NZTDT 2021/4

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER THE	Education Act 1989
IN THE MATTER	a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**SHELLEY MAREE WARETINI (aka SHELLEY MAREE BECKETT)** registered teacher (Registration Number 254310), of Havelock North Respondent

---

RECALLED DECISION OF THE TRIBUNAL

Hearing:	25 August 2021
Tribunal:	Jo Hughson (Deputy Chairperson), Kiri Turketo, Simon Walker
Counsel:	Ms N Tahana for the Complaints Assessment Committee Ms A Harris for the Respondent [Mr B Nettleton for Evolve Education Group as third party]
Decision:	6 October 2021
Recalled Decision:	1 July 2022

HEI TĪMATANGA KORERO – INTRODUCTION AND SUMMARY

[1] Ms Waretini was first registered and provisionally certified, in 2005. She received full registration in 2007. Her last practising certificate expired on 10 May 2020.[1]

[2] Ms Waretini was employed by Evolve Education Group New Zealand Limited (Evolve) for approximately five years.[2] From November 2017 to 5 August 2018, she was Evolve's Centre Support Manager, supporting 10 Evolve Early Childhood Centres in the Hawke's Bay. In that period, as well as her Centre Support Manager role, she was required to perform additional roles including:

(a) Centre Manager for one Centre

(b) Acting Centre Manager for a kindergarten; and

(c) Acting Centre Manager for another Centre.[3]

[3] On 6 August 2018 Ms Waretini was appointed Evolve's Area Manager. As Area Manager, she was also required to act as Acting Centre Manager for up to three Evolve Early Childhood Education Centres, until she resigned in January 2019.[4]

[4] The Complaints Assessment Committee (the CAC) charged[5] that Ms Waretini, on or about 18 November 2018, failed to notify the appropriate authorities of child protection concerns and/or follow up to ensure a notification of concern had been made (in respect of one child).

[5] The conduct was alleged to amount to serious misconduct pursuant to section 378 of the Education Act 1989 (the Act). Alternatively, it was alleged the conduct amounted to conduct which otherwise entitles the Tribunal to exercise its powers pursuant to section 404 of the Act.

---

[1] Agreed Summary of Facts at [1]

[2] Agreed Summary of Facts at [2].

[3] Agreed Summary of Facts at [3].

[4] Agreed Summary of Facts at [4].

[5] Notice of Charge dated 10 February 2021 (the Notice is incorrectly dated 10 February 2020).

[6] The hearing proceeded on the papers based on an Agreed Summary of Facts[6].

[7] Ms Waretini admitted the conduct, and liability. Despite that, it was for the Tribunal to reach a view as to whether the conduct charged was proved, and if it was, whether it amounted to serious misconduct (and if so, what, if any, penalty should be imposed).

[8] Written submissions were received from Counsel for the CAC and Counsel for Ms Waretini, addressing the issues of liability, penalty, and non-publication orders.

[9] The Tribunal found the charge established. It had no difficulty concluding that an adverse finding of serious misconduct was warranted. The Tribunal made orders of censure, suspension of registration for a period of 6 months, a direction to the Teaching Council to impose conditions on a future practising certificate, and costs.

[10] There was an interim non-publication order in effect prior to the hearing, in respect of Ms Waretini's name and identifying particulars[7]. Ms Waretini sought a permanent order. The Tribunal was not satisfied that there were sufficient grounds to displace the presumption in favour of name publication such that it was proper for a permanent order to be made. The Tribunal declined to exercise its discretion to make a permanent order. It follows that Ms Waretini's name may be published in connection with these proceedings.

[11] Evolve sought a permanent order in respect of the name of the Centre where the child (Child X) attended at the relevant time. The Tribunal considered that such an order in respect of the name and identifying particulars of the Centre including geographical location (other than that the Centre is in the Hawke's Bay area) would be "proper" to ensure that the child and his whānau members cannot be identified.

[12] It followed that the Tribunal also considered it proper to make a permanent order in respect of the name and identifying particulars of Child X to protect the privacy interests of the child, and a permanent order in respect of the names of the child's whānau members who were identified in the papers that were before the Tribunal, and their private details (telephone numbers and address).

---

[6] Above, fn.1. Signed by the parties' representatives on 26 May 2021. It is noted it is the Tribunal's expectation that the respondent teacher should sign any agreed statement of facts.

[7] Interim Order dated 27 April 2021: Minute of Pre-Hearing Conference. This was continued on 26 May 2021 until further order of the full Tribunal; Minute of Pre-Hearing Conference

[13] The Tribunal has also made an order permanently suppressing from publication the references to Ms Waretini's personal health information in this decision. This order is made to protect Ms Waretini's privacy interests. The health information was submitted in support of Ms Waretini's application for name suppression which has been declined. The information is highly sensitive and personal in nature and is not relevant to the Tribunal's decisions on liability or penalty. Ms Waretini's private interests outweigh the public interest in this information being published and therefore the Tribunal considered that it was proper for such an order to be made. In addition, the Tribunal has made an order permanently suppressing parts of paragraphs [74] and [84] of this decision to protect the reputational interests of Evolve.

[14] The reasons for the Tribunal's decisions follow.

FACTS

[15] The Tribunal was satisfied that the following facts were established on the balance of probabilities and made findings accordingly[8]:

Circumstances

[16] In September 2018, a report of concern (ROC) had been made to Oranga Tamariki about Child X. The ROC was made by an early childhood centre previously attended by Child X. Ms Waretini and Evolve had no knowledge of that ROC having been made.

[17] In November 2018 Ms Waretini was Evolve's Area Manager for Hawke's Bay.

[18] Child X was enrolled at one of Evolve's Centres in the Hawke's Bay area between September 2018 and April 2019 (Centre H).

[19] On Monday, 19 November 2018 staff became concerned after noticing bruising on Child X's face and Child X disclosing that his mum had hit him. Child X was [redacted] years' old at the time.

Phone call and email

[20] On that date, 19 November 2018 Ms Waretini was working at another Centre in the area. Centre H's Manager contacted Ms Waretini (by phone) and sought her

[8] ASF at [5]-[16].

assistance. The Centre Manager was new to the role and was unsure what to do regarding concerns for Child X.

[21] During the phone call Ms Waretini and Centre H's Manager agreed that a ROC should be made to Oranga Tamariki in respect of Child X. Ms Waretini believed that she directed Centre H's Manager to make a ROC. However, whether she did or did not instruct Centre H's Manager to make a ROC was not at issue in these proceedings[9].

[22] Centre H's Manager then sent an email (at 12.02pm) to Ms Waretini outlining her concerns and attaching photos of Child X[10]. Included in the email was key information about the father and mother of the child including their names, phone numbers, and address. In the email, Centre H's Manager asked, "Let me know if you need any other photos and do I say anything to her [the mother] when she picks up?". A copy of the email and the photos of the child was produced to the Tribunal.[11]

[23] Ms Waretini never responded to the email or advised the Centre Manager about what to communicate to Child X's whānau.

[24] Ms Waretini did not notify Oranga Tamariki. Nor did she, as Area Manager, follow up about whether a notification had been made (by the Centre Manager).

[25] Evolve's Child Protection Policy (which was produced to the Tribunal)[12] provides that:

- *"[u]nless stated the Centre Manager is the designated person within each centre who is responsible for child protection"*[13]

[9] As agreed by the parties; Agreed Summary of Facts at [11].

[10] The Tribunal understood that the photos had been taken that day.

[11] Agreed Statement of Facts, Appendix 1.

[12] Agreed Summary of Facts, Appendix 2.

[13] ASF at [16], Appendix 2, page 1.

- "*Every Centre Manager must seek support from their Area Manager, Regional Manager, General Manager or TLDM to support with a collaborative decision before making a referral"*[14]
- *"An incident report will be written up…The incident report must be with your Area Manager within two hours of making the referral"*[15]

[26] Ms Waretini acknowledged and accepted the high but appropriate standards required of teachers, and, specifically, of the Area Manager, for the purposes of child protection. She acknowledged that she failed to meet the necessary standards by:

(a) Not considering the Centre Manager's email with due care and priority;

(b) Not responding to the Centre Manager's email at all; and

(c) Not ensuring that a ROC was notified to Oranga Tamariki with due urgency.

[27] A ROC was not made about Child X in November 2018 either by Ms Waretini or the Centre (or any other employee of Evolve). No ROC was made in respect of the concerns that arose in relation to Child X on 19 November 2018.

Subsequent events

[28] It was an agreed fact that Ms Waretini [redacted] during her employment at Evolve. On 4 January 2019 she resigned from Evolve for reasons including [redacted].[16]

[29] On 14 March 2019 Centre H's Manager rang Oranga Tamariki with further concerns regarding Child X's physical wellbeing.

[30] On 4 July 2019 the Ministry of Education (MOE) was notified of these concerns. The MOE confirmed that Ms Waretini had not submitted a ROC to the MOE in November 2018.

[14] ASF at [16], Appendix 2, page 5.

[15] ASF at [16], Appendix 2, page 5.

[16] ASF at [18].

[31] On 22 July 2019 the MOE also confirmed that Oranga Tamariki did not receive a ROC from Ms Waretini in November 2018. The MOE's email confirming this was produced to the Tribunal.[17]

[32] On 22 July 2019 the MOE advised the Teaching Council that Child X had suffered a brain bleed earlier in the month (and was in hospital) and whānau members were under investigation. The MOE's email advising of this was produced to the Tribunal.[18]

[33] On 23 July 2019 Evolve's General Manager (quality assurance and professional learning) submitted a mandatory report to the Teaching Council outlining Ms Waretini's conduct in or around November 2018.

TE TURE – LEGAL PRINCIPLES - Liability

[34] It was for the CAC to prove the charge, on the balance of probabilities.

[35] "Serious misconduct" is defined in section 378 of the Act as follows:

> **Serious misconduct** means conduct by a teacher –
>
> (a) That-
>
> (i) Adversely affects, or is likely to adversely affect, the wellbeing or learning of one 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.

[36] This test for serious misconduct is conjunctive[19]. That is, as well as being conduct that has one or more of the adverse professional effects or consequences described in subsection (a)(i)-(iii) the conduct must also be of a character or severity that meets

[17] ASF at [21], Appendix 3.

[18] ASF at [22], Appendix 4.

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

the Teaching Council's criteria for reporting serious misconduct. Those criteria are set out in Part 3, Rule 9 of the Teaching Council Rules 2016 (the Rules).

[37] Rule 9 states that a teacher's employer must immediately report to the Council in accordance with section 394 of the Act if the employer has reason to believe the teacher has committed a "serious breach of the Code of Professional Responsibility". In this case the matters reviewed by the Tribunal arose from the mandatory report made by the General Manager of Evolve on 23 July 2019.[20]

[38] The Code of Professional Responsibility and Standards for Teaching (the Code) documents the minimum standards for ethical and professional behaviour that are expected of every registered teacher. As such, the Code sets out the commitments that teachers make to the profession, learners, families and whānau, and to society.

[39] Rule 9(1)(a) through (k) is a non-exhaustive list of conduct which may constitute a serious breach of the Code and therefore, which must be reported by the teacher's employer.

[40] It was submitted for the CAC that Ms Waretini's conduct engaged all three limbs of the definition in section 378(a). It was submitted further that the conduct engaged section 378(b) as it was a serious breach of the Code as demonstrated by the examples given in Rules 9(1)(d) and 9(1)(k) of the Rules ((d): failing to protect a child or young person due to negligence or misconduct, not including accidental harm; and (k): an act or omission that brings or is likely to bring, the teaching profession into disrepute). As such, the CAC submitted that the test for serious misconduct was met.

[41] When determining whether established conduct is likely to have had an adverse effect on a student for the purposes of the definition of serious misconduct in section 378(a)(i), the Tribunal is not required to be satisfied that there has been an actual adverse impact on a student's or students' wellbeing or learning. While there may be no direct evidence of adverse consequences for a student, the Tribunal is entitled to proceed on the basis that such consequences are a logical outcome or likely occurred or would occur, because of the teacher's conduct.

[42] Previous Tribunal decisions demonstrate that the term "fitness to practise" in the definition of serious misconduct in section 378(a)(ii) extends beyond competence

[20] The Mandatory Report was not produced to the Tribunal, although nothing turned on that.

issues and includes conduct that, when considered objectively, will have a negative impact on the trust and confidence which the public is entitled to have in the teacher and the teaching profession as a whole, including conduct which falls below the standards legitimately expected of a member of the profession, whether of a teaching character or not.[21]

[43] When considering whether particular conduct may bring the teaching profession into disrepute (for the purposes of section 378 (a)(iii); and Rule 9(1)(k)) the question to be asked is whether reasonable members of the public, informed and with the knowledge of all the factual circumstances, could reasonably conclude that the reputation and good-standing of the teaching profession was lowered by the behaviour of the teacher concerned.[22] This objective test is applied regularly by the Tribunal.

[44] The principal question is whether the teacher's actions, wherever and whenever they took place, reflect adversely on his or her fitness to be a teacher and/or may bring the teaching profession into disrepute[23].

[45] Each case must be determined on its own facts. Whether or not there has been serious misconduct (or misconduct) and the severity of any such misconduct is assessed by objective standards. Not every departure from accepted professional standards will amount to serious misconduct for the purpose of section 378, or even misconduct simpliciter.

[46] Subjective matters personal to the respondent teacher are not to be considered in any significant way when objectively assessing whether there has been serious misconduct[24]. Personal factors may be given full consideration at the penalty stage if a charge is found to have been established. In this regard, Ms Waretini relied to some extent on her work circumstances as it was agreed they were in November

21 This is the approach taken to "fitness to practise" for the purposes of the Health Practitioners Competence Assurance Act 2003, and the approach which has been taken by this Tribunal in previous decisions.

22 Being the standard stated by the High Court (Gendall J) in *Collie v Nursing Council of New Zealand* [2001] NZAR 74 at [28] in relation to the test of "likely to bring discredit to the [nursing] profession", adopted by the Tribunal in previous decisions including *CAC v Webster NZTDT* 2016-57, 6 April 2017 at [46] and *CAC v Harrington* NZTDT 2016/63, 6 April 2017 at [17].

23 For example, see NZTDT 2009/05, 11 May 2009.

24 See *Martin v Director of Proceedings* [2010] NZAR 333 and *Cole v Professional Conduct Committee of the Nursing Council of New Zealand* [2017] NZHC 1178, at [126]-[130] applied in previous decisions of this Tribunal.

2018 and the fact that others' actions or inactions played a significant part in the outcome for the child (hospitalisation for a brain bleed in July 2019).[25]

Relevant standards

[47] The Code makes it clear that teachers are expected to behave in ways that promote a culture of trust, respect, and confidence in them as a teacher and in the profession. Clause 1.3 of the Code addresses a teacher's commitment to the teaching profession and relates to:

> maintaining public trust and confidence in the teaching profession by demonstrating a high standard of professional behaviour and integrity.

[48] By acting with integrity and professionalism, teachers and the teaching profession maintain the trust and confidence that learners, families and whānau, and the wider community place in teachers to guide their children and young people on their learning journey and to keep them safe[26].

[49] Conduct that damages this trust and confidence breaches the expectation set out in Clause 1.3. That may include conduct both inside and outside of work that interferes with their performance as a teacher, that affects the trust and confidence that others have in them as a teacher, or that reflects badly on the integrity or standing of the teaching profession.

[50] Clause 2.1 of the Code states that teachers will work in the best interests of learners by promoting the wellbeing of learners and protecting them from harm.

[51] The Tribunal assessed the conduct against those standards.

Findings on the Charge

[52] The Tribunal considered the established facts and the submissions for the parties, carefully.

[53] The Tribunal was satisfied the evidence established that Ms Waretini engaged in the conduct charged; namely, that on 19 November 2018 she failed to notify the appropriate authorities of child protection concerns held in respect of Child X and she failed to follow up to ensure a notification of concern had been made.

[25] Submissions for Mr Wihapi at [3].

[26] Clause 1.3 Code of Professional Responsibility.

[54] The Tribunal had no difficulty concluding that the conduct, viewed objectively, was serious misconduct. That finding entitled the Tribunal to exercise its powers pursuant to section 404 of the Act.

Serious misconduct – limb (a)

[55] As to the first limb of the test for serious misconduct, the Tribunal reasoned that:

(a) Child X had already suffered injuries when he presented at Centre H on 19 November 2018. Those injuries were observed by staff and the Centre Manager, and the child was photographed. The photographs showed bruising on the Child. In the absence of any intervention by authorities, inquiries into his wellbeing or advice to the Centre Manager on how to deal with his parents, Child X was allowed to return home from the Centre. He was potentially exposed to further harm. That situation arose at least in part because of Ms Waretini's failures to consider the Centre Manager's email, her failure to respond to the email at all, and her failure to ensure a ROC was made to Oranga Tamariki.

(b) By not acting on the concerns that were notified to her on 19 November 2018 or following up to ensure a notification had been made by the Centre Manager (or Centre staff) it can reasonably be said that Ms Waretini put Child X at risk of being harmed.

(c) In this regard it is noted that the Tribunal did not accept the submission for the CAC that while Ms Waretini's conduct was not the direct cause of Child X being admitted to hospital for a brain bleed in July 2019, the subsequent event of Child X's admission to hospital is of significant relevance to Ms Waretini's conduct. The Tribunal did not take that subsequent event into account when it was assessing whether Ms Waretini's inactions in November 2018 met the test for serious misconduct. It was a factor the Tribunal considered at the penalty stage. Established conduct must be viewed down the lens of what occurred or what was known at the time of the offending, not with the benefit of hindsight or knowledge of subsequent events. Put another way, the Tribunal's finding that Ms Waretini is guilty of serious misconduct was made without having regard to the subsequent event of Child's X's hospitalisation for a brain bleed which occurred some eight months later (in July 2019), or in any event six months after Ms Waretini had left her employment at Evolve.

[56] As has been said before[27] teachers are advocates and the voice for children. This is consistent with the standard in the Code that teachers are expected to work in the best interests of learners by promoting their wellbeing and protecting them from harm. As soon as Ms Waretini was informed (as she was by phone and then email supported by photographs of Child X's injuries on 19 November 2018) that there was a possibility of abuse by a whānau member, she had both a contractual and a professional obligation to provide support and guidance to the Centre Manager and to follow up with the Centre Manager to ensure that the concerns had in fact been reported to Oranga Tamariki. For those reasons, Ms Waretini's failure to consider the Centre Manager's email and to respond to it combined with her failure to ensure the concerns had been notified to Oranga Tamariki, were significant departures from acceptable standards by a teacher who was in a position of responsibility which included responsibilities associated with child protection. In the Tribunal's view, in the circumstances as they were known to Ms Waretini at the time (bruising on the child and the child's claim that he had been hit by "mum"), a logical outcome of her inactions was an adverse effect on Child X's wellbeing.

[57] Limb (a)(i) is met for those reasons.

[58] Ms Waretini acknowledged that she failed to meet the necessary standards expected of her as Area Manager by not considering the Centre Manager's email with due care and priority, not responding to the email at all, and not ensuring that a ROC was made to Oranga Tamariki. That conduct was not only contrary to Evolve's Child Protection Policy, under which she had responsibility to provide support and guidance to Centre Managers, but in the Tribunal's view it was a serious and significant breach of the Code (a failure to demonstrate a high standard of professional behaviour, and to work in the best interest of learners by promoting their wellbeing and protecting them from harm). Teachers can reasonably be expected to raise concerns in circumstances such as those that arose for Centre staff and Ms Waretini on 19 November 2018 and that is to ensure that others who are qualified to make inquiries can do so, to protect the child concerned. The Tribunal concluded that when Ms Waretini's failures are viewed objectively, there can be no doubt they reflect adversely on her fitness to be teacher. Limb (a)(ii) is met.

[59] Further, in the Tribunal's opinion, any reasonable member of the public, informed of the facts and circumstances of Ms Waretini's conduct in failing to act on serious

[27] *CAC v Baxter* NZTDT 2019/35, 6 September 2019.

concerns notified to her about a child's safety, would reasonably conclude that the reputation and good standing of the teaching profession is lowered by such conduct. Considered objectively, in the Tribunal's view, the conduct would cause members of the public to doubt whether or to what extent the teaching profession was observing its obligations. To that extent, the Tribunal accepted the submission for the CAC that Ms Waretini's conduct may bring the teaching profession into disrepute. Limb (a)(iii)

[60] In summary, the Tribunal concluded that Ms Waretini's conduct has or has had all three adverse professional effects or consequences described in the definition of serious misconduct in section 378(a) of the Act.

Serious misconduct – limb (b)

[61] The Tribunal concluded that reasonable members of the public with knowledge of all the factual circumstances here would not consider Ms Waretini's conduct to be appropriate for a teacher who had responsibility as an area manager for a number of early childhood centres and significant responsibility under her employer's child protection policy. In the Tribunal's opinion, by her omissions, Ms Waretini's conduct was serious breach of the Code of Professional Responsibility which brings or will likely bring the teaching profession into disrepute (Rule 9 (1)(k)).

[62] Further, the Tribunal considered that the conduct was also a serious breach of the Code of Professional Responsibility to the extent that it was conduct that failed to protect a child or young person due to negligence or misconduct. Ms Waretini's conduct involved a significant falling short of the standards expected of all members of the teaching profession to carry out their duties and responsibilities with care so that children and young people are protected from harm (Rule 9(1)(d)). The Tribunal's view was that Ms Waretini's conduct involved a serious dereliction of duty and professional negligence in respect of a significant matter (suspected child abuse).

[63] In that regard, the Tribunal did not accept the submission that was made for Ms Waretini that her conduct falls at the lower end of the spectrum of serious misconduct offending, or that it was misconduct (rather than serious misconduct). That it involved "neglect" rather than "active wrongdoing" had no bearing on the objective gravity of the offending, in the Tribunal's view.

[64] For those reasons, the Tribunal had little difficulty concluding that Ms Waretini's conduct was of a character and severity that met the reporting criteria specified in

Rule 9 and therefore, the second limb of the test for whether there has been serious misconduct, is met.

Comparable cases

[65] For completeness, the Tribunal notes that when it was reaching a view about whether the conduct it was reviewing was serious misconduct, or not, the submissions that were made for the parties in relation to previous Tribunal decisions which involved established failures to report, were considered.

[66] The previous cases referred to by Counsel for the CAC were as follows:

(a) *Baxter*[28]: the teacher failed to report a concern about the appearance of a three-year-old child's genitalia in a timely manner. The teacher did eventually report his concern but 16 days after noticing. The Tribunal concluded that the failure to report in a timely manner was serious misconduct.

(b) *Bremer*[29] involved a principal who failed to notify authorities about a teacher's sexual impropriety with young students. The Tribunal found that the principal had sufficient information to recognise that the teacher presented a risk to students, and it was incumbent on him to inform the appropriate authorities. His failure to discharge this duty amounted to serious misconduct.

(c) *Back and Mepham*[30] involved two teachers, who were partners, who formed a non-romantic but inappropriate relationship with a 13-year-old student. Both teachers were charged with failing to secure professional guidance and support for the student when they knew she was self-harming and was vulnerable. That case did not pinpoint a failure to report as the serious misconduct charged. However, the Tribunal in that case found that the teachers' failures to secure guidance and support of the student contributed to a cumulative finding of serious misconduct.

[28] NZTDT 2019/35, 6 September 2019.

[29] NZTDT 2015/17, 5 April 2016.

[30] NZTDT 2015/19, 17 May 2016.

[67] It was submitted for Ms Waretini that these cases involved teachers who recognised, or should have recognised, risk to a child or young person, but decided not to report that risk to the persons qualified to make an assessment as the severity of that risk, or who were otherwise in a position to take steps to protect the child in question (for example the Police or Oranga Tamariki). Further, that her case differed because here, Ms Waretini spoke to the Centre Manager over the phone about the concerns she (the Centre Manager and staff) held about Child X. When she heard about those concerns Ms Waretini agreed that a ROC should be made.

[68] The reality is that Ms Waretini's serious misconduct arose from her failure to consider the Centre Manager' email with due care and priority, her failure to respond to the Centre Manager's email at all and then her failure to follow up to ensure that a notification of concern had in fact been made. In the Tribunal's view, Ms Waretini's inactions were equally, if not more serious than the actions of the teachers in the previous cases, given the context and the nature of the concerns that had been reported to her about the child and her role in respect of child protection under her employer's policy.

Finding

[69] It was all those reasons that the Tribunal was satisfied the charge was established and that Ms Waretini is guilty of serious misconduct.

WHIU - PENALTY

[70] Having made an adverse finding of serious misconduct, the Tribunal was entitled to exercise its powers under section 404 of the Act. The Tribunal could do one or more of the things set out in section 404(1).

[71] It is well established that the primary purposes of the imposition of disciplinary penalties under the Act are to maintain professional standards (through general and/or specific deterrence), to maintain the public's confidence in the teaching profession, and to protect the public through the provision of a safe learning environment for students[31].

[72] Rehabilitation of the teacher is often an important purpose.[32]

[31] As discussed in *CAC v McMillan* NZTDT 2016/52 at [23].

[32] *CAC v Teacher* NZTDT 2016/55 at [30].

[73] In previous decisions the Tribunal has accepted as the appropriate sentencing principles those identified by Collins J in *Roberts v Professional Conduct Committee of the Nursing Council*[33]. His Honour identified eight factors as relevant whenever an appropriate penalty is being determined in professional disciplinary proceedings. In short, the Tribunal must arrive at an outcome that is fair, reasonable, and proportionate in the circumstances. It must identify the least restrictive penalty that can reasonably be imposed which meets the seriousness of the case and discharges the Tribunal's obligations to the public and the teaching profession.

Ms Waretini's apology and acknowledgement

[74] Ms Waretini apologised, [redacted].

[75] Ms Waretini has acknowledged and accepted that it is possible that had she taken actions such as following up to see whether a ROC had been made, she may have prevented further harm to Child X. However, she does not accept that her conduct was the direct cause of harm to Child X (and the Tribunal accepted that it was not). Through her counsel, Ms Waretini has indicated she is genuinely "deeply sorry" and wishes to apologise for the part she played in the "wider narrative" that led to Child X's hospitalisation some eight months later, in July 2019 (which was six months after Ms Waretini had left her employment with Evolve and four months after Oranga Tamariki had received a second ROC regarding Child X, as it had in March 2019)[34]. She referred to the fact that the actions and/or inactions of other individuals and entities played a significant part in that outcome[35] (which point the Tribunal considered was not an unreasonable one for Ms Waretini to have made, all circumstances considered).

Submissions as to appropriate penalty

[33] [2012] NZHC 3354 at [44]-[51].

[34] ASF at [5], [19] and [24].

[35] ASF at [24].

[76] Counsel for the CAC submitted that when the aggravating and mitigating factors are balanced (discussed below), as well as the Tribunal's obligation to impose the least restrictive penalty, a censure, and conditions of practice would be an appropriate penalty combined with annotation of the register. The conditions that were suggested were requiring Ms Waretini to inform her current or prospective employer of the Tribunal's decision and provide a copy of it to them and, if she takes up another teaching role in early childhood education, she must "organise a mentor for a period of six months and within six months from the date of commencement of the role, provide to the Senior Manager: Professional Responsibility, evidence that she understands her reporting responsibilities.[36]

[77] Counsel for Ms Waretini indicated that the penalty sought by the CAC was not opposed.

Discussion and findings on penalty

[78] The Tribunal considered the relevant penalty principles including the previous Tribunal cases referred to, and the submissions that were made for the CAC and for Ms Waretini.

[79] The Tribunal was satisfied that it was appropriate and necessary to impose a formal penalty. For the reasons given below, the Tribunal considered that the least restrictive penalty which meets the seriousness of the case and discharges the Tribunal's obligation to the public and the teaching profession is a censure to express the Tribunal's disapproval of the conduct which occurred (section 404(1)(b)), a six-month period of suspension of registration (section 404(1)(d)), annotation of the register (of the censure) for a period of two years (section 404(1)(e)), and (because the evidence was that Ms Waretini does not hold a current practising certificate) a direction to the Teaching Council to impose conditions on any subsequent practising certificate issued to Ms Waretini (section 404(1)(j)).

[80] It is necessary to ensure that the penalty imposed for the serious misconduct that has occurred in this case, is consistent with the penalties imposed in comparable previous cases. As was said by Randerson J in *Patel v Dentists Disciplinary Tribunal*[37]:

[36] Written submissions for the CAC at [26]-[28].

[37] (High Court, Auckland, AP77/02, 8 October 2002), at [31].

> …. while absolute consistency is something of a pipe dream, and cases are necessarily fact dependent, some regard must be had to maintaining reasonable consistency with other cases. That is necessary to maintain the credibility of the Tribunal as well as the confidence of the profession and the public at large.

[81] The Tribunal sought guidance from the cases referred to above, but in the end, it concluded that those cases were not particularly helpful in terms of providing a benchmark as to the relative seriousness of Ms Waretini's conduct. That is because they were not cases involving a failure to ensure a notification of suspected child abuse that had been agreed should be made, had been made by a teacher who held a position of responsibility that included responsibility for child protection.

[82] The Tribunal also took account of the aggravating and mitigating features identified by the parties, as well as the view it reached ultimately that Ms Waretini is likely able to be rehabilitated, both in terms of her health and professionally.

[83] The Tribunal considered that the aggravating features in this case were:

(a) Vulnerability – given his young age ([redacted] years-old) and the alleged abuse from a whānau member (the mother) Child X was particularly vulnerable.

(b) Multiple warnings – the Centre Manager raised her concerns with Ms Waretini on two occasions: once by telephone and once by email. Despite these two warnings Ms Waretini failed to follow up with the Centre Manager as to how she should communicate with Child X's parents at pick up, and she failed to ensure that Oranga Tamariki was notified.

(c) Breach of duty – Ms Waretini had a duty as an educator and as the Area Manager, to report child protection concerns. It was incumbent on her to inform the authorities and in doing so initiate an enquiry which would reveal whether Child X was being abused or not and to make sure that if he was, there was no ongoing abuse.

(d) Harm – there was at least some possibility that Child X's subsequent hospitalisation for a brain bleed and removal from his parents' care may have been avoided. The Tribunal noted that the CAC acknowledged that Ms Waretini was not directly responsible for the subsequent events, but her inaction in November 2018 meant that those who were qualified and able to inquire into Child X's circumstances were not engaged soon enough. Had the concerns been elevated to Oranga Tamariki earlier, by

Ms Waretini and by others, the risk of further harm to Child X may have been mitigated.

[84] As for the mitigating features the Tribunal considered these were:

(a) Work circumstances – at the time of her conduct, Ms Waretini was working within multiple roles within Evolve including as Area Manager and as Acting Centre Manager for other Evolve Centres in the area. [redacted] However, the Tribunal did not consider these circumstances excused Ms Waretini from discharging her professional responsibilities to Child A, given what had been reported to her on the phone by the Centre Manager. It ought to have been clear to Ms Waretini that she needed to prioritise the matter of Child X at that time.

(b) Remorse – Ms Waretini has apologised, through this process including in an affidavit[39]. The CAC and the Tribunal accepted that her acknowledgement of her failures, and her apology, is a genuine expression of sorrow and remorse.

(c) Cooperation – it is acknowledged that Ms Waretini actively participated in the CAC and Tribunal processes including by engaging counsel and by agreeing the summary of facts. She is to be commended for that.

(d) By her expression of remorse and her engagement in these processes, Ms Waretini has demonstrated a degree of insight into her offending.

[85] The Tribunal recognised that cancellation or suspension of registration or a practising certificate should not be ordered if an alternative penalty can achieve the objectives sought. Further, that rehabilitation of the teacher is a factor requiring careful consideration. Ultimately, the Tribunal must balance the nature and gravity

[38] ASF at [18].

[39] Ms Waretini's affidavit filed in support of her application for permanent name suppression.

of the offending and its bearing on the teacher's fitness to practise against the need for removal or suspension and its consequences to the individual teacher[40].

[86] The Tribunal concluded that a period of six months' suspension of Ms Waretini's registration is necessary to protect the public and maintain the standards of the teaching profession. The offending in this case was regarded by the Tribunal as of sufficient gravity (and as having a significant bearing on Ms Waretini's fitness to be a teacher) to warrant the imposition of this serious penalty outcome.

[87] As above, the Tribunal considered that Ms Waretini's omissions in November 2018 involved serious negligence in relation to a very serious matter (suspected child abuse). They are failings that cannot be countenanced in the teaching profession. Therefore, the Tribunal did not consider that a period of suspension would be a disproportionate response to what occurred here.

[88] At the time of Ms Waretini's omissions she was in a position of responsibility and had an obligation in relation to child protection and leadership under her employer's Child Protection policy. Her conduct had the potential to have tragic consequences for Child X and she of all people should have recognised that and given the concerns her urgent attention. A penalty of suspension is necessary to send a message to Ms Waretini and to other members of the teaching profession that the conduct the Tribunal has reviewed here is not low-level but rather, grave given its potentially serious consequences for young children.

[89] In addition, the Tribunal decided to make an order censuring Ms Waretini as a mark of its serious disquiet about her conduct, and to uphold professional standards.

[90] The Tribunal also decided that the register should be annotated to record the censure and made an order pursuant to section 404(1)(e). Such an order will ensure transparency and protect the public.

[91] In addition, the Tribunal decided to direct the Teaching Council to impose the following conditions on any subsequent practising certificate to be issued to Ms Waretini if she applies for a certificate once her period of suspension had ended:

91.a.1 For a period of one year, Ms Waretini is to participate in mentoring with a mentor approved by the Manager: Teacher Practice and/or Professional Responsibility at the Teaching

[40] *Dad v General Dental Council* [Privy Council] at [1543] referred to in *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, AP77/02, 8 October 2002, Randerson J) at [31].

Council. The mentoring to focus on providing advice and guidance to Ms Waretini to enable her to understand her child protection reporting obligations and is to be completed to the satisfaction of the Manager: Teacher Practice and/or Professional Responsibility.

91.a.2 For a period of one year, Ms Waretini is not to hold a position of responsibility (leadership) within a learning environment or organisation which owns or operates early childhood centres.

91.a.3 For a period of two years, Ms Waretini is to advise any current, prospective, or future employers in the education sector, of this decision (and provide a copy of this decision to those employers)

[92] This direction is made for rehabilitative purposes and to protect the public. It is being given under section 404(1)(j).

[93] In an affidavit Ms Waretini swore in support of her application for permanent name suppression she disclosed [redacted]. The Tribunal considered that a period of suspension followed by a period when Ms Waretini will be required to practise subject to conditions will enable her to focus on rehabilitation not only in relation to [redacted] but also the professional issues which have been highlighted by the conduct the Tribunal has reviewed. The Tribunal is confident Ms Waretini can be fully rehabilitated and wishes to give her the opportunity to achieve that hence the orders it is making here. In the meantime, the public will also be protected.

Costs

[94] It is usual for an award of costs to be made against a teacher once a charge is established, although in this case the CAC did not seek an order in respect of its costs.

[95] When considering the appropriate quantum of costs, the Tribunal must take account of the need for the teacher who has come before the Tribunal to make a proper contribution towards the costs that have been incurred. As has been said in previous decisions of the Tribunal, the teaching profession as a whole should not be expected to fund all the costs of the disciplinary regime under the Act.

[96] Prior to the hearing, at the Tribunal's request, the CAC filed a Schedule of its investigation and prosecution costs and disbursements which amounted to $14,741.55 excluding GST[41] (which the Tribunal considered were reasonable).

[97] A 40% contribution to the CAC's costs is usually considered reasonable and appropriate where the respondent teacher had cooperated in the proceedings and the matter has been able to be heard and determined other than in a full in-person hearing.

[98] In this case the Tribunal decided to make a reduced costs order of 20% of total reasonable costs. The order is being made as the Tribunal does not consider it fair or reasonable that the teaching profession as a whole should have to meet the full costs of these proceedings. A reduced order takes into account that Ms Waretini has not held a practising certificate since her last one expired in May 2020 and therefore, she will not have been working in paid employment as a teacher (which may have affected her financial means). A reduced order also acknowledges the level of Ms Waretini's cooperation and engagement with the CAC during its investigation and when prosecuting the Charge.

[99] Accordingly, the Tribunal made an order pursuant to section 404(1)(h) that Ms Waretini is to pay the sum of $2,948.31 to the CAC.

[100] As to the hearing costs, the Tribunal made an order that Ms Waretini is to make a 40% contribution towards those costs, being payment of the sum of $458.00 to the Teaching Council. That order is in line with the Tribunal's Costs Practice Note and is made under section 404(1)(i).

[101] If Ms Waretini wishes to enter a payment arrangement with the Teaching Council in respect of the costs that she is being ordered to pay, then that will be a matter for her to take up with the Council.

Non-publication orders

[102] Interim non-publication orders in respect of Ms Waretini's name and identifying details had been made at a pre-hearing conference on 27 April 2021 and those

[41] Costs Schedule for the CAC dated 24 August 2021.

orders were continued when the matter next came before the Tribunal at a conference held on 18 May 2021, to preserve the position for Ms Waretini.[42]

[103] Ms Waretini sought a permanent non-publication order in respect of her name and identifying particulars[43] as well as in respect of the name of the childcare centre that Child X attended, and details regarding the geographical location of the Centre. A permanent order was sought on the following grounds:

(a) It is likely that publication of Ms Waretini's name will exacerbate her [health issues [redacted]

(b) It is likely that publication of Ms Waretini's name, and/or the geographical location of the Centre will result in the identification of Child X and his family.

(c) It is likely that, as a consequence of publication of Ms Waretini's name, the abuse that Child X suffered will be unfairly attributed to Ms Waretini, resulting in a penalty that would significantly outweigh the gravity of her conduct.

[104] Ms Waretini's application was supported by an affidavit she had sworn on 2 August 2021 and by an affidavit sworn by Dr Glenda Lynette Ward. Dr Ward deposed that she has been Ms Waretini's General Practitioner for approximately 25 years. Dr Ward stated [redacted].

[105] In her affidavit, Dr Ward raises concerns that publication of Ms Waretini's name will aggravate her [redacted]. In her own affidavit, Ms Waretini has deposed that [redacted].

[42] Minute of the Deputy Chairperson dated 18 May 2021.

[43] Application dated 5 August 2021.

[106] Counsel for the CAC indicated that as Ms Waretini's application is supported by independent evidence (Dr Ward's evidence) the Committee takes a "neutral position" in respect of the application.[44]

[107] Evolve made an application for non-publication of the name of Centre H on the basis that publication would "almost certainly lead to the identification of Child X, and Child X's family[45]. Reference was made to the media interest in the case of Child X at the time of his hospitalisation, and to the fact that the Hawke's Bay region, and in particular the community served by Centre H is "very small and close-knit." It was submitted that were the Centre name to be published, this would "almost certainly lead to the identify [sic] of Child X and Child X's family, and for this to quickly become widely known within the region in these circumstances".

[108] The CAC indicated it did not oppose the application for a non-publication order in respect of the name of the Centre.[46]

Relevant principles

[109] The default position is for the names of teachers who are subject to Tribunal proceedings to be published. A non-publication order can only be made under section 405(6) if the Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant, if any) and the public interest.

[110] The principle of open justice is reflected in section 405(3) of the Act which requires the proceedings to be held in public unless the Tribunal orders otherwise. The primary purpose behind the open justice principle in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.[47]

[111] The starting point in any consideration of name suppression is this fundamental principle of open justice, as reflected in section 405(3). Various High Court and Court

[44] CAC's Submissions on Non-Publication Orders, dated 18 August 2021.

[45] Letter from Evolve Education Group New Zealand Limited ([redacted], GM People & Talent/Head of Human Resources) to the Tribunal dated 19 August 2019.

[46] CAC's Submissions on Non-Publication Orders, dated 18 August 2021.

[47] *CAC v Teacher* NZTDT 2016/27, 25 October 2016, at [66].

of Appeal decisions have confirmed this approach. The Court of Appeal in *Y v Attorney-General*[48] observed:

> Given the almost limitless variety of civil cases and the fact that every case is different, the balancing exercise must necessarily be case dependent. Sometimes the legitimate public interest in knowing the names of those involved in the case (either as party or as witnesses or both) or knowing the details of the case, will be high. *Hart v Standards Committee (No. 1) of the New Zealand Law Society* was such a case. As this Court observed:
>
> > "the public interest in open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well-established in the disciplinary context…."
>
> Consequently, a professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure."

[112] However, as the High Court observed in *Director of Proceedings v Johns*[49] and more recently, in *J v New Zealand Institute of Chartered Accountants Appeals Council*[50] every decision will necessarily be case and fact dependent and will require the weighting of the public interest with the particular interests of any person in the context of the facts of the case under consideration. As previous decisions of this Tribunal demonstrate, there may well be cases where there are private factors that outweigh the public interest considerations at stake, and which displace the presumption in favour of disclosure of name and identifying details. This may include cases where it can be demonstrated that publication would not serve the objectives of the Tribunal, including protection of the public (for example, where publication would stand in the way of the teacher's rehabilitation and therefore be counterproductive)[51] and the maintenance of professional standards.

---

[48] [2016] NZCA 474, (2016) PRNZ 452 at [32].

[49] [2017] NZHC 2843, at [169] – [171].

[50] [2020] NZHC 1566 at [85] cited in *Teacher Q* at [32].

[51] See the discussion of Moore J in *Director of Proceedings v Johns* above at [173]-[178].

[113] Previous decisions of the Tribunal have referred to there being a two-step approach to be taken by the Tribunal when determining the issue of name suppression, with reference to *CAC v Finch*[52] [53]. Counsel for Ms Waretini referred to this decision in his written submissions. The two-step approach has been stated to involve a first step threshold question, which requires deliberative judgement on the part of the Tribunal, whether, having regard to the various interests identified in section 405, it is "proper" to make non-publication orders. If it is then at the second step the Tribunal may exercise its discretion and make the order sought.

[114] In *Dr N v A Professional Conduct Committee of the Medical Council* [54] the High Court considered the issue of the proper approach to appeals against the Health Practitioners Disciplinary Tribunal's decisions on name suppression. That Tribunal's power to make an order suppressing the name of a practitioner who is before it is found in section 95(2) of the Health Practitioners Competence Assurance Act 2003. Section 95 contains a similar provision to section 405 except that the Health Practitioners Disciplinary Tribunal must be satisfied it is "desirable" to make an order rather than be of the opinion that it is "proper", as this Tribunal is required to be. Mallon J stated at [45]:

> In my view the two-step approach is not the correct one. I agree with the submission for the PCC that the requirement of desirability is inevitably subsumed into the overall discretion of the Tribunal (that is, whether the Tribunal "may" make the order is determined by whether it is "desirable" to do do). It is difficult to envisage any case where the Tribunal would consider that the threshold of desirability is met and yet then go on to decline to make an order. That is because anything relevant to the discretion will have already been considered as part of the private and public interest considerations that are relevant to whether suppression is desirable.[55]…

---

[52] NZTDT 2016/11.

[53] Above, NZTDT 2016/27, at [67],

[54] [2013] NZHC 3405.

[55] As Mallon J went on to state in footnote 20. of her decision, "In *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZHC 933, [2013] NZAR 1055 at [32], at [38] Wylie J noted that, while there might be some overlap, "the threshold question [of desirability] focuses more on matters of general principle, for example, the public interest and the interest of others, including complainants, and the discretionary element to the decision will focus more on matters personal to the applicant arising out of the charge, and the Tribunal's findings in relation to it". But the factors personal to the applicant will be considered as part of the Tribunal's regard to "the interests of any

[115] For the same reasons, this Tribunal considered that the requirement in section 405(3) that it must be of the opinion that it is "proper" to make a non-publication order, is subsumed into the overall discretion of the Tribunal (that is whether the Tribunal "may make the order" is determined by whether it is "proper" to do so). Like the High Court in *Dr N* the Tribunal here cannot imagine any case where the Tribunal would consider that the threshold of "proper" is met and yet then go on to decline to make an order.

[116] In summary, there are relevant factors (the public and private interests at stake in the particular case) that must be considered. Those factors are balanced by the Tribunal to form a view about whether non-publication is "proper", on the facts of the case.[56] If the Tribunal, having balanced the competing interests, forms the view that non-publication is "proper" then it follows that it may make an order.

[117] In *Director of Proceedings v Johns* [57]the High Court (Moore J) accepted Counsel for the practitioner's submission that the threshold of desirability under section 95(2) of the Health Practitioners Competence Assurance Act 2003 is considerably lower than the 'exceptional' test commonly used in the Courts. Adopting the same reasons as those adopted by other Judges of the High Court Moore J at [166] stated he was:

> satisfied that the test under s 95 invokes a considerably lower threshold than the usual civil test. It does not require exceptionality nor even something out of the ordinary. And while it is a concept not readily amendable to precise definition it does require evaluating the competing considerations of the interests of any person and the public interest. Attempts to refine the definition further are fraught because the analysis will always be case dependent.

[118] The Tribunal, as presently constituted, adopted the same approach to the threshold of "proper" for the purposes of section 405(3)[58]. Exceptionality is not required[59] and nor even something out of the ordinary. However, there must be sound reasons for

---

person". That was how the Tribunal (in my view, correctly) took those factors into account in relation to Dr N".

[56] *J v New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566 at [85] cited in *Teacher Q* at [32]/

[57] Above, with reference to the comments of Chisholm J in *ABC v Complaints Assessment Committee* [2012] NZHC 1901, [2012] NZAR 856 at [44]. It is noted that in the *Johns* case the High Court did not refer in its decision to *Dr N* case referred to above.

[58] In previous decisions this Tribunal has commented that the thresholds of "proper" and "desirable" are not considered to be dissimilar.

[59] As was recognised in *CAC v Finch* NZTDT 2016-11.

finding that the presumption favouring publication is displaced.[60] What must be struck is a balance between considerations of open justice and the interests of the person in respect of whom non-publication orders are sought.[61]

Submissions for Ms Waretini

[119] Counsel for Ms Waretini filed detailed and comprehensive submissions which were gratefully received by the Tribunal and carefully considered.

[120] It was submitted for Ms Waretini that:

Publication will likely exacerbate Ms Waretini's [health issues] [redacted]

(a) The evidence in Ms Waretini's affidavit and Dr Ward's affidavit demonstrates that [redacted].

(b) Non-publication orders were sought and granted on mental health grounds in *CAC v Teacher Z*[62]. In that case the teacher gave evidence supported by her doctor that her mental health had been negatively impacted by the allegations in the proceedings, and that her diagnosis was not one that was fleeting or would resolve over time, but rather long-term conditions that she would need to manage.[63] The Tribunal found the teacher's mental health condition (and that of her son) were such that the risk of further negative impact outweighed the public interest in naming the teacher.[64]

(c) The GP's opinion is that publication of Ms Waretini's name will result in a serious aggravation to [redacted] with potentially grave consequences. It is highly likely (likely in the sense of there being an

[60] Y v *Attorney-General* above fn. 48 at [29].

[61] *Y v Attorney-General* above fn. 48 at [31].

[62] *CAC v Teacher Z* NZTDT 2020/14.

[63] At [19].

[64] At [55].

"appreciable" or "real risk"[65]) that the consequences relied on will follow if no order is made.

Publication of Ms Waretini's name and/or the name of the geographical location of the Centre is likely to result in the identification of Child X and his family

[121] It was submitted:

(a) There are several features, as set out in Ms Waretini's affidavit, which increase the risk of identification of Child X including that the Centre is situated in a small, tight-knit community where inhabitants are well-known to each other.

(b) The Centre is [redacted]

(c) The facts of the proceeding are of a kind likely to generate media attention which are in turn likely to lead to speculation and gossip by members of the community about the family involved.

(d) Orders have been made in a previous case where identification of the respondent teacher and/or the school was likely to lead to the identification of the pupil.[66] In that case the respondent was recruited to the school from America and had only worked at the one school. The school was situated in a small community and publication of the teacher's name was likely to subject the student to speculation, gossip, and unwanted attention.

(e) A similar conclusion can be drawn here on the basis that Ms Waretini's role as Area Manager makes identification of the Centre, and therefore Child X, likely. The facts in these proceedings are of a kind likely to draw attention and lead to speculation and gossip by members of the community.

(f) Reference was made to a media article that was annexed to Ms Waretini's affidavit.[67] It was submitted that because of the features unique to this proceeding, any identifying information such as Ms Waretini's name, the

[65] *CAC v Finch* NZTDT 2016/11 at [14] to [18].

[66] *CAC v Teacher* NZTDT 2015-68.

[67] Marked "A".

Centre and/or the geographical location of the Centre, is likely to lead to the identification of Child X. The Tribunal noted that the street name and the community in which Child X lived, are identified in the article.

Publication of Ms Waretini's name is likely to result in the abuse that Child X suffered being unfairly attributed to Ms Waretini's conduct

[122] It was noted by Counsel that Ms Waretini acknowledges and is deeply sorry for the role she played in failing to protect Child X. Reference was made to the very personal repercussions of failing to meet the professional standards expected of her as a teacher including loss of confidence in her ability as a teacher, such that she no longer feels she can work in early childhood education. On top of that, she has continued to [redacted] throughout the course of these proceedings. Counsel submitted that he has observed, based on Dr Ward's affidavit that at times [redacted]. It was submitted this is [redacted] in a disciplinary proceeding.

[123] It was submitted that publication of name would have the effect of being an additional penalty to the penalty orders made for the conduct. It was submitted that is because while Ms Waretini accepts that she played a part of the failure to protect Child X, hers was not the only part. Reference was made to the following relevant agreed facts:

(a) A ROC was made to Oranga Tamariki about Child X in September 2018 by an early childhood education centre previously attended by Child X,

(b) Ms Waretini was not working at Centre H on 19 November 2018 when concerns about Child X's wellbeing were noted by staff working there that day (and when she was phoned and emailed about them). To Ms Waretini's knowledge, no other Evolve staff have been reprimanded or investigated for their failure to submits ROCs in relation to Child X.

(c) Oranga Tamariki was contacted again in relation to Child X on 14 March 2019.

(d) Child X's brain bleed occurred in July 2019. That was despite that Oranga Tamariki having been notified, on two separate occasions, about

concerns regarding Child X's wellbeing (September 2018 and March 2019).

(e) Child X's brain bleed precipitated the mandatory report regarding Ms Waretini's conduct, in July 2019.

[124] It was submitted that without non-publication orders, Ms Waretini will be the only party personally named in relation to Child X's probable abuse, the effect of which will be that Child X's abuse is likely to be attributed to Ms Waretini's conduct. Members of the public will blame her for the outcome for Child X and in isolation it is likely to appear that she had a far greater level of control over Child X's fate than she truly did.

[125] It was submitted further that publication of Ms Waretini's name will operate as a penalty that goes over and above the personal repercussions she has experienced and those penalties the Tribunal imposes under section 404 of the Act. The submission was made that Ms Waretini's conduct was not deliberate, it was a "serious oversight", and one that she deeply regrets and is unlikely to repeat; and publication of Ms Waretini's name is unlikely to add any further deterrent or educative value than the publication of the general facts.

[126] It was submitted that the Tribunal's discretion to prohibit publication is engaged in this case and the Tribunal must weight the public interest in favour of publication with the particular private interests of Ms Waretini to determine if it is proper for the open justice principle to prevail. In respect of the public interest considerations, reference was made to the need to protect the public and the desire to maintain public confidence in the teaching profession through the transparent administration of justice. It was submitted that Ms Waretini's conduct "*does not elicit a significant need to protect the public*"". It was submitted that her conduct was "*an isolated error that is unlikely to be repeated and does not constitute a danger to the public*". Further, "*while it is acknowledged that actions of [Ms Waretini] may have prevented further harm to Child X, her conduct was not the cause of harm to Child X"*.

[127] In summary, in terms of Ms Waretini's interests it was submitted that the granting of non-publication orders would:

(a) Assist her to [redacted].

(b) Protect the identify and privacy of Child X and his family, minimising the risk that he can be identified through publication of her name and the name and geographical location of the Centre, and the speculation and gossip that is likely to flow on from that.

(c) Ensure that the penalty handed down to her in relation to her conduct is commensurate with the gravity of that conduct.

Discussion

[128] Now that she has been found guilty of serious misconduct there is a public interest in Ms Waretini's name being published in connection with these proceedings. The principle of open justice is paramount to maintain public confidence in the teaching profession through the transparent administration of justice[68].

[129] When deciding whether it was proper to make a permanent order, the Tribunal balanced the private interests of Ms Waretini, [redacted] primarily, against the relevant public interest considerations. Those considerations are openness and transparency of disciplinary proceedings, accountability of the disciplinary process, the public interest in knowing the identity of the teacher charged with a disciplinary offence, the importance of freedom of speech and the right enshrined in section 14 of the New Zealand Bill of Rights Act 1990, and the need to avoid unfairly impugning other teachers.

[130] The Tribunal considered the medical evidence provided by Ms Waretini very carefully. It was noted that in her letter of 18 May 2021 the GP, Dr Ward confirmed that Ms Waretini [redacted].

[131] In her affidavit Dr Ward provided more extensive information including [redacted]

[68] *CAC v Teacher* NZTDT 2016/27, at [66].

[redacted]

[132] The Tribunal does not doubt that there is a possibility that Ms Waretini may suffer some adverse health consequences, [redacted], because of the stress of publication of her name. However, on balance it was not persuaded that the available medical evidence discloses circumstances which are sufficient to counterbalance the competing public interests in Ms Waretini's name being published. The Tribunal considered that Ms Waretini's longstanding GP, would likely be able to continue to manage and if necessary, treat any associated health consequences of that nature, were they to arise.

[133] The Tribunal did not consider that publication of Ms Waretini's name would be counterproductive in terms of protecting the public.

[134] The Tribunal considered that the concerns Ms Waretini has raised about the likely identification of Child X and/or speculation and gossip by members of the community about the family involved were her name to be published, can be mitigated by the making of a permanent order in respect of the name and geographical location of Centre H and of the name and identifying particulars of Child X and his whānau members (who are named in the papers before the Tribunal).

[135] The Tribunal was not persuaded that identification of Ms Waretini's role as an Area Manager would likely lead to the identification of the Centre or Child X. The evidence was that Evolve has a number of early childhood education facilities in the Hawke's Bay area. It is accepted by the Tribunal that had Ms Waretini been the Centre Manager, then the situation would have been different for her in terms of name suppression (she would likely have been granted a permanent order).

[136] If the name of the Centre, the child and his whānau members were permanently suppressed then the Tribunal's view is it is unlikely the child will be identified. As above, the community in which the child lived and the street address where he and his mother and father resided at the time of his hospitalisation has already been

published in media and there was no evidence before the Tribunal that the Child or his whānau members have been identified by that publication. By making an order that the geographical location of the Centre is permanently suppressed from publication, the Tribunal's orders will have a wider effect and details that have previously been published will not be able to be published in connection with these proceedings.

[137] In terms of the concern that publication of Ms Waretini's name is likely to result in the abuse that Child X suffered being unfairly attributed to Ms Waretini's conduct, the Tribunal's view was that it should be clear from this decision the nature and extent of Ms Waretini's part in the tragic circumstances that arose for Child X. The Tribunal accepted that the evidence discloses that while Ms Waretini by her inactions played a part, her part was not the only part. As discussed, the evidence was that Oranga Tamariki had received a ROC about Child X in September 2018. Another ROC was made in mid- March 2019. Despite Oranga Tamariki having received two separate ROCs about concerns held about Child X's wellbeing, Child X still suffered a brain bleed which led to his hospitalisation in July 2019. It is clear to the Tribunal that Ms Waretini cannot fairly or reasonably be blamed as the only person or entity who was responsible for the outcome for Child X in July 2019.

[138] In any event, weighing the private interests of Ms Waretini with the relevant public interest factors, the Tribunal did not consider that there were sufficiently strong grounds (either alone or in combination) to tip the balance away from the presumption which favours open and transparent disciplinary proceedings, and therefore publication of Ms Waretini's name.

[139] For those reasons the Tribunal was not persuaded it was proper for a permanent order to be made in respect of Ms Waretini's name and identifying details. The interim order will expire when this decision is issued to the parties.

[140] However, the Tribunal was persuaded that it was proper for a permanent order to be made in respect of Ms Waretini's personal health information/medical evidence which is referred to in this decision. Ms Waretini's health information is of a highly sensitive nature and the Tribunal concluded that her privacy interests significantly outweigh the public interest in that information being in the public domain. As is apparent from the discussion above, the health information was submitted in support of Ms Waretini's application for name suppression which has been declined. It is not relevant to the Tribunal's decisions either on liability or penalty.

[141] The CAC sought permanent orders in in respect of Child X, supported by Ms Waretini. The Tribunal had little difficulty concluding that the private interests of Child X and his whānau members are such that it is proper for Child X's name and identifying particulars (including the names of the Child's whānau members) to be permanently suppressed. There is a public interest in Child X not being named.

[142] To ensure that the Tribunal's order in respect of Child X is not undermined the Tribunal also considered that it is proper to permanently prohibit from publication the name of the Centre and its geographical location (address and community location). This order does not extend to the fact that the Centre is in the Hawke's Bay region.

[143] Evolve sought a non-publication order in respect of paragraphs [74] and [84] of this decision on the basis that matters raised by Ms Waretini in these proceedings were not raised with Evolve in any substantive form during her employment and the assertions are refuted. An affidavit in support was filed, from Evolve's General Manager, dated 27 June 2022. It was indicated for the CAC that the Committee took a neutral stance in respect of Evolve's application. The application was considered, and the Tribunal concluded that it is proper for the italicised parts of paragraphs [74] and [84 (a)] of this decision to be permanently prohibited from publication to protect the reputational interests of Evolve in the particular circumstances of this case, as disclosed in the affidavit.

Conclusion

[144] The Charge is established. Ms Waretini is guilty of serious misconduct.

[145] The Tribunal's formal orders under the Education Act 1989 are:

(a) Ms Waretini is censured for her serious misconduct pursuant to section 404(1)(b).

(b) Ms Waretini's registration as a teacher is suspended for a period of six months from the date of this decision, pursuant to section 404(1)(d).

(c) The register is to be annotated to record the censure, for two years pursuant to section 404(1)(e).

(d) Pursuant to section 404(1)(j) the Teaching Council is directed to impose the following conditions on a subsequent practising certificate that may be issued to Ms Waretini if she resumes practise as a teacher following her period of suspension:

145.d.1 For a period of one year, Ms Waretini is to participate in mentoring with a mentor approved by the Manager: Teacher Practice and/or Professional Responsibility at the Teaching Council. The mentoring to focus on providing advice and guidance to Ms Waretini to enable her to understand her child protection reporting obligations and is to be completed to the satisfaction of the Manager: Teacher Practice and/or Professional Responsibility.

145.d.2 For a period of two years, Ms Waretini is not to hold a position of responsibility (leadership) within a learning environment or organisation which owns and/or operates early childhood centres.

145.d.3 For a period of two years, Ms Waretini is to advise any current, prospective, or future employers in the education sector, of this decision (and provide a copy of this decision to those employers).

(e) Ms Waretini is to pay $2,948.31 to the CAC as a contribution to its costs pursuant to section 404(1)(h),

(f) Ms Waretini is to pay $458.00 to Teaching Council in respect of the costs of conducting the hearing, under section 404(1)(i).

(g) There is to be an order under section 405(6)(c) permanently suppressing from publication the references in this decision to Ms Waretini's personal health information.

(h) There is to be an order under section 405(6)(c) permanently suppressing from publication the name and identifying particulars of Child X ([redacted]).

(i) There is to be an order under section 405(6)(c) permanently suppressing from publication the names of Child X's parents ([redacted] and [redacted]) and their private details (telephone numbers and address).

(j) There is to be an order under section 405(6)(c) permanently suppressing from publication the name of the Centre which Child X attended at the relevant time in November 2018 ([redacted]) and the geographical location of the Centre ([redacted]). For the

avoidance of doubt this order does not extend to the fact that the Centre is situated in the Hawke's Bay region.

(k) There is to be an order under section 405(6)(c) permanently suppressing from publication the italicised parts of paragraphs [74] and [84(a)] of this decision.

Dated at Wellington this 6th day of October 2021

Date of recalled decision:

1st day of July 2022

Jo Hughson
Deputy Chairperson

NOTICE

1 A teacher who is the subject of a decision by the Disciplinary Tribunal made under section 404 of the Education Act 1989 may appeal against that decision to the District Court (section 409(1) of the Education Act 1989).

2 The CAC may, with the leave of the Teaching Council, appeal to the District Court against a decision of the Disciplinary Tribunal made under section 404 (section 409(2).

3 An appeal must be made within 28 days of receipt of written notice of the decision, or any longer period that the District Court allows.

4 Section 356(3) of the Education Act 1989 applies to every appeal under section 409 as if it were an appeal under section 356(1).