NZTDT 2021/06

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER THE	Education Act 1989
IN THE MATTER	disciplinary proceedings pursuant to Part 32 of the Act
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE**
AND	**ANDREW (ANARU) ABRAHAM WIHAPI** registered teacher (Registration Number 262350) Respondent

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DECISION OF THE TRIBUNAL

Hearing:	25 August 2021
Tribunal:	Jo Hughson (Deputy Chairperson), Kiri Turketo, Simon Walker (Members)
Counsel:	Ms N Tahana for the Complaints Assessment Committee Ms J Brown, NZEI Te Riu Roa, for for the Respondent
Decision:	29 September 2021

HEI TĪMATANGA KORERO – INTRODUCTION AND SUMMARY

[1] Mr Wihapi is registered under his English name, Andrew Wihapi, but the Tribunal was told he prefers and is commonly referred to by his Māori name, Anaru Wihapi[1].

[2] Mr Wihapi obtained full registration as a teacher in 2007. His last practising certificate expired on 5 April 2021. He applied successfully for the renewal of his practising certificate and his current certificate will expire on 19 May 2024[2]

[3] Mr Wihapi has been employed by Rotorua Primary School since 2006 and he continues to work at the school. The Tribunal was told that the students at Rotorua Primary School (the School) refer to Mr Wihapi as Mātua Anaru.[3]

[4] The Complaints Assessment Committee (the CAC) charged[4] that Mr Wihapi:

(a) On or around 14 November 2019 asked Student A, then Year [redacted], to lick the palm of his hand and then repeatedly slap Mr Wihapi's hand; and/or

(b) On or around 13 November 2019 asked Student B, then Year [redacted], to lick the palm of his hand and then repeatedly slap Mr Wihapi's hand and/or

(c) On or around 7 November 2019 challenged Student C about his honesty in front of his peers and some teachers during a hui.

[5] The conduct in (a) and (b) above was alleged separately and cumulatively 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.

[6] The conduct in (c) was alleged separately to amount to misconduct and to conduct which entitles the Tribunal to exercise its powers pursuant to section 404 of the Act.

[7] Cumulatively the conduct in (a)-(c) was alleged to amount to serious misconduct.

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[1] Agreed Summary of Facts (ASF) at [1].

[2] See ASF [1]. Renewal of practising certificate was confirmed by the Teaching Council on 28 September 2021.

[3] ASF at [2].

[4] Notice of Charge dated 29 March 2021

[8] The hearing proceeded on the papers based on an Agreed Summary of Facts[5].

[9] Mr Wihapi admitted the conduct and accepted that his behaviour fell short of what is expected from teachers. It was for the Tribunal to reach a view as to whether the conduct, if established, amounted to serious misconduct or misconduct; and if so, what, if any, penalty should be imposed.

[10] Written submissions were received from Counsel for the CAC and from Ms Wihapi's representative, addressing the issues of liability, penalty, and name suppression.

[11] The Tribunal found the charge established. It had no difficulty concluding that adverse findings were warranted. The Tribunal made orders of censure, imposed conditions on practice, annotation of the register to note the censure, and costs.

[12] There was an interim non-publication order that was in effect prior to the hearing, in respect of Mr Wihapi's name and identifying particulars[6]. Mr Wihapi sought a permanent order, on medical grounds. The Tribunal was not satisfied that there were sufficient grounds for a permanent order and declined to exercise its discretion to make a permanent order. It follows that Mr Wihapi's name may now be published in connection with these proceedings. Nor was the Tribunal satisfied there were grounds for the permanent suppression of the name of the School. For that reason, the School's name may also be published.

[13] The Tribunal made a permanent order under section 405(6) of the Act that the names of Student A, B and C, who were identified in the papers before the Tribunal, be prohibited from publication. The Tribunal considered the privacy interests of the young students and their whānau, as well as the students' wellbeing and learning interests, outweigh the public interest in each of them being identified. It followed that it was proper for there to be permanent orders.

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

[5] Above, fn.1. Signed by the parties' representatives on 3 June 2021. It is noted it is the Tribunal's expectation that the respondent teacher should sign any agreed statement of facts.

[6] Interim Order dated 18 May 2021: Minute of Pre-Hearing Conference.

FACTS

[15] The Tribunal was satisfied that the following facts were established on the balance of probabilities and made findings accordingly[7]:

7 November 2019 (particular 1(c)) – Student C

[16] On 7 November 2019 Mr Wihapi attended a Pūkaki hui with approximately 130 students and five other teachers present.

[17] Students at the School are not to have cell phones on them during school hours. At the Pūkaki hui students were reminded to leave their cell phones at the office desk in the morning and collect them after school.

[18] Mr Wihapi asked if any students had brought their cell phones to School and whether any students had handed their cell phone in at the School office.

[19] Mr Wihapi was aware that one of the students, Student C ([redacted]), owned a cell phone. Mr Wihapi then made Student C stand up in front of the other students and asked him where his cell phone was. Student C gave a vague response. Mr Wihapi said that he did not believe Student C and asked Student C to get his bag. Student C went to get his bag.

[20] The incident ended when the Principal of the School entered the hall.

November 2019 (particular 1(b)) – Student B

[21] On 13 November 2019 Student B ([redacted]) was refusing to do his work and being defiant so his teacher sent Student B to Mr Wihapi's classroom as this was the 'Buddy Class'.

[22] Student B told Mr Wihapi that he had been hitting another student. Mr Wihapi asked him why, but Student B shrugged his shoulders.

[23] Mr Wihapi then made Student B lick his own hand to make it wet and then slap Mr Wihapi's hand continuously. Mr Wihapi stopped when he saw that the slapping was starting to hurt Student B.

[24] He explained to Student B that "this is what it feels like when you hit someone often" and spoke to him about being nice to other children and showing respect to them.

[7] ASF at [4]-[21].

[25] On returning to his classroom, Mr Wihapi made Student B explain what "strategy" he has used. Student B explained he had to lick his hand and make it wet, and that Mr Wihapi made him slap his own hand continuously until he was tired, and his hand was sore. Student B was very distraught and upset. His teacher noted that Student B was noticeably scared of Mr Wihapi following this incident.

14 November 2019 (particular 1 (a)) - Student A

[26] On 14 November 2019 Student A ([redacted]) was being disruptive in class. Student A's teacher approached Mr Wihapi to talk to Student A about his behaviour.

[27] On arrival at Mr Wihapi's classroom Student A was in tears, angry, and upset. Mr Wihapi asked Student A to explain what he had done but Student A would not respond.

[28] Mr Wihapi became impatient and snapped at Student A to speak "NOW". Student A got a fright, he screamed, put his hands over his ears and began to cry. Student A still did not respond to Mr Wihapi.

[29] Mr Wihapi said, "we are going to play a game" and he told Student A to lick Student A's own hand. Mr Wihapi held his own hand out and told Student A to slap it and keep slapping it.

[30] Student A then explained to Mr Wihapi that he had disobeyed his teacher. Mr Wihapi discussed how important it is for Student A to listen to his teacher's instructions. He then walked Student A back to his classroom.

[31] Student A was visibly upset when he returned to his classroom and his teacher got Student A to sit down and breathe in and out to calm him down.

TE TURE – LEGAL PRINCIPLES - Liability

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

[33] "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.

[34] This test for serious misconduct is conjunctive[8]. 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 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).

[35] 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 a mandatory report made by the School.

[36] The Code of Professional Responsibility (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.

[37] 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.

[38] It was submitted for the CAC that the Respondent's conduct in particulars (1)(a) and (b) engaged all three limbs of the definition in section 378 (a). It was submitted further that that conduct engaged section 378 (b) as it was a serious breach of the Code as demonstrated by the example given in Rule 9 (1) (k) of the Rules (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.

[39] It was submitted for the CAC that the conduct in particular (c) would not engage Rule 9(1) and therefore would not meet the test for serious misconduct. However, it was

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

submitted that it was misconduct and when considered together with the conduct in particulars 1 (a) and (b), cumulatively the three acts were serious misconduct.

[40] 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 because of the teacher's conduct.

[41] Previous Tribunal decisions demonstrate that the term "fitness to practise" in the definition of serious misconduct in section 378 (a)(ii) extends beyond competence 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.[9]

[42] 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.[10] This objective test is applied regularly by the Tribunal.

[43] 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[11].

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9 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.

10 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].

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

[44] Rule 9(2) provides that "misconduct" described in any of the paragraphs (a) to (e) and (k) of Rule 9(1) may be a single act, or a number of acts forming part of a pattern of behaviour, even if some of the acts when viewed in isolation are minor or trivial.

[45] If the Tribunal is not satisfied the test for serious misconduct is met, the conduct may still amount to "misconduct". If conduct that meets one of the matters in limb (a) of the definition of serious misconduct is made out, the question whether limb (b) is met determines whether the conduct is "serious misconduct" or "misconduct simpliciter"[12].

[46] Each case must be determined on its own facts. Not every departure from accepted professional standards will amount to serious misconduct for the purpose of section 378, or even misconduct[13]. Whether or not there has been serious misconduct and the severity of any such misconduct is assessed by objective standards.

[47] 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[14]. Personal factors may be given full consideration at the penalty stage if a charge is found to have been established. In this regard, Mr Wihapi relied on the fact that at the time of his conduct he was suffering from "severe fatigue because of an underlying heart condition".[15]

Relevant standards

[48] 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.

[1212] *Evans v CAC of the Teaching Council of Aotearoa New Zealand* [2021] NZCA 66. *Teacher Y v Education Council of Aotearoa New Zealand* [2018] NZDC 3141.

[13] See Courtney J in *Martin v Director of Proceedings* (High Court, CIV-2006-404-005706) at [23] where this point was made in respect of health practitioners.

[14] 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.

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

[49] 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[16].

[50] Conduct that damages this trust and confidence breaches the expectation set out in Clause 1.3. That may include conduct 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.

[51] 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.

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

Findings on the Charge

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

[54] The Tribunal was satisfied the evidence established Mr Wihapi engaged in the conduct charged.

[55] Mr Wihapi acknowledged that requiring Students A and B to lick their hands and then slap his hand was inexcusable and a "totally unacceptable behaviour management strategy". He acknowledged that it was inappropriate as the students' feelings were not taken into consideration.

[56] In respect of his challenging of Student C, Mr Wihapi accepted that he should not have asked Student C to stand up in front of the other students during the Pūkaki hui, and that he should not have sent him off to get his bag. He acknowledged this was a wrong strategy to use as he had embarrassed the student in front of his peers.

[57] The Tribunal had no difficulty concluding that the conduct was serious misconduct, when the acts in relations to Students A and B are considered separately and together, that the act in relation to Student C was misconduct and when the three acts are considered cumulatively the conduct was serious misconduct. Those

[16] Clause 1.3 Code of Professional Responsibility.

findings entitled the Tribunal to exercise its powers pursuant to section 404 of the Act.

Serious misconduct – limb (a)

[58] As to the first limb of the test for serious misconduct, the Tribunal was on the opinion that Mr Wihapi's requests that the students lick their hands and then slap his hand, combined with his raised voice, would have been confusing, scary, and intimidating for Students A and B who were [redacted] years old at the time of the incidents. Both Student A and Student B returned to their classroom upset, following their interaction with Mr Wihapi. Student A's teacher had to calm him down with breathing exercises The Tribunal had little difficulty concluding that a logical outcome of Mr Wihapi's conduct in respect of Students A and B, is that the students' emotional wellbeing was likely adversely impacted.

[59] In respect of Student C, the Tribunal was satisfied he would have felt embarrassed and ashamed, which Mr Wihapi acknowledged in the reflective statement he produced to the Tribunal.[17] In that regard Mr Wihapi stated that when he challenged Student C about his honesty, he made a "*huge mistake of embarrassing him in front of all the other students. Upon my reflection, it was a stupid thing to do as I didn't think of how humiliated he would feel*".

[60] The Tribunal accepted the CAC's submission that challenging Student C's honesty in a public hui in front of others including his peers likely adversely affected his emotional wellbeing. The student was a [redacted] whose self-esteem was potentially adversely affected by Mr Wihapi's behaviour.

[61] For those reasons, the Tribunal was satisfied that limb (a)(i) is met is respect of all three established acts.

[62] The Tribunal did not accept the submission for Mr Wihapi that because the level of force exerted was controlled by the students, it was likely to be minimal and "probably no more than a high five". The Tribunal considered that submission was extraordinary in the circumstances, but in any event, was speculative. The Tribunal had little difficulty concluding that Mr Wihapi's behavioural management approach (which it considered was punitive in nature) in respect of two [redacted] tamariki reflects adversely on his fitness to be a teacher. This finding is consistent with the

[17] Affidavit of Andrew Abraham Wihapi dated 30 June 2021 at [7].

Tribunal's finding in *CAC v Herbert* [18] where the teacher had yelled at a student, made that student stand next to her desk for 30 minutes and, on another occasion pushed the student. The Tribunal in that case found that the teacher's actions amounted to serious misconduct in that they reflected adversely on their fitness to be a teacher.

[63] For those reasons the Tribunal concluded that limb (a)(ii) is met in respect of Mr Wihapi's behaviour towards Students A and B.

[64] Further, in the Tribunal's opinion, any reasonable member of the public, informed of the facts and circumstances of Mr Wihapi's conduct in respect of Students A and B (requiring them to lick their hands and then slap him multiple times), would reasonably conclude that the reputation and good standing of the profession is lowered by such conduct. Considered objectively the conduct would cause members of the public to doubt whether or to what extent the teaching profession was observing its obligations. The Tribunal considered that most parents would object strongly to Mr Wihapi's behavioural management approach in respect to young tāmariki who were likely humiliated by his conduct towards them. For those reasons, the Tribunal accepted the submission for the CAC that Mr Wihapi's conduct in respect of Students A and B may bring the teaching profession into disrepute. Limb (a)(iii) is met.

[65] For those reasons, the Tribunal concluded that Mr Wihapi's conduct in respect of Students A and B 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. His conduct in respect of Student B likely had the adverse effect or consequence described in limb (a)(i).

Serious misconduct – limb (b)

[66] As above, the Tribunal concluded that reasonable members of the public would not consider the conduct Mr Wihapi engaged in in November 2019 towards Students A and B (when his acts considered individually and then together) to be appropriate for a teacher in a contemporary New Zealand learning environment. In the Tribunal's opinion the conduct was a serious breach of the Code of Professional Responsibility which brings or will likely bring the teaching profession into disrepute.

[18] NZTDT 2018/81. 31 October 2019.

[67] Although not relied on by the CAC, the Tribunal considered that the conduct in respect of Students A and B was also a serious breach of the Code of Professional Responsibility to the extent that it was conduct that involved using unjustified or unreasonable physical force on young children or encouraging another person to do so, for the purposes of Rule 9(1)(a). The conduct involved physical punishment of a relatively low-grade type in a misguided attempt to encourage two young tamariki to understand their behaviour. The Tribunal considered that such conduct is not acceptable in the teaching profession.

[68] For those reasons, the Tribunal concluded that Mr Wihapi's conduct involved serious breaches of the Code of Professional Responsibility as demonstrated by the examples described in Rule 9(1) (a) and (k) of the Teaching Council Rules 2016. His conduct in respect of those students was of a character and severity that met the reporting criteria specified in Rule 9 and therefore, the Tribunal was satisfied the second limb of the test for whether there has been serious misconduct, is met.

[69] The Tribunal did not accept the submission that was made for Mr Wihapi that his conduct in relation to Student C at the hui when he challenged Student C's honesty "barely amounts to misconduct", was a "gaff" or that it involved a demonstration that people students share the world with are "imperfect and while the lesson stings in the moment, it is a useful understanding for a teenager to gain as they enter adulthood, as they learn humanity, resilience, and tolerance". The reality is that Mr Wihapi could have challenged Student C in a way that would not have involved humiliation in front of his peers at what is a critical time in a [redacted] child's development (as he or she is about to enter [redacted]). In the Tribunal's opinion the way in which Mr Wihapi dealt with Student C was a falling short of acceptable standards for a teacher involved in a Pūkaki hui attended by [redacted] Māori boys. It was a clumsy approach to improve a student's behaviour that failed to have sufficient regard to the child's emotional wellbeing. Although the Tribunal could not be satisfied it was conduct that may bring the profession into disrepute when considered on its own, it was a sufficiently serious falling short of accepted standards that likely affected the student's emotional wellbeing and as such warrants an adverse disciplinary finding that it was misconduct.

Cumulative charge

[70] While the conduct in respect of Student C was not considered to meet limb (b) when considered in isolation, when it is considered together with the conduct in respect of

Students A and B, in the Tribunal's view the series of acts, which occurred within a period of a fortnight in respect of three young students, was serious misconduct.

Comparable cases

[71] The Tribunal noted that there have been similar cases where the Tribunal has found comparable conduct which has involved teachers causing students to harm themselves or another, to amount to serious misconduct. The Tribunal sought guidance from some of those cases that were relied on by the parties, particularly when it was reaching a view about whether each of the three acts in question was serious misconduct, misconduct, or not. For completeness, these are noted below.

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

(a) *Teacher J*[19]: a teacher asked a student to bite the finger of another student "so he knew how it felt" because the other student had bitten that child before. The teacher had a relatively lengthy career without incident. Immediately she recognised her error and took responsibility for her behaviour. The Tribunal concluded that the Teacher J's conduct was serious misconfuct.

(b) *Finau*[20] involved a teacher who, on several occasions, encouraged children to use force in retaliation to being hurt. The teacher told a student to slap another child back, and to push another child if that child pulled on their clothing. The teacher also used inappropriate language, grabbed children by their arms and pulled their hair. The Tribunal found that this combined behaviour was serious misconduct.

(c) *Muir*[21] involved a teacher who made a four-year-old child wash his own soiled underwear in a bucket. On reflection the teacher realised this was not a good idea. The Tribunal held that the teacher's actions amounted to serious misconduct noting this was not appropriate training practice to prevent soiling.

[19] NZTDT 2017/27, 2 January 2018

[20] NZTDT 2017/25, 8 January 2018

[21] NZTDT 2018/1 2 November 2018.

(d) *Teacher K*[22] involved a teacher who smacked her two-year-old child on his nappy after the child was being extremely difficult. The Tribunal affirmed that the use of force for a corrective purpose, even if no aggression or anger is involved, will typically amount to serious misconduct.[23]

[73] Cases relied on by Mr Wihapi involved findings of misconduct in respect of the following acts:

(a) *Teacher S*[24] approached a student from behind, placed her hands on his shoulders, then pushed him over to his desk. The student cried but the Tribunal noted that the fact that a child cries does not automatically lead to a conclusion that the student was adversely affected because they may have been upset by the reprimand. The conduct did not last long and, unlike in Mr Wihapi's case, it was not retaliatory or intended to punish. Nor was it motivated by anger. Low level force was used. Nevertheless, the Tribunal was satisfied the conduct was misconduct.

(b) *Crump*[25] involved a teacher who had pulled a student's hair tie to get her attention, shepherded the student by gently pushing her back; and led her twice by holding her wrist.

(c) *Treanor*[26] involved a teacher who had used pressure against two students' heads to enliven their haka which was lacking passion.

WHIU - PENALTY

[74] Having made adverse findings, 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).

[75] It is well established that the primary purposes of the imposition of disciplinary penalties under the Act are to maintain professional standards (through general

[22] NZTDT 2020/24 21 January 2021

[23] Above fn. 22 at [21].

[24] NZTDT 2018/5

[25] NZTDT 2019/12

[26] NZTDT 2019/39

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[27].

[76] Rehabilitation of the teacher is often an important purpose.[28]

[77] 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*[29]. 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.

Personal circumstances of Mr Wihapi

Mr Wihapi's reflective statement

[78] Mr Wihapi made a reflective statement by way of an affidavit.[30]

[79] Mr Wihapi provided information about his whakapapa. He attached his response to the School Principal who made the Mandatory Report which he said outlines his thinking at that time. In that response Mr Wihapi indicated he wished to convey his apologies to each student, their teacher and their whānau.

[80] Mr Wihapi stated that during 2020 the School had embedded a "*more holistic approach to managing student behaviour*".

[81] He stated that that he should have approached the incidents with a holistic concept. He referred to Sir Mason Durie's 'Whare Tapa Whā' concept which describes health and wellbeing as a wharenui with four walls. Under this model, the four cornerstones of Māori health (the walls of the wharenui) are: taha hinengaro (emotions/mental health), taha wairua (spiritual health and wellbeing), taha whanau (family health) and

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

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

[29] [2012] NZHC 3354 at [44]-[51].

[30] Affidavit of Andrew Wihapi Reflective Statement affirmed at Rotorua on 25 May 2021.

taha tinana (body/physical health)[31]. Mr Wihapi stated he had learnt that if one of those four walls falls then the entire wharenui collapses.

[82] Mr Wihapi stated that he felt ashamed of himself for making two students slap his hand until it hurt them emotionally and physically. He said he is disappointed that he did not consider the students' feelings or the feelings of their teachers and whanau. He stated that in future he would approach the situation holistically by allowing the student first to calm down. He would then ask the student to tell him about their feelings and what led to them, and he would then explain that when they hit other students, it hurt them and makes them upset.

[83] As above, Mr Wihapi acknowledged that when he challenged the [redacted] about his honesty he made "*the huge mistake of embarrassing him in front of all the other students*". He said he has reflected and realised this was "*stupid thing to do as I didn't think of how humiliated he would feel*". He said he should have given the student the benefit of the doubt as he did not have any rapport with the student and therefore did not know if he (the student) was being honest. Mr Wihapi acknowledged he should have spoken to the student's teacher and let him decide what to do or spoken to the student in private.

[84] Mr Wihapi provided information about his wellbeing at the time of his offending. He stated he had whānau bereavements (his eldest sister and his mother) in 2018 and in that year and in 2019 he and his whānau were very burdened with what were huge losses. Mr Wihapi stated that he has ongoing heart issues for which he has had surgery to replace heart valves and other associated medical procedures. He said this case has been ongoing and has caused him to feel tired and stressed. Mr Wihapi stated that he is now more open with his colleagues about his health, rather than keeping his health issues 'close to his chest'. He stated that his colleagues have been supportive of him, and he is now more comfortable seeking advice and guidance from them.

[85] Mr Wihapi's final words were:

> Being a teacher brings happiness and light into my life. Seeing tamariki develop into lifelong learners. When they learn, I also learn. There are so many things that I love about my career, one of the biggest is when those tamariki come back to say "Kia ora

[31] Sir Mason Durie ONZ KNZM (Professor of Māori Studies and research academic at Massey University who is known for his contributions to Māori health) developed this wellbeing model in 1984.

> Matua, thank you for being my best teacher ever" especially when I find out they are at university or doing an apprenticeship.
>
> My greatest disappointment is putting myself in this situation. I have distressed the tamariki and disappointed their whanau who entrusted me as a teacher to take care of them. I am sincerely sorry.

[86] The Tribunal was grateful to Mr Wihapi for his reflective statement and considered it carefully. In relation to his conduct in respect of Students A and B, who were [redacted] years old at the time, the Tribunal was concerned that Mr Wihapi appeared to be hiding his demonstrated preparedness to incite violence and inflict punishment on young tamariki, behind a Māori lens. In this regard, Tribunal member Ms Kiri Turketo identified that because Mr Wihapi is Māori, whakapapa dictates that children are untouchable. Technically therefore, Mr Wihapi's conduct in respect of those students obliterated what it means to be Māori. The Tribunal was also concerned there was no evidence that Mr Wihapi had met with the students and their whānau by way of hui to apologise, kanohi-ki-te-kanohi. Tribunal member Turketo noted that that would be a demonstration of a true understanding by Mr Wihapi of mātauranga Māori and tikanga Māori including the concepts of Te Whare Tapa Whā, tikanga, and kawa.

CAC's submissions

[87] The CAC submitted that this is not a case where cancellation would be an appropriate response to the conduct the Tribunal has reviewed and would be inconsistent with comparable cases. The aggravating and mitigating factors which are discussed below were accurately identified. It was submitted that a suite of orders including a censure, annotation of the register and conditions requiring Mr Wihapi to inform his employer of the Tribunal's decision and "to organise a mentor and/or complete professional development on behavioural management" would be appropriate and consistent with previous cases.[32] Costs were also sought and a Schedule of the CAC's costs was filed and served before the hearing.

Submissions for Mr Wihapi

[88] Ms Brown for Mr Wihapi correctly identified that disciplinary proceedings are civil rather than criminal in nature and that the purpose of statutory disciplinary proceedings is not to punish the practitioner for misbehaviour (although it may have

[32] Written submissions for the CAC at [27]-[30].

that effect) but to ensure that appropriate standards of conduct are maintained in the occupation concerned.[33] The relevant penalty principles were acknowledged.[34]

[89] As for aggravating features present here Ms Brown noted that there had been "two incidences where the hand slapping happened, and these two students were quite young".

[90] In terms of mitigating features, Ms Brown relied on what she said was Mr Wihapi's "flawless career", his engagement with the CAC and the Tribunal process, that he has demonstrated insight and remorse in his reflective statement, and he had "substantial health problems at the time that undermined his wellbeing and coping ability".

[91] It was submitted that should the Tribunal decide that a penalty was necessary, then a censure and a requirement that Mr Wihapi disclose the Tribunal's decision to his current and future employers for a year would align with similar cases and fulfil the Tribunal's obligations to the profession and the public. It was submitted that the insight Mr Wihapi has demonstrated indicates he does not need mentoring or training in behaviour management as he knows better ways of dealing with student "misbehaviour". It was submitted that "because teachers sent misbehaving tamariki too [sic] him suggests he already has a high degree of skill in this area, and that his shortcomings on these occasions were an aberration". In that regard the fact that students who had misbehaved were being sent to Mr Wihapi for behaviour management did raise some questions for the Tribunal about the behaviour management practices at the School at the time (November 2019).

Findings on Penalty

[92] The Tribunal considered the relevant penalty principles including the comparative cases, as well as the submissions that were made for the CAC and for Mr Wihapi.

[93] 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)),

[33] *Z v Dental Complaints Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

[34] As have been applied by the Tribunal in previous recent decisions including *CAC v Teacher A* NZTDT 2018-53.

annotation of the register (of the censure) for a period of two years (section 404(1)(e)) and the imposition of conditions on practice (section 404(1)(c)).

[94] 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 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[35].

[95] The Tribunal concluded that there were alternatives to cancellation and suspension of Mr Wihapi's registration or practising certificate that would achieve the objectives of protecting the public and maintaining the standards of the teaching profession, (having regard to the gravity of his offending and its bearing on his fitness to be a teacher). The Tribunal did not consider that Mr Wihapi's conduct was of sufficient gravity to warrant the imposition of these most severe penalty outcomes and was of the view that such measures would be a disproportionate response to what occurred here.

Penalties imposed in comparable cases

[96] 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*[36]:

> …. 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.

[97] The Tribunal sought guidance from the comparable cases relied on by the parties, as discussed, and used those cases to benchmark the relative seriousness of Mr Wihapi's conduct. In most of those cases the penalties imposed included orders of censure, annotation of the register and conditions on practice, including mentoring, and undertaking professional learning and development focused on developing

[35] *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].

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

respectful practices[37], positive guidance[38], or understanding cultural and legal expectations in New Zealand[39]. The Tribunal noted that cancellation was not imposed even in cases that were more serious than the conduct that the Tribunal has reviewed here (*Teacher J* and *Finau*).

[98] When determining the penalty orders to be made, the Tribunal also took into account the aggravating and mitigating features identified by the parties, and the view it reached that Mr Wihapi is likely able to be rehabilitated.

[99] The Tribunal accepted that the aggravating features were accurately identified by the CAC:

(a) Multiple incidents in short succession - there were three separate incidents involving three different students within a two-week period, and the incidents with Students A and B occurred only a day apart.

(b) Abuse of trust - Mr Wihapi breached the teacher-student relationship by his unusual and harmful behavioural management techniques that did not promote the wellbeing of his students.

(c) Vulnerability of the students - Students A and B were [redacted] years old at the time of Mr Wihapi's offending and therefore they were vulnerable.

(d) Encouraged the use of force - while Mr Wihapi did not himself use force, he directed Students A and B to use force on themselves. He only made Student B stop slapping his (Mr Wihapi's) hand when it was obvious that Student B was beginning to hurt.

(e) Victim impact/harm - other staff members observed that both Students A and B were visibly upset after the incidents.

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

(a) Remorse and insight – Mr Wihapi has expressed remorse and has acknowledged his wrongdoing and taken action to address his misconduct as demonstrated in his reflective statement filed on 30 June 2021. He has

[37] *Finau* NZTDT 2017/25, 8 January 2018.

[38] *Teacher J* NZTDT 2017/27, 2 January 2018.

[39] *Teacher K* NZTDT 2020/24, 21 January 2021.

provided insight into how he will approach these situations holistically in the future. There is some degree of insight into his actions.

(b) Personal circumstances – as above, Mr Wihapi claimed he was burdened with health issues and whānau bereavements around the time of his offending which "*undermined his wellbeing and coping ability*"[40]. While the Tribunal accepted these circumstances were part of the picture for Mr Wihapi at the time of his misconduct in November 2019, the Tribunal did not accept they in any way excused his behaviour.

(c) Mr Wihapi has no previous disciplinary history. As above, he was described by his representative as having had a "flawless career".[41]

(d) Cooperation – it is acknowledged that Mr Wihapi actively participated in the CAC and Tribunal processes including by agreeing the summary of facts.

[101] The Tribunal decided to make an order censuring Mr Wihapi as a mark of its serious disquiet about his conduct, and to uphold professional standards. Mr Wihapi's conduct involved behaviour that is not acceptable for a teacher working in a contemporary New Zealand primary school.

[102] In addition, the Tribunal ordered that the register of teachers be annotated to record the censure, pursuant to section 404(1)(e). Such an order will ensure transparency and protect the public.

[103] The Tribunal decided to impose the following conditions on Mr Wihapi's practising certificate, for rehabilitative purposes and to protect the public (pursuant to section 404(1)(c)):

103.a.1 For a period of one year from the date of this decision, Mr Wihapi is to participate in mentoring with a mentor approved by the Manager: Teacher Practice at the Teaching Council. The mentoring to focus on providing advice and guidance to Mr Wihapi to enable him to understand and develop appropriate

[40] Written submissions for Mr Wihapi at [26].

[41] Written submissions for Mr Wihapi at [26].

student behaviour management techniques and is to be completed to the satisfaction of the Manager: Teacher Practice.

103.a.2 For a period of one year from the date of this decision, Mr Wihapi is not to hold a position of responsibility (leadership) within a School or learning environment.

103.a.3 Mr Wihapi to advise any current, prospective, or future employers, of this decision (and provide a copy of this decision to those employers). This condition is to apply for two years from the date of this decision.

Costs

[104] It is usual for an award of costs to be made against a teacher once a charge is established. 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.

[105] The CAC indicated that the costs of its investigation and prosecution and disbursements amounted to $10,931.33 excluding GST[42]. The Tribunal considered those costs to be reasonable.

[106] The Tribunal concluded that a 40% contribution to the CAC's costs was reasonable and appropriate. That would be in line with recent decisions of the Tribunal and acknowledges that Mr Wihapi has cooperated, had admitted the conduct, and agreed to matter being heard and determined other than in a full in-person hearing (although because of those matters the total costs will have been less in any event).

[107] Accordingly, the Tribunal made an order pursuant to section 404(1)(h) that Mr Wihapi is to pay the sum of $4,372.53 to the CAC.

[108] As to the hearing costs the Tribunal made an order that Mr Wihapi 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).

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

[109] If Mr Wihapi wishes to enter into a payment arrangement with the Teaching Council in respect of the costs that he is being ordered to pay then that will be a matter for him to take up with the Council if he wishes.

Non-publication orders

[110] Interim non-publication orders in respect of Mr Wihapi's name and identifying details had been made at a pre-hearing conference on 18 May 2021.[43]

[111] Mr Wihapi sought a permanent non-publication order in respect of his name and identifying particulars[44]. A permanent order was sought on medical grounds and evidence was provided including a cardiologist's reports dated December 2019 and May 2021, a Rotorua Hospital Discharge Summary from 1 June 2021 (when Mr Wihapi had attended the emergency department of Rotorua Hospital with heart palpitations), and a letter from Mr Wihapi's GP (of nine years – Dr Simon Firth) dated 8 July 2021.

[112] Ms Brown submitted for Mr Wihapi that the totality of the medical evidence identifies ongoing and complex cardiac problems that are aggravated by stress. Ms Brown submitted that the most recent cardiologist's report noted that Mr Wihapi's heart function has improved but that stress could increase the experience of the sensation of palpitations. The GP's letter identified the cardiac problems are coupled with a history of depression and epilepsy and that stress (including the stress associated with name publication) could adversely affect Mr Wihapi's heart palpitations. It was submitted that the potential health impacts on Mr Wihapi were his name to be published are "much more than the ordinary stress of disciplinary proceedings" and on that basis it would be proper to permanently suppress his name and identifying details including the name of the School and the tamariki involved.

[113] It was indicated for the CAC in Counsel's written submissions filed before the hearing, that Mr Wihapi's application was opposed. Leave was sought to file further submissions after any independent evidence on the possible impacts of possible publication had been filed by Mr Wihapi. Prior to the hearing the Tribunal sought an update from Counsel as to the CAC's position as by then independent evidence had been filed. On Monday, 23 August 2021 Counsel for the CAC indicated that given

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

[44] Written submissions for Mr Wihapi at [32]-[38].

the medical evidence that had been filed, the CAC would take a "neutral position" on the application for a permanent order.

Relevant principles

[114] 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.

[115] 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.[45]

[116] 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 of Appeal decisions have confirmed this approach. The Court of Appeal in *Y v Attorney-General*[46] 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…."

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

[46] [2016] NZCA 474, (2016) PRNZ 452 at [32].

> 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."

[117] However, as the High Court observed in *Director of Proceedings v Johns*[47] 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)[48] and the maintenance of professional standards.

[118] Ms Brown 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*[49]. This approach has been adopted by the Tribunal in other previous cases[50]. 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.

[119] In *Dr N v A Professional Conduct Committee of the Medical Council* [51] 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

[47] [2017] NZHC 2843, at [169] – [171].

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

[49] NZTDT 2016/11.

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

[51] [2013] NZHC 3405.

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.[52]…

[120] 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.

[121] In summary, there are relevant factors (the public and private interests at stake) that must be considered. Those factors are balanced by the Tribunal to form a view about whether non-publication is "proper". 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.

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

[122] In *Director of Proceedings v Johns* [53]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.

[123] The Tribunal, as presently constituted, adopted the same approach to the threshold of "proper" for the purposes of section 405(3)[54]. Exceptionality is not required[55] and nor even something out of the ordinary. However, there must be sound reasons for finding that the presumption favouring publication is displaced.[56] 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.[57]

Discussion

[124] Now that he has been found guilty of serious misconduct there is a public interest in Mr Wihapi'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[58].

[125] The Tribunal considered that if Mr Wihapi wishes to be viewed through a Māori lens, then he should expect that his name may be published.

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[53] 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.

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

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

[56] Y v Attorney-General above fn. 29 at [29].

[57] *Y v Attorney-General* above fn. 29 at [31].

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

[126] In any event, when deciding whether it was proper to make a permanent order, the Tribunal balanced the private health interests of Mr Wihapi, against the relevant public interest considerations (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 unfairly impugning other teachers).

[127] The Tribunal considered the medical evidence provided by Mr Wihapi very carefully. It noted the cardiologist's report dated May 2021 states that when he was last assessed Mr Wihapi's heart was reasonably stable, and his heart function had improved significantly on his echocardiogram and "*I would anticipate that this will remain stable*". Further, "*whilst clearly this is a stressful experience for Andrew to go through I'd be hopeful he would not have any untoward effect on overall heart function. It may however increase the experience of the sensation of palpitations which are more likely to reflect ectopics rather than atrial fibrillation*." The report noted that Mr Wihapi is to be followed up in six months' time. The Rotorua Hospital Discharge Summary dated 1 June 2021 noted that Mr Wihapi is to continue on medications and if he has a similar episode of palpitations he is to return to the Emergency Department.

[128] The Tribunal does not doubt that there is a possibility that Mr Wihapi may suffer some adverse consequences, in terms of an increased experience of heart palpitations, because of the stress of publication of his 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 Mr Wihapi's name being published. The Tribunal considered that Mr Wihapi's longstanding GP, and his cardiologist would likely be able to continue to manage and if necessary, treat any associated health consequences of that nature, were they to arise.

[129] The Tribunal considered also that publication of Mr Wihapi's name may have a positive impact on his rehabilitation or in any event, would not be counterproductive in terms of protecting the public.

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

[131] The School was not separately represented in these proceedings. In view of the Tribunal's decision to decline to make a permanent order in respect of Mr Wihapi's name and identifying particulars, the Tribunal did not consider that there are any grounds for suppression of the name of Rotorua Primary School.

[132] The CAC sought permanent orders in respect of the students involved. This was supported by Mr Wihapi. The Tribunal considered that it is proper that the name of Students A, B, and C be permanently suppressed from publication having regard to their privacy interests and the privacy interests of their whānau, as well as the wellbeing and learning interests of those students. There is no public interest in the three students being named.

Conclusion

[133] The Charge was established. Mr Wihapi is guilty serious misconduct.

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

(a) Mr Wihapi is censured for his serious misconduct pursuant to section 404(1)(b).

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

(c) The following conditions are to be imposed on Mr Wihapi's practising certificate, pursuant to section 404(1)(c):

134.c.1 For a period of one year from the date of this decision, Mr Wihapi is to participate in mentoring with a mentor approved by the Manager: Teacher Practice at the Teaching Council. The mentoring to focus on providing advice and guidance to Mr Wihapi to enable him to understand and develop appropriate student behaviour management techniques and is to be completed to the satisfaction of the Manager; Teacher Practice at the Teaching Council.

134.c.2 For a period of one year from the date of this decision, Mr Wihapi is not to hold a position of responsibility (leadership) within a School or learning environment.

134.c.3 Mr Wihapi to advise his current employer and any prospective, or future employers, of this decision (and provide a copy of this

decision to those employers). This condition is to apply for two years from the date of this decision.

(d) Mr Wihapi is to pay $4,372.53 to the CAC as a contribution to its costs pursuant to section 404(1)(h),

(e) Mr Wihapi is to pay $458.00 to Teaching Council in respect of the costs of conducting the hearing, under section 404(1)(i).

(f) There is to be an order under section 405(6)(c) permanently suppressing from publication the name of Students A ( ), B ( ) and C ( ).

Dated at Wellington this 29th day of September 2021

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).