunal was satisfied it is proper for there to be an order under section 405(6)(c) permanently suppressing the Respondent's name and any details which may identify him. This order is to extend to the name of the School where the conduct occurred, and to the name of the Respondent's current employer as disclosed in the evidence that was before the Tribunal.

Conclusion

[67] The charge that the conduct amounts to conduct which entitles the Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989 is established.

The Tribunal has found that the conduct was misconduct and has made an adverse finding to that effect.

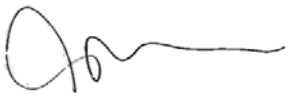
[68] The Tribunal's formal orders under the Education Act 1989 are:

(a) The Respondent is censured for his misconduct pursuant to section 404(1)(b).

(b) The Respondent is to pay $458.00 to the Tribunal under section 404(1)(i).

(c) There is an order under section 405(6)(c) permanently suppressing from publication the name of the Respondent and any identifying details. This order is to extend to the name of the School where the conduct occurred, and to the name of the Respondent's current employer.

Dated at Wellington this 14th day of December 2020



Jo Hughson
Deputy Chairperson

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).