**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2022/02**

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| **IN THE MATTER** | of the Education Act 1989 |
| **AND** | |
| **IN THE MATTER** | of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal |
| **BETWEEN** | **COMPLAINTS ASSESSMENT COMMITTEE** |
| **AND** | [redacted] |
| | **Respondent** |

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**TRIBUNAL DECISION**

**Dated: 25 October 2022**

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**TRIBUNAL:** Ian Murray, Kiri Turketo and Nikki Parsons

**HEARING:** Held at Wellington on 12 October 2022 (on the papers)

**REPRESENTATION:** Sean McCusker and Amy Oliver, Counsel for the CAC

Janette Brown, NZEI for [redacted]

**Charge**

1. The Complaints Assessment Committee (CAC) has referred to the Tribunal a charge of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC charges that [redacted], registered teacher, of [redacted], in or around 2020:

    a. Tethered his personal iCloud account to an iPad owned by [redacted];

    b. After leaving [redacted], in or around September 2020, provided a student at [redacted] with his iCloud password to access the iPad;

    c. As a result of the above conduct, caused his personal photographs and images on his iCloud account, which included intimate photographs and images with sexualised messages, to sync to the iPad and be accessible to students at [redacted].

## Evidence

2. Before the hearing the parties conferred and submitted and Agreed Summary of Facts (**ASF**), signed by the respondent and counsel for the CAC. The ASF is set out in full below (although the images and memes are not reproduced):

*Background*

1. [redacted] was first fully registered in 2004.

2. During 2020, [redacted] was in a relationship with Teacher B, another teacher at [redacted] (the **School).**

3. Following the School's investigation into another alleged incident involving [redacted] and Teacher B, [redacted] was placed on discretionary leave on 8 June 2020.

4. [redacted] resigned from the School on 26 June 2020.

5. The Teaching Council received a mandatory report regarding [redacted] resignation on 3 July 2020.

*Devices at [redacted] School*

6. Students at the School kept their own assigned devices.

7. In addition to students' assigned devices, the School kept a number of "spare" iPads to be used when students' assigned devices were flat. The spare iPads were stored with the children's assigned devices in a cabinet in the classroom.

*Inappropriate use of school devices*

8. Subsequent to his resignation, on 1 July 2020 [redacted] returned his electronic devices to the School.

9. Between 1 July 2020 and 25 September 2020, two students in [redacted] former classroom asked to use a spare iPad.

10. The children accessed the iPad through using the school's generic passcode, 0000.

11. While using the iPad, the students discovered a number of images of [redacted] and Teacher B, as well as sexual memes, stored in the "photos" section of the iPad. Screenshots of these images and memes are annexed as

Schedule A. The images depicted [redacted] and Teacher B fully-dressed and cuddling or sitting/lying close together. The sexual memes included sexual statements; for example, "I really like your beard. Can I touch it ... with my vagina?" The memes did not include any sexualised imagery.

12. On 25 September 2020 one of the students who had observed the images spoke to the principal of the School, [redacted], about the images found on the iPad.

13. The iPad was later submitted for forensic analysis.

14. Forensic analysis of the IPad identified that the iPad was last factory reset on 21 May 2020. At this time of the forensic analysis, the iPad was tethered to the cloud to his personal email address.

15. The iPad was used minimally subsequent to 21 May 2020. An analysis of the IPad's activity log indicated the iPad had been used to search google on some occasions and had been turned on/off a number of times.

16. The forensic analysis concluded that the other 105 devices tethered to the iCloud account for his personal email address had populated the iPad with the images of [redacted] and Teacher B, as well as the sexual memes. The analysis identified that there was no evidence that [redacted] had used the device to download or access the images and sexual memes.

**Teacher's response**

17. On 3 November 2020, [redacted] provided a written response to the investigator through his representative.

18. In his response, [redacted] explained that he and Teacher B for a number of years had been responsible for the purchase, setting up, maintaining and upgrading of all School devices, including sixty iPads and thirty Chromebooks. Both himself and Teacher B were also the ICT leaders for teacher devices and set up the teachers' and principal's leased laptops and computers.

19. [redacted] stated that as a result of his ICT role, he and Teacher B wiped school devices to factory settings when they collected their belongings in late June/early July 2020.

20. [redacted] explained that he received a private message from a School student on 16 September 2020 advising him that his account was located on a school iPad and [redacted] password was required to remove the account. [redacted] provided the password to the student and later changed his password to avoid any further access.

21. [redacted] explained that the images on the iPad were private photos from a personal account and the images were not taken on, captioned or shared on school

devices.

22. On 22 October 2021, [redacted] provided a further response to the draft investigation report, stating that:

> *I pride myself on my professionalism and integrity, and I have let people down. I acknowledge and take full responsibility for the images being on the iPad in question. This indeed was a lapse of judgment and I am sincerely sorry to the children involved. I have learned valued lessons from this and have taken steps to ensure this will never happen again. This is absolutely inadvertent. I had the iPad synced to my personal computer as I was photographer for school events and found it the most reliable way to transfer photos for use by the school.*

3. We must be satisfied on the balance of probabilities that the CAC has proved the charge. In this case, the admissions in the summary of facts provide an adequate basis to establish the particulars of the charge. Accordingly, we find that the particulars are established. That does not, of itself, mean we have found the conduct amounts to serious misconduct. To decide that question, we need to be assess that established conduct against the statutory criteria for serious misconduct or conduct otherwise entitling the Tribunal to exercise its powers.

## Serious misconduct

4. Section 378 of the Act provides:

> ***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 Education Council's criteria for reporting serious misconduct*.

5. The criteria for reporting serious misconduct are found in r 9 of the Rules. The CAC relies on r 9(1) (d) and (k).

***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:*

*(d) failing to protect a child or young person due to negligence or misconduct, not including accidental harm: …*

*(k) an act or omission that brings, or is likely to bring, the teaching profession into disrepute.*

*CAC submissions*

6. The CAC summarised the facts of the case and set out the relevant legislation. On the issue of serious misconduct, the CAC argued that all three limbs of s 378 of the Act were established.

7. In respect to the effect on the wellbeing or learning of students, the CAC argued that viewing the images of [redacted] and Teacher B, who were both teachers at the school, would be confusing to the students, especially those of primary school age. The basis of this argument is because the students looked up to the teachers as trusted authority figures and seeing those images may undermine the trust and confidence in their teachers. It was argued that the sexual memes were clearly inappropriate for primary school aged children and had the potential to negatively impact the children's views on sexuality and healthy sexual behaviours.

8. With regard to [redacted] fitness to be a teacher, the CAC argued that his decision to tether his personal Apple iCloud account to a school

electronic device reflected adversely on his fitness. They argued that teachers must take care to separate their personal lives from teaching practice, including maintaining boundaries between personal and school devices. The CAC argued that while he may have tethered his personal iCloud account to the school device to assist in uploading of photographs, that that decision risked student safety and represented poor teaching practice. It was submitted that was a breach of clauses of the Code requiring the maintenance of high standards of professional behaviour and integrity and to avoid placing students at risk.

9. Further, the CAC argued that parents placed trust in teachers to ensure their children are protected from inappropriate content while at school and [redacted], by linking his iCloud account to a school device, led to conduct that undermines the public trust and confidence in the safety of schools. This had the tendency to bring the teaching profession into disrepute.

10. The CAC also argued that the behaviour met the reporting criteria. They argued that the behaviour was conduct that failed to protect a child or young person due to negligence and was an act or omission likely to bring the teaching profession into disrepute.

11. The CAC referred the Tribunal to cases involving exposure of students to inappropriate material, even inadvertent.[1] The CAC acknowledged these cases involved pornography rather than the images and the sexual memes in this case, but argued by analogy the principles in those cases should be applied.

*Respondent submissions*.

12. [redacted] disputed that the conduct amounted to serious misconduct. He noted that the images were simply those of an ordinary, loving couple and were not sexualised. Because of the benign nature of the imagery, his conduct was not serious misconduct.

13. With regard to the memes, [redacted] argued that while they included

[1] *CAC v Lother* NZDT 2016 – 17 and *CAC v Teacher* NZDT 2013 - 10

sexual ideas and language, the attached imagery was neutral. It was accepted that the language may cause some discomfort to children, but largely the language was likely to go over their heads of 5 or 6 year olds and older children it was argued that they were likely to be indifferent to the imagery and language.

14. [redacted] argued that there was no evidence of any adverse effect on any children and nor were the images or the memes of a kind where we could infer such adverse effect.

15. Further, it was argued that the images of the two teachers together may have been confusing, but that does not mean that the students were likely to be adversely affected. It was argued that the fact that [redacted] was in a loving relationship with another teacher is unlikely to have adversely affected the students,.

16. Further, it was argued that [redacted] made a mistake in tethering his personal account to the device, but that this was a relatively low level mistake and does not adversely affect his fitness to be a teacher, especially as there was no evidence that any students were adversely affected.

17. Further, it is argued that the reputation of the profession was not adversely affected by this inadvertent mistake by [redacted] which allowed children to view relatively low level images and memes.

18. [redacted] argues that the behaviour was not of such a character or severity that amounted to misconduct.

19. [redacted] referred to *CAC v West*[2] by analogy as more serious behaviour which only just amounted to misconduct.

**Analysis**

20. We have assessed [redacted] behaviour against the test for serious misconduct. Starting with the first ground, because there is no direct evidence of any adverse effect on the child, we need to look at the

[2] *CAC v West* NZDT 2018 – 90 where an expletive filled outburst by a teacher was found to be barely misconduct. That behaviour caused distress to learners.

likelihood of an adverse effect on students.

21. We agree that seeing the images of two teachers clearly being affectionate with each other may have been somewhat confusing to the students who presumably did not know that the teachers were in a relationship. But from that, we cannot infer that this was likely to adversely affect them. Would it have been argued that if the child came upon the two teachers hugging at school or kissing, that that would be sufficient to trigger this criteria for serious misconduct? That seems unlikely.

22. In relation to the memes, while unfortunate that the children were exposed to them and noting that they did involve swearing and concepts of a sexual nature, ultimately, we were not able to conclude that they were of a nature that we could simply infer that the children would have been adversely affected by them. In the absence of an effect on any children, we consider that it would be speculative to make the link that children were likely to be affected by it.

23. Ultimately, we conclude that the possible effect on the child is too speculative to establish the criteria for serious misconduct.

24. Turning to the second ground, whether the conduct reflects adversely on [redacted] to be a teacher, we accept at the outset that this was an error of judgement.

25. However, not all errors of judgement are sufficient to establish an adverse effect on [redacted] fitness to be a teacher. We accept that [redacted] had a legitimate reason for the tethering of his account with the school iPad. He was uploading photographs from school events. We are also aware that Apple do not allow schools to have school accounts which can be used by multiple users, so that can force teachers to look at the option of linking their own accounts to the school iPads. As this case demonstrates, doing that brings with it potential risks. However, in this case we are not satisfied that linking his account to the school iPad for the purposes of uploading photographs was of such a character to adversely affect his fitness to be a teacher given the relatively benign

nature of the images and memes that the students were expose to.

26. We further note that providing the student with his password to untether the account was misguided. However, on balance, we do not consider that this is conduct sufficient to adversely affect his fitness to be a teacher.

27. As a result, we also do not find this ground of serious misconduct is made out in relation to this ground.

28. Turning the final ground of the criteria for serious misconduct in the Act, bringing the profession into disrepute. The test for deciding whether a teacher's actions are likely to bring the teaching profession into disrepute is informed by the conclusions of the Court in *Collie v Nursing Council of New Zealand*.[1] It is an objective test and requires consideration of 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 [redacted] actions.

29. We carefully considered whether [redacted] admitted mistakes were of a character which would objectively cause members of the public to lose faith or respect in the teaching profession and we ultimately concluded that they would not. We concluded that [redacted] made a genuine mistake, albeit one which exposed children to relatively low level inappropriate material. We do not consider that that is sufficient to generally lower the good standing of the teaching profession and that members of the public looking at it reasonably, would conclude that this was simply a mistake that all professionals can make. So, we find this ground for serious misconduct not established.

30. Having concluded that we were not satisfied that any of the two statutory grounds for serious misconduct were established, we were not technically required to consider the reporting grounds. However, were we required to consider those two grounds; we would have concluded that they were made out. We do not consider that there was not a failure by [redacted] to protect a child due to negligence or misconduct and for the reasons we

[1] *Collie v Nursing Council of New Zealand* [2001] NZAR 74.

have already articulated it was not an act or omission likely to bring the teaching profession into disrepute.

31. The test for serious misconduct has not been established so the respondent's behaviour does not amount to serious misconduct.

**Misconduct**

32. Having concluded that the statutory criteria for serious misconduct were not established, we have to then consider whether this behaviour amounts to misconduct. We carefully considered whether or not this conduct amounted to misconduct, but ultimately, we concluded by a fine margin that it did not. Again, the context that we have already considered led us to the conclusion that this was not misconduct.

33. In essence, for the reasons we have already articulated, we concluded this was simply an error by a teacher that while he should not have made, it had no obvious consequence on the school or on the students. Not every error or mistake by a teacher will amount to misconduct and in the end we concluded that this was one that did not.

34. In our opinion [redacted] made an error of judgment in what he did but it did not amount to misconduct and therefore we are not going to take disciplinary action against [redacted].

**Costs**

35. In our view, the CAC was proper to bring the charge before the Tribunal and the fact that we did not find serious misconduct or misconduct does not alter that fact.[3] As a result, we have provisionally concluded that this is not an appropriate case to award costs against the CAC.

**Name suppression**

36. [redacted] seeks suppression of his name.

37. The basis on which [redacted] seeks suppression of his name is that the case should not have made it to the Tribunal and if it has remained at the CAC phase then his name would not be published.

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[3] *CAC v Sinel* NZTDT 2019 - 61 and *CAC v Teacher G* NZTDT 2019 – 59.

*General Principles on Non-Publication*

38. Section 405(3) provides that hearings of this Tribunal are public. This is consistent with the principle of open justice. The provision is subject to subsections (4) and (5) which allow for whole or part of the hearing to be in private and for deliberations to be in private. Subsection (6) provides:

> *(6) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:*
>
> *(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
>
> *(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
>
> *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

39. In deciding if it is proper to make an order prohibiting publication, we must consider relevant individual interests as well as the public interest. If we decide that it is proper, then we may make such an order.

40. There is no onus on the applicant and that the question is simply whether the circumstances justify an exception to the fundamental principle.[2]

41. The correct approach is to strike a balance between open justice considerations and the interests of the party who seeks suppression.[3]

**CAC position**

42. The CAC oppose suppression.

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[2] *ASB Bank Ltd v AB* [2010] 3 NZLR 427(HC) at [14].
[3] *Hart v Standards Committee* (No 1) of the New Zealand Law Society [2012] NZSC4 at [3].

**Analysis**

43. Ultimately because we concluded that this was not serious misconduct or misconduct and that this was a simple mistake, we considered that this was a proper case for [redacted] to be given name suppression. Had the matter been dealt with by the CAC at that stage of the process, then he would not have been named and so for those reasons we concluded that this was a proper case for [redacted] name and identifying particulars to be suppressed.

*Orders*

44. For all these reasons, we order suppression of [redacted] name and any details that might identify him.

Ian Murray
Deputy Chair

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

1. This decision may be appealed by 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).