NZTDT 2018/41

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

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

DECISION OF THE TRIBUNAL

Tribunal:	Nicholas Chisnall (Deputy Chair), Simon Williams and Kiri Turketo
Hearing:	20 November 2018
Decision:	Result decision 1 April 2019 and substantive decision on 17 June 2019
Counsel:	D R La Hood and E Fitzherbert for the referrer D King for the respondent

Introduction

[1] The Complaints Assessment Committee (the CAC) referred a charge against the respondent, [redacted], of serious misconduct and/or conduct otherwise entitling the Tribunal to exercise its powers. The CAC's notice of charge, dated 6 August 2018, alleges that the respondent:

> Engaged in conduct that breached professional boundaries by engaging in an intimate sexual relationship with a former student, Student S, which commenced when she was 18 and had recently left school.

[2] We heard this matter on 20 November 2018. We issued a result decision on 1 April 2019, in which we said, "The filing of supplementary submissions required us to delay releasing our decision. As such, we have decided to issue a result decision to provide the parties with closure. We will provide substantive reasons in due course". These are our reasons.

[3] We heard [redacted] charge on the same day as another matter referred to the Tribunal, which alleged the same type of serious misconduct – the formation of an inappropriate relationship with a former student.[1] We issued a result decision in that matter on 1 April 2019. Ms King represented both practitioners. Ms King and counsel for the CAC prepared lengthy and comprehensive submissions addressing this type of referral.

[4] On 1 April, we made the usual order, under s 405(6) of the Education Act 1989 and r 34 of the Teaching Council Rules 2016, for the suppression of Student S's name and identifying particulars. It was also agreed that we should suppress [redacted] name. As we explained:

> Having received further submissions from the parties, we are satisfied that it is proper to order suppression of the respondent's name and that of the school where he taught Student S. Ensuring that naming the respondent does not identify Student S is a paramount concern. It is a question whether publication of the respondent's name risks defeating our order that Student S's name be suppressed. The purpose behind r 34 of the Rules is to protect the welfare of young persons affected by practitioners' behaviour. The identification of Student S, if publication occurs, must be a "likely" consequence, which simply means that there must be an "appreciable" or "real" risk. In light of the fact that [redacted] remains in a relationship with Student

[1] NZTDT 2018/10.

S, we accept that there is an appreciable risk.

A summary of our findings

[5] While [redacted] did not deny that he and Student S commenced an intimate sexual relationship "by March or April 2014", he resisted the CAC's assertion that he committed serious misconduct by breaching professional boundaries. In other words, he denied that he and Student S formed an inappropriate relationship.

[6] For convenience, we set out in full what we said in our result decision:[2]

> While the result was very finely balanced, we have concluded that we are not satisfied that the CAC has proved its charge to the requisite standard. We briefly explain why that is.
>
> The test for serious misconduct under s 378 of the Education Act 1989 is conjunctive.[3] As such, as well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The CAC places specific reliance on r 9(1)(e) and 9(1)(o) of the now superseded New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (the Rules), which applied in March and April 2014 when the alleged inappropriate relationship began.
>
> We commenced our enquiry by addressing the second element to the test for serious misconduct, which is whether we are satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules. Rule 9(1)(e) prohibits a practitioner "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". Rule 9(1)(o) of the Rules talks about "any act or omission that brings, or is likely to bring, discredit to the teaching profession".
>
> If there was an inappropriate relationship in contravention of r 9(1)(e), then it would almost inevitably follow that [redacted] behaviour – in terms of the first limb of the test for serious misconduct in s 378(1) - both reflects adversely on his fitness to teach and brings the profession into disrepute.
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> Under r 9(1)(e), the CAC must satisfy us that:

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[2] At paragraphs [4] to [14].
[3] *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141, 27 February 2018, at [64].

(a) The relationship commenced as a result of the respondent's position as Student S's teacher; and

(b) The relationship was "inappropriate".

We are satisfied that the first element is met. However, we are not satisfied that the relationship between [redacted] and Student S was, when it began, inappropriate.

In *CAC v Teacher C*[4] we warned that:[5]

> There is not, and cannot be, a blanket prohibition on intimate relationships between teachers and former students.

In *Teacher C*, we referred to the way in which international guidelines address the reason why teachers owe a duty of care to former students, and why it is that a relationship between a teacher and former student might be inappropriate:[6]

> Romantic/sexual relationships with former students may violate professional boundaries.
>
> A significant factor in teacher-student relationships is the difference in power and authority between the two parties and the unusually high level of trust the student places in the teacher. These differences do not suddenly disappear at a specific point in time. They linger as an imbalance between two individuals and as a potential impediment to their capacity to make decisions in their own and others' best interests.
>
> Consequently, teachers should not assume that they will be protected from disciplinary action by claiming a relationship began only after the school term concluded or exams finished.

In *Teacher C*, we endorsed the use of factors described in international guidelines to assess whether a relationship is or was inappropriate. These provide that:

> The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is only one of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a teacher's conduct in these circumstances. Other factors that teacher regulatory authorities may take into account include:
>
> - The age difference between the student and the teacher;
> - The emotional/social maturity of the student;
> - The vulnerability of the student;
> - Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school;

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[4] *CAC v Teacher C* NZTDT 2016/40.
[5] At [183].
[6] *Teacher C*, at [190], citing the Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries, September 2015.

- Any misconduct of the teacher during the professional relationship with the student.

We have weighed the various factors described in *Teacher C*. While the age difference between the respondent and Student S is significant - and the gap between when Student S finished her schooling and the relationship beginning was relatively short - we are not prepared to accept that those factors, in and of themselves, made the relationship inappropriate. The focus of the enquiry described in *Teacher C* is on whether there was a power imbalance between the teacher and former student at the time the relationship began. Simply put, we do not have sufficient evidence about Student S's emotional and social maturity in March/April 2014 to reach a conclusive view on whether there was an inappropriate relationship, and we are not prepared to speculatively assume that Student S was vulnerable.

The CAC invited us to apply the "catch all" in the Rules - r 9(1)(o) – if we held that the behaviour did not fulfil the requirements of r 9(1)(e). In this case, given that r 9(1)(e) is directly responsive to the type of mischief alleged, we are not prepared to find that this is behaviour that is caught by the general - r 9(1)(o) - where we have held that it does not contravene the specific - r 9(1)(e). This is because the way in which it is alleged that [redacted] brought discredit to the profession was by initiating an inappropriate relationship with Student S.

The evidence we heard

[7] The parties filed an agreed statement of facts, which provides:

The respondent, [redacted] is a registered teacher. He is 40 years old. The respondent is employed at [redacted] (the School), where he has taught since Term 2 of 2012.

The respondent works in the [redacted] unit in the school, a Maori bilingual unit based in the school. As a part of his role there he assists in Kapa Haka and writing and teaching songs and haka.

The respondent also teaches an adult Kapa Haka group along with his siblings outside of school time.

Inappropriate relationship[7]

During the 2012 and 2013 school years, the respondent taught a student, Student S. During the 2013 school year, Student S was in the respondent's performing arts and Kapa Haka class in the [redacted] unit.

Student S left the school at the beginning of November for study leave and officially left the school in December 2013,

[7] While this was the heading adopted in the summary, as will be apparent, [redacted] denied that the relationship was inappropriate.

when she was 18 years of age. She turned 18 in November 2013.

In or around March 2014, Student S joined the respondent's adult Kapa Haka team, where she became a member along with some of her friends and family. This group included around four former students from the School. The respondent was the cook and was also part of the tutoring team. A sexual relationship between the respondent and Student S started by March or April 2014 after she joined the group.

At the time, the respondent was around 36 years of age.

Around April Student S discovered she had become pregnant to the respondent. Her and the respondent's daughter was born in 15 January 2015.

The School became aware of the respondent and Student S's relationship when a staff member saw a picture posted to Facebook of the respondent with his daughter shortly following her birth.

Following this, there have been multiple posts on Student S's Facebook page where the respondent is shown and/or referenced.[8]

As at 7 May 2018, the respondent's Facebook page noted that he was in a relationship with Student S.

The respondent and Student S are not currently in a sexual relationship but have a relationship for the purpose of supporting their daughter and sharing responsibilities for that.

Teacher's response

The respondent stated there was no relationship with Student S while she was at school.

In response to the Education Council, the respondent accepted that his actions were unwise and reckless. He stated that he was now aware of the "power relationship" between teachers and students, and the fact that this relationship can take time to fully dissipate.

He noted that the sexual contact with Student S occurred after she finished at the school. He also noted that she was over 18 years old at the time, was an independent woman, and that neither of them felt that there was "any teacher/ pupil concept between us."

[8] Which we do not consider it necessary to set out in this decision.

[8] [redacted] elected to give evidence and filed a brief of evidence in advance of the hearing, which he adopted as his evidence-in-chief. He was carefully cross-examined by counsel for the CAC, Mr La Hood.

[9] [redacted] was asked whether he turned his mind to his professional obligations when he commenced his relationship with Student S:

> Q. So, at that time did you think there was any problem at all with having a relationship with a student that resulted in her having a baby - ex-student, sorry?
>
> A. At that time, I thought that I hadn't done anything wrong but afterwards my principal explained to me and it was at that point that I became aware of the seriousness of the situation.

[10] [redacted] explained that the concern his principal articulated was regarding the short period of time that elapsed between Student S leaving school and the relationship commencing.

[11] Mr La Hood invited [redacted] to use the benefit of hindsight and asked, "Where do you think you may have crossed the line or the boundary?" [redacted] candidly answered:

> The line that's been referred to is time. That is perhaps the context for what's in the document [his statement].

[12] [redacted] was asked to describe the degree of connection that he had with Student S during the time that he was teaching her. He disagreed with Mr La Hood's proposition that he had a "strong connection" with Student S. He said:

> No, I disagree with that. Besides living in a Maori context, there were 200 children before me. So, to say that we were in a very close relationship, I'm unable to explain or to answer that.

[13] [redacted] also rejected the proposition that he might have had a closer bond with Student S by virtue of the fact that he is Maori, as is she.

[14] [redacted] denied that Student S had ever come to him "for support or guidance during the time she was a student at school". Nor did he accept Mr La Hood's proposition that he knew that Student S was "a bit of a wild one".

[15] [redacted] stated that the Kapa Haka class that Student S joined commenced in late January 2014. He said that he was not the group's

"supervisor"; rather he was the cook. He was asked to describe the frequency of his contact with Student S:

> Q. So, at the Kapa Haka you had no input at all into any of the instructing?
>
> A. In our group, we practice on Sundays, following which meetings are held with my core group and whanau back at home.
>
> Q. So, are these meetings ones where Student S would come?
>
> A. No.
>
> Q. So, just explain to us then, what was the nature of the contact you had with her at Kapa Haka classes on Sundays starting from late January 2014?
>
> A. We practised on Sundays and the only time I see the group is when the food is ready. That is the only time I engage with the group when the when they come to eat.
>
> Q. So, how many adults were there during the group session?
>
> A. Between 50 and 60.
>
> Q. But you did start to form a relationship with Student S during the course of the Kapa Haka sessions, didn't you?
>
> A. Between the months of April and May.
>
> Q. Sure but you'd have started seeing her again in that context from when she joined in late January, is that right?
>
> A. Seeing is seeing?
>
> Q. Did you say hello to each other?
>
> A. There are 60 people with whom I say hello.
>
> Q. So, how did it go from "hello" in January to having a baby in April; can you explain that to us, please?
>
> A. It started with discussion.
>
> Q. About what?
>
> A. About Kapa Haka and how I can assist her with her efforts at Kapa Haka.
>
> Q. But you just told us that you are just the cook?
>
> A. Yes, that is right but the discussions began in April.
>
> Q. So, at some point you were not just a cook, you started helping with the Kapa Haka, didn't you?
>
> A. I spend my time in the kitchen but at the completion of practices people come and see me and that's where I consulted with her and with other members of the group.

Q. About Kapa Haka?

A. No, not just about Kapa Haka.

Q. So, there must have been a lead in between saying hello and then getting her pregnant. Is this lead in time just late March and early April; is that what you're saying? You only started having intimate conversations in late March and early April and then you got her pregnant; is that how it worked?

A. Yes.

Q. So, pretty short time period to intimacy; do you agree?

A. That's up to you to decide.

[16] While Mr La Hood put to the respondent that the relationship with Student S "began well before she got pregnant", this proposition was rejected.

[17] Mr La Hood tested whether [redacted] turned his mind to the risks associated with commencing a relationship with a former student:

Q. So, let's assume that it was just March, did you stop and think when it happened say in March, this young woman who I was only teaching within a couple of months back, back in November, three or four months back, has come to me to ask for help as if I am a teacher of her Kapa Haka, maybe it's not a good idea to get into an intimate relationship; did you ask yourself that?

A. What I'm saying is that when she came, they all came, I'm talking about her friends, the elders, and perhaps that's when our relationship began.

Q. Did you ever stop to think this is a really bad idea when this young woman seems to be coming to me for guidance in saying why she might have when I was a teacher to get into a relationship with her; did you ever stop to think that?

A. Kapa Haka wasn't the only context in which we engaged, it wasn't the only topic of discussion between ourselves. She came to me with a whole lot of others, so it wasn't solely based on Kapa Haka.

Q. So, was she seeking guidance from you in other aspects of her life?

A. Once again, she didn't come alone, she came with a group. The group asked questions. She didn't ask a question on her own, the discussion was with a group.

Q. Some point though before you got her pregnant there must've been times when you spoke alone surely; yes or no?

A. Perhaps, yes.

Q. Perhaps or yes, which is it?

Q. Periodically yes but a picture is being painted that isn't right.

[18] [redacted] accepted that Student S initiated contact outside Kapa Haka via text messaging. Mr La Hood put his statement to him, in which the respondent said:

> I reluctantly replied as it sounded like a text that you may get in trouble, however, I responded as I thought this may have to do with the group. This was not the case and I left it at that. Time passed she texted again which then led to talking at our Kapa Haka live-ins. Over time we then started to create a bond during Kapa Haka time which was before and after practice when we would find the time to talk.

[19] [redacted] accepted that he thought that the personal nature of the message "might be trouble". There was the following exchange:

> Q. Do you accept that you exercised poor judgement in not putting a stop to it then, do you accept that?
>
> A. I thought at the time that she had left school, she was 18 and so our relationship from that point on I didn't view it as one of a teacher to student.
>
> Q. Why did you think it could be trouble then, the text?
>
> A. The context for that is that it took place at the beginning of March. But from my perspective, she was 18, she left school and so she was then able to decide for herself the path that she should follow.
>
> Q. I'm just going to ask you this because I need to ask you directly, did you think it was trouble because you knew being so much older and her former teacher that you really shouldn't be doing it; is that fair?
>
> A. That was there, that thought was there at the beginning but then over time it waned.

[20] [redacted] did not accept that Student S came to him at Kapa Haka for "emotional support".

The relevant legal framework

[21] Section 378 of the Education Act 1989 defines "serious misconduct" as behaviour by a teacher that has one or more of three outcomes; namely that which:

> (a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or

(b) Reflects adversely on the teacher's fitness to be a teacher; and/or

(c) May bring the teaching profession into disrepute.

[22] The test under s 378 is conjunctive.[9] As such, as well as having one or more of the three adverse professional effects or consequences described, the conduct concerned must also be of a character and severity that meets the Teaching Council's criteria for reporting serious misconduct. The New Zealand Teachers Council (Making Reports and Complaints) Rules 2004 (the Rules), which applied in 2014, describe the types of behaviour that are of a prima facie character and severity to constitute serious misconduct.[10]

[23] As we said in our result decision, it is sensible to commence our enquiry by addressing the second element to the test for serious misconduct, which is whether we are satisfied that the respondent's conduct is of a character and severity that meets one or more of the reporting criteria in 9(1) of the Rules. That upon which the CAC placed specific reliance is r 9(1)(e), which prohibits a practitioner "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". If there was an inappropriate relationship in contravention of r 9(1)(e), then it almost inevitably follows that we can be satisfied that the respondent's behaviour both reflects adversely on his fitness to teach and brings the profession into disrepute.

[24] We have previously described the purpose of r 9(1)(e) of the Rules in the following way:[11]

> It is important to emphasise that [the rule] is prophylactic in nature, and thus is concerned with the prevention of harm to a student that the formation of a personal relationship with a teacher might cause.

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[9] *Teacher Y* above n 3, at [64].
[10] Which were superseded by the Education Council Rules 2016 (which had a name change to the Teaching Council Rules 20016 in September 2018) when they came into force on 1 July 2016. Rule 9(1)(e) of the 2016 Rules, as originally drafted when it came into force in July 2016, was identically worded to r 9(1)(e) in the 2004 Rules.
[11] In NZTDT 2016/64.

[25] Under r 9(1)(e), the CAC must satisfy us that:

(a) The respondent and Student S were, when their relationship commenced, in contact as a result of [redacted] position as a teacher; and

(b) The relationship was "inappropriate".

[26] In *CAC v Teacher C* we said that:[12]

(a) The long-settled position is that, for a teacher to have a sexual relationship with a student at the school at which he or she teaches, is serious misconduct at a high level.[13]

(b) A relationship need not be sexual for it to be improper and to cross professional boundaries.[14]

[27] In *Teacher C* we addressed whether, and when, a relationship between a teacher and a former student might be inappropriate. We warned that:[15]

> There is not, and cannot be, a blanket prohibition on intimate relationships between teachers and former students.

[28] We interpolate that we have rejected Mr La Hood's submission that the Tribunal should presume that it would be inappropriate for a teacher to form a relationship with a former pupil within six months of the date upon which the student left school. This approach would be arbitrary. In *Teacher C*, we recorded the CAC's acknowledgement that whether a relationship is inappropriate must be decided case-by-case. We said:[16]

> The CAC posed, for our consideration, the following question – when (if ever) can a teacher have a romantic relationship with a

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[12] *Teacher C*, above n 4 at [183]. This was the Tribunal's first substantive consideration of a charge alleging that a teacher had seriously misconducted herself by forming an intimate relationship with a former student. While we dealt with a relationship between a teacher and a former student (who, it appears, was still at school) in NZTDT 2011/17, the teacher in that case admitted the charge and the Tribunal therefore did not closely scrutinise the issue.

[13] As the District Court said in *Scully v the Complaints Assessment Committee of the New Zealand Teachers Council*, Wgtn DC, CIV 2008 085 000117, 27 February 2009.

[14] See NZTDT 2016/64 and the decisions it discussed.

[15] At [183].

[16] At [12].

former student? We record that Mr La Hood made it clear that the CAC was not suggesting that it will always be inappropriate for a teacher to form a romantic relationship with a former student, and we consider that to be a realistic concession. Rather, Mr La Hood submitted, whether a relationship can be deemed inappropriate is context-specific. We return to the factors said to guide that assessment later in this decision.

[29] We repeat and endorse what we said In *Teacher C*:

> [192] [We] emphasise that whether a relationship is inappropriate is a context-specific enquiry and not amenable to prescriptive regulation. It is essential that practitioners exercise personal judgement and ask themselves whether their behaviour towards, or interactions with, a student or former student may risk blurring the teacher-student boundary. Teachers carry the responsibility to distance themselves from any potentially inappropriate situation.

[30] In *Teacher C*, we referred to the way in which international guidelines address the reason why teachers owe a duty of care to former students, and why it is that a relationship between a teacher and former student might be inappropriate. We said:[17]

> In a recent decision, NZTDT 2016/64, we considered the reasons why it is important to maintain boundaries between teachers and students. We referenced guidelines created in two other jurisdictions and said:[18]
>
> > International guidelines usefully describe why the teacher-student boundary exists, and identify the circumstances in which the line demarking the professional from the personal may be crossed.
>
> And:
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> > The [Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries] acknowledge that a teacher-student relationship may initially be appropriate, but a boundary violation will occur if the relationship shifts to serving the needs of the teacher instead of those of the student.

[31] In *Teacher C*, we endorsed what is said in the Northern Territory Teacher Registration Board Guidelines on Managing Professional

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[17] *Teacher C*, above n 4, at [186] and [187].
[18] *Teacher C*, at [23]. We considered the Northern Territory Teacher Registration Board Guidelines on Managing Professional Boundaries, September 2015 and the General Teaching Council for Scotland's Code of Professionalism and Conduct.

Boundaries (the NT Guidelines) regarding relationships between teachers and former students. They provide:[19]

> Romantic/sexual relationships with former students may violate professional boundaries.
>
> A significant factor in teacher-student relationships is the difference in power and authority between the two parties and the unusually high level of trust the student places in the teacher. These differences do not suddenly disappear at a specific point in time. They linger as an imbalance between two individuals and as a potential impediment to their capacity to make decisions in their own and others' best interests.
>
> Consequently, teachers should not assume that they will be protected from disciplinary action by claiming a relationship began only after the school term concluded or exams finished.

[32] In NZTDT 2016/64 and *Teacher C,* we noted the caution contained in the NT Guidelines that:

> The teacher-student relationship is not equal. Teachers are in a unique position of trust, care, authority and influence with their students, which means that there is always an inherent power imbalance between teachers and students.

[33] The other guidelines we referenced in both NZTDT 2016/64 and *Teacher C*, from Scotland, describe the fact that parents, and the public in general, place a very high degree of trust in those who are educating pupils and rely upon teachers to interpret what is right and what is wrong. Regarding relationships with pupils, that code emphasises that teachers, and not students, bear the duty to distance themselves from any potentially inappropriate situation.

[34] In *Teacher C*, we also endorsed the use of those factors described in the NT Guidelines to assess whether a relationship is or was inappropriate. These state that:

> The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is only one of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a teacher's conduct in these circumstances. Other factors that teacher regulatory authorities may take into account include:

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[19] *Teacher C*, above n 4, at [190].

- The age difference between the student and the teacher;
- The emotional/social maturity of the student;
- The vulnerability of the student;
- Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school;
- Any misconduct of the teacher during the professional relationship with the student.

[35] In *Teacher C*, we also considered how other professions address the formation of relationships. We repeat and endorse what we said, which was:

> [193] We were also referred to the codes of conduct of three other professions – medical practitioners, social workers and psychologists.[20] Ms King [counsel for Teacher C] submitted that the teaching profession stands apart from those others because teachers do not form a therapeutic relationship with their charges. However, we disagree that there is a sharp distinction. While the duties and responsibilities are clearly different, each is a profession that brings its members into contact with inherently vulnerable people. There is an ability to influence those with whom the practitioner has a professional relationship, which explains why, in each profession concerned, a high standard of both professional and personal conduct, as well as integrity, are expected to protect the public.
>
> [Footnote in original]

[36] Recently, in *CAC v Teacher L*,[21] we addressed the submission made on behalf of the practitioner that, "He should not be judged against the standards expressed in Codes in other countries, Codes of Ethics and/or other professions of which he had no access or awareness of at the material time". Teacher L's counsel also submitted that there was, and remains, "a gap in guidance in the current [Code of Professional Responsibility and Standards for the Teaching Profession], which needs to be filled". We said:[22]

> The Education Council's Code of Ethics for Certified Teachers (Code of Ethics) applied in 2015 and 2016, which is the timeframe during which Teacher L is alleged to have behaved inappropriately. It relevantly provided that practitioners must, "Develop and maintain professional relationships with learners

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[20] The relevant provision in the psychologists' code was referred to by Mr Ching in his evidence and the relevant rule is set out at [92] above.
[21] *CAC v Teacher L* NZTDT 2018/23, 17 December 2018.
[22] At [20] to [22].

based upon the best interests of those learners".[23] As the CAC acknowledged in *Teacher C*, the Code of Ethics did not "provide clear guidance" on the issue of relationships between teachers and former students.[24] However, we consider that whatever opacity previously existed has been remedied by the Education Council's Code of Professional Responsibility (the Code), which came into effect in June 2017. It emphasises the need for practitioners to work in the best interests of learners by:

> 2.2 Engaging in ethical and professional relationships with learners that respect professional boundaries.

The Code provides examples of behaviour that may breach the "boundaries of ethical and professional relationships with learners". These include:

> (a) Fostering online connections with a learner outside the teaching context (for example 'friending') or privately meeting with them outside the education setting without a valid context.
>
> (b) Communicating with them about very personal and/or sexual matters without a valid context.
>
> (c) Engaging in a romantic relationship or having sexual or intimate contact with a learner or with a recent former learner.

None of this, however, is new. While we accept that there were not prescriptive rules addressing the formation of relationships with former students in 2015 and 2016, the Tribunal has said many times that a teacher's professional obligations to his or her students do not end outside the classroom, and it is crucial that practitioners maintain and respect the boundary between them and their charges. The general expectation is encapsulated in the Tribunal's statement that:[25]

> As the adult and a teacher, [the teacher] has a responsibility to maintain professional boundaries. [The teacher and student] are not contemporaries. They could not be friends. [The teacher is] in a position of power and responsibility, where he [or she] should role model appropriate behaviour. [His or her] actions should attract esteem, not discomfort or fear. Students and parents should be able to trust that when a student seeks mentorship, counsel or comfort from a teacher, the teacher will respond in a way that has the student's wellbeing as being paramount.

[37] As such, in *Teacher L* we were unable to accept that, "… a practitioner with many years' experience was not alert to the fact that the inherent power

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[23] At 1(a).
[24] *Teacher C*, above n 4, at [185].
[25] *CAC v Huggard* NZTDT 2016/33, at [21], which was a case where the teacher engaged in prolific text and phone communication with a student about personal matters.

imbalance between a teacher and his or her pupils may persist after the formal professional relationship has ended".

[38] Parents, and the public in general, place a very high degree of trust in teachers and rely upon those in the profession to interpret right from wrong. Regarding relationships with pupils, we repeat that it is teachers, and not students, who bear the duty to distance themselves from any potentially inappropriate situation.

[39] While not relevant in the instant case, for completeness we observe that r 9(1)(e) of the Teaching Council Rules 2016 was amended on 29 September 2018. It now provides that:

> 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:
>
> (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.

Our findings

[40] We reminded ourselves that the burden rests on the CAC to prove the charge and that, while the standard to which it must be proved 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.[26]

[26] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC). In a recent High Court decision, *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, 31 May 2017, Gendall J said at [36] that while the burden rests on the prosecution throughout, in disciplinary cases there is an expectation that the practitioner "must be prepared to answer the charge once a prima facie case has been made out". The respondent had met this expectation by giving evidence.

[41] As we explained in our result decision, we are not satisfied that the prosecution has met its burden by proving that it is more probable than not that the respondent formed an inappropriate relationship with Student S.

[42] We explain our reasoning, beginning with the first element of r 9(1)(e), about which Mr La Hood submitted:

> A narrow and literal interpretation of r 9(1)(e) suggests that the contact that has led to the commencement of the inappropriate relationship has to be "as a result of" the teacher's "position as a teacher". Such an interpretation could potentially exclude [redacted] who came into contact with the student at Kapa Haka class, after the cessation of the teacher–student relationship.

[43] We accept the CAC's submission that a purposive approach should be taken to r 9(1)(e), "simply requiring that there be some form of causal nexus between the teacher–student relationship and the subsequent contact for the rule to be met".

[44] We are satisfied that the respondent and Student S were in contact, at the time their relationship commenced, as a result of [redacted] position as a teacher. Therefore, the first element of r 9(1)(e) is met.

[45] This is because we accept that there was a nexus between the respondent and Student S's professional relationship and the subsequent personal one. While it would be speculative to find that Student S joined the Kapa Haka group because [redacted] was associated with it, we accept, based on the agreed summary of facts, that there was an association between the school and the Kapa Haka group, which brought them into contact. It is a logical inference that [redacted] recent association with Student S, as her teacher, was a reason why the relationship developed.

[46] We now explain why we are not satisfied that the relationship between the respondent and Student S was inappropriate when it commenced. We will do so by addressing each of the factors described in the NT Guidelines, which were adopted in *Teacher C*.

The length of time between the conclusion of the teacher-student relationship and the beginning of the intimate relationship

[47] It is an agreed fact that Student S joined the Kapa Haka group "in or around March 2014", and the sexual relationship "started by March or April 2014". As such, while Mr La Hood put to the respondent that the relationship

with Student S "began well before she got pregnant", this proposition was rejected and there is no evidence to support a finding that an intimate relationship – sexual or otherwise – began earlier than what is recorded in the agreed facts.

[48] Based on the agreed facts, the relationship began at least three months after Student S "officially" left school in December 2014.

[49] Mr La Hood submitted that, "there had not been a sufficient period of time which could have served as a "break" between the teacher–student relationship" and the personal. We endorse, as a general proposition, the CAC's submission that, "The closer proximity there is between the teacher-student relationship and intimate relationship, the greater likelihood there is of the relationship being inappropriate". However, as we explained earlier in this decision – when assessing the CAC's submission that six months would constitute a sufficient "break" – we expect that it will seldom be satisfactory to consider time-lapse in isolation in order to determine whether a relationship between a teacher and former pupil began inappropriately.[27] As the NT Guidelines say:

> The length of time between the conclusion of the teacher-student relationship and the beginning of an intimate relationship is *only one* of a number of critical factors that regulatory authorities may take into consideration when judging the appropriateness of a teacher's conduct in these circumstances.
>
> [Our emphasis]

[50] We recognise that the difference in power and authority between a teacher and former student, "[Do] not suddenly disappear at a specific point in time. They linger as an imbalance between two individuals and as a potential impediment to their capacity to make decisions in their own and others' best interests".[28] The other factors described in the NT Guidelines inform the enquiry whether the requisite imbalance still "lingered" at the point the relationship began.

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[27] A clear-cut example where time-lapse was dispositive is the case of *CAC v Teacher S* NZTDT 2016/69, where the teacher behaved inappropriately with a student after a leaving dinner. *Scully,* above n 13*,* involved a similar allegation, as the relationship took place very shortly after the student left the school.
[28] NT Guidelines.

[51] The CAC submitted that the teacher-student dynamic, and its associated inherent power imbalance, persisted when [redacted] and Student S began their relationship. It relied on the fact that Student S sought out the respondent's advice about Kapa Haka. We, however, do not accept that this provides a sound basis to conclude that the respondent – because Student S sought advice from him – remained, in effect, her teacher.

[52] That being said, this is a factor that pulls in favour of a finding that [redacted] began an inappropriate relationship with Student S. It is one of the reasons why we described the decision as finely balanced. Based on what [redacted] candidly told us in evidence, it appears that, when he first received a personal text message from Student S, he recognised the professional risks associated with commencing a relationship with a former student. Nonetheless, he maintained that there was no longer a power imbalance when the relationship began, notwithstanding the fact that the relationship appears to have developed rapidly.

[53] We observe that there was no evidence of any attempt by [redacted] to keep his relationship with Student S covert. The relationship was openly discussed on social media, which explains why it came to the attention of the school, and was subsequently referred to the Council by way of mandatory report. This is relevant insofar as it provides the Tribunal with an insight into whether [redacted], when the relationship commenced, appreciated that he may be exploiting his position as Student S's former teacher. We found this a more reliable way in which to assess the propriety of the relationship than questions that invited him to answer whether, with the benefit of hindsight, he accepted that he had exercised poor judgement.[29]

The age difference between the respondent and Student S

[54] Student S was 18 in March/April 2014, whereas [redacted] was 36.

[55] In *Teacher C*, we said in relation to a similar age gap that:

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[29] We accept that [redacted] developed an appreciation, when the matter was raised with him by his principal, regarding why the short duration between Student S leaving school and the relationship commencing meant that the school was obliged to take the issue seriously. We did not take [redacted] to accept, however, that it was only when the principal raised his relationship with Student S that he first realised that it may have been inappropriate to commence it.

> [197] The age difference between the respondent and Student A is a factor that weighs heavily in the mix, although we accept the point made by Ms King that "it cannot be that an age difference per se is a barrier to a consensual, non-exploitative relationship". Rather, it is the age difference in conjunction with other factors that makes the relationship inappropriate. The point is that the age difference tends to accentuate the power imbalance between the respondent and Student A.

[56] Again, we accept that this is a factor that pulls in favour of a finding that the respondent began an inappropriate relationship with Student S.

Was Student S vulnerable?

[57] As will be apparent, Student S did not give evidence and we know nothing about her personal circumstances at the point when her relationship with [redacted] began – other than her age. Nonetheless, the CAC made the submission:[30]

> Shortly after [redacted] relationship with Student S commenced, Student S fell pregnant with his child. While it is clear that Student S remains in a relationship with [redacted] and may not consider herself to be a victim in the sense of having immediately identifiable harm caused to her, the Tribunal will be aware that this is not an uncommon phenomenon for those who have been subject to the abuse of a position of trust or power.

[58] The CAC's submission invites the Tribunal to presuppose that Student S, because she was 18 – and the respondent 36 - was vulnerable. Counsel relied upon what we said in *Teacher C*; namely:

> [198] [We] have also considered the growing body of scientific evidence on adolescent brain development that demonstrates that young people are significantly different neurologically to adults, discussed by the Court of Appeal in *Churchward v R*.[31] In brief, the research shows that age-related neurological differences between young people and adults mean that young persons may be more vulnerable or susceptible to negative influences and outside pressures, and may be more impulsive than adults.[32]

[59] It would be speculative for the Tribunal to find that Student S – by virtue of her age alone, in reliance upon the research into adolescent brain

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[30] Under the heading "Potential harm to Student S".
[31] *Churchward v R* (2011) 25 CRNZ 446.
[32] Also, the Court in *Churchward* recognised that youth is seen as a larger concept than childhood and extends past 18 years of age.

development discussed in *Churchward* – lacked the autonomy to form a consensual relationship, and one on an equal footing, with [redacted].

[60] This case stands in sharp contrast to *Teacher C*, where there was substantial evidence outlining the former student's vulnerability and the fact that Teacher C was aware of his circumstances when she commenced a relationship with him.

Evidence of the nature of the teacher-student relationship, including the closeness, dependence, significance and length of the relationship at the school

[61] We are satisfied that there is no evidence that the relationship between [redacted] and Student S, when he taught her, was anything other than "ordinary".

Any misconduct of the respondent during the professional relationship with Student S

[62] There is no evidence that suggests that the relationship between Student S and [redacted] – when he was her teacher – was anything other than professional.

Conclusion on the charge

[63] As we said on 1 April, while the age difference between the respondent and Student S is relatively significant - and the gap between when Student S finished her schooling and the relationship beginning was relatively short - we are not satisfied that these two factors, in combination, meant that the respondent embarked on an inappropriate relationship. The focus of the enquiry described in *Teacher C* is on whether there was a persisting power imbalance between the teacher and former student at the time the relationship began. Given the lack of evidence about Student S's emotional and social maturity in March/April 2014, it would be speculative to find that she was vulnerable, and that the respondent effectively remained her teacher because he was in a position of "trust, care, authority and influence".

[64] We do not criticise the CAC for bringing the charge. The fact that the relationship began so soon after Student S left school meant that it was legitimate to invite the Tribunal to determine whether a professional boundary between [redacted] and his former pupil remained necessary.

However, where it is alleged that a teacher formed an inappropriate relationship with a former student, the Tribunal must be cautious when assessing if an operative power imbalance – which is the mischief with which r 9(1)(e) is concerned – remained at the point of commencement. It would be wrong – and patronising - for the Tribunal to too readily assume that a former student lacked the maturity to enter what appears to be, in all other respects, an equal consensual relationship.

Does rule 9(1)(o) of the Rules apply to the respondent's behaviour?

[65] The CAC submitted that r 9(1)(o), as well as r 9(1)(e), applied. The former rule describes "any act or omission that brings, or is likely to bring, discredit to the teaching profession".

[66] The language employed in r 9(1)(o) almost replicates that used in s 378(1)(a)(iii) of the Education Act, which defines, as serious misconduct, any conduct that "may bring the teaching profession into disrepute". Section 378, which came into effect on 1 July 2015, can be contrasted with its predecessor, s 139AB of the Education Act,[33] which defined serious misconduct as behaviour by a teacher that:

(a) Adversely affects, or is likely to adversely affect, the well-being or learning of one or more children; and/or

(b) Reflects adversely on the teacher's fitness to be a teacher.

[67] Thus, s 378 added a third criterion.

[68] We acknowledge the CAC's submission that the Tribunal has previously held that any discreditable behaviour that is of a severity to engage r 9(1)(o) will amount to behaviour that brings the profession into disrepute under s 378(1)(a)(iii).[34]

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[33] This is not a proceeding to which the repealed s 139AB applies (pursuant to cl 5 of Schedule 20), as the mandatory report that ultimately resulted in the CAC's notice of charge post-dated the coming into force of Part 32 of the Education Act on 1 July 2015.

[34] Referring to *CAC v Usofuno* NZTDT 2017/30, at [19].

[69] In *Teacher Y*, the District Court recently held that r 9(1)(o) is subject to the ejusdem generis rule, but rather:[35]

> [Reflects] a legislative intention to expand the scope of the Rule beyond the categories set out in the previous subparagraphs to effectively act as a "catch all" provision catching any act or omission that brings, or is likely to bring, discredit to the profession. What that conduct might be is a matter for the Tribunal.

[70] While we of course accept the CAC's submission that the Tribunal is imbued with specialist expertise and therefore best placed to determine whether there has been a departure from the standards expected of a teacher[36] - given that r 9(1)(o) is a "catch all", we question how it can have application when we have held that the elements of r 9(1)(e) have not been met. As we said on 1 April 2019:

> In this case, given that r 9(1)(e) is directly responsive to the type of mischief alleged, we are not prepared to find that this is behaviour that is caught by the general - r 9(1)(o) - where we have held that it does not contravene the specific - r 9(1)(e). This is because the way in which it is alleged that [redacted] brought discredit to the profession was by initiating an inappropriate relationship with Student S.

Name suppression

[71] Rule 34(4) of the Teaching Council Rules 2016 obliges the Tribunal to consider making a suppression order whenever it receives evidence from anyone who falls into one of four specified categories of persons deemed to be vulnerable.[37] Rule 34(1)(b) applies to Student S, as she "is a person on whom, or in respect of whom, sexual acts are alleged to have been performed".[38]

[72] We make an order under s 405(6) of the Education Act for the permanent suppression of the name and identifying particulars of Student S.

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[35] *Teacher Y*, above n 3, at [66].
[36] Referring to *Cole v Professional Conduct Committee of the Nursing Council* [2017] NZHC 1178, at [61].
[37] Rule 34(4) is headed "Special protection for certain witnesses and vulnerable people". It obliges the Tribunal to consider whether it is proper to make an order for suppression under s 405(6) of the Education Act whenever it has evidence before it that "includes details relating to a person described in subclause (1)".
[38] Student S is a person "who is, or was at the relevant time, a student at a school or an early childhood education service".

[73] Having received submissions from the parties, we are satisfied that it is proper to order suppression of the respondent's name and that of the school where he taught Student S. It is a paramount concern to ensure that naming the respondent does not identify Student S. It is a question whether publication of the respondent's name risks defeating our order that Student S's name be suppressed. The purpose behind r 34 of the Rules is to protect the welfare of young persons affected by practitioners' behaviour.[39] Its application is not predicated on the Tribunal making a finding of serious misconduct against a teacher. The identification of Student S, if publication occurs, must be a "likely" consequence, which simply means that there must be an "appreciable" or "real" risk. In light of the fact that [redacted] remains in a relationship with Student S, we accept that there is an appreciable risk she could be identified if we name the respondent.

Costs

[74] On 1 April, we invited the parties to file memoranda addressing costs. That did not happen, as the CAC elected to appeal our decision. For completeness, we will nonetheless address costs.

[75] The Tribunal's power to order costs is found in s 404(1)(h) of the Education Act, which confers a discretion. It states:

> 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:
>
> …
>
> (h) require any party to the hearing to pay costs to any other party.
>
> …

[76] The Tribunal issued a Practice Note on costs in 2010. It sought to achieve an "objective and predictable" approach to costs applications.

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[39] We recently described the relevant principles regarding name suppression in *CAC v Jenkinson* NZTDT 2018/14, 17 September 2018, at [32] to [36]. We will not repeat them here.

However, we emphasised that costs must be considered on a case-by-case basis to ensure that a fair result is achieved, but:

> That said, the purpose of this Practice Note is to signal – so that it does not come as a surprise to anyone – that, in the future, the Tribunal's starting point will be to consider in each case whether it is fair and appropriate, having regard to the circumstances, that it make an award in favour of the successful party reflecting 50% of all three categories of costs.

[77] The paragraph that we have recited suggests that costs will follow the event, and thus be paid by the unsuccessful party as a matter of routine. However, it is settled that different rules apply when a practitioner seeks costs at the end of a disciplinary proceeding. In *CAC v Beilby*,[40] which considered an application for costs brought by the respondent-practitioner after the Tribunal found that the CAC had not proved the more serious particulars in its notice of charge, we said that:[41]

> This is an appropriate case to make some further observations relating to costs. Bearing in mind the adoption of the *Baxendale-Walker*[42] principles in the recent decision of the New Zealand Lawyers and Conveyancers Disciplinary decision in *Hall*,[43] we think it is appropriate to signal for the future that the approach adopted in that case is the approach we will take. Accordingly, to the extent that our Practice Note of 17 June 2010 might suggest what [counsel for Mr Beilby] refers to as "a more liberal approach" that Practice Note needs to be read subject to this decision.

[78] The English and Wales Court of Appeal, in *Baxendale-Walker v Law Society*, identified the relevant principles that apply when a law practitioner brings a costs application against the Law Society. As we said in *Beilby*, those principles are equally relevant to other professional regulators that perform a disciplinary function.

[79] The English Court said in *Baxendale-Walker* that:[44]

> Our analysis must begin with the Solicitor's Disciplinary Tribunal itself. This statutory tribunal is entrusted with wide and important disciplinary responsibilities for the profession, and when deciding any application or complaint made to it, section 47(2) of the

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[40] *CAC v Beilby* NZTDT 2014/53C, 19 September 2014.
[41] At p 6.
[42] *Baxendale-Walker v Law Society* [2007] EWCA Civ 233.
[43] *New Zealand Law Society v Hall* [2014] NZLDT 17.
[44] At [34].

> Solicitors Act 1974 undoubtedly vests it with a very wide costs discretion. An order that the Law Society itself should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly discouraged by s 47(2)(i). That said, however, it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the Tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings. Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in *Bolton* makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although, as Mr Stewart maintained, it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safeguard standards, the Tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the Tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation – dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party – would appear to have no direct application to disciplinary proceedings against a solicitor.

[80] This rationale holds true in respect to the nature of the power to award costs contained in s 404(1)(h) of the Education Act, and the statutory responsibilities to maintain professional standards, and "guard the public interest" that this Tribunal, and the CAC as a corollary, carries.

[81] The Court in *Baxendale-Walker* went on to state that, where a disciplinary tribunal is advancing the public interest to ensure that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint, then:[45]

> [Unless] the complaint is improperly brought, or, for example, proceeds … as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The "event" is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial

[45] At [40].

> feature which should inform the Tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage.

[82] Therefore, the following principles emerge from *Baxendale-Walker*:

(a) A costs order should only be made against a regulator if there is good reason for doing so. "Good reasons" include that the prosecution was misconceived, without foundation, or borne of malice or some other improper motive.

(b) Success by the practitioner in defending a matter is not, on its own, a good reason for ordering costs against a regulator. In the context of whether costs should follow the event, the "event" is only one of a number of factors to be considered.

(c) A regulator should not be unduly exposed to the risk of financial prejudice if unsuccessful, when exercising its public function.

[83] We are sympathetic to the fact disciplinary proceedings inevitably cause a degree of professional and financial hardship to those charged and, at first blush, the different approach to costs awarded to successful regulators vis-à-vis successful practitioners appears inequitable. However, as the authorities explain, there are strong policy reasons why that approach has developed. Despite our finding, we are amply satisfied that the proceeding was properly investigated and brought, and there is not good reason to make a costs order against the CAC. To call in aid the considerations described in *Baxendale-Walker*, this was not an improperly brought complaint, and nor was it a "shambles from start to finish".

[84] We do not make an order for costs.

Nicholas Chisnall
Deputy Chair

NOTICE

1 A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.

2 An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.

3 Section 356(3) to (6) apply to every appeal as if it were an appeal under section 356(1).