NZTDT 2020/7

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER THE	Education Act 1989
IN THE MATTER	a charge referred by the Complaints Assessment Committee
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	[redacted] **[NAME PERMANENTLY SUPPRESSED – TEACHER Z]**, Teacher (Registration Number [redacted]) Respondent

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DECISION OF THE TRIBUNAL

Hearing:	25 August 2020 on the papers
Tribunal:	Jo Hughson (Deputy Chairperson), Megan Cassidy, Will Flavell (Members) Nichola Coe (observing)
Counsel:	Ms B Tatham for the Complaints Assessment Committee No participation by or for Respondent
Decision:	23 September 2020

Introduction

1. The Respondent is a registered teacher with a full practising certificate. Prior to the conduct in question she had been working as an early childhood education teacher.
2. The Complaints Assessment Committee (the CAC) charged that on 6 February 2019 the Respondent grabbed her 12-year-old daughter by the hair and/or pulled her a short distance by the hair.
3. This conduct was alleged to amount to serious misconduct pursuant to section 378 of the Education Act 1989. Alternatively, it was alleged the conduct amounted to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 404 of the Education Act 1989 (the Act).
4. The hearing proceeded on the papers by way of formal proof. The CAC filed an affidavit made by Daniel Rakic who is an investigator employed by the Teaching Council of Aotearoa New Zealand (the Council). Submissions were received from Counsel for the CAC. The Tribunal considered these submissions carefully when it assessed the evidence and made findings. For the reasons set out below, the Tribunal is not satisfied the charge is established. The Tribunal does not consider the conduct it is has found established is conduct that warrants a professional disciplinary response.
5. The CAC made an application for a permanent non-publication order suppressing the name of the Respondent's daughter and any details capable of identifying her. For reasons discussed in this decision the Tribunal concludes that it is proper to permanently prohibit from publication the name and identifying details of the Respondent's daughter, as disclosed in the evidence received by the Tribunal. The Tribunal also concludes it is proper permanently to suppress from publication the name and identifying details of the Respondent. There is an appreciable risk that if the Respondent is named in connection with these proceedings, this would undermine the efficacy of the non-publication order made in respect of her daughter.

Legal Principles - Liability

Onus and Standard of Proof

6. The onus of proof of the charge rests on the CAC.
7. 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[1].

Serious misconduct

8. "Serious misconduct" is defined in section 378(1) of the Act as follows:

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

9. This test for serious misconduct is conjunctive[2]. As such, as well as being conduct that has one or more of the adverse professional effects or consequences described in subsection (1)(a)(i)-(iii) the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct. The reporting criteria are set out in Part 3, Rule 9 of the Teaching Council Rules 2016 (in this case, as drafted after amendments on 18 May 2018). These criteria are engaged when and " if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility including (but not limited) to" one or more of the acts or omissions described in the following sub-clauses (a) to (k).

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

11. The CAC submitted that the Respondent's conduct reflects adversely on her fitness to be a teacher and may bring the teaching profession into disrepute for the purposes of the definition in section 378(1) (at (a)(ii) and (iii)). Appropriately, (a)(i) was not relied on. The Respondent's relationship with the child involved did not arise from her role as a teacher and therefore it is not apt to refer to her child as a "student' in this context. It was submitted further that the conduct was of a character that meets

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[1] *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.

[2] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

the criteria for reporting serious misconduct in Rule 9(1)(a) and/or (j) and/or (k)). As such, the CAC submitted that the test for serious misconduct is met.

12. It is well established, by previous decisions of the Tribunal, that when considering whether particular conduct would bring the teaching profession into disrepute[3] 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 has been lowered by the behaviour of the teacher concerned.[4] More is said about this question, below.

13. It is also well established that a teacher's actions in his or her personal life may bring the profession into disrepute[5] and/or reflect adversely on the teacher's fitness to be a teacher. The principal question is not whether the incident occurred in a teacher's private or professional capacity, but rather, whether the teacher's actions, wherever and whenever they took place bring the teaching profession (as a whole) into disrepute or reflect adversely on his or her fitness to be a teacher.

14. Previous Tribunal decisions demonstrate that the term "fitness to be a teacher" in the definition in section 378(1)[(a)(ii)] 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.[6]

15. As to the requirement that the conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, relevantly, Rule 9(1)(a) relates to where a teacher has used unjustified or unreasonable physical force on a child or young person.

16. Rule 9(1)(j) relates to where a teacher has engaged in any act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of three months' or more.

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[3] (for the purposes of section 378(1)(a)(ii); and for the purposes of Rule 9(1)(k)).

[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].

[5] For example, see NZTDT 2009/05 11 May 2009.

[6] This is the approach taken to "fitness to practise" for the purposes of criminal convictions referred under section 100(1((c) 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."*

17. Rule 9(1)(k) encompasses any act or omission that brings, or is likely to bring, the teaching profession into disrepute.

18. For conduct to amount to misconduct, it goes without saying there must have been a breach of accepted professional standards, in the opinion of the Tribunal. If the Tribunal is not satisfied the test for serious misconduct is met, conduct including (but not limited to) that of the character or severity described specifically in Rule 9(1) may still be the subject of an adverse finding that it was misconduct.

19. However, each case must be determined on its own facts. The Tribunal considers that it cannot be that every departure from accepted professional standards or every unwise or immoral act by a teacher in his or her personal life should amount to serious misconduct for the purpose of section 378, or even misconduct (in a professional sense)[7]. The Tribunal considers that the principal purpose of the disciplinary regime provided for under the Act (to maintain professional standards and the public's confidence in the profession, and to protect the public through the provision of a safe learning environment for students[8]) does not require a disciplinary response to "minor human errors that inevitably occur in professional practice" nor to each and every of "the human transgressions that teachers might commit in their private lives"[9].

20. 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[10]. Personal factors are given full consideration at the penalty stage if a charge is found to have been established.

Relevant standards

21. The Teaching Council's Code of Professional Responsibility (the Code) sets out the standards of 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).

22. 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:

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[7] See Courtney J in *Martin v Director of Proceedings* (High Court, CIV-2006-404-005706) at [23] where this point was made in respect of health practitioners.

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

[9] To use the words of Courtney J in *Martin v Director of Proceedings* (above) at [23].

[10] See *Johns v Director of Proceedings* [2017] NZHC 2843; see also Venning J in *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR at [71] and *Dr E v Director of Proceedings* (2008) 18 PRNZ 1003.

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

23. 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[11].

24. Conduct that damages this trust and confidence breaches the expectation set out in Clause 1.3. The Tribunal acknowledges that may include conduct outside of work that interferes with their performance as a teacher, 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.

25. 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 under the Act for serious misconduct, or misconduct.

26. The task for the Tribunal is to consider whether the teacher has departed from acceptable standards required of a teacher in the circumstances. What those standards are will be the Tribunal's own assessment of what is appropriate *professional* conduct assessed against the purposes of the Act. The Tribunal is comprised of two competent, responsible, and senior members of the teaching profession and a layperson (the Deputy Chair, who is a barrister), and as such is suited to make its own assessment. The Tribunal recognises that the reasonableness of the standards applied should reflect community expectations as well as usual professional practice. As Elias J (as she was then) observed in *B v Medical Council of New Zealand*[12]

> The structure of the disciplinary processes set up by the Act, which rely in large part upon judgment by a practitioner's peers, emphasises that the best guide to what is acceptable professional conduct is the standards applied by competent, ethical, and responsible practitioners. But the inclusion of lay representatives in the disciplinary process and the right of appeal to this court indicates that usual professional practice, while significant, may not always be determinative: the reasonableness of the standards applied must ultimately be for the court to determine, taking into account all the circumstances including not only practice but also patient interests and community expectations, including the expectation that professional standards are not to be permitted to lag. The disciplinary process in part is one of setting standards.

[11] Clause 1.3 Code of Professional Responsibility.
[12] HC AK HC 11/96, 8 July 1996.

27. Previous decisions of the Tribunal have emphasised the importance of teachers understanding the prohibition in the Act on the use of corrective and disciplinary force against children. There have been findings that the use of physical force against children is unacceptable and amounts to a disciplinary offence, even at a lower level[13] and/or where a teacher's use of force has occurred purely in the private sphere[14].

28. The Tribunal accepts that the use of physical force as a corrective or punitive measure will in most cases undermine public trust and confidence in the teaching profession, particularly where the force has been used towards a student in the setting of a learning environment. However, the Tribunal is required to undertake a context-specific, objective assessment of the established facts in each case, as it has done in this case[15].

Facts

29. The Tribunal is satisfied the following facts are established on the affidavit evidence of Mr Rakic:

(a) On Monday, 4 February 2019 the Respondent and her 12-year-old daughter had an argument at home. This resulted in the daughter running away from home to a friend's house[16].

(b) Two days later, on Wednesday, 6 February 2019, the Respondent received a verbal warning by New Zealand Police for 'Assaults Child (Manually)'[17]. She had driven herself and her daughter to the Police station immediately after an incident that had occurred between them, when the Respondent went to retrieve her daughter from the friend's address.

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[13] *CAC v Rangihau* NZTDT 2016/18, at [58]; *NZTDT* 2014/49, 20 May 2014 at page 5*, CAC v Teacher* NZTDT 2016/50, 6 October 2016 *and CAC v Haycock NZTDT* 2016/2, 22 July 2016*.*

[14] See *CAC v Teacher* 2017/16 where the teacher, after finding out that his 13-year old son had been arrested for shoplifting "clipped his son around the ear during an argument"; *CAC v Teacher* NZTDT 2019-51 where during an argument at the teacher's home, the teacher struck his 11-year-old son in the face, pushing him to the ground and causing swelling to his eye; *CAC v Teacher D* NZTDT 2019-51 where a teacher had received a warning for "Assaults Child" relating to her use of force (hitting on the face and being smacked with a wooden spoon) to discipline foster children in her care; *CAC v Teacher* 2019-101, 11 May 2020 (not published) where the teacher had received a written warning for "Assaults Child" following an incident in which she hit her child on the leg with a hairbrush while on holiday, as a form of discipline. The Tribunal considered the teacher's conduct amounted to serious misconduct, albeit close to the border of misconduct; [21] and [25].

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

[16] DRX-6 New Zealand Police Case Summary Report, affidavit of Mr Rakic.

[17] Section 194 of the Crimes Act 1961.

(c) On 30 April 2019, the Teaching Council received a vetting report from Police in respect of the Respondent in which the verbal warning for Assaults Child (Manually) was noted as follows[18]:

> "2019: the applicant has driven herself and her daughter (12 years) to the Police station following an incident where the applicant has allegedly grabbed the girl by the hair and pulled her towards the car. The child retaliated by grabbing the applicants [sic] hair until both falling to the ground. The applicant was verbally warned by Police for Assaults Child (Manually)."

(d) In a response dated 23 July 2019 to the CAC investigation the Respondent stated[19]:

> "I am 6ft tall and although only 12 my daughter is just shy of being the same height but also has the addition of her father's [ethnicity] genes. This is not a child that I could pick up and carry out of the house if my verbal requests were continued to be ignored. I tried firmly to take her by the hand then the wrist and then by the elbow all of which were resisted, and my hands hit away. After 10 minutes or so of this standoff, my daughter's bravado and my determination increasing I grabbed her by the hair. It was tied in a high pony on top of her head – I did not want to cause her any damage or unnecessary pain so took a firm grip around her hair tie and as close to her scalp as possible it was then that I was able to coheres [sic] her to move towards the front door and then the car. [Daughter] continually tried to resist and on several occasions dropped her body weight to the floor in an effort for me to either pull her hair out and cause her significant pain and injury or release my grip neither of which I was willing to do and managed to maintain fluidity in the resistance and force that I was using by moving with her. [Daughter] saw this as an opportunity at one point to grab a fistful of my hair (I have very short hair) and whilst we were interlocked like this, I was able to direct us towards my car. As we neared the car [daughter] stumbled on a rock garden and the two of us fell, from this point I was able to open my car and with no other option available [daughter] got into the front passenger seat of my car. As I began to drive out of the driveway [daughter] began to threaten me with child abuse and calling the police. I offered her my phone and allowed her the opportunity to do so."

(e) Further, the Respondent disclosed information about her personal circumstances at the time of this incident. She referred to the dissolution of her

[18] Exhibit DR-1 of Mr Rakic's affidavit.
[19] Exhibit DR-3 of Mr Rakic's affidavit.

marriage in 2018 [redacted], and the mental, physical and emotional toll of this on her as well the burden of increased financial responsibilities she faced. The Respondent also referred to the effects of these circumstances on her daughter which, she stated, led to her daughter displaying negative behaviours and attitudes at school, culminating in four episodes of her daughter running away from home. The Respondent stated:

> "On this occasion the altercation between her and I occurred after [daughter] had already been away from home for two nights [she had run away]. It was on Waitangi day when I was informed by her younger sister [redacted] that she and her new friend had verbally abused their younger siblings and were not allowing them entry into the house. It was at this point that I chose to go and collect her.
> My arrival incensed hostility and I was met with a strong defiance and unwillingness to cooperate and return home with me. This was the first time I had ever had my daughter challenge me in this way and sadly I did not receive it well."

(f) The day after the incident the Respondent remained distressed and deemed herself mentally and emotionally unfit for work.[20] She disclosed the circumstances of her actions and the incident to her employer at that time.[21]

(g) The Respondent has described the circumstances around her resignation from her employment on 26 February 2019 (following a further three occasions when her daughter ran away from home) as being so she could focus on her and her family's well-being[22].

Findings on the charge

30. The Tribunal has considered the evidence and Counsel for the CAC's submissions carefully.

31. The Tribunal is satisfied the evidence before it establishes that on 6 February 2019 the Respondent grabbed her 12-year-old daughter by the hair and pulled her a short distance by the hair. This was during a mother-daughter argument that occurred on a statutory holiday. The conduct did not occur in a classroom or school environment and therefore was conduct that occurred purely in the private sphere. It was conduct that involved the use of force by a teacher in her capacity as a distressed and frustrated parent rather than in her capacity as a teacher. The Tribunal is satisfied

[20] Exhibit DR-3 of Mr Rakic's affidavit.
[21] Exhibit DR-3 of Mr Rakic's affidavit.
[22] Exhibit DR-3 of Mr Rakic's affidavit.

the use of force was not for the purposes of correction or punishment, but rather to extract her daughter from a troubling and potentially unsafe situation.

Was this conduct serious misconduct or misconduct?

32. The Tribunal, as it is constituted in this case, considers this is one of those cases which, if established as misconduct or serious misconduct (or as conduct which otherwise entitles the Tribunal to exercises its powers under section 404), would extend the category of professional conduct to cover situations which intrude into a teacher's purely personal or private life, just because he or she has the status of a registered teacher.

33. In *Collie*[23] when discussing the test for "bringing discredit to the nursing profession", Gendall J referred to the need for there to be some "logical link" or "connection" to the [nursing] profession, its standards and public expectations of members of the profession, as against purely personal or private behaviour (for conduct to bring discredit to the profession). His Honour referred to examples of behaviour that is entirely personal and private and not likely to bring discredit to the profession such as; cheating at cards, telling lies in a private capacity, unfaithfulness to a partner and attracting financial ruin through failed business activities. He referred to "the other side of the coin" as there may be conduct which does not occur in the actual day to day performance of (nursing) skills but which *bears some direct relationship to the professional behaviour or standing of the health practitioner, or which may arise out of, or have some connection with his or her professional position so as to bring discredit upon the profession.* The Tribunal can see no reason to adopt a different approach to its assessment of the conduct of a registered teacher and whether it may bring the teaching profession into disrepute.

34. In this case, the Tribunal does not consider there is enough connection between the Respondent's established conduct and her membership of the teaching profession. Nor does the Tribunal consider the Respondent's conduct bears a direct relationship to her professional behaviour or standing. The Tribunal is satisfied the conduct has not arisen out of or has any connection with the Respondent's professional position as a registered teacher.

35. In this case the Tribunal is satisfied the Respondent's conduct was a one-off heat of the moment loss of composure by a frustrated parent towards her pre-teenage daughter, in circumstances which the Tribunal considered arose from the Respondent's overwhelming concern for her daughter's safety rather than was

[23] At [18] and [25].

intended to cause her harm. Ultimately the Tribunal considers that it cannot reasonably be concluded that the use of physical force in this case was either unjustified or unreasonable, all circumstances considered. As above, there was no suggestion or evidence that the force that was used was for the purposes of punishment or correction.

36. The Tribunal acknowledges that teachers are expected to role model positive behaviour in their daily lives, including to the students they teach, and to children in general. However, that does not mean that each time a teacher demonstrates a lack of judgement or control over his or her own child in a parenting context, there has been a falling below the standards of the ethical and professional behaviour expected of teachers.

37. The Tribunal considers that the conduct in this case, considered objectively, has no bearing on the Respondent's practice as, or fitness to be, a teacher. Teachers are human. When they happen to be in the role of a parent in a situation where their own children may be displaying negative behaviours, the Tribunal considers that reasonable members of the public would understand that at times, less than ideal responses to that behaviour may occur on the part of the teacher in his or her capacity as a parent.

38. In the Tribunal's opinion, reasonable members of the public, informed and with the knowledge of all the factual circumstances could not reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the Respondent's behaviour. Put another way, the Tribunal does not consider that reasonable members of the public would lose trust and confidence in the whole profession, were they to be informed of the all the relevant factual circumstances.

39. It is for those reasons the Tribunal is not satisfied the first limb of the conjunctive test for serious misconduct is met. It follows therefore, that the Charge of serious misconduct cannot be not established even if the second limb of the test is met. In that regard the Tribunal is satisfied the conduct was of a character that could have been the subject of a prosecution for an offence punishable by imprisonment for a term of three months' or more. As found, the Respondent received a verbal warning for Assault on a child (under the age of 14 years) which is an offence under section 194 Crimes Act 1961 that may be punishable by imprisonment for a term not exceeding two years. However, although the Respondent received a warning for the crime of "Assaults Child", the Tribunal considers that her conduct needs to be considered in its specific context, when determining whether it was a falling short of professional standards, as described above.

40. In the Tribunal's view, the Respondent's conduct was conduct in her private life that is not considered to have any bearing on her status as a registered teacher. There has been no misconduct, in a professional sense.

41. Not having made an adverse finding the Tribunal is not entitled to exercise its powers pursuant to section 404 of the Act to the extent those powers involve the imposition of penalties.

Costs

42. The Tribunal has the power to order any party "to the hearing" to pay costs to any other party, pursuant to section 404(1)(h) of the Act. This power arises "following a hearing of a charge of serious misconduct, or a hearing into any matter referred" to the Tribunal by the CAC.

43. It is usual for an award of costs to be made against a teacher once a charge is established. However, if a charge is not established the Tribunal does not consider it is fair or appropriate to make an order that the respondent teacher pay a contribution towards the CAC's costs (under section 405(1)(h) or the Tribunal's costs under section 404(1)(i).

44. In any event, the CAC did not seek an order in respect of its costs under section 405(1)(h) on the basis that external counsel was not instructed.

45. The relevant principles in respect of awards of costs against the 'unsuccessful' party at the conclusion of disciplinary proceedings (in this case, the CAC) were discussed by the Tribunal in *CAC v McClutchie-Mita.*[24] With reference to the decision of the English and Wales Court of Appeal in *Baxendale-Walker v Law Society*[25] the Tribunal noted the following principles as emerging:

    a. A costs order should only be made against a regulator if there is good reason for doing so. "Good reasons" include that the prosecution was misconceived, without foundation, or borne out of malice or some other improper motive.
    b. Success by a practitioner in defending a matter is not, on its own, a good reason for ordering costs against a regulator. In the context of whether costs should follow the event, the "event" is only one of several factors to be considered.
    c. A regulator should not be unduly exposed to the risk of financial prejudice if unsuccessful, when exercising its public function.

46. The Tribunal has had regard to those principles.

[24] NZTDT 2017/3C.
[25] [2007] EWCA Civ 233.

47. Although the outcome of these proceedings calls into question whether conduct of the nature reviewed in this case should be referred to the Tribunal, there is no evidence or suggestion that the CAC brought and/or prosecuted these proceedings in bad faith, or that the matter was improperly or insufficiently investigated (or prosecuted) by the CAC[26].

48. The Respondent was engaged at the investigation stage[27]. She was not represented by a lawyer or other representative during the investigation and there is no evidence that she incurred costs that would be associated with engaging professional assistance to appear before the CAC (or the Tribunal).

49. The Respondent has not engaged in these proceedings before the Tribunal, at any stage. It was for that reason that the CAC had to proceed by way of formal proof.

50. Having regard to this combination of circumstances the Tribunal does not consider there is good reason to make a costs order in favour of the Respondent. Costs, if any, should lie where they fall.

Publication of Name

51. The CAC made an application for a permanent non-publication order in respect of the name, and any details capable of identifying, the Respondent's daughter. The application was made under section 405(6) of the Act and Rule 34(4) of the Rules.

52. The Respondent did not engage in these proceedings and did not apply for any non-publication orders.

Legal principles

53. The default position is for the names of teachers who are subject to Tribunal proceedings to be published. A non-publication order can only be made under section 405(6) 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.

54. As Counsel for the CAC acknowledged, the principle of open justice is reflected in section 405(3) of the Act which requires the proceedings to be held in public unless the Tribunal orders otherwise. The primary purpose behind the open justice principle

[26] See above, NZTDT 2017/3C.

[27] She responded to the investigator's draft report by stating "Your report reads from an unbiased perspective there I have no issues with this process proceedings as required. I will await the CAC decision"; exhibit DR-9 to the affidavit of Mr Rakic.

in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.[28]

55. The starting point in any consideration of name suppression is this 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*[29] 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."

56. However, as the High Court observed in *Director of Proceedings v Johns*[30] 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 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)[31] and the maintenance of professional standards.

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[28] *CAC v Teacher* NZTDT 2016/27, 25 October 2016, at [66].
[29] [2016] NZCA 474, (2016) PRNZ 452 at [32].
[30] [2017] NZHC 2843, at [169] – [171].
[31] See the discussion of Moore J in *Director of Proceedings v Johns* above at [173]-[178].

57. 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[32]. 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.

58. The Tribunal, as presently constituted, respectfully calls into question whether this is the correct approach to the assessment of applications for non-publication orders under section 405(3) of the Act.

59. In *Dr N v A Professional Conduct Committee of the Medical Council* [33] 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]:

> 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.[34]…"

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

[33] [2013] NZHC 3405.

[34] 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.

60. 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.

61. 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.

62. In *Director of Proceedings v Johns* [35]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:

> 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.

63. The Tribunal adopts the same approach to the threshold of "proper" for the purposes of section 405(3)[36]. Exceptionality is not required[37] and nor even something out of the ordinary. However, there must be sound reasons for finding that the presumption favouring publication is displaced.[38] 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.[39]

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[35] 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.

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

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

[38] Y v Attorney-General above fn. 29 at [29].

[39] *Y v Attorney-General* above fn. 29 at [31].

CAC's application for non-publication order

64. Non-publication of the Respondent's daughter's name is sought by the CAC on the basis that she was 12 years old at the time of the conduct and publication of her name would "inevitably create undue hardship for her". The Tribunal agrees.

65. In respect of the Respondent's interests, the CAC accepted that there is, or may be, an appreciable risk that naming the Respondent will undermine the efficacy of any non-publication order made in respect of her daughter.

66. There is also the fact that the charge has not been established, as the Respondent's conduct is not considered to amount to serious misconduct or misconduct, and therefore is not a matter for professional discipline. In the Tribunal's opinion, publication of the Respondent's name would not likely serve to advance the objectives of the Tribunal to protect the public and maintain professional standards, in those circumstances.

67. The Tribunal has balanced these private interests against the relevant public interest considerations (openness and transparency of disciplinary proceedings, accountability of the disciplinary process, the public interest in knowing the identity of the teacher charged with a disciplinary offence, the importance of freedom of speech and the right enshrined in section 14 of the New Zealand Bill of Rights Act 1990 and unfairly impugning other teachers). The Tribunal considers that the private interests outweigh the public interest in naming the Respondent and her daughter in connection with these proceedings.

68. For these reasons, the Tribunal concludes it is proper to make permanent orders suppressing the names and any identifying details of the Respondent and her daughter.

Conclusion

69. The charge that the Respondent's conduct amounts to serious misconduct or conduct which otherwise entitles the Tribunal to exercise its powers under the Education Act 1989 is not established.

70. The Tribunal's formal orders under the Education Act 1989 are:

71. There is an order under section 405(6)(c) permanently suppressing from publication the name of the Respondent's daughter and any details that are likely to identify her.

72. There is an order under section 405(6)(c) permanently suppressing from publication the name of the Respondent and any details that may identify her.

Dated at Wellington this 23rd day of September 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).