

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022/14

IN THE MATTER of the Education and Training Act 2020

AND

IN THE MATTER of a charge of serious misconduct referred by the
Complaints Assessment Committee to the New
Zealand Teachers Disciplinary Tribunal

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

AND


Respondent

DECISION OF THE TRIBUNAL ON CHARGES

7 December 2022

HEARING: Held on 20 October 2022 on paper via Teams

TRIBUNAL: Rachael Schmidt-McCleave (Deputy Chair)
Nichola Coe and Simon Williams (members)

REPRESENTATION: C Patterson/J Ah Koy, Meredith Connell for the Complaints
Assessment Committee
Jo Martin, PPTA for the respondent

Hei timatanga kōrero – Introduction

1. Pursuant to section 497(4) of the Education and Training Act 2020 (the “Act”), the Complaints Assessment Committee (“CAC”) referred the respondent’s conduct to the Tribunal, on the basis that the CAC considers that it constitutes “serious misconduct” as defined in section 10(a) of the Act.
2. The charge alleges that the respondent, a registered teacher of Christchurch, displayed inappropriate behaviour at school when he:
 - (a) On or around 19 June 2020, drew an inappropriate image on a classroom window in front of students during class;
 - (b) On or around 26 June 2020, drew an inappropriate image and/or had in his possession an inappropriate image which he had drawn, which was found by students in his classroom;
 - (c) Made inappropriate comments to students, including:
 - (i) On or around 28 May 2020, making an inappropriate comment to some female Year 11 students;
 - (ii) On or around 28 May 2020, making an inappropriate comment to Student A, a Year 11 student;
 - (iii) On or around 26 June 2020, making an inappropriate comment to Student B, a Year 9 student;
 - (d) On or around 11 June 2020, kicked a chair or stool whilst teaching.
3. The CAC alleges that the conduct above separately and/or cumulatively amounts to serious misconduct pursuant to section 10 of the Act and any or all of Rules 9(1)(e) 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 Act.
4. The matter was heard on the papers via Teams on 20 October 2022.

Ko te hātepe ture o tonono nei – Procedural History and Preliminary Matters

5. A pre-hearing conference (“PHC”) was held on 3 August 2022. The parties agreed to various timetabling matters. An interim name suppression order was made in respect of the respondent, to stay in place until the charge is disposed of. An interim suppression order was also made over the name of the School.

Kōrero Taunaki - Evidence

Agreed Summary of Facts

6. The ASoF is set out in full below:

Background

1. *The respondent, ██████████, is a registered teacher. ██████████ holds a Full Professional practising certificate, valid until 1 May 2023.*
2. *At all material times, ██████████ worked as a teacher at ██████████, a secondary school in Christchurch (**school**).*
3. *On 10 September 2020, ██████████ was dismissed from the school with two months’ notice.*
4. *On 14 October 2020, ██████████ resigned from the school, prior to his notice period expiring.*
5. *As at the date of this summary of facts (August 2022), ██████████ is not employed in education.*
6. *On 4 August 2020, a mandatory report was submitted to the Teaching Council by ██████████ (**Principal**), the principal of the school. In the report, the Principal expressed ██████████ concern that ██████████ was mentally unwell.*

Drawing inappropriate images at school

Drawing 1

7. *On or about 19 June 2020, during a year 11 English class that he was teaching, ██████████ drew on the classroom window using window chalk an image of an unclothed female figure holding a whip, sitting on the shoulders of an unclothed male figure. A photograph of the drawing is attached as **Tab 1**.¹*
8. *The image was drawn towards the end of a lesson as the class was packing up, in the presence of students who later reported it to the school nurse.*
9. *██████████ commented to the three students’ [sic] who remained that “you guys are going to tell someone and get me in trouble” in reference to the picture*

¹ Attached to Summary of Facts.

he had drawn. After students had left the classroom, ██████ took a photo of the picture he had drawn in anticipation of possible concerns.

Drawing 2

10. On 26 June 2020, some year 11 female students found a drawing done by ██████ in his classroom. The drawing depicted two figures (one male and one female) engaging in sexual intercourse. A photograph of the drawing is attached at **Tab 2**.²

11. Upon finding the image, the students took it to the school nurse who subsequently reported the image to the Principal.

Inappropriate comments to students

Comment 1

12. On or about 28 May 2020, ██████ commented to some year 11 female students “be careful how you dress because old men like ██████ might take advantage of you.”

Comment 2

13. On or about 28 May 2020, Student A was in a class being taught by ██████. Student A was talking to Student B on FaceTime, while Student B (named “X”) was in another class. ██████ commented to Student A (aware that Student B could hear him through the phone) that he used to have a dog called “X”, and that “she’s a white bitch”.

14. ██████ had previously growled and yapped like a dog at Student B when she entered his classroom during lunch hour.

Comment 3

15. On or about 26 June 2020, Student C was attending a First Aid class that was being held in ██████ classroom by another teacher. The students were working in the computer room. ██████ said that he liked the grey hair on Student C’s head. Overhearing this, another student said, “do you think that [Student C] has more hair than you?”. ██████ said “No. She hasn’t seen my body hair.”

Kicking and breaking a chair whilst teaching

16. On or about 11 June 2020, ██████ was teaching his year 9 social studies class. Also present in the room was a learning assistant. During the class, students were being disruptive and noisy. ██████ asked two students who were being particularly disruptive to the rest of the class, to leave the room. The two students continued to be disruptive through the glass pane in the classroom door from outside the classroom.

² Attached to Summary of Facts.

17. *The class continued being noisy and laughing. ██████████ then kicked a stool with this foot to regain the class's attention. The stool hit against the door and broke as the seat of the stool was already broken. This caused at least one of the students to become fearful.*
18. *During this particular class he also yelled at the students stating "How the hell does this happen? Did your parents pull you out of a dumpster? Can someone explain to me? Cos the stork couldn't bring them the child they wanted." ██████████ also called the class "spoilt little muppets".*
19. *██████████ subsequently apologised to the class for his behaviour.*

School investigation and mandatory report

20. *The conduct was reported by students to the school nurse who then reported it to the Principal of the school. The learning assistant who was present during one of the incidents also sent an email outlining her concerns to the Deputy Principal, who subsequently forwarded the email on to the Principal for follow up.*
21. *On 30 June 2020, the Principal wrote to ██████████ regarding the allegations and the initial enquiries she would be making into his conduct.*
22. *On 1 July 2020, ██████████ was suspended pending the outcome of the investigation by the school.*
23. *On 24 July 2020, ██████████ attended a disciplinary meeting with the Principal in order for him to provide a verbal and/or written response to the allegations.*
24. *On 4 August 2020, the Principal submitted a mandatory report about ██████████ to the Teaching Council. The report was subsequently referred to a Complaints Assessment Committee (CAC) for investigation.*
25. *On 18 August 2020, ██████████ met with the Board of Trustees (Board) subcommittee regarding the allegations and investigation.*
26. *On 1 September 2020, the Board sent ██████████ a letter setting out their preliminary decision following their meeting on 18 August 2020.*
27. *On 8 September 2020, ██████████ appeared before the Board at a special disciplinary meeting.*
28. *On 10 September 2020, the Board sent ██████████ a letter advising him of the Board's final decision on whether ██████████ conduct constituted misconduct and/or serious misconduct. ██████████ employment was terminated with his notice period ending on 10 November 2020. The Teaching Council was subsequently notified.*
29. *As noted above, ██████████ resigned from the school on 14 October 2020.*

Response to mandatory report

30. On 25 November 2020, ██████████ provided a written response to the Complaints Assessment Committee in response to the mandatory report.

Drawing inappropriate images at school

31. In relation to Drawing 1, ██████████ stated that the year 11 English class he had been teaching at the time of the incident was exploring themes of fatherhood, whānau and fantasy in relation to a film they had been studying. Three of the students in his class were refusing to carry out the essay and came to the front of the class to engage with him instead. ██████████ stated that he drew a man walking in window chalk on the window, and added the female figure to the man's shoulders. He stated that he "used the drawing as a teaching tool to articulate the structure of fantasy." He stated that the notion that it constituted a sexualisation of teaching is "unfair" and that "conversely, it was an attempt to desexualise the students' notions of fantasy, particularly as they pertained to the work of art."

32. ██████████ stated that he encouraged the students to record the drawing and that they declined. He notes that the drawing contains no representation of genitalia and that after the students left his class, he photographed the drawing in anticipation of possible concerns.

33. In relation to Drawing 2, ██████████ admits that he drew the image but that it was not intended to be seen by students. He stated it was not drawn during class time and that it had been removed from his schoolbag. ██████████ accepts that it was not an appropriate drawing to have in his possession at school.

34. In a response dated 6 February 2022 to the Complaints Assessment Committee, ██████████ stated that he provided two of the three images of the drawings used as evidence in the investigation. He stated that he sincerely regrets that the drawings were more provocative than intended, but that he rejects the notion that he "used drawing to sexualise." ██████████ stated that he was disappointed by the lack of consideration for his property.

Inappropriate comments made to students

Comment 1

35. In relation to Comment 1, ██████████ stated that he does not remember the particulars of this interaction. He stated that if it occurred, it was perhaps an example of self-deprecation taken out of context.

Comment 2

36. In relation to Comment 2, ██████████ stated that Student B was previously in his year 9 English class in 2018. He stated that Student B understood from an anecdote he had told her during 2018 that his family had a pet dog called "X". He stated that he growled at Student B from the back of his throat followed by

a 'yap' and it was not the first time he had made that sound to her. ██████ stated that he would not 'bark' at her and that she had taken it with good humour in the past in the context of the antidote. If she had taken offence previously, he stated he would not have repeated the sound.

37. In a response dated 6 February 2022 to the Complaints Assessment Committee, ██████ stated that in his response to the mandatory report dated November 2020, he outlined the context for the 'woofing' sounds. He stated that they should be understood in the context of the anecdote he shared with Student B about his pet dog with whom Student B shared a name. ██████ stated that he referred to his pet dog as a "white bitch", not Student B.

Comment 3

38. In relation to Comment 3, ██████ stated that Student C had complimented him, possibly on his shoes. He stated that he returned the compliment regarding her silver hair. ██████ observed that Student C immediately appeared to become self-conscious. He attempted to mitigate any offence Student C may have taken by making a comment about the lack of hair on his head and a "flippant remark" about body hair. ██████ stated that the remarks he made were intended to alleviate any shame Student C might have felt about her body image.
39. In a response dated 6 February 2022 to the Complaints Assessment Committee, ██████ stated that he regrets not setting clearer boundaries with his students, particularly regarding his personal space.
40. In respect of all three comments, he stated that he regrets that his tone came across as overly familiar at times and that some of his comments have been misrepresented. ██████ stated that he does not recall passing comment on the students' choice of dress and that "he would never have taken advantage of them."

Kicking and breaking a chair while teaching

41. ██████ stated that he was teaching a year 9 class and had asked two students who had been particularly disruptive to leave the room. The class continued to laugh and be disruptive. He admitted that in frustration he kicked a stool over, but that the cushion on top of the stool had been detached for some time. He does not recall kicking the stool into the door.
42. ██████ stated that he immediately apologised to the group and apologised personally to the learning assistant who was also present in the class at the time of the incident. ██████ also apologised to the student who became fearful and acknowledge the comments made by the learning assistant that the year 9 students' [sic] appeared to be "baiting" him.
43. In a further response dated 6 February 2022 to the Complaints Assessment Committee, ██████ stated that "tipping" the stool over was a "feeble attempt to regain the attention of a class whose focus I had lost". He admitted

that he should have reacted differently, particularly around impressionable young people.

44. On 25 November 2020, in a response to the Complaints Assessment Committee by ██████████ on behalf of ██████████, it was stated that ██████████ accepted that many of ██████████ actions were inappropriate but were made in attempt to build appropriate relationships with learners in a challenging environment. ██████████³ also stated that ██████████ was willing to work with the Council to improve his practice in order to continue teaching.”

Te Ture - The Law

7. Section 10 of the Act defines serious misconduct:

serious misconduct means conduct by a teacher –

(a) *that –*

- (i) *adversely affects, or is likely to adversely affect, the wellbeing or learning of 1 or more students; or*
- (ii) *reflects adversely on the teacher’s fitness to be a teacher;*

or

- (iii) *may bring the teaching profession into disrepute; and*
- (b) *that is of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct.*

8. As confirmed by the District Court in relation to the identical test under section 378 of the Education Act 1989 (the “former Act”),⁴ the test under section 10 is conjunctive, meaning that as well as meeting one or more of the three adverse consequences, a teacher’s conduct must also be of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.
9. The criteria for reporting serious misconduct are found in the Teaching Council Rules 2016 (the “Rules”). The Tribunal also accepts the CAC’s submission that, if established, the respondent’s conduct would fall within the following sub-rules of Rules 9(1):

³ Spelt two different ways in original.

⁴ *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018 at [64]

- (a) Rule 9(1)(e): breaching professional boundaries in respect of a child or young person with whom the teacher is or was in contact as a result of the teacher's position as a teacher; for example,—
 - (i) engaging in an inappropriate relationship with the child or young person:
 - (ii) engaging in, directing, or encouraging behaviour or communication of a sexual nature with, or towards, the child or young person:
 - (b) Rule 9(1)(k): an act or omission that that brings, or is likely to bring, the teaching profession into disrepute.
10. The Tribunal accepts that the test under Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the respondent's behaviour.⁵

Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

CAC submissions

11. In summary, the CAC submits that the respondent's conduct meets both limbs of the definition of serious misconduct because it:
- (a) By drawing sexually explicit images, the respondent caused the students involved who saw the drawings to be sufficiently concerned to report it. From this it can reasonably be inferred that the conduct made the students (particularly female students) uncomfortable that their male teacher drew, and had in his possession at school, images of a sexual nature. Whether or not they were intended to be seen, they were observed by students, and caused them to (or at the very least, were likely to make them) feel uncomfortable and to affect their emotional wellbeing.
 - (b) Similarly, by making sexual, offensive or derogatory comments to female students, the respondent plainly engaged in conduct likely to adversely affect the well-being of the students involved. It is well-established that comments of this kind

⁵ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43, 24 March 2017.

are likely to and can adversely affect the emotional well-being of students (*CAC v Fairhall NZTDT 2018/9, 12 November 2018*).

- (c) The respondent's conduct in yelling at, using verbal putdowns, and showing physical aggression in front of, Year 9 students during class when he kicked a stool over was plainly conduct that also risked impacting the well-being of the students present and caused at least one of the students to become fearful.
 - (d) The respondent's conduct reflects adversely on his fitness to be a teacher, as it involved him demonstrating a complete lack of professionalism, professional boundaries, and little regard for the emotional well-being of students.
 - (e) The respondent's conduct in the circumstances was a disproportionate response to the behaviour of the students. It calls into question the respondent's ability to cope with the usual stressors of being a teacher. His conduct demonstrated poor modelling to the youngest students of the school, which reflects adversely on his fitness to teach.
12. The Committee also submits that the respondent's course of conduct reflects adversely on his fitness to be a teacher by the fact that the conduct was contrary to various provisions of the Code:
- (a) Section 1.3, maintaining public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity;
 - (b) Section 1.5: Maintaining public trust and confidence in the teaching profession by contributing to a professional culture that supports and upholds the Code;
 - (c) Section 2.1, working in the best interest of learners by promoting their wellbeing and protecting them from harm. The Code's Examples in Practice guide specifically states that using verbal or body language that is unreasonable and inappropriate (e.g. aggressive, threatening or humiliating language, or using an intimidating stance and demeanour) is an example of behaviour that does not promote learners' well-being and may cause harm; and
 - (d) Section 2.2, working in the best interests of learners by engaging in ethical and professional relationships with learners that respect professional boundaries.

Failing to create a safe learning environment by making jokes or innuendo of a sexual nature or inappropriate comments about their physical appearance is specifically noted as an example of behaviour that breaches the boundaries of ethical and professional relationships with students.

Respondent submissions

13. The respondent accepts that he engaged in the behaviour as detailed in the summary of facts. He accepts that the combined conduct amounts to serious misconduct as detailed in Rules 9(1)(e) and (k) of the Rules.
14. The respondent accepts that if his conduct was assessed by a reasonable member of the public, informed of all the facts and circumstances, they would conclude that his actions would have brought the teaching profession into disrepute, and it adversely reflects on his fitness to be a teacher. The respondent accepts that the serious misconduct threshold has been met.

Kupu Whakatau – Decision

15. The Tribunal finds all the particulars set out in the notice of charge are established to the requisite standard.
16. The Tribunal considers that, cumulatively and for the reasons discussed below with respect to the legal position, the established particulars amount to serious misconduct pursuant to section 10 of the Act, and rules 9(1)(e) and (k) of the Rules. The Tribunal considers that the respondent's conduct:
 - (a) adversely affected, or was likely to adversely affect, the well-being or learning of the children involved (section 10(a)(i) definition);
 - (b) reflects adversely on his fitness to be a teacher (section 10(a)(ii) definition);
 - (c) may bring the teaching profession into disrepute (section 10(a)(iii) definition and Rule 9(1)(k)); and
 - (d) breached his professional boundaries with the children involved (Rule 9(1)(e)).

17. The Tribunal is concerned at the impact the explicit images may have had on the students involved. The Tribunal does not consider it relevant that the respondent did not necessarily intend the drawings to be seen, or to be interpreted in a sexual manner, the fact is they were seen and they were explicit. That they were then likely to make students, especially female students, uncomfortable goes without saying, and is demonstrated by some students raising the incidents with the school nurse.
18. Secondary school students are at a vulnerable and often confused age and stage of life. They trust their teachers to act as role models and provide them with positive support as they grow and develop.
19. In terms of the derogatory comments made, again, it is indisputable that such comments can have an adverse impact on students, regardless of the intention behind the comments. Teachers must be mindful to speak at all times in a manner that upholds the mana tamaiti of the student and are cognisant of remaining dignified in their comments.
20. Finally, reacting in an aggressive manner in reaction to a disruptive situation indicates to the Tribunal that this is a teacher who is struggling to cope with the stressors of life as a teacher and has difficulties regulating emotion. Again, it is incontrovertible that such reactions can impact adversely on the well-being of students and, indeed, in this case at least one student became fearful.
21. The Tribunal has no difficulty in concluding that the respondent's actions, as set out in the charge and summary of facts, breached professional standards and is likely to bring the profession into disrepute. Reasonable members of the public, looking at the respondent's conduct objectively, would consider that the reputation and good standing of the teaching profession was lowered by his conduct, given the impact of his actions on the emotional well-being of a number of students, and the repeated nature of the inappropriate conduct.
22. The Tribunal is also not convinced, by the respondent's response as set out in the summary of facts, that the respondent fully appreciates the extent his behaviour was likely to impact negatively on students. The Tribunal remains concerned that the respondent is yet to take full ownership for his actions.
23. In *CAC v Huggard* NZTDT 2016/33, the Tribunal noted (at [20]-[21]):

“When a student feels uncomfortable with a teacher’s interactions, it is difficult for the student to tell a teacher to leave [him or her] alone....as the adult and teacher, the respondent had a responsibility to maintain professional boundaries....he was in a position of power and responsibility, where he should role model appropriate behaviour. His actions should attract esteem, not discomfort or fear.”

24. This is supported by a number of other cases which involved teachers using inappropriate language with students, and showing aggression (including *CAC v Teacher NZTDT 2010/24*, 15 October 2010, *CAC v Teacher N NZTDT 2018/31*, 8 October 2018, *CAC v Hughes NZTDT 2018/52*, 7 December 2018).

Whiu - Penalty

25. Having determined that this case is one in which we consider serious misconduct to be established, the Tribunal must now turn to consider what is an appropriate penalty in the circumstances:

500 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher’s practising certificate or authority for a specified period:*
 - (d) *suspend the teacher’s practising certificate or authority for a specified period, or until specified conditions are met:*
 - (e) *annotate the register or the list of authorised persons in a specified manner:*
 - (f) *impose a fine on the teacher not exceeding \$3,000:*

- (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
 - (h) *require any party to the hearing to pay costs to any other party:*
 - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under 493 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
- (3) *A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.*

26. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.⁶ We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.⁷

27. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers⁸:

- (a) Protecting the public;
- (b) Setting the standards for the profession;

⁶ *CAC v McMillan*, NZTDT 2016/52.

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

⁸ Above n 16 at [40] – [62]

- (c) Punishment;
 - (d) Rehabilitation;
 - (e) Consistency;
 - (f) The range of sentencing options;
 - (g) Least restrictive;
 - (h) Fair, reasonable and proportionate.
28. The Tribunal does not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.
29. In its submissions on penalty, the CAC, after pointing the tribunal to comparable cases, submitted that the respondent's conduct falls at the more serious end of the spectrum, taking into account a number of factors including the age of the students, the impact of the conduct on the students, the number of instances of inappropriate conduct (five including the drawings and comments, plus the instance of aggression), and the fact that each aspect of the conduct was witnessed by a number of students, and a staff member on one occasion.
30. The Committee notes that it is not aware of any personal aggravating factors relating to the respondent. It acknowledges a number of personal mitigating factors which will be relevant to the Tribunal's assessment of penalty:
- (a) The respondent has no previous disciplinary history.
 - (b) In relation to the kicking stool incident, the respondent showed remorse and apologised to the Year 9 class and the other staff member present at the time for his behaviour.
 - (c) The respondent also accepted his conduct for these proceedings (by accepting the Summary of Facts) although he initially attempted to justify his behaviour (at the CAC stage of the process). The respondent has displayed some remorse but has sought to minimise his conduct recently (as part of the CAC process) commenting in his response that some of his comments "have been misrepresented".

- (d) In relation to the drawings, the respondent initially attempted to justify the behaviour by stating that the Drawing 1 was an “attempt to desexualise the students’ notions of fantasy, particularly as they pertained to the work of art”. As to Drawing 2, while the respondent accepted that it was not an appropriate drawing to have at school, he still attempted to blame the students who found the drawing, suggesting that they went into his personal property to find it.
 - (e) The Committee considers that the above comments indicate that the respondent has a lack of self-awareness and insight into his conduct and the impact of his conduct on the affected students.
31. The Committee submits that a starting point of cancellation of the respondent’s registration as a teacher is the appropriate outcome.
32. If the respondent demonstrates genuine insight and remorse for his conduct and puts forward other mitigating circumstances supporting that rehabilitative orders would sufficiently mitigate the risk of the respondent engaging in similar conduct going forward, the Tribunal may consider it is able to step back from cancellation (or suspension). If so, the Committee submits that the appropriate penalty ought to be one of censure, annotation of the register, and the imposition of conditions on the respondent’s practising certificate requiring:
- (a) The respondent to undergo mentoring.
 - (b) The respondent to complete further professional development in regard to appropriate classroom management and/or professional boundaries.
 - (c) The respondent inform any prospective employers in the teaching profession of the Tribunal’s decision for two years.
33. The respondent submits that he is remorseful to all parties affected by his actions and that he regrets his actions.
34. The respondent has reflected on the comments made about an earlier response to some of his actions regarding him minimising and attempting to justify some of his behaviour. In regards to the drawing the respondent is fully accepting the drawing should not have been at school. The respondent wishes to communicate with the Tribunal that he fully owns and

accepts his actions. The respondent owns his comments and regrets that some of his comments have minimised and justified some of his behaviour.

35. The respondent submits that the most appropriate penalty is censure, annotation of the register, undergoing professional mentoring, completing further professional development regarding appropriate classroom management and/or professional boundaries, and informing any prospective employers in the teaching profession of the Tribunal's decision for up to two years.
36. The Tribunal has taken into account both sets of submissions carefully and considered the cases referred to by both parties. In the circumstances, the Tribunal is particularly concerned at the repetition of the behaviour and its impact on the well-being of the students involved. The Tribunal does however acknowledge the remorse and the beginnings of self-awareness shown in the respondent's submissions.
37. Bearing in mind the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
 - (a) A censure under section 500(1)(b) of the Act;
 - (b) Annotation of the register under section 500(1)(e) of the Act;
 - (c) Conditions on the respondent's practising certificate that he:
 - (i) Undergo professional mentoring for a period of two years from the date of this decision;
 - (ii) Undertake a course in professional boundaries and classroom behaviour management;
 - (iii) Show a copy of this decision to any employers for a period of two years from the date of this decision.

Utu Whakaea – Costs

38. The CAC submits that a 40% contribution to the CAC's overall costs is appropriate. This reflects a discount from the starting point of 50% to acknowledge the respondent's cooperation.
39. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC. The CAC has filed a Costs Schedule which sets out the total costs as \$8,628.00, with 40% of that being \$3,307.20.
40. The respondent is also ordered to pay 40% of the Tribunal's costs pursuant to section 500(1)(i). The Tribunal's total costs are \$1455.00, 40% of which is \$582.00.

He Rāhui tuku panui – Non-publication

41. There is an interim order for non-publication. The Committee seeks an order for permanent non-publication in respect of the name and identifying details of Students A, B and C, pursuant to s 501(6) of the Act. That order is granted. The privacy of all students involved, and the lack of public interest in their names being published in connection with the proceedings (in contrast to the respondent, who is charged with a disciplinary offence) mean that it is proper to order suppression.
42. The school board has applied for permanent non-publication for the name of the school and any identifying particulars of the school. The Committee does not oppose the application and suggests that such an order is appropriate in the circumstances to protect the students directly involved in the incidents.
43. The affidavit of ██████████ deposes that the Year 9 class involved at the time are now Year 11 students and are still enrolled at the school. While ██████████ affidavit states "most" of the students still attend the school, it is likely that the Year 11 students involved (including Students A, B and C) are likely to have finished high school. The school's order is also granted and that should extend to the Principal's name.
44. The respondent has applied permanent name suppression for himself. That application is opposed by the CAC.

45. The respondent points to the potential harm that would occur to another New Zealand secondary school teacher also called [REDACTED] and the potential harm that could flow to that teacher's wife, children, and the school he is employed at. He has provided an affidavit from that other [REDACTED]
46. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.⁹
47. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the opinion that it is "proper" to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.
48. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought.¹⁰ Bare assertions will not suffice for displacing the principle of open justice and nor will the "ordinary" hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.¹¹
49. Here, the Tribunal considers the issue of the risk of confusion of the other [REDACTED] with the established charges here outweighs the public interest in open justice. While harbouring a degree of suspicion as to how the other [REDACTED] became aware of the charges, given the interim non-suspension orders in place, the Tribunal nonetheless considers that the risk to him and his family of wrong identification displaces the presumption of open justice. The Tribunal emphasises here that this is due to the coincidences of timing set out in the second [REDACTED] affidavit and that this should not be seen as precedent for any case where there may be duplication of names.

⁹ *CAC v Teacher* NZTDT 2016/27 at [66] citing *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

¹⁰ *Ibid* at [61].

¹¹ *Y v Attorney-General* [2016] NZCA 474 citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 approved by the Supreme Court declining leave to appeal in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.

50. The Tribunal therefore orders permanent suppression of the name and identifying details of the respondent.

R. E. Schmidt-McCleave

Rachael Schmidt-McCleave
Deputy Chair

NOTICE - Right of Appeal under Section 409 of the Education Act 1989

1. This decision may be appealed by the teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).