

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/39

UNDER|WĀHANGA of the Education and Training Act 2020

**BETWEEN|I WAENGA I A COMPLAINTS ASSESSMENT
COMMITTEE**

Prosecutor|Kaiwhiu

AND|ME

Respondent|Kaiurupare

DECISION

Date: 6 September 2023

Hearing|Te Rongonga: 28-30 June 2023

Representation|Hei Māngai: Rebecca Scott – Harbour Chambers, for the
Complaints Assessment Committee
Dzintra King, PPTA, for the respondent

Tribunal: Catherine Garvey (Deputy Chair), Lynette Evans, Rose
McInerney, Teresa Rifle

INTRODUCTION

1. This case concerns the teaching and marking of a Level 2 National Certificate of Educational Achievement (NCEA) technology internal assessment. Secondary schools across New Zealand assess students under the New Zealand Qualifications Authority (NZQA) criteria for NCEA qualifications. Students completing NCEA are assessed against Achievement Standards (AS) and Unit Standards (US). Components of NCEA require internal assessment, where schools set and assess student work in accordance with prescribed Standards. The need for integrity and robustness in setting tasks, teaching, marking and moderation of internal assessments cannot be overstated.
2. As well as qualifications and experience in industry the respondent has a post graduate Teaching Diploma, with teaching experience overseas and in New Zealand in intermediate to tertiary educational settings, including NCEA at Levels 1-3. The majority of his NCEA experience is in automotive and engineering workshops, and about one year's experience teaching NCEA Level 1-3 technology before starting at Paeroa College in 2018¹. The charge relates to his marking of Technology Level 2 AS 91356 in 2020, awarding "achieved" or "merit" grades for internal assessments that did not meet the minimum requirements of the Standard.
3. The delivery of teaching and marking of NZQA-prescribed Standards is supported by NZQA-approved clarification materials, Internal Assessment Resources from Te Kete Ipurangi (TKI) including teacher and student guidelines, and published exemplars. Schools appoints a Principal's Nominee "*to liaise with NZQA on behalf of the school in relation to assessments and marking of standards*" and to support teachers to follow NCEA marking and moderation processes.²
4. The primary means of ensuring that internal assessment is carried out in a robust and consistent manner are pre-moderation of the assessment to be set, then internal and external moderation of marking against the Standard. Pre-moderation means the work that a teacher intends to deliver is critiqued by a colleague with relevant subject expertise before teaching commences. Moderation involves a subject expert marking to verify that the teacher's judgement about what meets the criteria for "achieved", "merit" or "excellence" is consistent with the Standard. This can be internal or external in the first instance, but samples of the marking must also be available to NZQA for moderation. NZQA provides advice to schools that marking is "consistent", "not yet consistent" or "not consistent" with a Standard.
5. In 2020 Paeroa College used a website interface called ASSAY to record the procedures followed, grades assigned, storage of assessment material and any relevant comments. The Principal's Nominee was required to review the ASSAY entries before publishing the data to NZQA, thereby formalising submission of the marking.³

¹ Transcript of Evidence 29 June 2023 pp 69-70

² Brief of Evidence 5 April 2023 [REDACTED] at [3]

³ n2 at [12]

THE DISCIPLINARY CHARGE

6. A mandatory report about the respondent's marking was made by the Paeroa College Principal in September 2020. After some delay, an investigation was commenced by the CAC in early 2022 with a final report on 3 June 2022. The Notice of Charge was laid on 15 August 2022 and the particulars read:
 1. The CAC charges that [REDACTED], registered teacher, of [REDACTED], failed to comply with the teaching and marking requirements of NZQA when teaching a Level 2 Hard Materials class at Paeroa College in 2020 when he:
 - a. Awarded all students "achieved" and/or "merit" grades for NZQA Achievement Standard 91356 (the Standard) when the students' work:
 - (i) Did not meet the minimum requirements of the Standard; and/or
 - (ii) Was 80-85% the same as each other; and/or
 - b. Failed to acknowledge that notes he had written on students' scripts and/or drawings he had completed for students as part of the design process for the Standard were not the students' work; and/or
 - c. Posted in the classroom and/or provided students with exemplars of the Standard he had created himself; and/or
 - d. Permitted students to trace drawings and submit them as part of their work for the Standard.
 2. The conduct alleged in paragraph 1 separately and cumulatively amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and Rule 9(1)(g) and/or (k) of the Teaching Council Rules 2016 or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 500 of the Education and Training Act 2020.
7. The hearing took place on 28-30 June 2023. A panel of the Tribunal must consist of three members including the Chairperson or Deputy, but the Chairperson may direct that there be more than three.⁴ On application of the parties a fourth member was appointed to ensure that the panel had membership with recent experience in teaching and marking NCEA. At the conclusion of the hearing, we gave an oral indication of our finding on liability and penalty. We invited the parties to file a schedule of costs and submissions as to costs and non-publication orders. This additional material was received by the Tribunal on 14 August 2023.

THE EVIDENCE

Witnesses and NCEA Documents

8. The CAC called evidence from three staff at Paeroa College:

⁴ R 55(1) Teaching Council Rules 2016

- a. [REDACTED], [REDACTED].
 - b. [REDACTED], [REDACTED].
 - c. [REDACTED], [REDACTED].
9. The CAC also facilitated evidence in person from a member of the Board of Trustees in support of the school's application for permanent non-publication orders.
10. The respondent attended the hearing and gave evidence.
11. The Tribunal did not have the benefit of reviewing key documents, being the students' work that is the subject of this charge, the respondent's marking, the moderator's marking, the external moderator's report, or the resubmitted work and moderated grades. We heard that these materials were destroyed when a storage room was cleared out to make room for other items. NZQA requires secure storage of assessments for two years, and that the location of these to be notified to NZQA to verify they are available for external moderation. Paeroa College has a collection of procedures designed to cover all aspects of NCEA external and internal assessments and which include the need to store assessment materials securely for two years.⁵
12. The evidence about the storage and disposal of the documents was inconsistent. The written briefs of the [REDACTED] and the [REDACTED] state it was put aside securely for safekeeping and accidentally disposed of by a staff member who was unaware of its importance.⁶ When asked to elaborate, the [REDACTED] referred to the storage location being a "kind of a closet" that held only a few items, being "old blinds, that kind of thing" and "candy wrappers on the floor."⁷ Ms [REDACTED] described a safely locked cluttered store room at the back of a technology classroom storing "electrical teaching kits and teaching aids and one part of the storeroom had the internal moderation."⁸ Conversely the ASSAY form, which we received after the CAC evidence was concluded, verifies that the assessment materials were stored in the [REDACTED] and available for moderation. We accept that the work was disposed on a day that the [REDACTED] was not at school, and while some work was moved to storage elsewhere the subject work was not located among this.

The Facts

13. The respondent commenced employment at Paeroa College in July 2018, at which time disciplinary proceedings were on foot in relation to marking issues at his previous school. The respondent said he disclosed this at his interview with the then-[REDACTED]. In October 2018 the Tribunal (differently constituted) held an undefended hearing on the papers and found the respondent guilty, imposing conditions and a censure⁹. The respondent addressed a staff meeting at Paeroa College to discuss

⁵ Paeroa College National Certificate of Educational Achievement Procedures, section 23 Storage of Assessment Material

⁶ Brief of Evidence [REDACTED] 5 April 2023 at [57]; Brief of Evidence [REDACTED] 5 April 2023 at [39]

⁷ n1 at p47

⁸ Transcript of Evidence 28 June 2023 p107 and p140

⁹ CAC v [REDACTED]

this decision. Mentoring was one of the penalty conditions and the █████ agreed to act as his mentor.

14. In 2020 the respondent was responsible for teaching 24 assessments, which were mostly automotive and engineering assessments delivered as US. US materials are usually prepared by an external industry provider, and some are also marked by the external provider. The respondent taught two AS, which were Level 2 and Level 3 technology assessments.
15. The respondent chose to teach AS 91356 to his Level 2 Hard Materials class and provided the AS, Clarification, mark sheet and the planned task to his █████ for pre-moderation. AS 91356 requires students to develop a conceptual design for an outcome and is a generic technology standard that can be taught in any of the technology subjects.¹⁰ Ms █████ expressed reservations about the class not starting with a US to familiarise themselves with key concepts and technology language but agreed that the material met the requirements of the Standard.¹¹
16. Marking requirements are established by the content of the Standard. To earn an “achieved” grade students must develop a conceptual design for an outcome that involves:
 - a. establishing potential conceptual designs though generating and evaluating design ideas that are informed by research, including the analysis of existing outcomes.
 - b. using evidence from research and functional modelling including stakeholder feedback to evaluate conceptual designs.
 - c. selecting and communicating a final conceptual design for an outcome.
 - d. explaining the outcome’s potential fitness for purpose.¹²
17. Clarification documents provide guidance based on work that has been moderated by NZQA in previous years, to assist the marker to assess what is required to meet the Standard. The clarification for AS 91356 highlights research, functional modelling, stakeholder feedback from more than one stakeholder.¹³
18. Ms █████ said that the respondent was on notice that students must provide sufficient depth of evidence for AS 91356 because of an email she sent on 20 April 2020 with the subject heading “RE: External moderation” about the NCEA external moderation process of a Level 3 technology Standard, and which concluded:

Refer to the Clarifications for this standard and Level 2 91356, to establish the depth of evidence required, in the Technology pages of the NZQA website.

¹⁰ n6 at [37]

¹¹ Internal Moderation Cover Sheet 2020. The date of verification for critiquing (pre-moderation) is 12 March 2020.

¹² Achievement Standard 91356 Version 3, Generic Technology 2.3 “Develop a conceptual design for an outcome”, NZQA 2019.

¹³ NZQA Level 2 Technology clarifications, 91356: Develop a conceptual design for an outcome, December 2016.

19. To scaffold the class through the assessment the respondent prepared a booklet, which he did not give to Ms [REDACTED] for pre-moderation as he prepared most of it during the COVID-19 lockdown to assist students with tasks they could tick off.¹⁴ The Agreed Bundle contained only the odd pages of the booklet, with tasks four to six and 10-12 missing from a total of 15 tasks. The title page is headed Student Task and includes the explanation:

The Following shows the Expectations for level 2 Technology (HDM).

The Task Illustrates the Design Process and as a guide for the Individual student.

20. The respondent gave the class a copy of the AS, the NZQA clarification, TKI Student guidelines and his Student Task. The concept was a product they could use to help clean their room and have fun doing so, and the respondent said that they brainstormed the idea of a basketball hoop to throw items through when cleaning up.

21. The nationwide COVID-19 lockdown closed schools on or about 25 March 2020. The term one school holidays were brought forward and after the holidays several weeks of lessons were taught remotely as the lockdown continued until in-class learning could resume at Paeroa College on 15 May 2020. The respondent prepared bundles of trial materials for students to collect and test at home. When classes resumed in person, he taught for several weeks before the students handed in their assessments near the end of term two.

22. The respondent graded the work at “achieved” or “merit” and gave it to the [REDACTED] with his mark sheet. Common practice is to provide samples of work on the grade boundaries for moderation, although that is not a hard and fast rule. The respondent said he gave Ms [REDACTED] the work for “*pre-assessment*”, expecting students to have time to improve what was submitted if needed. He said that he did not give Ms [REDACTED] all of the required paperwork for moderation for this reason, but his evidence as to what else would be provided was vague.¹⁵

23. Ms [REDACTED] was clear that there was no pre-assessment process, and she received the work for moderation. She moderated the work over the school holidays and considered it was all at the level of “not achieved.” She met with the respondent for a mentoring session on 22 July 2020 and her record of that meeting outlines several concerns:

Discussion around requirements for NZQA. I had moderated 2 Technology assessment tasks set by [REDACTED] and 1 Unit Standard. With the Unit Standard [REDACTED] had developed the assessment tasks (although these were available from the industry provider). Student comments were brief but the standard was met. However, with the Achievement Standard my opinion of the grade achieved and his grade differed. We discussed how students were not at an Achieved standard as there was no connection between stakeholder feedback and the development of the conceptual design. Stakeholder feedback was not explicit as required for the standard. The standard had undergone external moderation last year and although [REDACTED] had developed a checklist sheet for student use the assessment task needed to make it clear that stakeholder feedback is required to show the development of the concept. I gave hard copies of the standard, the

¹⁴ n1 at p130. The respondent said he did email this to Ms [REDACTED] after it was written.

¹⁵ n1at p138

feedback from external moderation, clarification of standard and a copy of an exemplar at an Achieved standard to [REDACTED]. I also had concerns around some of the students' work being authentic. No students had referenced their sources and some work looked to be a blatant cut and paste. Students will be given the opportunity to reference their work and hopefully they will be able to identify that stakeholder feedback needs to be explicit. I will look at these standards again following resubmission. I reminded [REDACTED] about following the school's procedures with ASSAY and markbook. We will meet next week."

24. Ms [REDACTED] said that she "*would have told [the respondent] that the students needed to identify what was missing themselves and could be reminded that they needed to reference their work and that [she] would moderate the work again after it had been resubmitted.*"¹⁶ The respondent did not recall this meeting being on 22 July, saying the first he knew of concerns was at a later meeting with the [REDACTED] however Ms [REDACTED] dated record is consistent with her account.

25. The respondent re-read the work overnight and could not reconcile the moderated grades with his marking. He returned the work to Ms [REDACTED] with the marks unchanged and without giving students an opportunity to resubmit. He told the Tribunal that he wanted to further discuss the concerns, but that did not happen.¹⁷

26. Ms [REDACTED] said that disagreement between a teacher and moderator should lead to "*a good dialogue*" but that it would be unusual for feedback to be disregarded and issues should be raised with the [REDACTED] and recorded in ASSAY.¹⁸ Marked assessments can only be returned to students for improvement where resubmission is appropriate or for a Further Assessment Opportunity (FAO). Resubmission means a student is given time to remedy a small issue without reteaching or the addition of substantial content, and they are required to identify for themselves what needs to be remedied. The [REDACTED] said that while NZQA does not stipulate a timeframe, as a guide resubmission should be achievable within 50 minutes or an hour.¹⁹ By contrast, a FAO means the original work is not used and the AS is re-taught with a new task set for the whole class.

27. The school's NCEA Procedures confirm that resubmission involves a single opportunity for students to improve their already submitted work and is limited to specific aspects of the assessment that students are capable of discovering and correcting immediately. And:

The opportunity for students to improve their work through resubmission is lost if teachers do not promptly return work to students. Because there is no opportunity for further teaching or learning, the student is disadvantaged if there is a time lag between the initial assessment and the opportunity for resubmission.²⁰

28. When the respondent did not offer a resubmission, Ms [REDACTED] escalated the matter to the [REDACTED]. She agreed that a further discussion could have been held about resubmission but said she was told not to speak to the respondent. Ms [REDACTED]

¹⁶ n6 at [45]

¹⁷ n1 at p140

¹⁸ n6 at [25]

¹⁹ n8 at p 34. At the time work at any grade was able to be resubmitted but Ms [REDACTED] clarified that currently only work at "not achieved" level may be given this opportunity.

²⁰ n5 at section 6 "Further Assessment Opportunities and Resubmission."

scheduled a meeting with the respondent, Ms [REDACTED] and another [REDACTED] for 4 August 2020. The outcome letter records that he is “*not consistently teaching and marking NCEA work at the level required to ensure the validity of student grades*” and instructs the respondent to rectify the issues raised and to seek relevant professional development and internal support.

29. On 13 August 2020 Ms [REDACTED] showed samples of the work to a local colleague with experience as a moderator for NZQA. The external moderator shared Ms [REDACTED] opinion (unfortunately her report was also discarded). Ms [REDACTED] instructed Ms [REDACTED] to formalise her concerns in writing, which she did on 14 August as follows:

- Research notes showed no referencing and a number of students had the same or very similar answers.
- The research was not used to make decisions around the conceptual design.
- There was no on-going stakeholder feedback and in some cases no mention of who the stakeholder was. There was mention of a consultant.
- Stakeholder feedback was not being used to develop the concept. Sketches were used as the functional modelling. They appeared to have been produced without feedback or developing the concept. They did not relate to the brief. In some instances all sketches appeared the same.
- Some of the sketches looked to be of a different standard of others in the portfolio of work. They were more refined.
- Photographic evidence of the testing does not show what was being tested by students. No validity.
- The brief allowed for this standard to be met if specifications provided were rigid enough. There were not any written specifications.
- Students had developed a mock-up using cardboard but they did not understand the purpose of this as a modelling tool or how it related to the conceptual design.

30. Ms [REDACTED] spoke to one student from the class “*whose sketches were in question*” because of disparities in quality, and said he initially told her that it was his work but when shown his three sketches for comparison said that the respondent “*had helped him with it*”. The nature of that help was not described. It appears that Ms [REDACTED] asked the external moderator about a teacher ‘helping’ with sketches.²¹ In oral evidence she said the student told her the respondent had done the sketch.²²

31. Ms [REDACTED] taught the class on 19 August 2020 and emailed the [REDACTED] afterwards with an amended version of her report and noting that “*not one of [the students] could actually tell me what conceptual design meant.*”

32. After Ms [REDACTED] submitted her report she noticed material relating to the assessment displayed on the wall of the respondent’s classroom. Her written brief said this contained answers, but this was not confirmed in oral evidence when she clarified that it was sketches only. Likewise, the [REDACTED] saw and photographed the exemplar and told the Tribunal she could not recall any writing, just sketches.²³ These photographs were deleted so not available to the CAC or Tribunal.

²¹ Report 14 August 2020

²² n8 at p112

²³ n8 at p141 ([REDACTED]); n1 at p 47 [REDACTED]

33. By letter dated 21 August 2020 the respondent was put on notice of a meeting to discuss allegations of serious misconduct based on the matters in Ms [REDACTED] report. A meeting on 31 August was attended by the [REDACTED], respondent, [REDACTED], and representatives from the New Zealand School Trustees Association and PPTA. There is no formal record of the meeting, just annotations by the NZSTA representative on a copy of the respondent's written response to the concerns that he prepared for the meeting.
34. It is clear that at the meeting the respondent was defensive, and conceded little other than that there was no referencing. (Before the Tribunal, he appeared to confuse referencing with research, saying "*I saw they didn't maybe put the URLs or where they found it but there is heaps of referencing. There was quite a bit of referencing*"²⁴). He conceded there was "*room for improvement*" with stakeholder feedback and appeared to agree it was at a "*low level*." He wrote that he was "*gutted and confused*" and acknowledged the need to learn and move forward. Although his written response displayed a lack of insight it concludes:
- I am professional and mature enough to learn from this happening and apologise to the school for any concerns caused.
35. The investigation did not reach a formal conclusion as the respondent resigned on 3 September 2020.
36. At some point the class were assisted by Ms [REDACTED] to resubmit. The Internal Moderation Cover Sheet entry in ASSAY records the respondent as the teacher in charge, and that the assessment materials were critiqued on 12 March 2020. Ms [REDACTED] is named as the person completing verification and in completing the form, verified that assessment materials and student work were stored in the Home Economics office. The grades for three students are documented, with columns for the respondent's grades, the moderated grades and the final grades – all marked with an "A" for "achieved." The column for discussion comments has three entries stating that the work was at low achieved level, with a note for one student being "*Research should have been referenced, Research implied in conclusion.*" There is no comment about any disagreement over marking, or that the work was resubmitted. The form is dated 17 September 2020.

DISCUSSION

37. In reliance on the initial issues identified by Ms [REDACTED] and what she hoped could be achieved on resubmission, we focus on referencing and stakeholder feedback as the areas in which the respondent passed work that did not meet the minimum requirements of the Standard. The authenticity of the work was also in question.
38. The provision of references to verify the research done is necessary to meet the Standard. The [REDACTED] explained that students are taught from Year 9 to list the sources used in their work for assessment, using APA referencing²⁵. The respondent did not strongly contest the allegation of a lack of referencing. His evidence suggests he did not expect formal referencing was required for AS 91356.

²⁴ n1 at p116

²⁵ America Psychological Association style referencing; n8 at p36

39. The need for stakeholder feedback to be evidenced in the development of the work produced by the student is also a minimum requirement of the Standard. The respondent said that the students used him and another teacher as stakeholders and over lockdown were to consult people at home. He said he understood the importance of stakeholders, and the quality of feedback could have been better.²⁶
40. The respondent said that his Student Task included stakeholder feedback. The Agreed Bundle held a complete copy of a task developed for Level 3 technology students, and he said tasks 10 and 11 titled “Informative Consultation” appeared the same as his Level 2 task. Students were to consult with a named and knowledgeable person to discuss their ideas and plans and use the information gathered to improve their work. The task required at least three different statements about what the student learned from talking to other people. Ms [REDACTED] and the respondent disagreed over the terminology used, with the respondent treating “*consultation*” as analogous to “*stakeholder feedback*”; the critical issue is that the respondent deviated from the strict requirements of the Standard in simplifying the task for his students.
41. As for authenticity, this is a minimum requirement of all NCEA assessments and is defined in NZQA guidelines as “*the assurance that evidence of achievement produced by a learner is their own.*”²⁷ The ability to produce authentic work is compromised when a student copies from another student or source, a teacher gives too much guidance, or the student obtains specific answers from a source such as an exemplar.
42. NZQA expects teachers to instruct students on delivering work that is authentic, to manage the potential for inauthenticity, and to have checks in place to verify the authenticity of work submitted for marking. Paeroa College’s NCEA procedures required students to sign an authenticity declaration²⁸ although the respondent did not require this step. The authenticity concerns in addition to the lack of referencing were work appearing similar or identical, differing quality of sketches and different writing within the same piece of work.
43. Ms [REDACTED] note of 22 July 2020 does not refer to the respondent’s handwriting or drawings on student work, but her brief refers to “*different handwriting on the same piece of work, some of which appeared to be Mr [REDACTED] who had distinctive writing*” and continues:

Sometimes teachers do write on student’s work, for example, if they ask the student for clarification and the student gives a verbal response, that may be written by the teacher. Whenever a teacher writes on a student’s work that is being marked, best practice is for the teacher to write beside their handwriting the reason for the annotation, such as “verbal response from student” and then sign that annotation. It is preferable, however, that teachers do not annotate students’ work in any way when that work is being submitted for marking.²⁹

²⁶ n1 at p88

²⁷ NZQA Generic Resources and Guidelines-Authenticity

²⁸ n5 section 8; n2 at [20]

²⁹ n6 at [51]

44. The ██████ observed the respondent's "*distinctive handwriting*" on some of the work³⁰ but clarified this was "*not lengthy*" being one to three words of labelling³¹. The respondent was ambivalent about whether he had done any writing but said if he did it was headings as instructions about what came next.³²
45. As for drawings alleged to have been done by the respondent this relied on Ms ██████ discussion with the student who said the respondent had helped him. A teacher drawing on work submitted for marking is not acceptable. The respondent denied doing sketching or drawing for students.³³ The original allegation of helping was non-specific; had the student said at the time the drawing had been done by the respondent, we consider Ms ██████ would have said this unequivocally at the outset.
46. With regard to the so-called exemplars on the wall of the classroom, there is no dispute that the respondent displayed pictures of some sort. The respondent permitted his students to trace these as a starting point from which they were then to develop their design and drawings. He erred in permitting students to trace for an assessment, but we accept the evidence that he did not post written answers.³⁴

LIABILITY FINDINGS

47. The burden of proof rests with the CAC to satisfy the Tribunal that the particulars of the charge have been proved on the balance of probabilities.
48. Despite this being a defended hearing, counsel for the respondent did not cross-examine the CAC witnesses on most of the contested issues, or indeed at all in the case of the ██████. Cross-examination is expected on significant contested issues and assists the Tribunal in our assessment of the evidence and to understand a respondent's case. However, a lack of cross-examination does not mean that we must unreservedly accept unchallenged evidence. We have weighed all of the evidence that we received. For the reasons following we find that particulars 1(a)(i) and 1(d) are proved but that, on balance, the evidence does not establish particulars 1(a)(ii), 1(b) and 1(c).

Particular 1a(i) - the respondent awarded all students "achieved" and/or "merit" grades for NZQA Achievement Standard 91356 when the students' work did not meet the minimum requirements of the Standard.

49. As described, the minimum requirements of AS 91356 are set out in the Standard itself, with guidance in supplementary materials.
50. We accept that the students' work did not include references to verify the research done. The addition of references for completed research may be a suitable matter for resubmission, and we consider that the respondent ought to have given his class the opportunity when Ms ██████ advised him to do this.

³⁰ Brief of evidence 5 April 2023, ██████ at [43]

³¹ n1 at p47

³² n1 at p136

³³ n1 at p116, p118

³⁴ n1 at pp136-137

51. We also accept that the work contained insufficient evidence of stakeholder feedback and development of conceptual designs in response to that feedback. The respondent did not demonstrate that he had the correct understanding of how stakeholder feedback ought to have been utilised to achieve this minimum requirement of the Standard. His Student Task paid insufficient attention to the Standard, and he marked incorrectly because of this.
52. As the minimum requirements of referencing and stakeholder feedback were not met, the work could not be graded as “achieved” and particular 1(a)(i) is proved.

Particular 1(a)(ii) – that the students’ work was 80-85% the same as each other

53. Particular 1(a)(ii) relies on a figure estimated by Ms [REDACTED] and the [REDACTED] to quantify the similarities seen in work across the entire class. The intended inference is that the work was copied from the respondent, a student or some other source so was not authentic and should not have been marked as the student’s own.³⁵
54. This determination was not straightforward, hindered by the lack of primary evidence. The issues identified certainly show shortcomings in teaching. The choice of concept, the prompts in the Student Task, and the provision of website resources and sample drawings meant that similarities were likely. However, no-one raised the issue of authenticity with the students, their parents or guardians, or the [REDACTED] which was imperative if they had submitted work that was not their own for marking.³⁶
55. Further, we consider that if a substantial portion of the work was inauthentic, this points to the need to complete the assessment afresh. Referring to the opportunity to resubmit, Ms [REDACTED] wrote after her initial meeting with the respondent that “[s]tudents will be given the opportunity to reference their work and hopefully they will be able to identify that stakeholder feedback needs to be explicit.” We take this to mean that addressing these matters would resolve the authenticity concerns sufficiently to enable students to achieve, given that substantial new content could not be added.
56. We find this particular is not proved.

Particular 1(b) - that the respondent failed to acknowledge that notes he had written on students’ scripts and/or drawings he had completed for the students as part of the design process for the Standard were not the students’ work

57. We accept the evidence that it is seldom appropriate for a teacher to write on a student’s work that has been submitted for marking, and if this happens, best practice is to annotate the comments clearly and sign the annotation. However, we were unable to get a specific understanding of what the respondent had written on the assessments, and the evidence was equivocal as to whether this constituted marked content or some other annotation that the respondent failed to sign.

³⁵ The Principal’s letter advising of a formal investigation states “*the work of students on this assessment was 80-85% the same. Despite clear issues of inauthenticity, you awarded ‘achieved’ or ‘merit’ grades to all students.*”

³⁶ n5 section 9 “Breaches of the Rules.”

58. As to drawings said to have been completed by the respondent, the evidence of this was Ms [REDACTED] reference to the student who told her the respondent helped with his sketches. The statement that he had drawn a complete sketch was first made at the hearing. The respondent denies sketching or drawing for students.
59. While we find that the respondent wrote on some of the work, on the balance of probabilities we find that his 'help' did not include completing drawings. The evidence is insufficient for this particular to reach the threshold warranting discipline.

Particular 1(c) - posted in the classroom and/or provided students with exemplars of the Standard he had created himself.

60. In the context of NCEA Standards the term "exemplar" has a specific meaning, being part or the whole of a piece of work from previous assessments used as an example to show key aspects of a Standard and is intended primarily to assist teachers to make judgements about work sitting on grade boundaries. Exemplars are available on the NZQA website and are usually annotated for guidance.
61. The CAC's evidence does not establish that the respondent displayed "exemplars" in his classroom within the specific meaning that this term has in NCEA. We find this particular is not proved.

Particular 1(d) Permitted students to trace drawings and submit them as part of the work for the Standard

62. The respondent confirmed that he permitted students to trace drawings or pictures from material put on the wall. He saw it as one means of teaching size, proportion, and detail.³⁷ He erroneously maintained that the sketches produced by students were not part of the 'final concept' work that was marked.
63. We prefer Ms [REDACTED] evidence that the sketches were a necessary part of the assessment and were submitted for marking. Permitting students to trace work that is to be assessed is not appropriate in the context of the relevant AS, where students are marked on their own conceptual design and representation of that concept, whether through drawings, models or otherwise.
64. We find this particular proved.

Serious Misconduct

65. For the reasons following we find that particular 1(a)(i) separately meets the test for "serious misconduct" and particular 1(d) amounts to serious misconduct when considered cumulatively with 1(a).
66. Under s 10 of the Act "serious misconduct" means conduct by a teacher:
- a. That –
 - i. adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or

³⁷ Respondent's written response to Ms [REDACTED] report, August 2020

- ii. reflects adversely on the teacher's fitness to be a teacher; or
- iii. may bring the teaching profession into disrepute; and

b. that is of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.

67. It is well established that this test is conjunctive, meaning we are required to find one or more limbs of s 10(1) is made out as well as one or more of the types of conduct under r 9. Rule 9 is a non-exhaustive list of criteria for mandatory reporting by an employer who has reason to believe a teacher is in breach of the Code of Professional Responsibility. Rule 9(1)(g) refers to acting dishonestly in relation to the teacher's professional role or committing theft or fraud. Rule 9(1)(k) refers to "*an act or omission that brings, or is likely to bring the profession into disrepute*".
68. We heard oral submissions from counsel at the conclusion of the evidence (supported by extensive written submissions from Ms Scott).
69. For the CAC Ms Scott submitted that all limbs of s10(1)(a) are met. The CAC emphasised that the respondent did not admit to a lack of competence or understanding of the requirements for NCEA marking, and intended the marking schedule he gave for moderation to be final. As to s10(1)(a)(i) Ms Scott submitted that learners were affected adversely because their work was not assessed in accordance with the requirements of the AS, and the need for resubmission, which was delayed by the respondent's decision not to give this opportunity immediately.
70. Ms Scott submitted that the respondent showed a lack of integrity in his setting and marking of the task and the fact that his previous disciplinary conviction was for similar conduct indicates a pattern of behaviour that reflects adversely on his fitness to be a teacher: s 10(1)(a)(ii).
71. With regard to s 10(1)(a)(iii), the CAC submitted that the respondent's failure to follow verification of authenticity processes, NZQA and the school's marking requirements, and the advice of the moderator is all conduct which may bring the teaching profession into disrepute. That is, a reasonably informed member of the public would objectively consider the respondent's conduct to lower the good standing and reputation of the teaching profession. Further, when concerns were raised with the respondent in mid-2020 the CAC submit that his early responses were unprofessional, particularly his criticism of Ms [REDACTED]. The CAC highlighted the importance the Code places on integrity, including a commitment to high quality teaching, respectful collaborative relationships, high standards of professional behaviour and acting in the best interests of learners.
72. For the respondent, Ms King submitted that significant differences in understanding were apparent between the respondent and the CAC witnesses as to the requirements of moderation and assessment. The lack of primary evidence posed a significant problem as these differences could not be assessed in relation to the work that was at the heart of these proceedings. It was submitted that:

[The respondent] genuinely believed that what he was doing was in the best interests of the students. He was not setting out to defraud anybody or be dishonest about anything.

73. Ms King acknowledged that he had a lack of understanding of the NCEA processes involved and said that in some cases *“the difference between misconduct and competence are blurred and I think we clearly see that here.”*
74. We agree with Ms Scott other than as to the matter of intent. We consider that learners were adversely affected by the way their assessments were taught and marked, and the delay in resubmission. We note Ms [REDACTED] evidence that there was *“confusion and demoralisation amongst his AS 91356 class about the grades and that their work did not meet the achieved standard. Following the opportunity for resubmission, some but not all of the students reached an achieved standard.”*³⁸
75. We agree there were areas where the respondent’s conduct reflects adversely on his fitness including failing to pre-moderate the task he relied on, to ensure minimum requirements were met before awarding “achieved” grades, and to follow instructions regarding resubmission.
76. We also agree that the conduct has the potential to reflect adversely on the profession, through the public expectation of commitment to accepted procedures, quality teaching and positive professional relationships.
77. The respondent did not have a strong grounding in setting and marking technology Achievement Standards. There were shortcomings in the Student Task he created so he did not teach at a level that equipped the students for assessment. His marking did not reflect the minimum requirements of the Standard. However, we accept Ms King’s submissions and did not consider that the respondent made a dishonest attempt to teach or mark below standard. We perceive that his defensive response and the school’s fairly rapid escalation towards a disciplinary investigation influenced the ability to first address the issues as matters of competence.
78. The missing assessments, marking schedules, moderator comments and photographs impacted our findings. We have considered the apparent conflict between the serious allegations made about the respondent’s teaching and marking, and the fact that the work was considered amenable to resubmission for the addition of references and explicit inclusion of stakeholder feedback.
79. We consider on the balance of probabilities that the respondent intended to teach the key elements of the Standard to his students but did not pay sufficient attention to the AS itself in his teaching or properly understand what was required to mark at “achieved” level and therefore did not mark in accordance with the Standard. The conduct meets the threshold for “serious misconduct” under each limb of s10 and r 9(1)(k).

Penalty

80. The CAC sought censure and cancellation of the respondent’s registration, while Ms King submitted that annotation and censure are appropriate.

³⁸ Further Statement of [REDACTED] 20 June 2023 at [19]

81. The principles applied to determine penalty under s 500 of the Act are well known and we have taken these into account.³⁹ Disciplinary proceedings do not have a primarily punitive purpose but are to promote the maintenance of professional standards and protect the public. There is an inevitable emphasis on protecting students, and the scope of conduct that may adversely affect students is broad. The public interest is high in an education system that promotes quality and consistency in teaching and marking, and robust oversight of these processes.
82. We should impose the least restrictive penalty that is appropriate in the circumstances from the range of penalties available. Cancellation is reserved for the most serious cases and is appropriate where:
- (a) the offending is sufficiently serious that no outcome short of deregistration sufficiently reflects the adverse effect on the teacher's fitness to teach, or its tendency to lower the reputation of the profession; and
 - (b) the teacher has not taken adequate rehabilitative steps to address his or her conduct. This may indicate a level of ongoing risk that leaves no option but to deregister.⁴⁰
83. The respondent's earlier disciplinary charge perhaps meant a submission for cancellation was likely, given similarities in the conduct in the charges. The first matter was dealt with on the papers and the respondent's mitigating circumstances (primarily ill-health) were reflected in the penalty decision.
84. We find that the respondent does not pose such risk nor is the conduct so serious that his registration needs to be cancelled. The disciplinary functions of the Act can be met by a period of suspension and appropriate conditions. We do not perceive him as so lacking in insight that he is not amenable to professional development, which is important given his lack of experience with Level 1-3 NCEA Achievement Standards. We also consider there are other areas where he could usefully contribute.
85. A period of suspension and conditions reflects the seriousness with which we view the charge but provides the respondent an opportunity to return to teaching should he wish to. Conditions should meet the shortcomings that we have found and serve the purpose of protecting the public and support the respondent to improve his teaching practice. Conditions will be imposed as follows:
- a. to restrict the respondent to teaching junior classes below NCEA Level 1-3 (or tertiary as he has done) unless and until he completes further training/professional development.
 - b. professional development should include NZQA-delivered or other accredited courses in the delivery and marking of NCEA Achievement Standards.

³⁹ *Roberts v Professional Conduct Committee* [2012] NZHC 3354 at [44]-[51]

⁴⁰ *Complaints Assessment Committee v Fuli-Makaua* NZTDT 2017/40 at [54]

- c. Mentoring with oversight from the Teaching Council confirming agreement of the mentor relationship and submission of reports acknowledged by the mentor and respondent.

86. Censure is also appropriate.

COSTS

87. The Tribunal reconvened in private on 31 August 2023 following receipt of written submissions and supporting material from the parties as to costs and non-publication orders. In accordance with the Practice Note⁴¹ counsel for the CAC submitted a schedule of costs and submissions in support of its application for a contribution of 50% costs. The respondent filed submissions and a brief supporting affidavit opposing an award of costs.
88. The costs and disbursements set out in the CAC's particularised schedule total \$42,120.33. While at the high end this was a defended hearing over three days with no Agreed Summary of Facts, held at a location that required the parties and counsel to travel and stay over two or three nights. The need for reply statements increased the preparatory work required to be undertaken by counsel.⁴² The costs of the Tribunal are \$25,338.75.
89. The CAC sought a 50% contribution to costs, submitting that there was no basis for any reduction from this starting point. Ms Scott submitted that the respondent's conduct prolonged the proceedings as his approach necessitated the CAC preparing lengthy statements and calling viva voce evidence; that he would not agree to a summary of facts and was directed to file a second brief of evidence due to inadequacies in his first, which in turn required the CAC to prepare evidence in reply.
90. Ms King submitted that there should be a "*significant diminution*" in costs on the grounds that the respondent was partially successful in defending the charge, the difficulties posed by the absence of primary evidence, and that he will suffer financial hardship. The respondent filed an affidavit which outlined a substantial reduction in earnings since leaving the teaching profession. There was limited detail such as evidence of such as expenses, assets and liabilities.
91. The Practice Note provides guidance as to costs. The starting point for a defended proceedings is 50% with aggravating and mitigating factors applied to adjust that figure either upwards or downwards. We have considered the following mitigating factors:
 - a. the costs order should reflect the respondent's partial success.
 - b. the primary evidence supporting the charge was not available to guide the defence or assist the Tribunal, due to no fault on the part of the respondent.

⁴¹ Practice Note of Teachers Disciplinary Tribunal: Practice note 1: Costs, 1 April 2022

⁴² For other cases involving substantial costs see e.g. *Complaints Assessment Committee v E* [2018] NZTDT 950 where costs for a one day hearing were \$41,803, reduced by the Tribunal for the purposes of an order to \$23,516; and *Complaints Assessment Committee v Ashton* NZTDT 2015/39C.

- c. the respondent has suffered a substantial drop in income after losing his teaching position including a period of unemployment and then employment in a lesser-paid role.

92. Factors that support an order for costs include:

- a. the lack of an Agreed Summary of Facts. We accept the CAC's submission that a draft was prepared (as also referred to in the Schedule of Costs). The purpose of an Agreed Summary of Facts is to abridge preparation and hearing time.
- b. the limited cross examination of the CAC's witnesses despite this being a defended hearing.
- c. significant elements of the charge were proved that in themselves amounted to serious misconduct.

93. In the circumstances we make an order that the respondent contribute 30% of the costs of the CAC and Tribunal but reduce the total Tribunal's costs to reflect that it was on the instigation of the CAC and the respondent that the Tribunal appoint a further member.

NON-PUBLICATION ORDERS

94. Interim non-publication orders were made before the hearing in favour of the respondent, the school and staff and any students. The default position is that of open justice, with hearings held in public. Under s 501 of the Act the Tribunal may make orders for the non-publication of the name and identifying particulars of any person or any part of the proceedings where it is "*proper*" to do so, having regard to the interests of any person and the public interest.

95. The Tribunal has a discretion in this matter: if it considers there are grounds that make an order proper then an order may be made. The threshold is lower than the requirement for exceptional circumstances in court proceedings but there needs to be a sound reason for an order to displace the presumption of open reporting.⁴³ Each determination is dependent on the particular facts of the case and the competing private and public interests that are at play. The Tribunal requires something more than an assertion that a person will suffer harm due to publication, as some embarrassment or upset is an anticipated consequence of this. This is so for family members, and employees/schools as well as the teacher who is the subject of the charge. Evidence of appreciable risk or likely consequences assists the Tribunal to make an objective finding.

96. Applications for permanent non-publication orders were made by the Board of Trustees of Paeroa College on behalf of the school, identified staff and students. The respondent sought suppression of his name and identifying particulars. An application opposing any permanent orders was made by NZME Publishing Ltd (NZME).

⁴³ See for example *Complaints Assessment Committee v Waretini (aka Beckett)* [2021] NZTDT 4 at [117] – [118].

97. The application for Paeroa College was made by a member of the Board giving oral evidence to the Tribunal in support of a written application. Mr [REDACTED] gave eloquent evidence setting out the following factors (in summary):

- a. some current students are siblings of those who were in the affected class.
- b. the school would “*inevitably*” be subjected to “*negative inferences*” being drawn regarding its part in the proceedings, which would be exacerbated by the school being part of a small and proud community.
- c. doubt could be cast over the students who were taught by the respondent and students and staff would be identifiable because of the size of the school roll and faculty, and the dates in the charge.
- d. media interest and negative publicity will impact the wellbeing of current students and their sense of pride in the school. The earlier publicity regarding the respondent’s former school was said to unfairly cast criticism on the school.

98. The NZME application opposing non-publication relied on the In-Court Media Coverage Guidelines 2016. General submissions were made as to the principle of open justice, the importance of the media reporting on hearings and the public interest in such reporting. More specifically to this case NZME submit:

- a. the respondent’s name was published in the earlier disciplinary proceedings, notwithstanding the health concerns he was experiencing at that time.
- b. public shame or embarrassment is a natural consequence of disciplinary proceedings. Publication will not cause additional stress or harm over and above the stress of the proceedings.
- c. reference is made to High Court authorities in the criminal jurisdiction, and the requirement for “*exceptional*” circumstances before an order preventing publicity is justified.
- d. students in the respondent’s class are not “*victims*” to the extent that suppression of the school’s name is required and are now aged over 18 and unlikely to experience serious harm if this matter becomes public.
- e. the impact on the school’s reputation would be minor, and the school’s swift action is likely to reflect positively given the circumstances of the case.
- f. naming of a school in the context of the conduct of a single staff member is unlikely to cause loss of trust or an exodus of students.

99. The respondent spoke during his evidence-in-chief about his health, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]⁴⁴ He then provided a brief affidavit and supporting medical evidence.

100. Ms King's submissions acknowledge the presumption in favour of public hearings and publication, and the need to balance open justice with the private interests of the respondent. Ms King submits that while the respondent was named in the first disciplinary proceedings this does not mean that he is deprived of the ability to seek an order in reliance on a proper application and supporting evidence.⁴⁵ Ms King agrees that something more than the ordinary hardship that is anticipated to accompany publication of disciplinary findings is required and submits that the respondent meets that threshold because:

- a. publication will cause damage to his mental and physical health, noting the medical evidence filed in support of the application.
- b. there is a risk of harm by way of distress and humiliation to his wife and potential harm to her employment. His wife shares his surname and is employed in a school and was upset by the publicity accompanying the previous proceedings.

101. In his supporting affidavit the respondent states that he did not apply for name suppression in the first proceedings in reliance on advice that it would not be granted. Brief letters were provided from the respondent's general practitioners who saw him before and immediately after the hearing. The GP he consulted after the hearing reports that he was suffering significant distress relating to the proceedings, requiring medication. The respondent saw a consultant psychologist, [REDACTED] on 5 July 2020. [REDACTED] states that he is being treated for [REDACTED] [REDACTED], and [REDACTED] requiring him to [REDACTED] [REDACTED].⁴⁶ [REDACTED] describes the respondent reporting constant worry and rumination in relation to the proceedings and the Tribunal's findings. He concludes:

I am of the professional opinion that Mr [REDACTED] is presenting with an emotionally fragile and vulnerable state. He meets the criteria for a diagnosis [REDACTED]

I am of the opinion that disclosure of his identity in coverage by the media, would be hugely psychologically damaging to Mr [REDACTED] and add another layer of further secondary victimization. It would be psychologically punitive and disproportionate to the findings of the Tribunal being of a low grade level offense. It would have a compounding effect on his suffering from [REDACTED] [REDACTED]. This disorder developed as a result of the prolonged complaint process. It would also impact on his future possible career and return to education as an experienced teacher due to the stigma....

On Psychological grounds, I would strongly recommend disclosure of his identity in the public media and would be supportive of name suppression.

⁴⁴ n1 at p63

⁴⁵ *Complaints Assessment Committee v Teacher NZTDT* [2022] 12 at [39]

⁴⁶ [REDACTED]

102. The respondent's wife expresses concern for his mental and physical wellbeing, stating that his health has "*deteriorated tremendously over the last three years.*" This is the focus of her affidavit rather than the impact of publication on herself or their adult son, although she does refer to the family experiencing a "*rough mental period*" when the earlier case was publicised.
103. The CAC opposes non-publication of the respondent's name and submits that the grounds he has put forward are no more than the "*ordinary hardships or expected consequences of a proceeding involving serious professional misconduct.*" Ms Scott submits it is significant that this is the second disciplinary proceeding in which the respondent has been found guilty, creating a heightened public interest in publication.
104. The CAC submits that there is not the potential for the respondent's wife to experience "*acute professional embarrassment*" or to be prevented from doing her work because of the Tribunal's findings and, quite correctly, that there is nothing in the evidence that relates to the respondent's wife or that would "*impeach [her] honesty or integrity.*"
105. We consider that the medical evidence that the respondent is experiencing a [REDACTED] and other not-insignificant health difficulties including a [REDACTED] relating to his distress over these proceedings, takes his experience outside the ordinary consequences of a disciplinary charge. The evidence goes beyond mere assertions of possible distress or humiliation.
106. With regard to Paeroa College, while the evidence from the Board was compelling, we do not consider it proper to suppress the school's name. There is some risk that this will identify the respondent to some, but we do not consider this to be a high risk. The Tribunal has previously referred to the fact that schools commonly apply for orders, and that there is inevitably an expectation of some fallout from association with proceedings. The Act makes no specific provision to protect schools from the risk of reputational harm beyond the test that applies to any applicant.⁴⁷ We were not persuaded that there is an appreciable risk of the harms that Mr [REDACTED] was concerned to avoid. Three years have passed since the subject events, and this is not a case where the allegations involved a particular student or students as complainants or protagonists in the factual narrative whose identity requires protection.
107. We do however consider that the private interests of the staff involved and students named in documents produced to the Tribunal outweigh the public interest in their identities being disclosed.
108. It follows that we have accepted some of the submissions made on behalf of NZME as to publication of the name of Paeroa College, and Mr [REDACTED] as to staff and students. We were not required to assess the respondent's application as requiring exceptional circumstances; in accordance with s 501 our assessment is based on what we consider proper balancing the private interests of the respondent, staff and former students, and the public interest. We also note that the hearing was

⁴⁷ *Complaints Assessment Committee v Teacher NZDT* [2016] 27 (25 October 2016)

attended by a reporter working for NZME whose articles covered the hearing in some detail despite what was then in place in terms of interim non-publication orders, and we consider that this matter can be reported in such a way that covers the facts, findings and relevant professional standards with which this case was concerned notwithstanding the permanent orders that are now made.

ORDERS

109. Accordingly, the Tribunal makes the following orders:
- a. The respondent is censured.
 - b. The respondent is suspended for a period of one year from the date of this decision.
 - c. The following conditions are imposed:
 - i. Prior to undertaking the teaching and marking of any NCEA Achievement Standards the respondent is to undertake professional development with NZQA or another accredited provider that covers delivery and assessment of internal assessments for Achievement Standards.
 - ii. Mentoring for a minimum of 12 months from resuming teaching, with a focus on oversight of the setting, marking and moderation of internal assessments for NCEA Achievement Standards. The mentor is to be approved by the Teaching Council and the mentoring agreement signed by the mentor and respondent. Mentoring should persist until the respondent has satisfactorily delivered and marked internal assessments for NCEA Achievement Standards if that is not completed within 12 months.
 - d. The following non-publication orders are made:
 - i. The name and identifying particulars of the respondent (other than the name of Paeroa College).
 - ii. The name of the staff who gave evidence in this proceeding.
 - iii. The name of any students identified in documents produced to the Tribunal.
 - e. Costs are to be paid by the respondent in the sum of 30% of the costs of the CAC, and 30% of the Tribunal's costs reduced to \$23,061 for the reasons explained, being \$12,636.00 and \$6,918.00 respectively.
110. Pursuant to s 504 of the Act the respondent or the CAC, if dissatisfied with all or any part of any decision made under s 500, may appeal to the District Court.
111. An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the Court allows.

Dated: 6 September 2023

A handwritten signature in blue ink that reads "C Garvey". The signature is written in a cursive style with a large, looping 'G' and 'y'.

.....
C Garvey
Deputy Chairperson