

**I TE RŌPŪ WHAKARAUPAPA O AOTEAROA**

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2023/24**

**WĀHANGA|UNDER**

the Education and Training Act 2020

**MŌ TE TAKE| IN THE MATTER**

of a charge referred to the New Zealand Teachers Disciplinary Tribunal pursuant to the Education and Training Act 2020

**I WAENGA I A| BETWEEN**

**COMPLAINTS ASSESSMENT COMMITTEE**

Kaiwhiu | Prosecutor

**AND**

**[REDACTED]**  
Kaiurupare | Respondent

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**DECISION**

**17 November 2023**

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**REPRESENTATION:** L van der Lem, Luke Cunningham Clere for the Complaints Assessment Committee

C Shannon & J Gunn, Duncan Cotterill for the respondent

## INTRODUCTION

1. Mr [REDACTED] is a registered teacher and has been since 1999. At the time of the incident the subject of the charge he was employed in a part-time relieving capacity at [REDACTED] (the school), which is a specialist school with students aged 5 to 21<sup>1</sup>. The respondent is currently employed as a classroom teacher at a different school.
2. On 30 June 2021 the respondent used physical restraint on Student A. He wrote an incident report the same day<sup>2</sup> and a Mandatory Report was made to the Teaching Council on 9 August 2021. The matter was referred to a Complaints Assessment Committee, and the notice of charge was laid on 12 April 2023. The respondent co-operated with the CAC's investigation and has not disputed the events but defends the characterisation of these as serious misconduct.
3. The hearing proceeded by Audio Visual Link on 3 November 2023, with an Agreed Summary of Facts and written and oral submissions from the parties. Counsel for the school attended part of the hearing to address an application for permanent non-publication orders on behalf of the school and students.

## THE DISCIPLINARY CHARGE

4. The Notice of Charge reads:
  1. The CAC charges that [REDACTED], registered teacher, of [REDACTED], on 30 June 2021:
    - a. Used unjustified or unreasonable force on Student A (13 years old)<sup>3</sup> by:
      - i. Holding his arms behind his back;
      - ii. Holding him against a wall; and

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<sup>1</sup> The school is now named [REDACTED], and its satellite schools will incorporate the name [REDACTED]: Affidavit of [REDACTED], Tumuaki of [REDACTED].

<sup>2</sup> The Tribunal clarified with the respondent that he authored the incident report as while it is written in the first person outlining the incident from his perspective, the third line of the report states that it has been entered by another staff member.

<sup>3</sup> The charge originally referred to Student A as being 10 years old at the time of the incident. This was amended by agreement at the hearing following information from the school confirming Student A's correct date of birth.

iii. Placing him in a prone position on the ground, with Mr [REDACTED] body on top of him.

2. The conduct alleged in paragraph 1, and its subparagraphs, separately or cumulatively, amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and any or all of rule 9(1)(a) 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.

5. The Education and Training Act 2020 (the Act) addresses the use of physical restraint at registered schools. Section 98 prohibits the use of force for correction or punishment. It is not alleged that the respondent acted in contravention of s98. Section 99(4) defines what is meant by “*physically restrain*” in relation to a student which is to “*use physical force to prevent, restrict or subdue the movement of the student’s body or part of the student’s body against the student’s will.*” Section 99(1) outlines the limits on the use of physical restraint. Sections 100 and 101 provide for the Secretary of Education to issue related Rules and Guidelines.

### **Agreed Summary of Facts**

6. The evidence is an Agreed Summary of Facts signed and dated 15 August 2023, a copy of the incident report prepared by the respondent, and correspondence from the respondent’s PPTA representative to the Teaching Council dated 24 September 2021.

7. The Agreed Summary of Facts reads as follows (abridged):

[1]...

[2] Between 12 February 2021 and 20 May 2021, Mr [REDACTED] worked as a reliever at [REDACTED] (the School), [REDACTED]. The School is a specialist school which caters for students with high needs between five and 21 years old.

[3] The student involved in this matter (Student A) was [13] years’ old at the time of the incident. Student A is a high-needs student who has been diagnosed with autism and post- traumatic stress disorder, and has various learning difficulties.

[4] Student A was not in [REDACTED] class and he was not familiar with Student A's needs.

[5] ..

#### **Unjustified or unreasonable force on Student A**

[6] On 30 June 2021, at lunchtime, Student A was riding a bike on the School grass. He was continually trying to ride up and skid into other students. A number of other students and staff members were in the area. Student A also took a ball that another student was playing with, and threw it over a fence.

[7] Mr [REDACTED] asked Student A to get off his bike and put his hands on the handlebars to stop the bike. Student A responded by pinching and scratching Mr [REDACTED].

[8] Student A then took off his shoe, swung the shoe around by the laces and hit Mr [REDACTED] shoulder and then Mr [REDACTED] head with the shoe.

[9] Mr [REDACTED] grabbed Student A's left arm with both hands and placed him in a single elbow hold - by taking hold of Student A's arm around the elbow joint with both of his hands. He then began walking Student A over to the Administration Office. At about halfway to the office, Student A stopped walking and started kicking Mr [REDACTED] knee. Mr [REDACTED] then escalated the restraint to holding both of Student A's arms behind Student A's back, and continued to the office.

[10] Outside the office door, Mr [REDACTED] held Student A against the wall with one hand on his back and his hip against his backside. Mr [REDACTED] called for backup on his handheld radio.

[11] Whilst outside the office door, Student A again started to kick Mr [REDACTED]. In response, Mr [REDACTED] came in close behind Student A, put one knee on the ground, and spun Student A under his legs onto his stomach in a prone position. While Student A was on the ground, Mr [REDACTED] put his body on top of Student A and straddled him for about five seconds. Mr [REDACTED] kept his right knee and left foot on the ground while he straddled Student A.

[12] One of the teachers who witnessed the incident told Mr [REDACTED] to get off Student A.

[13] Student A was very upset and crying after the incident.

...

[16] During the School's investigation, Mr ██████ acknowledged in a meeting with other staff that in looking back there were other steps he could have taken during the incident. However, he maintained that his actions were proportional to the level of violence and threat from Student A.

[17] In a written response to the Mandatory Report, Mr ██████ noted (through his representative) that he had not been trained in the School's Team Teach holds for management of students using physical contact. He said he moved Student A to the office using restraint techniques in which he had been trained at his previous schools. Mr ██████ reiterated that he accepted the conduct occurred as alleged, but said he did not put any weight on Student A when he was in the prone position.

[18] At the CAC's meeting, Mr ██████ explained that he knew restraint was a last resort but that he thought there was a risk of something bigger happening between Student A and other students if he did not intervene. He noted that he had not taught Student A, so did not know whether the student had an individual learning plan. He acknowledged that he scooped Student A down at the door which was not part of his training. On reflection Mr ██████ said he could have used a different move but was not sure what else he could have done when Student A was beside the door.

[19] Following the CAC meeting, Mr ██████ clarified through his counsel that at the time he spun Student A onto the ground, he ensured that Student A had space to breathe at all times.

8. The Summary does not explicitly address the location of other students and staff as the respondent and Student A moved towards and reached the Administration Office. A photograph of the outdoor courtyard and grass area in the bundle shows it is not a lengthy distance between where Student A was moved from his bike and the Administration Office building. The incident report names three students who witnessed the incident and one named staff member, followed by question marks denoting uncertainty as to other staff who witnesses. The response to the Teaching Council asserts that there were about ten staff on duty in the immediate proximity.

### **Serious Misconduct and Misconduct**

9. The CAC argued that the respondent's conduct amounts to serious misconduct. The charge (and s500 of the Act) enables the Tribunal to exercise its disciplinary powers in

relation to any matter referred to it by the CAC, that is, misconduct warranting a disciplinary finding but which does not meet the threshold for serious misconduct.

10. Section 10 of the Act defines serious misconduct to mean conduct by a teacher:
  - (a) That
    - (i) Adversely affects, or is likely to adversely affect, the well-being or learning of 1 or more students; or
    - (ii) Reflects adversely on the teacher's fitness to be a teacher; or
    - (iii) May bring the teaching profession into disrepute; and
  - (b) That is a character or severity that meets the Teaching Council's criteria for reporting serious misconduct.
  
11. The criteria for reporting serious misconduct to the Teaching Council are set out in rule 9 of the Teaching Council Rules 2016. The CAC relies on r 9(1)(a) as to the use of unjustified or unreasonable physical force on a child or young person and (9)(k), being an act or omission that is likely to bring the teaching profession into disrepute.
  
12. For a finding of misconduct, it is established that one or more of the limbs under s10 must be made out but the second part of the test for serious misconduct, meeting the criteria for reporting, is not: *Evans v Complaints Assessment Committee* CA 672/2020; [2021] NZCA 66.

### **Submissions for the Complaints Assessment Committee**

13. The CAC accept that restraint was justified when the respondent intervened to prevent Student A from continuing to ride his bike in a potentially dangerous manner. The CAC also accepts that the respondent acted reasonably when he placed Student A in a single elbow hold to prevent him continuing to hit him with his shoe. The CAC submitted that the restraint became unjustified once the respondent had moved Student A towards the administration building and away from the immediate vicinity of other learners and that he could have released Student A when he was kicked by him. Student A was "*evidently elevated, and resisting*" and in those circumstances the respondent should not have attempted to move him with his arms held behind his back.

14. With regard to the holding of Student A against the building wall while using his radio to seek help the CAC submitted:

Pinning a learner against a wall is...a high-level restraint. As Student A was not violent at the point that he was put up against the wall, the CAC submits that s99 is engaged – Mr [REDACTED] was not in imminent harm, and therefore...his use of force in pinning Student A against the wall was not justified.

15. As to placing Student A prone and face-down, counsel pointed to the clear prohibition on this in the Use of Physical Restraint Guidelines issued by the Secretary of Education in August 2017. Mr van der Lem submitted:

These were issued under s139AE of the Education Act 1989, but were still of relevance whilst new guidelines were being prepared under the Act. The 2017 Guidelines stated that physical restraint may only be used when a teacher reasonably believes that the safety of the student involved, or any other person, is at serious and imminent risk – any restraint used must be the minimum force necessary to respond to the imminent risk prevented and be used only for as long as is needed to ensure the safety of everyone involved.

16. Counsel highlighted restraints that the guidelines state should not be used including:

- (a) Using force to take/drag a student who is resisting to another location;
- (b) Restraint when moving a student from one place to another...when they are in an escalated state, as this may escalate them further;
- (c) Tackling, sitting, lying or kneeling on a student;
- (d) Prone(face-down) physical restraint.

17. The 2017 guidelines were repealed along with the 1989 Act on 1 August 2020. Sections 100 and 101 of the current legislation provide for the implementation of Rules and Guidelines to assist registered schools and those employed within them on the use of restraint. The current guidelines "*Aramai He Tētēkura, a guide to understanding distress and minimising the use of physical restraint*" were issued in February 2023, leaving what counsel described as a lacuna between August 2020 to February 2023. The current guidelines contain a prohibition on face-down prone restraint. Counsel submitted that the

absence of effective guidelines in June 2021 did not make permissible what was, and is currently, impermissible.

18. Counsel referred us to s99. Section 99(1) provides that a teacher or authorised staff member must not physically restrain a student unless the conditions in s 99(2) are met, which states:

(2) The conditions are that-

(a) the physical restraint is necessary to prevent imminent harm to the student or another person; and

(b) the [teacher] reasonably believes that there is no other option available in the circumstances to prevent the harm; and

(c) the physical restraint is reasonable and proper in the circumstances.

19. Mr van der Lem said the key inquiry is whether the respondent's actions were justified in the absence of alternative steps. He submitted it is not safe to infer that the respondent continued to restrain Student A to prevent harm to others. While the respondent is captured by the words "*another person*" in s99(2)(a) his actions were impermissible because other options were available, and the restraint was not reasonable and proper in the circumstances.
20. The CAC referred to the three limbs under s10 of the Act being made out by virtue of the respondent's conduct being unjustified, involving an escalating use of force to restrain Student A in the face of alternative action. The student's welfare was "*clearly likely to be affected*" by the use of force, and reference in the Agreed Summary of Facts to Student A being upset and crying means the first limb is met.
21. The CAC submitted that the respondent's "*immediate*" resort to restraint techniques and the escalation of that restraint reflects adversely on his fitness (but acknowledged that we are not required to find that in fact the respondent is not fit to teach). As to s10(a)(iii) it was submitted to the effect that the duration of the restraint, the use of "*plainly impermissible force techniques*" despite training, and the fact Student A is a high needs learner would lead reasonable members of the public to conclude that the reputation and standing of the profession is lowered.



22. It follows from the submissions already outlined that the CAC considers the use of force was unjustified so that rule 9(1)(a) is made out, which requires reporting of a teacher *“using unjustified or unreasonable physical force on a child or young person.”*

### **Submissions for the Respondent**

23. The respondent emphasised the immediacy of the situation, his lack of knowledge of Student A and a lack of assistance from staff, characterising his conduct as reasonable within that context.
24. Counsel submitted that we could infer there was a continuing risk to other students because of Student A’s conduct leading to Mr [REDACTED] intervention. The student scratching, kicking, pinching and hitting with his shoe mean it can be inferred that he would not behave reasonably towards others. Regardless, as s99 also covers a risk of imminent harm to the respondent it was reasonable to take action to protect himself and the response of Student A was *“not predictable”*.
25. Counsel conceded that once Student A was in a prone position this amounted to misconduct but to break the incident down into components as the CAC does *“runs the risk of analysing matters with the benefit of hindsight rather than from the perspective of the teacher involved”*.
26. The use of restraint was not for disciplinary purposes (this is not alleged). It was submitted that the respondent was well-intentioned and could have been justly criticised for doing nothing. The written submissions state:
- [26]...Student A was actively lashing out with violence at Mr [REDACTED]. The alternative response of letting go at this point would have created significant risk to other learners in the area, and Mr [REDACTED] did not have any benefit of hindsight.
- [27] Considering that Mr [REDACTED] has a responsibility to protect other learners from harm, and that he perceived there was an imminent risk to other learners if he let go, it is submitted that the escalation of the restraint while Student A was kicking Mr [REDACTED] was justified.
27. As for alternative action, counsel submitted that it is not clear there was any once the respondent and Student A reached the office door, and the use of restraint was required

to enable him to radio for assistance. Other teachers on duty had not acted to remove students from the area or to help Mr [REDACTED].

28. The respondent understands the use of prone restraint is to be avoided for good reasons and it was used “*in a desperate attempt to keep hold of Student A while he was being kicked...*” for five seconds, with no weight on the student and ensuring the student had room to breathe. These points are made to mitigate the degree of danger that the use of the prone hold posed to Student A.
29. With regard to serious misconduct, the respondent accepted “*by the time Student A was lying on the ground in the prone position that his conduct adversely affected the wellbeing of Student A*”. It was submitted however that this conduct does not reflect adversely on his fitness to practice or have the potential to bring the teaching profession into disrepute on the grounds that the force used was not for disciplinary purpose. Relying on the test in *Collie*<sup>4</sup>, Mr Shannon said that a reasonably informed member of the public would be sympathetic to the challenge presented by a fast-moving situation and the risk of ongoing harm to the respondent.
30. Finally, the criteria for reporting under rule 9 were not met as there was an element of justification (that is, the restraint of Student A was not an unjustified use of force) and the respondent reasonably believed no other option was available to him.

### **Cases**

31. Both parties referred to *Complaints Assessment Committee v Teacher B*<sup>5</sup> in which a teacher restrained a child who was causing distress to others in the playground. The teacher went through an escalating series of interventions starting with hands on the student’s shoulders to direct him towards the office, prising the student’s hands off bars he was holding to resist being moved, and finally picking up the resisting student around the waist to carry him to the Principal’s office. The Tribunal found that there was a sustained use of force but it was not for ‘bad effect or purpose.’ This was in reference to rule 9(1)(a) as it then read “*the physical abuse of a child or young person.*” The Tribunal found the risk of harm to other students was material, and the teacher was in a difficult position determining the best intervention to protect others from harm. The conduct fell

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<sup>4</sup> *Collie v Nursing Council of New Zealand* [2001] NZAR 74 (HC) at [28].

<sup>5</sup> NZTDT 2017-7, 2 August 2017.

short in the Tribunal's view of physical abuse and a finding of misconduct was made with s378(1)(a)(i) and (ii) of the 1989 Act established.

32. In *Complaints Assessment Committee v D*<sup>6</sup> a teacher was found guilty of serious misconduct for engaging in swearing and an exchange of physical pushing and shoving with a student, including holding the student against a wall and striking them on the cheek. The CAC acknowledged that the respondent's conduct did not reach the same threshold of seriousness as in *D*, but "*far exceeds B*".
33. Both parties also referred to *CAC v Dhaliwal*<sup>7</sup> in which an 8-year-old student was upset and huddled on the floor crying. The teacher, who was not familiar with the particular needs and individual behaviour plan in place for the student, raised their voice and then lifted the student and carried him out of the room in what the Tribunal accepted was an attempt to ameliorate the situation. The student was not distressed by being carried. A finding of misconduct was made, with the absence of any anger, annoyance or loss of control in the teacher's actions being significant, as was their unfamiliarity with the student.
34. Finally, counsel for the respondent referred to *CAC v Rakena-Andrews*<sup>8</sup> in which the teacher forcefully grabbed the arm of a student standing near her in a classroom doorway after being pushed from behind. It was also alleged that the teacher kicked the student in the backside but the Tribunal did not find that proved. The teacher was found guilty of misconduct, on the basis that there was considered to be some justification for the force used. The Tribunal accepted that the teacher held a genuine belief there was some degree of risk to the student's safety and her own. All limbs of s10(a) were made out, however the Tribunal did not consider that the conduct was "*sufficiently grave to meet the second stage of the test for serious misconduct, given the allegation of justification we have found existed.*"<sup>9</sup>

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<sup>6</sup> NZTDT 2021/20.

<sup>7</sup> NZTDT 2019/80.

<sup>8</sup> [2019] NZTDT 1030, 15 April 2021.

<sup>9</sup> At [111].

## Discussion

35. The parties diverge on the point at which Mr [REDACTED] use of restraint became unjustified, and the characterisation of his actions as serious misconduct or misconduct. We were invited to draw inferences as to the absence or presence of ongoing risk to other students and whether this was a factor motivating the escalation of the restraint. The Summary of Facts is not determinative either way.
36. We do not impute any bad intent to the respondent. Section 99 sets a high threshold before physical restraint can be exercised in a manner that will not risk a finding of misconduct or serious misconduct, because all three limbs of s99(2) must be met. Based on the available evidence we find that after the initial restraint using an elbow hold when Student A became violent, the respondent had options other than to escalate the restraint. Once moved from the immediate vicinity, we find on balance that the student's conduct was directed solely at the respondent in response to the restraint. It is a reasonable inference that they remained within sight of others but the evidence falls short of establishing that protection of others from harm was the respondent's motivation. The decision to put the student face down on the ground and straddle him was unreasonable.
37. There was risk to the respondent as Student A was kicking him at various times during the restraint, but on balance we consider that this was a response to the respondent's physical restraint, and options were reasonably available to an experienced teacher. This included releasing the student, seeking assistance from staff and/or focussing on removing other students from the area.
38. The respondent relies on his lack of knowledge of Student A as a mitigating factor. As a part time reliever, he also had not been taught the school's Team Teach practices. This to some extent is mitigating, but not exculpatory in this case, in a specialist school with high-needs learners. The respondent had been in the school for several months and ought to have appreciated the potential risk of harm from a physical intervention. The availability of other options is important given s99(2)(b).
39. In the contemporaneous incident report the following content is important to our findings, indicating the concern about physical harm related to the respondent:

- (a) the reason for the intervention is *“Immediate danger of personal injury to staff & Bullying others.”*
- (b) After describing the student swinging his shoe the respondent records (presumably that he said) *“Let’s go to the office [REDACTED] you can’t assault staff. I held [Student A’s] left arm and we walked to door. Close to the door [Student A] started to try to kick me so I moved in closer to him to prevent being kicked. I called for back up on the walky talky. I moved back and [Student A] kicked me in the knee twice, to stop this I put onto his stomach with me on top, 5 seconds later I removed myself, behaviour staff came through the door and I went back to class.”*
- (c) the report includes the acknowledgement that *“I should have changed staff and had [REDACTED] deal with [Student A].”*
40. We find the three limbs of serious misconduct as defined in s10 are made out, primarily because of the prone restraint. The restraint adversely affected Student A as described in the Agreed Summary of Facts.
41. We find that the conduct reflects adversely on the respondent’s fitness as a teacher. On this one occasion he reacted using physical force rather than attempting de-escalation, removing others or calling for assistance. We accept this is an isolated incident and the reassurance from his current employer regarding his appropriate approach to learners.
42. Whether this reflects adversely on the profession was not clear-cut but we find that a member of the public observing the events and in the knowledge of the circumstances would not consider the totality of the respondent’s conduct reasonable. It goes beyond for example the conduct in *Rakena-Andrews* where the Tribunal also concluded that there was ‘an element of risk to the profession’s standing in the eyes of the public’ given the treatment of the student.
43. Because we find the escalating use of restraint was not justified, most seriously the placing of Student A face down on the ground beneath the respondent, we find rule 9(1)(a) is met.
44. As such the charge of serious misconduct is made out.

## PENALTY

45. The CAC did not seek cancellation or suspension, but censure and conditions which we agree is appropriate and proportionate. Penalty addresses sanction for the culpable conduct and provides the mechanisms by which the public can be protected from any risk of further misconduct and harm.
46. The respondent accepted that censure is appropriate, but that conditions are unnecessary, pointing to the evidence from Mr ██████████ current employer by letter to the Tribunal dated 21 September 2023<sup>10</sup>. This letter confirms knowledge of the charge and outlines the respondent's training during his current employment including:
- (a) Safe Crisis Management professional training completed in 2021, a three-day certificated course to increase understanding of student behaviour and how to respond safely with a focus on minimising the use of restraint. The training includes teaching of physical holds for use as a last resort and how to safely implement these for as short a time as possible. The training is in keeping with ss99 -101 of the Act.
  - (b) Safe Crisis Management two-day refresher course completed in 2023.
  - (c) The mandated Ministry of Education Physical Restraint and Seclusion online module.
47. The letter states that prone holds are not taught or considered acceptable use of force under any circumstances. It concludes that the respondent has shown commitment to the training described and to following the restraint guidelines *"with the welfare of students at the forefront. I have observed him to actively practise strategies to minimise the risk of restraint in everyday classroom practice through positive behaviour supports and in crisis situations."*
48. Mr ██████████ confirmed in response to a question from the Tribunal that his recent training included content relevant to teaching in a specialist school and the use of restraint in that setting.

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<sup>10</sup> Letter from ██████████ School staff ██████████, Behaviour Support Specialist Teacher/ Team Leader and ██████████, Principal.

49. But for the evidence of the respondent completing relevant training, we would have imposed a condition requiring such training. We are reassured by the evidence from his current employer.
50. We agree that censure is appropriate. We impose a condition that the respondent notify any new employer of these findings for a period of two years.

### **Non-publication orders**

51. The Tribunal may make non-publication orders pursuant to s501(6) of the Act if it is satisfied it is proper to do so. Orders may be made in relation to the name of the person charged, any particulars of the case, or any other person. We must have regard to the privacy of any complainant and the public interest.
52. Rule 34(4) of the Teaching Council Rules 2016 highlights the importance of addressing publication of details relating to a child or young person who is referred to in evidence before the Tribunal.
53. The respondent did not seek an order. On 1 November 2023 the Tribunal received an application on behalf of the school for permanent non-publication of the name of Student A and any other students, its name and any identifying particulars of the school, with an affidavit filed in support by [REDACTED] Tumuaki. Mrs [REDACTED] outlined the location of the school and relationship to satellite schools sharing its name within [REDACTED]; the enrolment of high and very high ongoing resourcing scheme (ORS) funded students and that the school's "*students and their whānau are often extremely vulnerable.*" Details of Student A are outlined, including his age, the observed impact of the incident, and the potentially harmful impact of publicity which identifies the school. Mrs [REDACTED] states that the school is seen by the student as his family and his safe place.
54. In relation to the identify of the respondent being published Mrs [REDACTED] deposed:

[26] I am very concerned that Student A will be re-traumatised and will suffer detrimentally if he becomes aware that the restraint incident has arisen again. I am confident that he remembers the incident and the stress and trauma it caused him at that time, as described above.

[27] If the school's name and other identifying details relating to the incident, including the teacher's name are published [REDACTED] cannot protect Student A's (sic) from finding out about the media reports. This is because Student A has a reading age of approximately 12 years of age (decoding and literal comprehension) and excels in the use of technology. The student is very familiar with the internet and is able to find what is of high interest to him with ease. He is easily capable of finding and recognising any identifying information that relates to the incident including, a reference to the facts of the incident, a decision from the NZDT, media reports, the respondents name, [REDACTED] [REDACTED] name or any detail that identifies the school.

55. Mrs [REDACTED] expresses concern that if the respondent's name is published in relation to these proceedings this would cause harm to Student A by impacting his relationship with the school, for reasons including his expectation that the school would protect him by ensuring that details of the incident would remain confidential.
56. Counsel for the CAC indicated that they would abide the Tribunal's decision. Counsel for the respondent supported the application and noted that the absence of application for interim suppression was because the respondent was not aware of the particular concerns for the student around publication. Both parties agreed that the character of the school was important to be published.
57. It is clearly proper to order non-publication of the name of Student A, and the other students referred to by name in the evidence.
58. We are also satisfied based on the evidence in Mrs [REDACTED] affidavit that it is proper to suppress the name of [REDACTED] school and identifying particulars, including the respondent's name, in the interests of Student A and those who teach, support and care for him. Such an order does not affect the ability to publish salient facts and findings in this case. The charge relates to a single event, the respondent's current employer is aware of the details of the charge, he has undertaken relevant training undertaken and will be required to notify potential employers for a two year period.

### **Costs**

59. Costs were reserved to allow the CAC to file a schedule of costs in accordance with the Practice Note, and for the respondent to provide submissions in relation to the quantum of costs. A schedule of costs, and confirmation that a contribution of 40% was sought,



was filed by the CAC. The costs of the CAC including that of the Committee total \$11,705.94 with a contribution of \$4,682.37 sought and 40% of the Tribunal's recoverable costs is \$582.00.

60. The respondent filed submissions in response, seeking a reduction in costs to a 30% contribution on the basis of his circumstances including:
- (a) his fixed term contract has not been renewed following notification to his employer of the Tribunal's finding of serious misconduct;
  - (b) alternative work in specialist schools where the respondent lives is limited, and includes his former employer (where the charge arose) and its satellite schools;
  - (c) the respondent has notified prospective mainstream school employers of these proceedings and not found success;
  - (d) the respondent is likely to take a significant reduction in salary due to changing roles as and when a new position is secured. This may be outside of teaching.
  - (e) a reduction in the quantity of contribution from 40% to 30% of the CAC's and Tribunal's will in the circumstances be significant to the respondent;
  - (f) the respondent is married with school aged children, and without employment will rely on his wife's income (also a teacher) to support the family.
61. Other relevant factors are that the respondent enabled this matter to proceed on the papers (but nonetheless was present for the proceedings) and co-operated at all times, and it proceeded by way of Agreed Summary of Facts.
62. Counsel also referred us to several cases in which a reduction in costs was ordered in reliance on the financial situation of the teacher, even in the absence of specific evidence to this end.
63. We agree that a contribution of 30% of the costs of the Tribunal and CAC is appropriate.

### **Orders**

64. The Tribunal makes the following orders as to penalty:

- (a) The respondent is censured.
  - (b) The respondent is to notify any future employer of the Tribunal's decision for a period of two years from the date of this decision.
65. The Tribunal makes the following orders for non-publication:
- (a) The name of [REDACTED] school and its satellite schools and its location in [REDACTED]. The school may be identified as a specialist school in the South Island.
  - (b) The name of Student A or other students identified in the evidence before the Tribunal.
  - (c) The name of the respondent.
  - (d) The name of other teachers identified in the evidence, including those who provided evidence in support of the application for non-publication and those named in the documentary evidence.
  - (e) The name of the respondent's current employer/place of employment.
66. The respondent is to pay 30% of the costs of the Tribunal and CAC being \$3,948.28 in total, \$3,511.78 to the CAC and \$436.50 to the Tribunal.
67. This decision may be appealed by either party to the District Court. Any appeal is to be made within 28 days after receipt of written notice of this decision, or any longer period that the Court allows.



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**Catherine Garvey**  
**Deputy Chair**

