

**BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL**

**NZTDT 2020/17**

**IN THE MATTER** of the Education Act 1989

**AND**

**IN THE MATTER** of a charge referred by the Complaints Assessment Committee to the New Zealand Teachers Disciplinary Tribunal

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE**

Referrer

**AND**

**SANDRA FAY O'BRIEN**

Respondent

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**DECISION OF THE TRIBUNAL**

**9 December 2020**

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**HEARING:** Held on 8 October 2020 on the papers

**TRIBUNAL:** Rachael Schmidt-McCleave (Deputy Chair)  
Nikki Parsons and Rose McInerney (members)

**REPRESENTATION:** Rebecca Scott, Barrister, for the Complaints Assessment Committee  
The respondent self-represented

## Hei timatanga kōrero – Introduction

1. The Complaints Assessment Committee ("CAC") has charged the respondent with engaging in serious misconduct and/or conduct otherwise entitling the Disciplinary Tribunal to exercise its powers.
2. The CAC sought to amend the original notice of charge and this application was granted by the Tribunal.
3. In the amended notice of charge, the CAC charges that the respondent:<sup>1</sup>
  - (a) On 8 March 2019 left a child unattended on a change table resulting in the child falling off the table; and/or
  - (b) On 19 March 2019:
    - (i) pulled a child by the hand; and/or
    - (ii) when questioned about the conduct in (b)(i) by another teacher, responded with "don't speak to me like that"; and/or
  - (c) On 20 March 2019:
    - (i) pulled a child by the arm in an attempt to get the child to come inside for lunch; and/or
    - (ii) the respondent's pulling or pushing of the child's arm resulted in the child tripping on a step and falling.
4. The CAC alleges that this conduct amounts to serious misconduct pursuant to section 378 of the Education Act 1989 ("the Act") and Rules 9(1)(a) and/or (b) and/or (c) and/or (k) of the Teaching Council Rules 2016, or alternatively amounts to conduct which otherwise entitles the Disciplinary Tribunal to exercise its powers pursuant to section 404 of the Act.
5. The matter was heard on the papers.

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<sup>1</sup> The Tribunal notes that, in its application to amend the charge, the charge was not actually any different to the original. However, the Tribunal notes the amendment was intended to be to that set out in the CAC's written submissions and has amended the charge in accordance with the notice of charge set out in the CAC's written submissions.

## Kōrero Taunaki - Evidence

### *Agreed Summary of Facts*

6. The parties have agreed a summary of facts (ASoF) in relation to the first limb of that charge. That ASoF is set out in full below:

1. *Ms Sandra Fay O'Brien (the **respondent**) is a fully registered early childhood education teacher, having obtained full certification on 27 March 2009.*
2. *Ms O'Brien is not currently teaching and has not [sic] intention of teaching again. She has had two knee replacements and cannot kneel or stand for long periods of time. Lifting children is difficult for her due to a chronic back condition. For health reasons she has decided to retire.*
3. *Ms O'Brien begun [sic] her training in Early Childhood Education in 2005, once her children had reached their teenage years. She began working at a Rainbow Steps (**Rainbow Steps**) Learning Centre, in Feilding, that was owned [sic] by her sister and worked there fulltime while she was completed [sic] her training through the New Zealand Teachers' Training College in Auckland. She was provisionally qualified in 2009 and fully registered in 2012.*
4. *Ms O'Brien was employed by Rainbow Steps from 2005 to December 2018 as the head teacher in the under 2's room with children aged 3 months to 2 years.*
5. *Rainbow Steps closed in December 2018 and was acquired by Aspiring Services Limited (**ASL**) who own and operate the Puddleducks' Nursery and Preschools centres located in New Plymouth, Palmerston North and Feilding.*
6. *The staff at Rainbow Steps were advised by ASL that they could apply for their jobs under the new ownership. Ms O'Brien was interviewed with ASL and applied for the same role at the centre renamed under the Puddleducks' Nursery and Preschools, brand.*
7. *Ms O'Brien was advised that ASL would like to offer her a role with the company, but that they considered that it was better for her to work in a different centre. She was offered a position as a teacher in the toddler room with children aged 18 months to 2.5 years in the Albert Street, Palmerston North (the **Centre**), which she accepted.*
8. *It was a new centre with new staff, new children and different practices to what Ms O'Brien was used to. Ms O'Brien found the adjustment difficult and did not think that*

*the centre was well set up or sufficiently resourced to be in the best interests of the children. The room was too small and with too many children. There were 23 children from 18 months to 2.5 years of age and four staff. The staff were told that the centre was going to be redone and upgraded.*

9. *On 8 April 2019, the Teaching Council of Aotearoa New Zealand (the **Teaching Council**) received a mandatory report from Hamish Davidson, Managing Director of ASL, regarding Ms O'Brien's resignation on 25 March 2019. The mandatory report notified the Teaching Council that Ms O'Brien had resigned during the Centre's investigation into a number of allegations.*
  10. *The first allegation involved an incident where Ms O'Brien had left a child unattended on a changing table, which had resulted in the child falling from the changing table. The other two allegations involved staff witnessing Ms O'Brien pulling or pushing children by the arms to make them move and that on one of those occasion [sic], this had resulted in a child falling onto a step.*
  11. *The matter was referred to a Complaints Assessment Committee (**CAC**) for investigation. Ms O'Brien provided a written response to the CAC on 9 June 2019. Ms O'Brien admitted that she had left the child on the changing table, but denied that she had pushed or pulled children.*
  12. *Ms O'Brien was offered the opportunity to appear before the CAC in person when they met to consider the matter on 24 April 2020 but declined.*
  13. *The CAC resolved that Ms O'Brien's conduct may possibly constitute serious misconduct, as defined under the Education Act 1989, and referred the conduct to the New Zealand Teachers' Disciplinary Tribunal (the **Disciplinary Tribunal**).*
- On 8 March 2019, Ms O'Brien left a child on a changing table, unattended, resulting in the child falling off the table*
14. *On 8 March 2019, Ms O'Brien took a child into the nappy changing room.<sup>2</sup>*
  15. *Ms O'Brien put the child on the changing table and then became distracted and walked out of the room.*

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<sup>2</sup> The ASOF annexed a photograph of the nappy changing room.

16. *Ms O'Brien said that she had previously changed this child's nappy and then the child had gotten wet and needed to be changed again before her nap time. Ms O'Brien put the child on the change table and then became distracted when she turned away to speak to a teacher about another child. She left the child for approximately 30 seconds before the child fell to the floor.*
17. *Ms O'Brien said that the child had gotten wet, and she had taken her into the nappy changing room to get changed. She said that she had had a 'total lapse in memory' and completely forgot that the child was on the changing mat and thought that she was still on the floor when she walked away. Following the incident, Ms O'Brien was shocked and upset.*
18. *The child was not injured. Ms O'Brien contacted her parents immediately to advise them what had happened and to apologise profusely for the incident occurring.*

Ms O'Brien's explanation

19. *Ms O'Brien was so upset after the child fell from the table that she utilised EAP services on 14 March. During the session, she discussed potential stressors that may have contributed to her lapse in memory and which had caused her to forget that she had put the child on the changing table.*
20. *Ms O'Brien said she was distressed that her sister's business had been forced to close. She had then worked for two weeks to clean up over the Christmas break before she started work for ASL on 7 January 2019. She said that she was tired from not having a break and stressed and upset from losing the Centre where she had worked for 15 years. Things had happened so quickly that they did not have a chance to properly say good bye to the children and their families.*
21. *She said she found the role working with the toddlers physically demanding and very different from her experience working with babies. She struggled with the new environment and found the procedures hard to get used to. She was the oldest teacher by more than 20 years.*
22. *Ms O'Brien said she was suffering from back pain as a result of standing for long periods during the day and carrying children and had found that she was needing to sit a lot more.*
23. *On 25 March 2019, Ms O'Brien resigned. The same day, she saw her doctor who provided her a certificate for a month's sick leave for back issues.*

7. In relation to the second and third limbs of the charge, the CAC filed the following affidavits:

- (a) Olivia Saying: Ms Saying is a registered teacher employed at the Puddleducks Centre. She deposed:

*On 29 March 2019 I was outside in the main playground area with the infants I look after. Sandy was outside looking after some of the toddlers. [REDACTED], one of the little boys that Sandy was looking after, needed a nappy change. Sandy wrapped her hand around [REDACTED] upper arm near the elbow and dragged him inside. The angle of the child's arm looked awkward so I told Sandy to be careful because I knew of a child whose arm had been dislocated that way. Sandy looked at me and snapped "Don't speak to me like that". Because I had only been at the centre for a couple of weeks, I didn't take it any further. I felt as if I had been told off by Sandy and she is much older than I am and was a much more experienced teacher.*

*The next day on 20 March 2019, I was again outside with the infants. I believe it was just before lunchtime so the children were all going inside. I noticed that Sandy was having trouble getting one of the children to go inside. [REDACTED], who was about two years old, did not want to go. I heard Sandy say to her "you don't listen". Sandy had her hand around [REDACTED] forearm and was pulling her towards the building.*

*[REDACTED] was resisting and pulling back and it looked as if she was trying to sit down. She was upset.*

*When they reached the step up to the decked area at the entrance of the building, Sandy was trying to get [REDACTED] up the stair, when she suddenly fell forward onto the step.*

*I couldn't tell whether it was because [REDACTED] had tripped on the step or because she had been shoved. [REDACTED] started crying hysterically. At this point, one of my colleagues, Sarah Robinson, stepped in and comforted [REDACTED]. Sandy walked off.*

*I was very taken aback to see Sandy's manner with [REDACTED]. I must have looked upset because, when Sandy was out of earshot, Sarah said to me that if I see anything like that, I should report it. Later that day I told the headteacher, Chelsey Field, what I had observed on both the 19<sup>th</sup> and 20<sup>th</sup> of March.*

*Sandy resigned shortly after the incident.*

- (b) Sarah Robinson: Ms Robinson is a teacher in training, currently employed by Puddleducks at its Feilding Centre. She has been working at Puddleducks full time for approximately three years, while she finishes her teacher training. Ms Robinson deposed:

*“On 20 March 2019, I was working with Sandy and was responsible for the toddlers.*

*At lunchtime, all the children come inside and sit at one large table to eat their lunch.*

*I was waiting for the last child to come in with Sandy. I was standing in the doorway of the big ranch sliders. I could see clearly as the ranch sliders were open. There is a deck and then a step down onto the playground area outside.*

*All of the other toddlers had come inside apart from ██████ who was a child aged about █ years and a few months. Libby Sairing, the infant teacher, was also in the outside area watching some of the infants.*

*I could see that Sandy was having some trouble getting ██████ to come inside. ██████ was giving her a bit of a run around. I knew ██████ could sometimes be a bit challenging to get inside at lunchtime. She was a very intelligent child, but sometimes you had to explain things to her, and she needed a bit of persuasion to do things.*

*I was aware that Sandy had only been working at the Centre for a couple of months so I thought I would go outside and help her.*

*As I was walking towards them Sandy had hold of ██████ by her arm at about where her elbow was. She had wrapped her hand around her arm and was forcibly leading ██████ towards the inside. I could hear her saying “get inside” and I could see that she was flustered. ██████ was trying to resist, and you could tell she was being forced forwards and towards the inside of the Centre either by a pulling or pushing action.*

*They were directly in front of me about two - three metres away. I don't know whether it was something that Sandy did or whether it was the result of ██████ not wanting to go in and resisting, but when they got to the stair, all of a sudden ██████ flew forwards and landed hard on the step.*

*I couldn't see if she had tripped on the stair or if it was because of Sandy forcing her to walk and then letting go of ██████ but she propelled forwards resulting in landing hard on the step.*

██████ was crying and upset. I wasn't sure whether she was crying because she had hurt herself or whether she was upset from the whole incident and because she was being made to come inside.

As I went toward ██████, Sandy walked past me leaving ██████ on the ground. I went straight up to ██████ and got down to her level and asked her if she would like a cuddle. I then picked her up and carried her inside.

As I picked her up, I saw that Libby Sairing had stopped and was looking at us. I said to her "if you're not ok with this sort of thing then tell your team leader about it".

Later that day, I spoke to Chelsea Field who was the team leader for the Infants, as my team leader was away that day. I thought what had happened was totally unnecessary and should have been handled quite differently and I felt pretty upset about it.

Sandy resigned shortly after the incident."

## **Te Ture - The Law**

8. Section 378 of the Act defines serious misconduct:

**serious misconduct** means conduct by a teacher –

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

9. The test under section 378 is conjunctive<sup>3</sup>, meaning that as well as meeting one or more of the three adverse consequences, a teacher's conduct must also be of a character or severity that meets the Teaching Council's criteria for reporting serious misconduct, pursuant to Rule 9 of the Teaching Council Rules 2016.

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<sup>3</sup> *Teacher Y and Education Council of Aotearoa New Zealand*, [2018], NZTDT 3141, 27 February 2018 at [64].



## Ngā Kōrero a te Kōmiti – CAC and Respondent Submissions

10. The CAC alleges that the respondent's conduct falls within the following sub-rules of Rules 9(1):
  - (a) Rule 9(1)(a): Using unjustified or unreasonable physical force on a child or young person or encouraging another person to do so.
  - (b) Rule 9.1(b): Emotional abuse that causes harm or is likely to cause harm to a child or young person.
  - (c) Rule 9.1(c): Neglecting a child or young person.
  - (d) Rule 9(1)(k): An act or omission that that brings, or is likely to bring, the teaching profession into disrepute.
  
11. The CAC also points to clause 2.1 of the Council's Code of Professional Responsibility, which states that teachers are expected to create learning environments that are safe and that promote the dignity and emotional wellbeing of all learners. The CAC notes that, by way of example, the Code explains that learners' wellbeing is not promoted and harm to learners may be caused in circumstances where there is "*inappropriate handling*" of learners or a failure "*to take reasonable steps to protect a learner from harm.*"
  
12. The CAC relies on *CAC v McIlroy-Hoff*<sup>4</sup>, where the Tribunal found there to be serious misconduct where an early childhood teacher who saw a four year old girl slap a two year old boy across his face responded by yelling at the girl, smacking her bottom, and taking her by the arm to hand her over to another teacher. The Tribunal found there was no justification for yelling, the use of force was for the purposes of punishment and was unacceptable, and there were other ways to deal with the situation than grabbing the girl's arm.
  
13. The CAC also relies on *CAC v Adie-Cropley*<sup>5</sup>. In that case, an early childhood teacher took a three year old boy by the hand to take him to wash his hands. The boy tried to bite the teacher, so she took a step back, causing the boy to fall. The teacher then dragged

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<sup>4</sup> *CAC v McIlroy-Hoff* NZDT 2019/124.

<sup>5</sup> *CAC v Adie-Cropley* NZDT 2019/83

the boy along the floor on his back towards the sleep room, pulling him by his hands or wrists. This was held by the Tribunal to worse than many of the rough handling cases seen, and the Tribunal found serious misconduct and cancelled the teacher's registration.

14. Other cases relied on by the CAC include *CAC v Williams*<sup>6</sup>, where the early childhood teacher was found to have engaged in conduct amounting to misconduct after grabbing a disruptive four year old boy by the arm and pulling him towards her, and dragging another disruptive boy out of the room by his arm, *CAC v Griffiths*,<sup>7</sup> again a misconduct case involving the early childhood teacher pulling and pushing a boy by his shoulders and holding the top of arm to lead him forcefully to the office, and *CAC v Emile*<sup>8</sup>, where a teacher reflexively pushed a child who had pushed another child (again, misconduct found).
15. In relation to the fall from the change table, the CAC relied on *CAC v Aiavao*,<sup>9</sup> where the Tribunal found there to be serious misconduct when an early childhood teacher locked up a childcare centre and left, when a child was still asleep inside and the child was left in a hot room for 15 minutes.
16. The CAC submitted that the respondent's conduct, both in the change table incident and in the handling incident, adversely affected or was likely to adversely affect the wellbeing of her learners, and therefore met the first limb of the test of serious misconduct under section 378(1)(a). The CAC went on to submit that, although the respondent's conduct falls within the broad scope of rules 9(1)(a) and (c), the character and severity of the conduct (having regard to the cases cited) is not such as to warrant a finding of *serious* misconduct. In the two cases above where serious misconduct was found, the CAC submitted that they were appropriate because of the amount of force used and because of the punitive dimension. In the change table incident, the CAC submitted that the respondent's lapse in attention and focus was fleeting.
17. The respondent did not make separate submissions herself but, in the agreed summary of facts quoted above, referred to her distress after the change table incident, and the

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<sup>6</sup> *CAC v Williams* NZTDT 2019/24

<sup>7</sup> *CAC v Griffiths* NZTDT 2017/22

<sup>8</sup> *CAC v Emile* NZTDT 2016/51

<sup>9</sup> *CAC v Avivao* NZTDT 2018/24

stressors and fatigue that caused her to lose focus. The respondent denied the “rough handling” incident.

18. We do record that we found the respondent’s lack of engagement with the process after agreeing (partially) to the summary of facts to be unhelpful and somewhat challenging.

### **Kupu Whakataua – Decision**

19. In summary, we consider that both limbs of the charge have been established by the CAC on the balance of probabilities. The respondent has admitted the first limb of the charge, and we are satisfied that the evidence shows that the respondent manhandled the child, establishing to our satisfaction the second limb of the charge.
20. We agree with the CAC that the respondent’s conduct does not meet the threshold for serious misconduct in terms of section 378 of the Act, and Rules 9(1)(a), (b), (c) of the Rules, but does constitute misconduct justifying the Tribunal making orders.
21. We have reached this view because of the fleeting nature of the respondent’s lack of focus in the change table incident (although we do note that the consequences could have been severe), and the lack of punitive intent in the rough handling incident, which distinguishes this case from the rough handling cases where serious misconduct has been found. We have also taken into account the fact the respondent has worked in early childhood care for a very long time, but was clearly suffering from fatigue and a number of other stressors in her life.
22. In terms of rule 9(1)(k), the High Court in *Collie v Nursing Council of New Zealand*<sup>10</sup> confirmed that the test for bringing the profession into disrepute is an objective one. In making its determination, the Tribunal must ask itself whether reasonable members of the public fully informed of the facts of the case could reasonably conclude that the reputation and good standing of the profession has been lowered by the respondent’s actions.
23. We consider that, bearing in mind the above points, reasonable members of the public fully informed of the facts of the case would reasonably conclude that the reputation and good standing of the profession has been lowered by the respondent’s actions.

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<sup>10</sup> *Collie v Nursing Council of New Zealand*, [2001] NZAR74 at [28] regularly applied by the Tribunal, for example see *CAC v Harrington* NZDT 2016/63, 6 April 2017

24. We consider that the analogous cases relied on by the CAC bear out the Tribunal's conclusions above.

### **Whiu - Penalty**

25. Having determined that this case is one in which we consider exercising our powers, we must now turn to consider what is an appropriate penalty in the circumstances.

#### **404 Powers of Disciplinary Tribunal**

- (1) *Following a hearing of a charge of serious misconduct, or a hearing into any matter referred to it by the Complaints Assessment Committee, the Disciplinary Tribunal may do 1 or more of the following:*
- (a) *any of the things that the Complaints Assessment Committee could have done under section 401(2):*
  - (b) *censure the teacher:*
  - (c) *impose conditions on the teacher's practising certificate or authority for a specified period:*
  - (d) *suspend the teacher's practising certificate or authority for a specified period, or until specified conditions are met:*
  - (e) *annotate the register or the list of authorised persons in a specified manner:*
  - (f) *impose a fine on the teacher not exceeding \$3,000:*
  - (g) *order that the teacher's registration or authority or practising certificate be cancelled:*
  - (h) *require any party to the hearing to pay costs to any other party:*
  - (i) *require any party to pay a sum to the Education Council in respect of the costs of conducting the hearing:*
  - (j) *direct the Education Council to impose conditions on any subsequent practising certificate issued to the teacher.*
- (2) *Despite subsection (1), following a hearing that arises out of a report under section 397 of the conviction of a teacher, the Disciplinary Tribunal may not do any of the things specified in subsection (1)(f), (h), or (i).*
- (3) *A fine imposed on a teacher under subsection (1)(f), and a sum*

*ordered to be paid to the Teaching Council under subsection (1)(i),  
are recoverable as debts due to the Teaching Council.*

26. We note that, in determining penalty, the Tribunal must ensure that the three overlapping principles are met, that is, the protection of the public through the provision of a safe learning environment for students and the maintenance of both the professional standards and the public's confidence in the profession.<sup>11</sup> We refer to the decisions of the superior Courts which have emphasised the fact that the purpose of professional disciplinary proceedings for various occupations is actually not to punish the practitioner for misbehaviour, although it may have that effect.<sup>12</sup>
27. In *Mackay* we looked at the principles the Tribunal must turn its mind to when considering penalty following a finding entitling it to exercise its powers<sup>13</sup>:
- (a) Protecting the public;
  - (b) Setting the standards for the profession;
  - (c) Punishment;
  - (d) Rehabilitation;
  - (e) Consistency;
  - (f) The range of sentencing options;
  - (g) Least restrictive;
  - (h) Fair, reasonable and proportionate.
28. We do not intend to repeat what we said in that decision, other than to note that we have turned our mind to these principles in reaching our decision on penalty.

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<sup>11</sup> *CAC v McMillan*, NZTDT 2016/52.

<sup>12</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *In re A Medical Practitioner* [1959] NZLR 784 at p 800 (CA).

<sup>13</sup> Above n 16 at [40] – [62]

29. The CAC, in its submissions, contends that although it accepts the conduct constitutes misconduct, rather than serious misconduct, it nevertheless reaches the threshold where a penalty must be considered.
30. The CAC considers that the only aggravating factor is that the incidents all happened within a short period of time, meaning that the respondent was not reflecting on her conduct. In mitigation, the CAC accepts that the respondent was stressed and suffering from back pain at the time, but says that it was incumbent on the respondent to make that known to her employer so that steps could be taken to assist her.
31. The CAC therefore seeks that, if the respondent returns to teaching, notwithstanding her personal health barriers, the appropriate outcome is the imposition of a condition that, for a period of two years from the date of this decision, the respondent provide a copy of the decision to any prospective employer in education.
32. Bearing in mind the above, as well as the obligation upon us to impose the least restrictive penalty in the circumstances, pursuant to section 404(1) of the Act, we therefore order as follows:
  - (a) A censure under section 404(1)(b) of the Act;
  - (b) Under section 404(1)(c) of the Act the following conditions are to be placed on the respondent's practising certificate:
    - (i) If the respondent returns to teaching, the respondent must enrol in an externally provided professional development course on guiding children's social behaviour as approved by the Council (such as the Incredible Years Teacher programme), and a completion certificate sent to the Manager of Professional Responsibility of the Teaching Council;
    - (ii) The respondent must tell her current and prospective future employer of the decision for a period of two years from the date of the full decision and provide them with a copy of the full decision with evidence to the Teaching Council of this disclosure.
  - (c) Pursuant to section 404(1)(e) of the Act, annotation of all the above for a period of two years following the date of the full decision.

### Utu Whakaea – Costs

33. The CAC submits that the respondent has been forthcoming and cooperative in relation to the first allegation, and therefore a reduction from the usual 50% is warranted.
34. The Tribunal sees no reason to depart from the usual principles and therefore orders 40% costs in favour of the CAC.
35. The CAC is to file and serve a copy of its cost schedule. Under section 404(1)(h) the respondent is ordered to pay 40% of the costs shown in the CAC schedule unless the respondent files and serves submissions as to costs within 10 days of the date the CAC has sent the cost schedule. If these submissions are received the Tribunal delegates to the Deputy Chair the task of fixing the amount of the CAC's costs.
36. The respondent is also ordered to pay 40% of the Tribunal's costs. This matter was dealt with on the papers and the schedule submitted by the Tribunal shows \$1,145.00 of total costs. The respondent is to pay \$458.00 pursuant to section 404(1)(i). Any objection should be filed within 10 days of receipt of the decision and referred to the Deputy Chair.

### He Rāhui tuku panui – Non-publication

37. The respondent has interim name suppression and has not at this stage sought permanent suppression. In the event she did, the CAC indicated it consider the usual principles ought to apply. The CAC seeks a non-publication order in respect of the names of children affected by the conduct.
38. The application of the principle of open justice to proceedings before the Tribunal is contained in section 405(3) of the Act. The primary purpose behind open justice in a disciplinary context is the maintenance of public confidence in the profession concerned through the transparent administration of the law.<sup>14</sup>
39. The Tribunal's powers to prohibit publication is found in section 405(6) of the Act. It can only make one of the non-publication orders in (a) to (c) of section 405(6) if it is of the

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<sup>14</sup> *CAC v Teacher* NZTDT 2016/27 at [66] citing *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].

opinion that it is “proper” to do so having regard to the interests of any person, including but not limited to, the privacy of the complainant and to the public interest.

40. The Tribunal has adopted a two-step approach to applications for non-publication orders. First, it considers whether it is proper to make a non-publication order having regard to the various interests identified in section 405(6); and, secondly, it decides whether to exercise its discretion to make the orders sought.<sup>15</sup> Bare assertions will not suffice for displacing the principle of open justice and nor will the “ordinary” hardships or expected consequences of a proceeding involving allegations of serious professional misconduct.<sup>16</sup>
41. Here, the Tribunal does not consider there to be a basis to displace the presumption of open justice by suppressing the respondent’s identity. The order for interim suppression will therefore lapse. The Tribunal orders suppression of the children’s name and identifying details however.

*R. E. Schmidt-McCleave*

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Rachael Schmidt-McCleave  
Deputy Chair

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

1. This decision may be appealed by the teacher who is the subject of a decision by the Disciplinary Tribunal or by the Complaints Assessment Committee.

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<sup>15</sup> Ibid at [61].

<sup>16</sup> *Y v Attorney-General* [2016] NZCA 474 citing *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 approved by the Supreme Court declining leave to appeal in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.



2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.
3. Section 356(3) to (6) applies to every appeal under this section as if it were an appeal under section 356(1).