BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2022-22

COMPLAINTS ASSESSMENT COMMITTEE
Prosecutor

V

[redacted]
Respondent

Date of hearing:	13 March 2022
Representatives:	E A M Mok for the CAC
	P H Mitchell for the respondent
Tribunal:	T Mackenzie, L Arndt, L. Evans
Date of decision	6 April 2023

DECISION OF THE TRIBUNAL ON CHARGE, PENALTY, PUBLICATION AND COSTS

Introduction

[1] The Complaints Assessment Committee (CAC) has filed two charges of Serious Misconduct against [redacted]

[2] The charge particulars are below. We have added in headings to delineate the two charges.

> First charge (social media)
>
> 1. The CAC charges that [redacted], registered teacher, of [redacted] in or around 2020 engaged in inappropriate use of social media by having a public Instagram account on which he followed other Instagram accounts that posted explicit or pornographic material.
>
> 2. The conduct alleged in paragraph 1 amounts to serious misconduct pursuant to section 10 of the Education and Training Act 2020 and Rule 9(1)(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.
>
> Second charge (inappropriate relationship)
>
> 3. The CAC charges that [redacted], registered teacher, of [redacted] between approximately November 2008 and February 2009 engaged in inappropriate conduct towards Ms P (who was in Year 13 at the College in 2008) by:
>
> a. Favouring Ms P in class during her Year 13 year;
> b. Obtaining Ms P's phone number without her consent;
> c. Inviting Ms P to his home for dinner at the end of the 2008 school year;
> d. Showing Ms P and her friend Ms Q a photo of himself in which he was naked (although his genitals were not exposed) at the end of the 2008 school year;
> e. Sending Ms P multiple text messages asking to meet up with her between the end of 2008 and approximately February 2009.
>
> 4. The conduct alleged in paragraph 3 amounts to serious misconduct pursuant to section 139AB of the Education Act 1989 and Rule 9(1)(e) and/or (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 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.

Facts

[3] The parties have agreed on the facts and recorded them in a Summary of Facts document. The contents are set out below. We have not included the pictures from the Instagram pages which are referred to.

Background

1. The respondent, [redacted] is a registered teacher. He was first registered on 10 May 2000.

2. Mr [redacted] no longer holds a current practising certificate. His practising certificate expired in September 2021.

3. Mr [redacted] began working as a teacher at [redacted] (**College**) in [redacted] in 2003. The College is a [redacted] Mr [redacted] started working at the College as a [redacted] teacher, and was subsequently [redacted] between 2006 and 2016.

4. Mr [redacted] resigned from the College in September 2020.

Conduct relating to Instagram account

5. In or around 2020, Mr [redacted] had a social media profile on Instagram under the name [redacted]. Mr [redacted] account was linked to his College email.

6. The College's social media policy stated that teachers had a responsibility to maintain professional standards in using social media. It further stated that staff must, when using social media in their personal life, "keep privacy settings appropriate", and consider "how material or images posted of you reflect on you as a professional associated with the school". Staff were required to attend training sessions at the College, including on use of social media.

7. Mr [redacted] privacy settings were set to "public", meaning that his profile was visible to any member of the public who viewed his account. As a result, anyone viewing Mr [redacted] Instagram account could also see the other profiles which Mr [redacted] "followed" on Instagram. Because of Mr [redacted] privacy settings, other users of Instagram could "follow" Mr [redacted] without his approval.

8. Mr [redacted] followed other accounts which posted sexually explicit and/or pornographic material, as well as images of teenage girls in swimwear and women in sexualised poses. A majority of the accounts which Mr [redacted] followed belonged to girls or women, including those with their ages listed in their profile as being under 18 years old (some being aged 15 and 16). The names of the accounts which Mr [redacted] was following included "tease_girls", "bikiniteenspot" and "freakiest_gals". Screenshots showing examples of some of the accounts Mr [redacted] followed (taken by the College after being notified of concerns about Mr [redacted] Instagram account) are attached at **Tab 1** and form part of this summary of facts.

9. In or around August 2020, multiple students at the College viewed Mr [redacted] Instagram account and were able to see the accounts Mr [redacted] was following.

10. On 31 August 2020, a former student of the College (who had left the College after finishing Year 13 in 2019) contacted the College, reporting that current students had seen Mr [redacted] Instagram account and had felt uncomfortable. The former student provided a sample of screenshots of accounts Mr [redacted] was following, a copy of which are attached at **Tab 2** and form part of this summary of facts. Names of the accounts Mr [redacted] was following included "thesupersexygirls", "thesupersexylingerie", "slavic.girll", "hunnies_0".

11. Four Year 10 students were subsequently interviewed by the College as part of an investigation. The students each reported having seen the account. When later spoken to about the Instagram account, students at the College made the following comments about how they felt looking at the accounts Mr [redacted] followed:

a. "[I]t was creepy and made her feel funny";

b. "[A] bit odd…I was like, oh, this is a bit weird, you know, like a teacher";

c. "[W]e were kind of joking about it at the start, and then it was kind of just like really weird and it was…a little bit confusing because we didn't really think that that was, like anything that he would do";

d. "[I]t was a bit weird. Like, all my like thoughts of him being like a really awesome teacher were a bit like controverted [sic] now, and I was like, oh, not seeing him the same as you would like seeing that he follows all these like, especially like girls' accounts";

e. "[A]fter immediately seeing it, it was a bit weird…It is a teacher at our school. And so that was just like, it was a bit uncomfortable for like, maybe like a day or two because you'd see him in the hallway and be, oh, I know about your Instagram account";

f. "[J]ust like uncomfortable, I guess".

12. At a meeting with the Principal of the College, [redacted], on 2 September 2020, Mr [redacted] said that he had not been aware his Instagram account had its settings on "public". He said he had not known the age of the people whose accounts he had followed.

13. Following the meeting on 2 September 2020, Mr [redacted] made his account settings private. He also provided a written response to the Principal stating that he had been "naïve" in respect of his account, but that he had not been inappropriate. He apologised for the "unintentional oversight" (in terms of his privacy settings) and for the "unease it caused for the…persons who viewed this".

14. Mr [redacted] was invited to attend a disciplinary meeting. At the disciplinary meeting on 16 September 2020, Mr [redacted] tendered his resignation from the College, which was accepted.

15. On 21 October 2021, the Principal of the College submitted a mandatory report to the Teaching Council following Mr [redacted] resignation.

Conduct with respect to student, Ms P

16. After Mr [redacted] tendered his resignation, the Principal of the College sent out an email to parents advising them of Mr [redacted] resignation.

17. On 25 September 2020, a former student of the College, **Ms P**, who had seen the email after this was forwarded to her by a school friend, made a complaint about Mr [redacted] conduct towards her when she was a student at the College. Ms P attended the College between 1998 and 2008. Specifically, Ms P reported that Mr [redacted] had engaged in inappropriate conduct towards her when she was a student (and shortly after she graduated from the College). Ms P stated that she had not felt comfortable raising Mr [redacted] actions towards her with anyone at the time.

18. In 2008, Ms P was a Year 13 student in Mr [redacted] class. Mr [redacted] would favour Ms P in class by giving her chocolate and energy drinks, which he did not provide to other students. Other students noticed that Mr [redacted] treated Ms P favourably and differently from other students. Mr [redacted] would make comments about Ms P being his favourite student and having a "high moral compass".

19. On the final day of the school term, Mr [redacted] located Ms P and gave her his telephone number on a piece of paper. He told her that, because he was no longer Ms P's teacher, she could call him [redacted] from then on. Ms P felt uncomfortable at this suggestion. Mr [redacted] also invited Ms P over to his house for dinner. He told her that this was because Ms P was the best [redacted] student, so he wanted to cook her dinner. Ms P declined to go to dinner.

20. Around this time, Mr [redacted] also obtained Ms P's mobile phone number without her permission. On one occasion, shortly after Ms P's graduation from the College and during the summer holiday break, Mr [redacted] texted Ms P again inviting her to dinner at his home. Mr [redacted] said his family would be there. Ms P felt uncomfortable going by herself, so brought a friend (also a recent former College student) with her.

21. During the visit to Mr [redacted] address, Mr [redacted] showed Ms P and her friend photos in a photo album. One photo showed Mr [redacted] naked in a bathtub (albeit, below the waist was not visible). Mr [redacted] brother was at the address during the visit, but Mr [redacted] partner did not arrive until the end of the visit.

22. After the dinner, Mr [redacted] sent Ms P further text messages asking to meet up with her. On one occasion shortly before Ms P moved to [redacted] for university, Mr [redacted] sent Ms P a text message asking for Ms P to meet up with him so they could spend time together "just the two of us", as her friend (who had gone with her to the dinner) had gone to [redacted] for university (or words to that effect). Ms P replied that she did not have time to see him before going to [redacted]. A few days later, Mr [redacted] responded in the early hours one Sunday morning implying that Ms P had let him down and that he did not understand why she did not want to see him. Ms P formed the impression that Mr [redacted] had been drunk when he sent the message, as the message was "garbled" (in terms of the spelling) and did not make sense. Ms P did not respond.

23. Over the following years, Mr [redacted] would, on occasion, contact Ms P, including calling and/or messaging her on her birthday (until she moved [redacted] and her phone number changed) and sending her messages on LinkedIn in 2015 and 2019. This contact was unwanted by Ms P.

Teacher's comments

Conduct relating to Instagram account

24. In respect of his Instagram account, Mr [redacted] stated that he had not been aware of the privacy settings on his account being set to "public", and said he was not aware of the nature of content some of the accounts he followed were posting (he said he received requests and then followed accounts back without checking the content of their posts). He said he was remorseful for his students seeing this. He denied having seen the College's social media policy and could not recall the training session addressing this.

25. In another response (dated 14 August 2021), Mr [redacted] also said "my accusers have cherry picked the worst images they could find...there is no way that I could have seen everyone's page I followed." He also referred to other publications, such as the *Daily*

Mail and *Elle* magazine, regularly showing "scantily clad women" and "topless young women", and provided an example of such images with this response (attached to this summary of facts at **Tab 3**).

26. Mr [redacted] also referred to the impact of his conduct in respect of his Instagram account on his reputation, stating: "I am glad I am out that school [sic] and teaching. The characters of the movie 'Mean Girls' are saints compared to the vindictive ones at [redacted] The school has lost a committed and caring teacher and after having my life dragged through the gutter for the past year, I'm done with teaching. [redacted] is a small community. My reputation is screwed. I will rather [redacted] for a living (as I am doing now) than teach such manipulative, vindictive spoilt brats".

Conduct with respect to student, Ms P

27. In respect of the complaint from Ms P, Mr [redacted] acknowledged having provided Ms P with treats during class, but denied engaging in any special treatment of her, stating he provided other students with treats too. He said that he had gotten on with Ms P, and had given his number to her so she could decide whether to come to dinner with his partner, his brother and him. He had told her she could bring someone with her. Mr [redacted] said that the photo of him in the bath was not improper (as there was bubble bath in the bath). He denied inviting Ms P to meet up with him in private. He also said he had contacted other former students over the years to keep in touch and that there was nothing inappropriate involved in this.

Law that applies to these charges

[4] We note that the first charge falls under the 2020 Act and the second under the 1989 Act. There is a slight difference between the two although nothing turns on that in this case.

[5] For the first charge, section 10(1)(a) of the Education and Training Act 2020 (the Act) defines serious misconduct as follows:

> **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
> (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

[6] For the second charge, the test for serious misconduct begins the same, with (i) and (ii) above, but is absent (iii) (disrepute). Other than that, the same approach is taken to considering (i) and (ii) across either Act. We will discuss the approach taken below.

[7] Regarding the first limb of (either) test (adverse effect). In *CAC v Marsom* this Tribunal said that the risk or possibility is one that must not be fanciful and cannot be

discounted.[1] The consideration of adverse effects requires an assessment taking into account the entire context of the situation found proven.

[8] Direct evidence from the child/student as to effects is not mandatory and indeed is rare, particularly in an ECS setting. Nor does the ambit of section 10 call for direct evidence. The use of the term "likely" permits the Tribunal to draw reasonable inferences as to effects or likely effects, based on the proven evidence in a case and its own knowledge.

[9] The second limb (fitness) has been described by the Tribunal as follows:[2]

> We think that the distinction between paragraphs (b) and (c) is that whereas (c) focuses on reputation and community expectation, paragraph (b) concerns whether the teacher's conduct departs from the standards expected of a teacher. Those standards might include pedagogical, professional, ethical and legal. The departure from those standards might be viewed with disapproval by a teacher's peers or by the community. The views of the teachers on the panel inform the view taken by the Tribunal.

[10] The third limb of the test (disrepute, in the 2020 Act) is assisted by reference to the High Court decision in *Collie v Nursing Council of New Zealand.*[3] The Court held that a disrepute test is an objective standard for deciding whether certain behaviour brings discredit to a profession. The question that must be addressed is whether reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and good standing of the profession is lowered by the conduct of the practitioner. This test is regularly applied in this Tribunal.

[11] Part (b) of the serious misconduct test (from either Act) requires that the conduct be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct. This criteria is found in a different set of rules for each charge/Act.

[12] For the first charge (2020 Act) the Teaching Council Rules 2016 provide the reporting criteria (the 2016 Rules). For the second charge (1989 Act) the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 apply (the 2004 Rules).

[13] The Court of Appeal has held that the test for serious misconduct[4] is conjunctive with paragraph (b) of the section 10 test.[5] Therefore for serious misconduct to be made out, as well as meeting one or more of the three limbs set out above in section 10(a), the conduct concerned must at the same time meet one or more of the Teaching Council's criteria for reporting serious misconduct (as per 10(b)).

---

[1] *CAC v Marsom* NZTDT 2018/25, referring to *R v W* [1998] 1 NZLR 35.
[2] *CAC v Crump* NZTDT 2019-12, 9 April 2020.
[3] *Collie v Nursing Council of New Zealand* [2001] NZAR 74, at [28].
[4] In section 378 of the (now repealed) Education Act 1989, the equivalent of section 10 of the 2020 Act).
[5] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZCA 637.

[14] The Tribunal will approach its task by first considering the tests in part 10(a) of the test (and likewise the first part of the s 378 test from the 1989 Act for the second charge). If met, misconduct is made out. If misconduct is made out the Tribunal will then consider part (b) of the test(s) to determine if serious misconduct is made out.

[15] As noted, the criteria to consider for part (b) of the serious misconduct test(s) are the reporting rules. The 2016 Rules, applicable to the first charge, make the following behaviour mandatory to report:

> **9 Criteria for reporting serious misconduct**
>
> (1) A teacher's employer must immediately report to the Teaching Council in accordance with section 394 of the Act if the employer has reason to believe that the teacher has committed a serious breach of the Code of Professional Responsibility, including (but not limited to) 1 or more of the following:
>
> (a) using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so:
> (b) emotional abuse that causes harm or is likely to cause harm to a child or young person:
> (c) neglecting a child or young person:
> (d) failing to protect a child or young person due to negligence or misconduct, not including accidental harm:
> (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:
> (f) viewing, accessing, creating, sharing, or possessing pornographic material while at a school or an early childhood education service, or while engaging in business relating to a school or an early childhood education service:
> (g) acting dishonestly in relation to the teacher's professional role, or committing theft or fraud:
> (h) being impaired by alcohol, a drug, or another substance while responsible for the care or welfare of a learner or a group of learners:
> (i) permitting or acquiescing in the manufacture, cultivation, supply, offer for supply, administering, or dealing of a controlled drug or psychoactive substance by a child or young person:
> (j) an act or omission that may be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:
> (k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.

[16] Here, the CAC relies on (k) for the first charge.

[17] For the second charge (1989 Act) the 2004 Rules at rule 9 provide a similar set of reporting criteria. A difference however is that the teacher only needs to have

"engaged" in any of the types of behaviour, whereas the 2016 Rules require "a serious breach". The behaviours listed in the 2004 Rules are:

> **9 Criteria for reporting serious misconduct**
>
> (1) The criterion for reporting serious misconduct is that an employer suspects on reasonable grounds that a teacher has engaged in any of the following:
>
> (a) the physical abuse of a child or young person (which includes physical abuse carried out under the direction, or with the connivance, of the teacher):
> (b) the sexual abuse of a child or young person (which includes sexual abuse carried out under the direction, or with the connivance, of the teacher):
> (c) the psychological abuse of a child or young person, which may include (but is not limited to) physical abuse of another person, or damage to property, inflicted in front of a child or young person, threats of physical or sexual abuse, and harassment:
> (d) being involved in an inappropriate relationship with any person under the age of 16 years:
> (e) being involved in an inappropriate relationship with a student with whom the teacher is, or was when the relationship commenced, in contact with as a result of his or her position as a teacher:
> (f) the neglect or ill treatment of any child or young person in the teacher's care:
> (g) the neglect or ill treatment of any animal in the teacher's care:
> (h) theft, or fraud:
> (i) involvement in the manufacture, cultivation, supply, dealing, or use of controlled drugs:
> (j) permitting, or acquiescing in, the manufacture, cultivation, supply, dealing, or use of controlled drugs by any child or young person:
> (k) viewing, accessing, or possessing pornographic material while on school premises or engaged on school business:
> (l) viewing, accessing, or possessing pornographic material that depicts children or young persons or that depicts animals engaged in sexual acts with humans:
> (m) breaching the school's standards or rules concerning the use of alcohol at the school or while on school business:
> (n) any other act or omission that could be the subject of a prosecution for an offence punishable by imprisonment for a term of 3 months or more:
> (o) any act or omission that brings, or is likely to bring, discredit to the profession.

[18] For the second charge, the CAC relies on rules (e) and (o).

[19] The burden rests on the CAC to prove the charge. While the standard to which it must be proven is the balance of probabilities, the consequences for the respondent that will result from a finding of serious professional misconduct must be borne in mind.[6]

[6] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC).

Discussion – liability for each charge

First charge/social media

[20] Mr [redacted] has indicated that he accepts the charge of serious misconduct.

[21] Notwithstanding this, we have considered the conduct ourselves. We do have some concerns regarding whether the first charge is serious misconduct.

[22] We start by noting that the fact of following these pages in and of itself is not something which we consider breaches the misconduct test. That is our view drawn from the facts before us, as there is no rule about private viewing interests one way or the other. Some situations of private internet use will obviously offend against the serious misconduct test. A blatant example for instance would be where there was evidence of unlawful or objectionable publications, or even something close to it. Each case will depend on its facts and we are not suggesting a line or test exists.

[23] Here though Mr [redacted] has followed pages which contain photos of adult women (some in sexualised poses), and pages containing teenagers (aged 15-16 in some cases) in bikinis/swim wear. All we really know from the evidence is that he will have clicked on "follow" on these pages.

[24] The mistake obviously made by Mr [redacted] was to have not made his Instagram page "private". A private page cannot be looked at in any detail without the page holder (i.e. Mr [redacted]) approving a person as a "follower" of the page. A page where "private" has not been selected however can be looked at by anyone, as has happened here.

[25] What has actually occurred here has to be borne in mind however. There is no evidence that Mr [redacted] advertised, discussed or made available his Instagram page to any students. He did not follow any students. He did not invite them to follow him. Nor did he leave it open in class on a computer or phone, and risk students seeing it.

[26] Students have instead become aware somehow of Mr [redacted] having an Instagram profile. His profile on the evidence before us indicates a mere 62 followers. Instagram and the "following" phenomenon has become well known in recent times. Some apparent celebrities, music stars, sports stars and the like will celebrate themselves reaching follower milestones measured in the millions.

[27] It does not appear to us then that Mr [redacted] had an Instagram profile that would have been well known. The evidence does not explain how the students came to find this profile. We consider though that what has likely occurred is that, schools being schools, his page would have been found by someone and talked about by students, and in turn students looked at it by searching for it. The alternative would be that each student who saw it somehow came across it by mere coincidence.

[28] Looking at a profile page however only brings up what we can see in the evidence, being basic information about the profile holder and whatever photos they have uploaded to their page. Mr [redacted] page shows several generic photos of himself.

[29] What pages Mr [redacted] followed himself (i.e. the pages at issue here) was not immediately present to anyone looking at his page. The students looking at the profile page have then had to locate and click on the "following" section of Mr [redacted] profile. That then opens up a list of what pages he was "following".

[30] Once they have done that, they have then had to scroll through them and click on particular pages to open them. Many of those pages clicked on had quite revealing names, as set out in the summary of facts. Once a page had been selected, the student has then had to observe their content, which by this stage could not have been a surprise to the viewer.

[31] This does not excuse what occurred. But we must consider it in considering the overall culpability here. We have some reservations over the level of conduct concern that arises, and particularly how it is said to have affected the students. The CAC has submitted for instance that: *"Mr [redacted]' lack of care with his account settings on Instagram meant that students were exposed to sexually explicit and pornographic material on the accounts that Mr [redacted] was following, and resulted in them being aware that their teacher was following accounts that posted such material."*

[32] There is some truth in that submission. But it does not capture the full reality. In our view Mr [redacted] lack of care was not entirely causative of what occurred. He certainly left the door open. But that is not what "meant" that students were exposed. They had to find out and look for themselves. We cannot accept that this happened by accident.

[33] Standing back however, this conduct still concerns a male high school teacher of female students, leaving himself exposed to the students being able to easily see that he is following these various pages that included what was probably some similar aged girls. In this day and age, the risk of students looking up a teacher's social media profile should be well known. The school had encouraged staff to ensure appropriate use of social media and privacy settings occurred for that very reason.

[34] We consider that Mr [redacted] conduct in enabling the risk of this occurring, which is exactly what then happened, meets the disrepute test in section 10. But not by a great margin. We do not consider it bears on fitness or had an adverse effect at the level required for the misconduct test.

[35] We do not consider that this conduct alone is a serious breach of any of the reporting rules including the disrepute rule.

[36] On the first charge then we find that misconduct has been proven but not serious misconduct.

Second charge

[37] Mr [redacted] has accepted this is serious misconduct.

[38] We likewise accept that this is serious misconduct. The conduct meets all three limbs of the s 10 test. We consider it is also a breach of the disrepute rule in (o).

[39] Rule (e) is also alleged in the charge, being an inappropriate relationship. We do not read that rule as requiring something more than existed here, i.e. a consensual or intimate relationship. There are no indications to read down the term "relationship" in that way, as to do so would create a threshold that was not intended or expressed.

[40] Ultimately there was a relationship of some sorts, as the parties knew each other and had contact. That relationship became inappropriate through the actions of Mr [redacted] as set out in the summary of facts. Rule (e) is also breached.

Penalty

[41] The parties are in agreement as to the proposed penalties. These are censure, annotation of the register and conditions on any future practising certificate.

[42] We have considered the conduct in total and Mr [redacted] position. He has accepted the conduct, albeit with some earlier explanations tending to suggest reservations about the gravity of the accepted conduct for both charges.

[43] We do take into account however the fall from grace that has occurred for Mr [redacted] It would be wrong however for Mr [redacted] to consider that this fall all started with the students looking at his Instagram profile (which ultimately led to his resignation and the relationship complaint coming out). The real responsibility lies with Mr [redacted], for attempting in various unwanted ways to embark on some form of inappropriate relationship with a recently graduated former student.

[44] We also take into account that Mr [redacted] has no previous disciplinary history (albeit we must temper that with the fact that the conduct in the second charge was some 13 or so years ago).

[45] If Mr [redacted] was still a practising teacher (and still had a practising certificate) we would be considering a suspension, subject to a more detailed exploration of what rehabilitative steps had or were being taken and what current risk still existed.

[46] In the present circumstances however the Tribunal agrees with the orders sought (which are agreed with by Mr [redacted]).

[47] As the charges fall under two different Acts, rather than split the orders across

both Acts and charges, we will attach the penalty orders now to the first charge, under the 2020 Act.

[48] The orders we make are:

- A censure under s 500(1)(b) of the Act.
- Annotation of the public register for a period of one year under s 500(1)(e).
- We direct the Teaching Council to impose the following condition on any future practising certificate issued to Mr [redacted] (s 500(1)(j): He is to inform any prospective or current teaching/education employers of this decision for a period of one year after being issued with the practising certificate.

[49] We note that we have not directed a condition that Mr [redacted] undertake further education on appropriate professional boundaries and social media. We consider that this experience and these orders has addressed this with Mr [redacted].

Non-publication applications

Legal principles

[50] The default position is that Tribunal hearings are to be conducted in public. Consequently the names of teachers who are the subject of these proceedings are to be published. The Tribunal can only make one or more of the orders for non-publication specified in section 501 if we are of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and to the public interest.

[51] The purposes underlying the principle of open justice are well settled. As the Tribunal said in *CAC v McMillan*, the presumption of open reporting "exists regardless of any need to protect the public".[7] Nonetheless, that is an important purpose behind open publication in disciplinary proceedings in respect to practitioners whose profession brings them into close contact with the public. In *NZTDT v Teacher* the Tribunal described the fact that the transparent administration of the law also serves the important purpose of maintaining the public's confidence in the profession.[8]

[52] In *CAC v Finch* the Tribunal noted that the "exceptional" threshold that must be met in the criminal jurisdiction for suppression of a defendant's name is set at a higher level to that applying in the disciplinary context. As such, the Tribunal confirmed that while a teacher faces a high threshold to displace the presumption of open publication in order to obtain permanent name suppression, it is wrong to place a gloss on the term

[7] *CAC v McMillan* NZTDT 2016/52.
[8] *NZTDT v Teacher* 2016/27,26.

"proper" that imports the standard that must be met in the criminal context.[9]

[53] In *Finch,* the Tribunal described a two-step approach to name suppression that mirrors that used in other disciplinary contexts. The first step, which is a threshold question, requires deliberative judgment on the part of the Tribunal whether it is satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of the statutory test at s 501(6), this simply means that there must be an "appreciable" or "real" risk.[10]

[54] In deciding whether there is a real risk, the Tribunal must come to a judicial decision on the evidence before it. This does not impose a persuasive burden on the party seeking suppression. If so satisfied, the Tribunal must determine whether it is proper for the presumption to be displaced. This requires the Tribunal to consider, "the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression".[11]

[55] In NZTDT 2016/27, we acknowledged what the Court of Appeal said in *Y v Attorney-General*.[12] While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".[13]

[56] The Court of Appeal in *Y* referred to its decision *X v Standards Committee (No 1) of the New Zealand Law Society*, where the Court had stated:[14]

> The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*.

[57] Gwynn J in the High Court considered the applicable principles for suppression in professional disciplinary litigation, in a Chartered Accountant's disciplinary decision.[15] Although the specific statutory wording in that legislation used the term "appropriate" (instead of "proper"), we consider little turns on such semantics and the observations of the Court are of application here. Gwynn J stated:

> [85] Publication decisions in disciplinary cases are inevitably fact-specific, requiring the

---

[9] *CAC v Finch* NZTDT 2016/11, at [14] to [18].
[10] Consistent with the approach we took in *CAC v Teacher* NZTDT 2016/68, at [46], we have adopted the meaning of "likely" described by the Court of Appeal in *R v W* [1998] 1 NZLR 35 (CA). It said that "real", "appreciable", "substantial" and "serious" are qualifying adjectives for "likely" and bring out that the risk or possibility is one that must not be fanciful and cannot be discounted.
[11] *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4, at [3].
[12] *Y v Attorney-General* [2016] NZCA 474, [2016] NZFLR 911, [2016] NZAR 1512, (2016) 23 PRNZ 452.
[13] At [32].
[14] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].
[15] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

> weighing of the public interest with the particular interests of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interests of any person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.
>
> [86] I do not consider the use of the word "appropriate" in r 13.62 adds content to the test usually applied in the civil jurisdiction or sets a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.
>
> (citations omitted).

[58] Having set out the applicable law above, we will turn now to consider the various publication issues that arise here.

Students and school

[59] We consider it proper to make permanent orders prohibiting from publication the names of any students or ex-students referred to in this case.

[60] We also consider that publication of the school's name would undermine this order. There is little to no public interest in the school name being able to be published, as the issues are all to do with Mr [redacted], and not the school.

[61] We therefore make a non-publication order of the schools name and identifying details, including the town that the school is in, whether it is co-ed or single sex, public or private, or of any particular faith.

[62] For the avoidance of doubt the school can be referred to as a "North Island secondary school".

Application by Mr [redacted]

[63] Mr [redacted] also seeks a permanent non publication order. Various grounds are advanced.

[64] We do not consider that Mr [redacted] concerns for future employment are a ground of any weight to displace the presumption of open justice. Many respondents in this jurisdiction will have the same concern. Making an order on that basis would nearly create a presumption of non-publication.

[65] Mr [redacted] (and Mrs [redacted]) have concerns for their son, should there be publication. We accept those. But again those concerns are part and parcel of a

disciplinary process. Such risks are taken on by professionals who commit misconduct. We do not consider that this displaces the presumption of open justice.

[66] The more significant part of the argument regards mental health concerns for Mrs [redacted]. We have been provided with extensive information from Mrs [redacted] herself, from a psychologist she sees, and from a counsellor she sees. Our summary of this follows, which we hope will not be seen as minimising or overlooking any of these issues.

[67] [redacted]

[68] [redacted]

[69] [redacted]

[70] [redacted]

[71] [redacted]

[72] [redacted]

[73] [redacted]

[74] [redacted]

[75] [redacted]

[redacted]

[76] [redacted]

[77] We have considered all of the evidence before us. We accept without reservation all of the issues and difficulties that Mrs [redacted] has had and continues to have.

[78] We accept that some level of recurrence is likely to occur if Mr [redacted] name was able to be published. What we struggle with though is what level of recurrence. The two professional opinions provided are consistently conservative. One opines that her mental health "will deteriorate". The other states "a worsening in her mental state".

[79] This contrasts with Mrs [redacted] who ventures as far as referencing suicide.

[80] This is a delicate area to deliberate over. However, we cannot place much weight on the fears expressed by Mrs [redacted] herself. They are obviously subjective and with a vested interest in outcome. They are also coloured by the reality of an ongoing struggle with anxiety. In short, and without wishing to sound critical, we consider objectively that they may be overstated.

[81] There is also a wider concern held by the Tribunal that a respondent (or a family member, as here) may make such "suicide" references too easily in a quest for success in these applications, placing particularly unfair pressure on a Tribunal it its decision making.

[82] Moreover to find that the risk of deterioration is at the level suggested by Mrs [redacted], we would expect the two professional opinion's to squarely address the issue.

[83] Overall we do not feel that the presumption has been displaced on the basis advanced.

[84] However, that is not the end of things. There remains an issue regarding the identification of the students involved in the second charge. The facts are quite particular, including events both at school and outside of it. We consider that if Mr [redacted] was able to be named alongside those facts that there is then a real risk of undermining the non-publication orders for the students involved.

[85] We consider this displaces the presumption of open justice in this case,

particularly when we take into account that the serious misconduct here concerns behaviour over a decade ago, after the student had graduated, and that Mr [redacted] is no longer teaching.

[86] We therefore make a final order for non-publication of Mr [redacted] name, and Mrs [redacted] given her name too would undermine the orders (and their son). We will also suppress the medical information above regarding Mrs [redacted], given this is particularly sensitive mental health information.

[87] To summarise the non-publication orders, there is non-publication of:

- The names of any students mentioned or involved in this decision.
- Identifying details of the school involved including name, town, private or public, whether of any faith or not, and whether single sex or not.
- The name of the respondent and his wife, and their son.
- The summary of mental health issues (paras [67] – [76]).

Costs

[88] The CAC seek a contribution towards costs. The starting point is that a 40% contribution is standard in situations such as this case, with an agreed set of facts and acceptance of liability.

[89] This is subject to the reasonableness of the costs incurred, and any inability to pay.

[90] The costs incurred were $8602.75 (excl GST and disbursements). That is very reasonable in our view for a matter such as the present, involving two discrete charges and associated sets of factual, liability and penalty considerations.

[91] Tribunal costs also apply, and are fixed at $1455 as a starting point.

[92] Mr [redacted] has raised financial issues with the Tribunal, although without sworn evidence at this stage.

[93] There seems no doubt that there have been a number of challenges for Mr [redacted] and his family. He has lost his career and is said to be working a minimum wage job. His wife has as noted had various difficulties, which have affected her employment from time to time.

[94] We do not know the entire financial position, i.e. debts, liabilities, income, outgoings etc. However we can easily conclude from the evidence that there are some financial difficulties. Whilst we can call for detailed financial evidence, that in itself can became an inexact science – and an uneconomic one too, for the modest further discount that might sometimes occur.

[95] We are minded to make a slight reduction to a little less than 30% of CAC and Tribunal costs. If Mr [redacted] wishes to argue for a lower amount, he should file any evidence within 10 working days. If nothing is received by the end of that period, the orders below will stand. If an application is filed, the CAC can respond within a further 10 working days if they wish to. A short decision will then issue.

[96] The costs orders for now then are (slightly rounded):

- CAC costs: $2500
- Tribunal costs: $400.

T J Mackenzie
Deputy Chair