

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL
I TE RŌPŪ WHAKARAUPAPA O AOTEAROA

I RARO I TE MANA O TE | UNDER THE

Education Act 1989 and the Education and
Training Act 2020

MŌ TE TAKE | IN THE MATTER OF

an inquiry by the Tribunal into the conduct of
PETER (formerly PETIA) VELDA VOWELL, Teacher
(registration number 354030)

TE WHAKATAUNGA MŌ TE WHIU, TE HERENGA ME NGĀ UTU
DECISION ON PENALTY, LIABILITY AND COSTS

TE RĀ:

19 September 2023

TE RONGONGA:

In person, 16 and 17 May 2023

PAE TARAIPUUNARA:

Rachael Schmidt-McCleave (Deputy Chair), David Spraggs/Simon
Walker (Members)

HEI MĀNGAI:

L Van der Lem (Luke Cunningham Clere) for the CAC
D King for the respondent

Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee ("CAC") has charged the respondent with:
 - (a) Serious misconduct, and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers, under section 401(3) of the Education Act 1989 (the "1989 Act")¹ after determining that information received from the mandatory report provided by Edgecumbe College (the "College") about the respondent's conduct should be considered by the Tribunal (the "Edgecumbe charge"); and
 - (b) Serious misconduct, and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers, under section 497 of the Education and Training Act 2020 (the "2020 Act")² after determining that information received from the mandatory report provided by Kaikohe Christian School (the "School") about the respondent's conduct should be considered by the Tribunal (the "Kaikohe charge").

The Edgecumbe charge

2. The CAC, in the amended notice of charge (the Edgecumbe charge) charges that the respondent, a registered teacher of Whakatane:³
 - (a) Between January and June 2019 was unprofessional in his behaviour towards students at the School including:
 - (i) Locking students out of the classroom; and/or
 - (ii) Pushing and/or closing and/or slamming the door against students' bodies as they tried to come through the door.
 - (b) Between January and June 2019 made inappropriate comments to and/or in front of students at the School including something along the lines of:
 - (i) Calling students "idiots" and/or "nut jobs";
 - (ii) Telling students what they did was "just retarded";
 - (iii) Uttering the words "for fucks sake"; and/or

¹ The alleged conduct in the Edgecumbe charge occurred before the coming into force of the Education and Training Act 2020.

² The alleged conduct in the Kaikohe charge occurred after the coming into force of the Education and Training Act 2020.

³ At the time of the conduct.

(iv) Suggesting that students belong in the “special school”.

3. The CAC alleges that the conduct alleged above separately or cumulatively amounts to serious misconduct pursuant to section 378 of the 1989 Act and Rule 9(1)(a), (b) and/or (k) of the Teaching Council Rules 2016 (the “Rules”) or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the 1989 Act.

The Kaikohe charge

4. The CAC, in the amended notice of charge (the Kaikohe charge) charges that the respondent, a registered teacher of Nelson⁴, failed to disclose to Kaikohe Christian School that he was under investigation by the Complaints Assessment Committee prior to commencing employment there in January 2021.
5. The CAC alleges that the charged conduct amounts to serious misconduct under section 10 of the Act, and Rule 9(1)(k) of the Rules, or alternatively amounts to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 500 of the Act.
6. The matter was heard in person in Whakatane on 16 and 17 May 2023. The respondent defended the charge.
7. At the conclusion of the hearing, the Tribunal received written submissions from the parties before convening again via Teams to discuss the two charges.
8. In relation to the Edgecumbe charge, the Tribunal found all the particulars to be established to the requisite standard, except for the particular set out in paragraph 1.a.(ii) (the allegation the respondent pushed, and/or closed, and/or slammed the door against students’ bodies as they tried to come through the door). The Tribunal considered there was insufficient, or unclear, evidence as to the how the door in question worked to be able to find that particular established.
9. The Tribunal found that the established particulars in the Edgecumbe charge cumulatively amounted to serious misconduct (albeit at the lower end).
10. In relation to the Kaikohe charge, the Tribunal found that the charge was established to the requisite standard and the conduct amounted to serious misconduct.
11. This decision sets out the Tribunal’s detailed reasons.

⁴ Now.

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

12. In a decision dated 13 July 2022 the then Chair of the Tribunal accepted that the two charges related to each other and an assessment of credibility of the witnesses including the respondent would be enhanced by hearing the charges together. The charges were joined and directions made through to a hearing.
13. A further pre-hearing conference was held in October 2022 and a Minute issued dated 14 October 2022, in which the Tribunal amended the timetabling directions and set the hearing down for a date in December 2022 in Edgecumbe.
14. In a further Minute dated 25 October 2022, due to a problem with finding an appropriate venue, the hearing was changed to Whakatane still to commence in December 2022.
15. In a further Minute dated 1 November 2022, the Tribunal further amended timetabling directions, due to the CAC experiencing difficulties with contacting several of its intended witnesses.
16. In a decision dated 30 November 2022, the Tribunal granted an order sought by the CAC that witness David Rogers (a witness for the Kaikohe charge) be permitted to give his evidence via AVL link.
17. In a Minute dated 1 December 2022, the Tribunal adjourned the hearing to allow the respondent's newly instructed representative from the PPTA to familiarise herself with the proceedings.
18. A further teleconference was heard early in 2023 and a Minute dated 2 February 2023 ensued, in which the hearing was rescheduled for 16 and 17 May 2023 in Whakatane.
19. At the outset of the hearing, a further amendment to the Edgecumbe charge was sought and granted removing a particular from the charge.

Te Ture - The Law

20. This decision refers to the provisions of the 2020 Act but the relevant provisions of the 1989 Act are the same.
21. The disciplinary regime of the Act is focused on "*the safety and welfare of children and young people in the education system and the quality of the institutions and teachers*" (*K v Complaints Assessment Committee of the Teaching Council of Aotearoa New Zealand* [2022] NZHC 307 at [107]). To that end, the 2020 Act (and its predecessor the 1989 Act) sets out a process for the mandatory reporting of potential serious misconduct by a

registered teacher (section 491), referral of that report to a CAC (section 496) and referral to the Tribunal by the CAC in certain circumstances (section 497). A matter may be referred to the Tribunal by the CAC at any time. However, it must be referred to the Tribunal by way of a charge when the CAC considers that the matter may possibly constitute serious misconduct (section 401(3)-(5)).

22. Section 10 of the 2020 Act defines serious misconduct:

serious misconduct means conduct by a teacher –

- (a) that –
 - (i) adversely affects, or is likely to adversely affect, the wellbeing or learning of 1 or more students; or
 - (ii) reflects adversely on the teacher’s fitness to be a teacher; or
 - (iii) may bring the teaching profession into disrepute; and
- (b) that is of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct.

23. The test under section 10 is conjunctive⁵, meaning that as well as meeting one or more of the three adverse consequences, a teacher’s conduct must also be of a character or severity that meets the Teaching Council’s criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.

24. What the CAC appropriately describes as these “gateway definitions”⁶, have been refined by the Tribunal in various cases:

- (a) In relation to the impact on the wellbeing or learning of a student, the Tribunal in *CAC v Marsom* stated that:⁷

“...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.”

- (b) When considering whether the conduct “*reflects adversely on the teacher’s fitness to be a teacher*”, the Tribunal has focused on:⁸

“...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

⁵ *Teacher Y and Education Council of Aotearoa New Zealand*, [2018], NZTDT 3141, 27 February 2018 at [64] discussing the identical text under section 378 of the 1989 Act.

⁶ Paragraph 22 CAC Opening Submissions.

⁷ *CAC v Marsom* NZTDT 2018/25 at footnote 10. Subsequently adopted by the Tribunal in *CAC v Teacher S* NZTDT 2020/45 at [7].

⁸ *CAC v Crump* NZTDT 2019/12 at [42].

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."

- (c) The approach generally taken by the Tribunal to the question of whether conduct is likely to bring the teaching profession into dispute is that set out by the High Court in *Collie v Nursing Council of New Zealand* [2001] NZAR 74, namely to ask whether:

"...reasonable members of the public, informed and with the knowledge of all the factual circumstances, could conclude that the reputation and good standing of the teaching profession was lowered by the behaviour of the teacher concerned."

25. The Tribunal accepts that, if established, the respondent's conduct would fall within the following sub-rules of Rules 9(1):

- (a) Rule 9(1)(a): using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so.
- (b) Rule 9(1)(b): emotional abuse that causes harm or is likely to cause harm to a child or young person.
- (c) Rule 9(1)(k): any act or omission that brings, or is likely to bring, discredit to the profession.

26. The Tribunal accepts that the test under Rule 9(1)(k) will be satisfied if reasonable members of the public, informed of the facts and circumstances, could reasonably conclude that the reputation and standing of the profession was lowered by the respondent's behaviour.⁹

27. The Tribunal considers that the following clauses of the Code of Professional Responsibility are also relevant:

- (a) Clause 1.3: *"I will maintain public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity."*
- (b) Clause 2.1: *"I will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm."*

⁹ *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28]; *CAC v Collins* NZTDT 2016/43, 24 March 2017.

28. The Code was issued with “*Examples in Practice*”¹⁰ which provide positive examples of what the principles look like in practice and include behaviours that are unacceptable and breach the Code.
29. An example of demonstrating a high standard of professional behaviour and integrity as required by clause 1.3 is “*behaving in ways that promote a culture of trust, respect and confidence in me as a teacher and in the profession as a whole.*” Conduct that damages this trust and confidence breaches clause 1.3.¹¹
30. An example of behaviour that does not promote learners’ wellbeing and may cause harm is “*inappropriate handling such as physically grabbing, shoving or pushing, or using physical force to manage a learner’s behaviour.*”

Kōrero Taunaki – Analysis of Evidence

CAC’s evidence

31. The CAC called three witnesses.
32. The first witness called was [REDACTED]. Ms [REDACTED] was a [REDACTED] student at Edgecumbe College in 2019, and the respondent was her music teacher. In her written brief, read into evidence, Ms [REDACTED] said the respondent engaged in the following conduct while he was her teacher:
 - (a) He often snapped at students in class.
 - (b) He slammed stuff on table, including laptops, and shouted at students.
 - (c) He threw books across the room.
 - (d) He would habitually lock students out of the classroom. He would tell them to go outside or ask to speak to them outside, then lock the door back into the classroom once the students involved had walked outside to speak to him. Before he locked students out, he would “*often have a go at them*”, telling them to respect him. When he locked them out he would slam the door. Ms [REDACTED] said he locked her out of the classroom a couple of times. She spoke to another teacher about this, but the respondent denied everything so it didn’t go anywhere.

¹⁰ *The Code of Professional Responsibility, Examples in Practice* (Education Council, Wellington, June 2017)

¹¹ At 7.

- (e) If he was playing the keyboard in class and got a tune wrong, he'd punch the keyboard and get angry.
 - (f) He talked about being transgender/transitioning after students asked why he had breasts and, when students asked follow up questions, he made comments like "*you are retards*" or "*you are idiots*". Ms [REDACTED] said this happened more than once.
 - (g) He told the class that they belong in a special needs school.
 - (h) She heard him call students "*retards*", "*idiots*", and "*nutjobs*" during class.
 - (i) He often swore in the presence of students, saying things like "*fuck sakes*", "*fuck up*", and "*oh my fucking god*".
 - (j) He threw whiteboard markers.
33. Ms [REDACTED] said there were at least two times where she tried to get back into the classroom before the respondent locked the door on her and he pushed against the door so she couldn't get back in. She said she asked him to let her in through the closing door, but he wouldn't. Ms [REDACTED] said she told the respondent it was illegal to kick the students out and that he had to teach them. She said she was upset at the time because she really wanted to learn music.
34. In oral evidence,¹² Ms [REDACTED] clarified that the respondent's swearing at students and locking students outside alleged behaviour started a couple of weeks into the school year. Ms [REDACTED] also further described the area where she was locked outside, and the interior of the classroom. She confirmed you could see out the door as it had glass in it. She said they "*weren't really doing much*" when the respondent locked them outside, they "*were trying to learn and ask him but then he would get frustrated and then ask us to go outside*". She described the respondent as pushing on the door from the inside and that he "*looked angry*."
35. Ms [REDACTED] said the name calling would arise when students were not listening to the respondent. She confirmed the names as set out in her written statement and in the notice of charge. She said the name calling was done in an angry manner by the respondent. She was also taken by counsel for the CAC to a document in the bundle¹³ which she confirmed was her list of all the "*stuff he's done and called us*" which she was

¹² Transcript, Day 1, pages 11ff

¹³ TE02

asked to prepare by a teacher (Ms Andrews) at the school after she had raised issues about the respondent when he was allegedly locking students out.

36. In response to questioning from counsel for the respondent, Ms [REDACTED] denied that she was a difficult student to teach (although she did confirm that she wanted to learn the drums not the piano)¹⁴ or that she would walk around the classroom shouting.
37. When questioned by the Tribunal, Ms [REDACTED] said the respondent's class was the only one at the school where students were locked out of class. She said she never experienced the door being locked when she was late to class. She also said that the respondent would snap at students "*almost every period, or every second period we had with him.*" She said by snap, she means the respondent "*[got] mad and yelled at us, out of nowhere*" and she confirmed it included the slamming of stuff on tables and laptops and the like.
38. The next CAC witness called (via AVL) was David Leslie Rogers, the principal of Kaikohe Christian School, a position he has held since the end of January 2014.
39. In his written statement, Mr Rogers stated that he hired the respondent to teach in the Integrated Curriculum and Mathematics areas at Kaikohe Christian School, as well as to provide timetabled release for primary teachers. He said the respondent's employment with the School began on 27 January 2021.
40. Mr Rogers said his standard practice when filling a position at the School is to ask potential employees to complete a written application form which includes a question along the lines of 'do you know of any matter that may impact KCS's decision to employ you?' Mr Rogers said he did not require the respondent to complete a written application form including such a question before he appointed him and, instead, during an interview with the respondent on 1 December 2020, he asked him if there was anything he needed to know about that would affect his employment at the School.
41. Mr Rogers said the respondent did not tell him he was under investigation or had an active disciplinary case before the Teaching Council. He said at no stage during the respondent's employment at the School did the respondent volunteer to him that he had been investigated by the CAC, or that the CAC had referred an allegation to the Disciplinary Tribunal.
42. Mr Rogers said in March 2021, he independently learned that the respondent had been charged with serious misconduct by the CAC, and that an allegation was proceeding to a

¹⁴ See evidence of Ms Andrews for the respondent.

hearing before the Tribunal. He said he found this out after the respondent had disclosed it to Kevin Low, the Head of the PE Department, who immediately brought it to Mr Rogers' attention. Mr Rogers said he met with the respondent to discuss it on 23 March 2021 and, during that meeting, the respondent disclosed that he had an active case before the Tribunal, relating to his employment at the College in 2019. Mr Rogers said the respondent provided him with his version of the details of the allegations against him (as they were at that time) and he was content at that point to continue supporting the respondent to gain full registration as a teacher at the School. He said the respondent later resigned from the School effective from 8 August 2021, on paid leave during an investigation into unrelated allegations against him.

43. In supplementary oral evidence,¹⁵ Mr Rogers explained that it is his general practice to ask at an interview whether there is any matter that may impact the School's decision to employ a candidate. He said he would expect a CAC investigation to come within a person's answer and while *"it might not impact the decision to employ or not...it would be in the interests of disclosure, so we would have a clear pathway before us in terms of what might need to be done to support"*.
44. In response to questioning from the Tribunal, Mr Rogers said that the School had become a little *"slack"* in terms of its processes, and didn't ask the question about investigations in the application form. The School has now reverted back to a very formal approach.
45. The final witness for the CAC was the investigator, Mr Thomas James Eathorne. Mr Eathorne is the lead investigator at the Teaching Council. His role requires him to investigate complaints made and convictions received by the Council, including the collation of all relevant material relating to a complaint for consideration by the CAC. He has been in that role since July 2021.
46. In Mr Eathorne's written brief, he described the process he took when he was assigned as the CAC investigator in July 2022 for the matters relating to both Edgecumbe College and Kaikohe Christian School. Mr Eathorne attached to his brief relevant documentation relating to his investigations, including the mandatory reports and the respondent's initial responses.

¹⁵ Transcript Day 1, pages 48 ff.

The respondent's evidence

47. The respondent gave evidence, as well as calling two other witnesses in his defence. Before he began giving evidence, his counsel gave a brief opening statement¹⁶ in which she indicated that the respondent denies some of the allegations, and accepts others, but for those he accepts, there is a context that he submits is very important.
48. The respondent then gave evidence. In his written brief of evidence, Mr Vowell explained his background and qualifications, including his significant achievements in music as a performer and composer. In relation to the particulars of the charges, and Ms ██████ evidence, he stated:
- (a) He has no recollection of snapping at students, slamming objects on tables considered as violence or shouting other than to be heard to give instructions.
 - (b) He did lock students out of classrooms. He followed school policy, instructions and advice regarding this.
 - (c) When he locked Ms ██████ out it was in response to her behaviour. She was a difficult student and was making threats to the class and to the respondent. She challenged his right to teach and instruct her. She often engaged her peer group and other students to do the same and walked around the class shouting at him. Other students would join her, others suggest she sit down. Seeing this pattern, he requested she step outside into the classroom courtyard and in response she stood on the table and slammed the window and door. In oral evidence, the respondent said she stood outside, with her voice raised and haughty, verbally attacking him.
 - (d) He did not hit his expensive keyboard.
49. The respondent in his brief also described a challenging experience with students at the school gossiping about his gender dysphoria. He also referred to the principal requesting a vote by students as to his status to teach and finding himself constantly challenged to defend his reputation as a new teacher. He looked for support in the school environment through management but there was none available.
50. In relation to the swearing allegation, he said he swore “*no more no less than most teachers in NZ*”. Students also swore in the classroom. Nevertheless, he did his best to uphold formal communication standards and often thought “*FFS*” rather than spoke it

¹⁶ Transcript, Day 1, page 63.

aloud. With regard to the alleged “retard” comment, he said it was banter with a sleepy student with whom he had a good rapport and the student involved did not make the complaint. In terms of special needs, he said he requested a teacher aide for three students who had learning difficulties and were constantly disrupting the class and making threats from time to time to himself and other students, including one saying her parents were in a gang and they were going to get him. He used a hole in the wall space to assist students with learning difficulties and other students complained they weren’t getting the space and accused him of saying he was calling the students in question special needs, to which he replied “special education needs or in kind”. He denied calling students special needs or retarded. He denied throwing whiteboard markers at students. He concluded his statement as follows:

“I found myself in a hostile environment. The social shaming, loss of reputation by community and school leadership. I would have been better to have just left the school,

I was on the ropes from the beginning, often confronted in the classroom with a feeling school management was adverse to me. Finding out the Principal taking a vote as decision to stay as a teacher and tutor undermined my belief I had pathways of support and avenues to deal with it.”

51. The respondent did not address the Kaikohe charge in his written brief.
52. In oral evidence,¹⁷ the respondent added to his evidence that he was advised by the School of the policy of locking the door while taking the role so that if a student arrived late, he could then question that student about their lateness.
53. In questioning from counsel for the CAC, the respondent responded to a number of matters. He addressed the Kaikohe charge in a somewhat equivocal and obfuscating way that did his credibility as a witness no favours, stating that no deceit was intended. He could not recall Mr Rogers asking whether there were any matters that might impact the School’s decision to employ him as it was a very informal interview. He refused at first to answer the question as to whether or not Mr Rogers asked the question in the interview, but ultimately claimed the matter was not talked about in the interview.
54. After some further obfuscation, the respondent ultimately also accepted that he had not raised the issue of locking Ms ██████ out because of behaviour issues with the Council investigator originally, but had referred only to the school policy of locking the door so roll could be taken. He maintained in evidence that he locked Ms ██████ out because she was a danger to him and the class, despite accepting he had not mentioned this to the Council investigator.

¹⁷ Transcript, Day 1 pages 64 ff.

55. The respondent denied swearing and snapping at students while under stress (albeit ultimately accepting he was under some stress at the College). He also denied calling students retarded and special needs in a way which was derogatory (referring again to the explanations he gave in his written brief).
56. In response to questioning from the Tribunal, the respondent conceded that he now accept that if he is under investigation, he should inform a future employer of that. He also elaborated further on the lack of senior support as a new teacher that he had experienced in the College. He also conceded that a teacher has a professional obligation to moderate and model better behaviours and ways of speaking, irrespective of the environment they find themselves in (in relation to swearing and the use of words like “retarded”).
57. The second witness called for the respondent was Richard Charles Andrews. Mr Andrew was employed at the College from February 2012 to April 2015, first as a teacher aide for special needs students, and later as the ICT Technician after school hours as well. From 2013 to October 2019 he was a parent elected Trustee for the College Board of Trustees.
58. In his written statement, he said he moved around the school a lot in his roles and during class hours about 30-50% of the classroom doors would be locked from the outside¹⁸ during lessons. He described this as “*common practice*”. He said this presumably was for health and safety reasons. He described some of the doors having clear glass panels.
59. Mr Andrews also described a Board of Trustees meeting he attended in early 2019 where, in relation to the respondent, the Principal turned up looking frustrated and confused, stating of the respondent that he “*had employed a woman and a man turned up.*” Mr Andrews said the Limited Statutory Manager in place at the College at the time had told the Principal to “*treat [the respondent] like any other professional teacher and move on*”,
60. Mr Andrews also described offering the respondent accommodation in his early weeks in Edgecumbe. He said he had encouraged the respondent to raise accommodation with the Principal as there were a number of school houses available but said the Principal was not co-operative.
61. Mr Andrews was aware, from his position on the Board, of a number of complaints about the respondent by mid-2019 and said the proper complaints procedure was not followed.

¹⁸ It is assumed logically that Mr Andrews meant from the inside.

He also expressed his view that the better mentoring and support should have been in place for the respondent.

62. In questioning from counsel for the CAC,¹⁹ Mr Andrews conceded that his most recent experience of finding locked doors at the College was in 2015 and he did not know if it was still common practice or was in 2019. He also conceded, as he did in his written brief, that he had never witnessed the respondent in the classroom. He also conceded in questioning from the Tribunal that he didn't know what support was in place for the respondent.
63. The final witness for the respondent was Stacey Gael Andrews. Ms Andrews is the wife of Mr Andrews and is a registered secondary school teacher who was employed by the College as Head of Science, Head of Mathematics and Dean of Year 10 from 2008 to 2019.
64. In her written brief, Ms Andrews spoke of her personal experience with the respondent, including confirming he spent some time staying with her and her family. Ms Andrews thought other staff at the College treated the respondent differently by being less friendly and somewhat standoffish. She also described the *"odd incident where he was 'voted out' of his form class after a discussion between the students and a senior manager."*
65. On the question of locking students out she said it was *"a common practice to lock students out until the roll was taken and instructions were given to get the class started"*. She said as the Year 10 Dean she would have supported this practice.
66. Ms Andrews recalled one incident with a student outside the class, *"standing on the table in the courtyard singing at the top of her lungs"*. She said the student said they were practising. She confirmed that the students in the music class were difficult (which she experienced after taking over supervision of the [REDACTED] music class after the respondent left). She said of Ms [REDACTED] that she was difficult in class, but one of the better behaved students in the class.
67. Under questioning from counsel for the CAC,²⁰ Ms Andrews said she supported the practice of locking students out for more than just roll call saying, *"...sometimes if you had a difficult student in the class, our practice at our school was we were a restorative school and so if they were difficult, you would ask them to leave the room and you would keep them out there until you got your class sorted and then you would go out there and have a mini chat with them and then if the mini chat wasn't resolved, then you would*

¹⁹ Transcript Day 2, pages 8 ff.

²⁰ Transcript Day 2, pages 26 ff.

look for perhaps removing them to another class or something like that.” When pressed, she admitted she would assist a student out of their room with her own hands and, in questioning from the Tribunal, that she supported the practice of locking students out of the classroom. She also confirmed that students at the College often used profanity which resulted in the teachers using it too (albeit not at the same level and some teachers more than others).

68. Ms Andrews conceded she never saw the respondent in the classroom. She never saw him calling students names or swearing at them. She did recall Ms [REDACTED] and another student coming to her with concerns, but she did not recall asking Ms [REDACTED] to prepare the list which is TE02 in the bundle. She does recall a restorative meeting taking place between herself, the respondent and the two students.

Kupu Whakatau – Decision

69. The Tribunal finds, in relation to the Edgecumbe charge, all the particulars to be established to the requisite standard, except for the particular set out in paragraph 1.a.(ii) (the allegation the respondent pushed, and/or closed, and/or slammed the door against students’ bodies as they tried to come through the door). The Tribunal considered there was insufficient, or unclear, evidence as to the how the door in question worked to be able to find that particular established and it was likely that the door opened outwards which meant that the particular as framed was not made out.
70. The Tribunal finds that the remaining particulars (locking students out of the classroom, calling them the names set out in the charge, and swearing in the manner set out in the charge) are established particulars and that, cumulatively, they amount to serious misconduct (albeit at the lower end).
71. In reaching this conclusion, the Tribunal accepted Ms [REDACTED] evidence, finding her to be a reliable and credible witness, who made concessions when appropriate (including as to how the door to the courtyard operated). Further, in essence, the respondent accepted much of the conduct alleged, instead raising context issues as an explanation. In relation to the incident in which the respondent locked Ms [REDACTED] out of the classroom, the Tribunal considered the respondent’s obfuscation of this event in evasive oral evidence to be unhelpful. The Tribunal also queries whether, if the reason was health and safety as he now claims, the respondent never raised this explanation when first interviewed by the Council.
72. The respondent’s conduct in the established particulars is conduct unbecoming of a teacher. While the Tribunal acknowledges the evident lack of support for the respondent

as a new teacher, the likely bias he suffered due to his gender dysphoria (shown by the Principal's statements in the Board meeting as relayed by Mr Andrews), and what seemed to have been practices existing in the College which were not appropriate (language use and locking students out for roll call), nevertheless it was incumbent on the respondent to manage himself professionally in front of students, to maintain dignity and to refrain from lowering himself professionally in a way that is likely to bring disrepute to the profession. That Ms [REDACTED] can still remember the events some time later shows the likely impact of his behaviour on the learners in his care.

73. In relation to the Kaikohe charge, the Tribunal found that the charge was established to the requisite standard and the conduct amounted to serious misconduct.
74. On this charge, the Tribunal found the respondent's evasive answers in evidence to be unhelpful and accepts the submission of the CAC that it "beggars belief" that the respondent was not aware that he was under investigation by the CAC at the time that he was interviewed by Mr Rogers on 1 December 2020, given the extensive correspondence he had engaged in with a CAC investigator during that time period. In the Tribunal's view, this lack of honesty in a matter so crucial to a decision to hire is conduct that brings the profession into disrepute.

Whiu - Penalty

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

500 Powers of Disciplinary Tribunal

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
 - (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
 - (b) *censure the teacher:*
 - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*

- (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
 - (e) *annotate the register or the list of authorised persons in a specified manner:*
 - (f) *impose a fine on the teacher not exceeding \$3,000:*
 - (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
 - (h) *require any party to the hearing to pay costs to any other party:*
 - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
 - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under 493 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
- (3) *A fine imposed on a teacher under subsection (1)(f), and a sum ordered to be paid to the Teaching Council under subsection (1)(i), are recoverable as debts due to the Teaching Council.*

76. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.²¹ We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.²²

²¹ *CAC v McMillan*, NZTDT 2016/52.

²² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

77. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers²³:
- (a) Protecting the public;
 - (b) Setting the standards for the profession;
 - (c) Punishment;
 - (d) Rehabilitation;
 - (e) Consistency;
 - (f) The range of sentencing options;
 - (g) Least restrictive;
 - (h) Fair, reasonable and proportionate.
78. The Tribunal does not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.
79. In its submissions on penalty, the proposes a combination of censure and conditions.
80. The Tribunal has already commented on the serious manner in which it regards this conduct. The Tribunal also notes that the respondent is not currently teaching. The Tribunal considers that the respondent's conduct is, however, mitigated by the fact he was in the early stages of his teaching career, and was not well supported within the College, as well as behaving in a manner that the evidence suggests was consistent with culture and practices within the College.
81. The Tribunal wants to ensure that the respondent can return to teaching if he wishes with the support and tools that he needs so this behaviour does not happen again. The Tribunal notes its view that the respondent may well fare better in a larger, better resourced and supported school than those in which he has taught to date.
82. Bearing in mind the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
- (a) Censure of the respondent under section 500(1)(b) of the Act.

²³ Above n 16 at [40] - [62]

- (b) Annotation of the register for a period of three years under section 500(1)(e) of the Act.
- (c) Under section 404(1)(c) of the Act the following conditions to be placed on the respondent's current, and any future, practising certificate:
 - (i) For a period of three years, the respondent must tell any future employer of the decision and provide them with a copy of the full decision with evidence to the Teaching Council of this disclosure.
 - (ii) The respondent to attend a Teacher Education Refresher (TER) course before he returns to teaching and to provide evidence of this to the Teaching Council.
 - (iii) The respondent to maintain a mentor at a senior level at the school he teaches at (Assistant or Deputy Principal or above) for two years after returning to teaching, with the mentor to provide a report to the Teaching Council at the conclusion of the arrangement.

Ngā utu – Costs

- 83. The CAC submits that a 50% contribution to the CAC's overall costs is appropriate. This allows no discount to the respondent for the mitigating factors the Tribunal has noted above.
- 84. The Tribunal sees no reason to depart from the usual principles. The Tribunal therefore orders 40% costs in favour of the CAC. The CAC has provided a Schedule of Costs which shows its total costs as \$28,694.00. The CAC notes that this includes costs incurred for aspects of the charges which did not proceed. The CAC therefore proposes to cap its recoverable costs at \$20,000. The Tribunal thanks the CAC and accepts this cap, resulting in 40% of \$20,000 being **\$8,000** to be paid by the respondent.
- 85. The respondent is also ordered to pay 40% of the Tribunal's costs pursuant to section 500(1)(i). The Tribunal's costs amounted to \$20,899.94, with 40% of that sum being **\$8,359.98**.

Ngā Whakahau whakaputanga-kore pūmau – Permanent non-publication orders

- 86. Permanent non-publication of Ms [REDACTED] name is ordered.
- 87. All other interim non-publication orders now lapse.

R. L. Schmidt-McCleave

Rachael Schmidt-McCleave
Deputy Chair

NOTICE - Right of Appeal under Section 504 of the Education Act 1989

1. This decision may be appealed by the teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.
2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Clauses 5(2) to (6) of Schedule 3 applies to every appeal under this section as if it were an appeal under clause 5(1) of Schedule 3.