BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

NZTDT 2019-21

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
AND	an application for costs
AND	an application for non-publication
BETWEEN	**KIRSTEN NATASHA KING** **Applicant**
AND	**COMPLAINTS ASSESSMENT COMMITTEE** **Applicant**

SUPPLEMENTARY TRIBUNAL DECISION ON COSTS AND NON-PUBLICATION
11 DECEMBER 2020

TRIBUNAL: Theo Baker (Chair)
Aimee Hammond and Stuart King (members)

Representation: Mr Dale LaHood and L R van der Lem for the CAC
Ms Gretchen Stone for the applicant

1. In a decision dated 13 May 2020 we dismissed a charge of serious misconduct against the applicant on the basis that we were not satisfied that the allegations, which may be summarised as rough handling of a child, were established.

2. We directed that costs would lie where they fell and invited further evidence and submissions on the question of non-publication of the applicant's name.

3. In a memorandum dated 25 May 2020, Ms Stone quite rightly pointed out that the parties had not been heard on the issue of costs. Ms Stone indicated her intention to apply for a 50% contribution to the applicant's costs. Directions for submissions were then made. She has now applied for costs and for an order for non-publication of her name. These applications are opposed.

Costs

4. The Tribunal's power to order costs is found in section 404 of the Education Act 1989. Section 404 of the Act provides:

> ***404 Powers of Disciplinary Tribunal***
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> *(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:*
>
> *...*
>
> *(h) require any party to the hearing to pay costs to any other party:*
>
> *(i) require any party to pay a sum to the Teaching Council in respect of the costs of conducting the hearing*

5. Where the CAC is successful, it is usual to direct the teacher to contribute towards the CAC costs under section 404(1)(h) and also the Tribunal costs under section 404(1)(i).

6. The CAC quite reasonably submitted that the Tribunal had determined costs, and was therefore "functus officio", which means that we have completed the task assigned to us and have cannot enter into further deliberations or revisions. We have no inherent power to reopen a matter.

7. Although that is correct, we acknowledge that there is a procedural flaw in our substantive decision. We made a decision on costs without providing an opportunity to the parties to be heard. That might provide a proper basis for an appeal or judicial

review of our decision.

8. No application for recall of the decision has been made, but we have decided to recall the costs aspect of our decision on the basis of the third ground in *Horowhenua County v Nash (No 2)* [1968] NZLR 632,[1] that is that "some other very special reason justice requires that the judgment be recalled." A clear procedural flaw is a very special reason for which justice requires our decision to be recalled.

9. We will now consider the question of costs in light of the submissions and evidence that has been filed.

Costs Principles in Disciplinary Proceedings

10. A Tribunal Practice Note issued on 17 June 2020 signalled that the starting point of costs would be 50% for a successful party.

11. In its submissions, the CAC referred to *CAC v Beilby* NZTDT 2014/53C,[2] *Baxendale-Walker v Law Society* [2007] EWCA Civ 233 [3] and *CAC v Matua* NZTDT 2018/41.[4]

12. In *CAC v Beilby* NZTDT 2014/53C,[5] we considered an application for costs where the most serious aspects of the charge had not been upheld. We made some observations relating to costs, bearing in mind the principles in *Baxendale-Walker* [6]which had been adopted in a New Zealand Lawyers and Conveyancers Disciplinary Tribunal case *Canterbury-Westland District Standards Committee v Simes* [2012] NZLCDT 28.[7] In *Beilby* we signalled that we would adopt that approach in future and noted that the 2010 Costs Practice Note should be read subject to the *Beilby* decision.

13. In *Baxendale-Walker v Law Society*,[8] the English and Wales Court of Appeal had identified the relevant principles that apply when a law practitioner brings a costs application against the Law Society, and we noted that those principles are equally relevant to other professional regulators that perform a disciplinary function.

14. To paraphrase the English Court's statement at paragraphs 35 and 40 of the decision:

    a) An order that the Law Society itself should pay the costs of another party to

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[1] *Horowhenua County v Nash (No 2)* [1968] NZLR 632 at 633
[2] *CAC v Beilby* NZTDT 2014/53C, 19 September 2014
[3] *Baxendale-Walker v Law Society* [2007] EWCA Civ 233
[4] *CAC v Matua* NZTDT 2018/41, 20 November 2018
[5] Above, note 2
[6] Above, note 3
[7] *Canterbury-Westland District Standards Committee v Simes* [2012] NZLCDT 28, at [38]
[8] Above, note 3

disciplinary proceedings is neither prohibited nor expressly discouraged by the relevant provision of the (UK) Solicitors Act 1947.

b) When the Law Society decides whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a referral to the Tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings.

c) Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, by ensuring that high professional standards are maintained.

d) The Law Society is not obliged to bring disciplinary proceedings, and the Tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention.

e) The normal broad approach to costs decisions in civil litigation –that properly incurred should be paid by the unsuccessful party – would appear to have no direct application to disciplinary proceedings against a solicitor.

f) [Unless] the complaint is improperly brought, or, proceeds … as a "shambles from start to finish", an order for costs against the regulator should not ordinarily be made.[9]

g) There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow.

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

15. In *Canterbury-Westland District Standards Committee v Simes*,[10] the New Zealand

[9] Above note 3, paragraph 40
[10] Above, note 7

Lawyers and Conveyancers Disciplinary Tribunal extracted the following principles from *Baxendale-Walker*:

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

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

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

16. However, the CAC drew our attention to a later High Court decision, referred to *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038,[11] where the adoption of *Baxendale* was modified. The High Court rejected the Lawyers and Conveyancers Disciplinary Tribunal's statement in *Simes* that the issue was whether there was "something extraordinary" about the proceedings against the practitioner so as to call for an order against the Standards Committee. Rather, the Tribunal is required to exercise its evaluative, discretionary, jurisdiction. Clifford J continued:

> [32] In my view, moreover, the Court of Appeal's decision in *Roberts* [12] shows that in New Zealand the fact the application is for costs against a regulator is not as telling a consideration in the regulator's favour as would appear to be the case in the United Kingdom.
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> [33] In my view, therefore, the correct approach in New Zealand in disciplinary proceedings where the relevant Tribunal does have a broad jurisdiction to award costs is that costs do not simply follow the event. The fact that a regulatory function is being discharged in the public interest is a relevant consideration, but is not determinative. Moreover, it sets the bar too high to (as the Tribunal would appear to have done to date) approach the matter on the basis that "something extraordinary" (for example, a finding of dishonesty, a lack of good faith, or that proceedings were improperly brought or were a shambles from start to finish) must have occurred before a costs order may properly be made against a Standards Committee. What is required is an evaluative exercise of the discretion provided by the Act.
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> [34] In weighing the disincentive that an award of costs might be considered to give rise to, the Tribunal should also bear in mind that the Law Society, and hence Standards

[11] *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038, 8 December 2017
[12] *Roberts v Professional Conduct Committee of Nursing Council of the New Zealand* [2012] NZHC 3354

> Committees, are funded by practitioners themselves through the levies the Law Society as regulator imposes on the profession. Where an award of costs is properly made against a Standards Committee, it falls to be paid by the profession. Over time, the acceptance or otherwise of the profession of the appropriateness of those compulsory levies will, in my view, act as a proper check on the way the Law Society discharges its regulatory functions.

Applicant submissions

17. Ms Stone submitted that there is good reason for making a costs award against the regulator on the basis that the CAC's prosecution was made without sufficient grounds to do so. There were two separate allegations with respect to the same child. In each situation there were other staff and parents present in the subject rooms, at the time of the allegations, who did not witness the alleged actions of the Applicant. One of the witnesses, present in the room of the first allegation was apparently not interviewed by the CAC.

18. Ms Stone submitted that the first allegation, was made by a staff member who was in another building, some 11 metres distance and located at such an angle that her view was very limited and for a very short period of time. This limitation on the witness evidence was all known prior to the evidence that was presented at the Disciplinary Tribunal hearing, as was the fact that there were no witnesses within the room that the Applicant was working in that supported the accuracy of the allegation.

19. According to Ms Stone, the second allegation was similarly lacking in any corroboration, despite the claim the child was "screaming and throwing furniture around". The staff member making the second allegation was also at the opposite end of the building of where the child was and other staff were, and there were inconsistencies in her recollection. Again, the applicant submits these limitations in the evidence were known in advance of the Disciplinary Tribunal hearing.

20. It was therefore submitted that the current case is distinguishable from *CAC v Beilby*,[13] where the limitations of the evidence could not have been assessed in advance of the hearing.

21. Ms Stone further submitted that the CAC were provided with an "independent" review, by Ms King's current employer, that highlighted the inconsistencies and bias in the Best Start investigation and the omissions in the CAC investigation that not only failed to conduct their investigation at a time Ms King was fit to participate in, it also re-

[13] Above, note 2

ordered the claimed order of events in a way that was inaccurate.

CAC submissions

22. We are grateful for the CAC submissions on the legal principles on costs in disciplinary cases, where the relevant statute allows for it. The essence of the CAC submissions on this case was that the applicant is required to show 'good reason' to support the application for costs against the CAC. The fact that the CAC's prosecution was unsuccessful is not sufficient.

23. In the CAC submission, the Tribunal's viva voce evidence was critical to the case and was not predictable. The applicant had not submitted that the case was a "shambles from start to finish", or that it was improperly brought.

24. The CAC reminded us that unlike the Lawyers and Conveyancers Act, section 401 of the Education Act 1989, requires a CAC to refer a matter to the Tribunal, where the conduct might possibly amount to serious misconduct.

Discussion

25. In *Baxendale* the UK court noted that the Law Society is not obliged to bring disciplinary proceedings, and the Tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. We acknowledge the CAC's submission that there is less discretion for the Teaching Council because of section 401(4) of the Act:

    The Complaints Assessment Committee must refer to the Disciplinary Tribunal any matter that the Committee considers may possibly constitute serious misconduct.

26. However, we interpret this as applying to disciplinary threshold, rather than evidential sufficiency. Reliance on section 401(4) to opposed costs would be more relevant where the factual allegations were established but the Tribunal did not find it sufficiently serious to meet the definition of serious misconduct.

27. By analogy with the Solicitor-General's Prosecution Guidelines[14] which apply to criminal proceedings, we surmise that the policy decision behind this mandatory referral to the Tribunal is in the nature of the "public interest" requirement.

[14] Under Guideline 5.1 of the Solicitor-General's Prosecution Guidelines as at 1 July 2013 for the Test for Prosecution is met if: 5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and 5.1.2 Prosecution is required in the public interest – the Public Interest Test.

28. The Evidential Test in the Solicitor-General's Guidelines requires that evidence which can be adduced in Court is sufficient to provide a "reasonable prospect of conviction", which is then expanded on:

A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

29. Unlike criminal proceedings, the standard of proof in disciplinary proceedings is the civil one: on the balance of probabilities. Although not explicitly stated in our decision, it is a well-established principle that the burden of proof sits with the prosecution.

30. As outlined in our substantive decision, we were not satisfied on the balance of probabilities that the allegations in the charge were established. We did not find that the alleged conduct was more likely than not to have occurred. We had the benefit of hearing the witnesses including their responses under cross-examination and questions from the Tribunal. We weighed the evidence and reached our conclusion.

31. Based on the reading of the briefs of evidence, the CAC had a prima facie case. There was credible evidence to be tested. It would be contrary to the public interest, if the CAC decided not to take a case simply because there was a possibility that a witness might not be believed. This was not a case of inherent unreliability of any witness.

32. We do not agree with the applicant's submission that the CAC ought to have realised before the hearing that the prosecution would be unsuccessful. In particular, we did not place any weight on Ms McLeod's opinions or findings. As we said in our substantive decision, at paragraph 104:

> The role of this Tribunal is not to consider the fairness or quality of any investigations that have been undertaken. An exception would be if it is alleged that some statements or documents that are being relied on were unfairly or illegally obtained. Our role is to consider the evidence of the witnesses before us. We hear the evidence, make findings of fact and then decide if the established facts amount to serious misconduct as described by the CAC in the Notice of Charge. If either party is concerned that an employer's or CAC investigation was deficient, there is nothing preventing other potential witnesses being spoken with and/or called to give evidence.

33. We acknowledge that not all disciplinary regimes provide for costs on an unsuccessful prosecution. Under section 101(f) of the Health Practitioners Competence Assurance Act 2003, the Health Practitioners Disciplinary Tribunal may order costs against a health practitioner. There is no provision to order costs against the prosecuting agency. In contrast, the Education Act 1989 allows us this Tribunal to order costs against "any party".

34. The High Court Decisions cited above concern the application of section 249 of the Lawyers and Conveyancers Act 2008. That section also specifies that costs may be ordered against a lawyer who has not been found guilty if the disciplinary tribunal "considers that the proceedings were justified and that it is just to do so".

35. The ability to order costs in the Real Estate Agents Disciplinary Tribunal (**READT**) was introduced in November 2018.[15] The Complaints Assessment Committee retained its power to order costs against a licensee following its own disciplinary process, whereas the READT's powers under section 110A of the Real Estate Agents Act 2008 are broad, but in section 110A(2) there is specific reference to factors concerning a party's conduct in the course of the proceedings

> ***110A Costs***
>
> *(1) ...*
>
> *(2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings—*
>
> *(a) has participated in good faith in the proceedings:*
>
> *(b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:*
>
> *(c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.*
>
> *(3) If a party fails to prosecute any proceedings at the time fixed for a hearing or to give adequate notice of the abandonment of any proceedings, the Disciplinary*

[15] Section 244 Tribunals Powers and Procedures Legislation Act 2018

Tribunal, if it considers it proper to do so, may order the party in default to pay costs to the Crown in a sum that it considers reasonable.

36. That does not mean that the READT cannot order costs against an unsuccessful prosecutor without those factors being present, and of course the provisions of that statute to not apply to this Tribunal. However, in the absence of any higher court authority in this jurisdiction we find the content of that section, along with all of the other cases mentioned, informative.

37. In summary:

a) Parliament has placed an obligation on the Complaints Assessment Committee to refer any matter that might possibly constitute serious misconduct to the Tribunal. If an allegation is established and is not found to amount to serious misconduct, it is unlikely that costs would be ordered against the prosecuting body.

b) The 2012 Practice Note should be read in conjunction with *Beilby,* which was issued in line with *Simes.* Since the *Beilby* decision, the High Court has issued *Lagolago*,[16] which modifies the approach in *Baxendale,* and invites successful respondents in disciplinary proceedings under the Lawyers and Conveyancers Act 2008 to seek costs

c) In other professional disciplinary jurisdictions, even where there is the ability to order costs against the prosecuting party, there is no presumption that costs "follow the event". In other words, it is not simply a matter of directing costs against an unsuccessful party.

38. We find that applying the *Baxendale* principles, the applicant has not advanced a proper basis to award costs against the CAC. We agree with the CAC submission that the proceedings were not a shambles from start to finish. Staff had made statements that gave rise to an investigation and charge being laid. Those staff gave evidence at the hearing and we considered it, but for the reasons outlined in our decision, we did not find their evidence cogent.

39. Applying *Lagolago*, we are required to undertake an evaluative exercise of our discretionary power under section 404(1)(h). Our evaluation is that there was a prima

[16] Above, note 11

facie case to be heard. The onus of proof was on the prosecution. In weighing the evidence, the scales did not tip in their favour. It was reasonable and appropriate for the CAC to bring this charge to the Tribunal. Rough handling of children in schools and learning centres is a matter this Tribunal takes very seriously in line with the policy behind section 139A of the Act, sections 59, 194 of the Crimes Act 1961 and the principles of the Children's Act 2014 as discussed in various Tribunal decisions.

40. The application for costs is dismissed.

Non-publication

Principles

41. Consistent with the principle of open justice, section 405(3) provides that hearings of this Tribunal are in public.[17]

42. Section 405(3) is subject to the following subsections (4) to (6) which provide:

> *(4) If the Disciplinary 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 to the public interest, it may hold a hearing or part of a hearing in private.*
>
> *(5) The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.*
>
> *(6) If the Disciplinary 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 to the public interest, it may make any 1 or more of the following orders:*
>
> > *(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
> >
> > *(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
> >
> > *(c) an order prohibiting the publication of the name, or any particulars of the affairs, of the person charged or any other person.*

43. Therefore, if we are to make an order for non-publication, we must first have regard to:

- the interest of any person;
- the privacy of the complainant;

[17] Section 405 was inserted into the Act on 1 July 2015 by section 40 of the Education Amendment Act 2015.

- the public interest.

44. Open justice forms a fundamental tenet of our legal system and "exists regardless of any need to protect the public",[18] but the public interest in publication of a teacher's name may include the need to protect the public. This is an important consideration where a profession is brought into close contact with the public. It should be known that based on a teacher's previous conduct, that teacher may pose a risk of harm. The public is entitled to know about conduct that reflects adversely on a person's fitness to teach.

45. Conversely, in certain instances, the public interest may include the suppression of information such as witness names (usually alleged victims of conduct) to ensure that they are prepared to come forward and give evidence in court proceedings.[19]

46. In *CAC v Jenkinson* NZTDT 2018-14[20] we summarised the principles on non-publication in this Tribunal. We referred to CAC v Teacher NZTDT 2016-27, where we acknowledged what the Court of Appeal had said in *Y v Attorney-General* [2016] NZCA 474: While a balance must be struck between open justice considerations and the interests of a party who seeks suppression, "[A] professional person facing a disciplinary charge is likely to find it difficult to advance anything that displaces the presumption in favour of disclosure". [21]

47. Where a person argues that harm would be caused by publication of a name, we must be satisfied that the consequence(s) relied upon would be "likely" to follow if no order was made. In the context of s 405(6), this simply means that there must be an "appreciable" or "real" risk.[22]

The application

48. The applicant seeks suppression of her name for the sake of herself, her children, her family, her current employers and the wider community. In an affidavit, the applicant had outlined the emotional impact of these proceedings on her and her family. She argues that if she is not given name suppression, she will not be able to continue with her chosen career, that future employees and colleagues will judge her and "take apart

[18] *CAC v MacMillan* NZTDT 2016/52, 23 January 2017
[19] *Y v Attorney-General* [2016] NZCA 474
[20] *CAC v Jenkinson* NZTDT 2018-14
[21] *Y v Attorney-General* [2016] NZCA 474, at [32]
[22] See C*AC v Jenkinson* above, note 11 at [34]; CAC v Teacher NZTDT 2016/68, at [46]; *R v W* [1998] 1 NZLR 35 (CA).

the investigation as they seen necessary." She submits that it is only fair that her name is not associated with allegations that were not successful. She says that her mana, health and wellbeing will be destroyed, and the fight she has endured to clear her name will be meaningless.

49. Ms Stone submits that the balance between the principles of open justice and the interest of the party favours non-publication of the applicant's name. In particular:

a) The CAC charges have not been upheld and the applicant is entitled to be protected from the possibility of adverse publicity in relation to the CAC charges.

b) The applicant continues to work in early childhood education and is extremely well respected. Publicity of the decision could impact on the Applicant's reputation and standing in the early childhood education community, if a 'where there is smoke there is fire' assumption is made.

c) The applicant has been required to work through the CAC and Disciplinary Tribunal process for a period of almost 2 years and is entitled to now move on with her life and her career without the possibility of publicity.

d) Publicity could have an adverse implication on the applicant's employability if she were to seek alternative employment at any stage in the future, with Tribunal decisions being available online and searchable.

e) There is no public interest in the identity of the applicant as the claims were not made out.

CAC response

50. The CAC provided submissions on legal principles governing name suppression decisions, including authorities in the context of charges not being upheld.

51. The CAC referred to examples of Tribunal decisions on applications for name suppression following an unsuccessful prosecution. In *CAC v Teacher*, NZTDT 2019/59 a teacher was granted non-publication of his name on the basis of the risk identification of another. In *CAC v Edwards,* NZTDT 2019/37 we dismissed a charge, but the teacher filed no application for permanent name suppression application or evidence in support of a final non-publication order, as directed. Accordingly, the teacher's name suppression lapsed, as no grounds for a permanent non-publication order had been advanced

52. The CAC helpfully referred us to other jurisdictions for guidance on the principles to apply. The *Adams on Criminal Law* commentary states that, in relation to applications for non-publication orders under section 200 of the Criminal Procedure Act 2011:

> Acquittals in themselves are not a sufficient basis for an order. They can give rise to legitimate public interest, debate and scrutiny which the principles of open justice and freedom of expression foster... However, the grounds made out in subs (2), particularly extreme or undue hardship, may be more readily made out following an acquittal. In this respect, the circumstances leading to the acquittal ought to be taken into account in the overall evaluative exercise.

53. The CAC cited the following cases concerning applications made under section 200 of the Criminal Procedure Act 2011 for our assistance:

a) In *NN v R*,[23] the applicant was acquitted on 12 charges of indecent assault. The High Court noted that the fact that an applicant had been acquitted was a relevant, but not determinative factor to consider. A non-publication order was granted, as the Court accepted that publication of the applicant' s name was likely to lead to the identification of the complainants and the applicant's son, and that this constituted a sufficient basis to depart from the presumption of open justice.

b) In *M v R*,[24] the applicant was acquitted on two charges of assault on a person in a family relationship. The Court of Appeal noted that the fact that the applicant was acquitted because the prosecution elected to call no evidence was a factor supportive of the application for a non-publication order. The order sought was eventually granted, following receipt of new evidence from a medical professional which established that the applicant was likely to suffer psychological difficulties if her name was published.

c) *R v Nightingale*,[25] the applicant was charged with 12 counts of indecent assault, relating to historic offending alleged to have taken place 40-63 years prior to charges being laid. A stay of prosecution was granted for reasons relating to the applicant's health, delay, and the unavailability of certain evidence at trial given this delay. The applicant retained the presumption of innocence as to those

[23] *NN v R* [2016] NZHC 669
[24] *M v R* [2013] NZCA 113
[25] *R v N* [2019) NZHC 2163; *R v Nightingale* [2019) NZHC 2575.

charges, as if he had been acquitted. He accordingly applied for a non-publication order on the basis that publication would cause extreme hardship for himself and his family and would also lead to his life being endangered. The Court accepted that hardship was made out on the evidence but determined that the hardship did not meet the level required for a non-publication order. Accordingly, the application was declined and a non- publication order was not made.

54. The CAC also referred to the approach taken by the New Zealand Health Practitioners Disciplinary Tribunal (**HPDT**). In *NZHPDT v Dr H, 653/Med14/281D,* having dismissed a charge involving the circumstances of intimate physical examinations of a patient, the HPDT noted that the primary principle is open justice, and that its decision to dismiss a charge faced by a practitioner should obviate any discredit to a practitioner flowing from publication. The doctor provided affidavit evidence of a raft of community and religious consequences for himself that would eventuate if his name were published. The NZHPDT determined that given this evidence, and in light of the detailed sexual nature of the allegation, the public were likely to conclude that "where there's smoke, there's fire" and so granted the order sought.[26]

55. The CAC submitted the applicant's case is distinguishable from that of the doctor in *Dr H.* Not only did the practitioner in that case supply affidavit evidence to support the consequences on which the application was based, but the charge in that case involved sexual offending that the public could reasonably be expected to take an interest in and speculate about. It was submitted neither of these factors applies to the applicant's case.

56. The CAC submitted there is no basis to depart from the principle of open justice in this case. The applicant provided insufficient evidence to establish that she is likely to suffer a loss of reputation in the event that her name is published, nor any evidence to establish that any such loss of reputation would affect her future employment prospects. The Tribunal's written decision articulating why it dismissed the charge should obviate any discredit flowing from publication.

[26] The HPDT revoked this decision in 1036/Med14/281D on application by TVNZ on the basis of evidence of convictions in New South Wales for indecent and publication of name of a doctor with the same name.

Discussion

57. We are grateful for the CAC's attempts to find relevant cases. We add *CAC v Teacher D*, NZTDT 2018/95, 30 March 2020 where, having dismissed the charge, we had ordered non-publication of the names of the students at a small school in a rural area. In order to protect their identity, we also ordered non-publication of the names of the applicant, the school, any witness, the school where the game was played, the region where the schools are located and therefore the location of the hearing.

58. Although the acquittal is a factor to take into account, it is not determinative. "Public interest" is not the same as "Public protection". As we have said previously, the principle of open justice is also part of the public interest.[27]

59. We accept that these proceedings have been very stressful for the applicant, but that is not the basis for a non-publication order. If it were, then most, if not all teachers would have their names suppressed. The applicant has provided no expert evidence of any specific condition that is likely to be exacerbated by publication of her name.

60. As for the respondent's family, we repeat what we said in CAC v Teacher 2016-27:[28]

> It is almost inevitable that a degree of hardship will be caused to the innocent family members of a teacher found guilty of serious misconduct. Such "ordinary hardships are not sufficient to justify suppression. However more acute forms of professional and familial embarrassment can make suppression the proper outcome.

61. We do not accept the applicant's argument that publication of her name will mean that she cannot continue with her chosen career. She has provided no evidence to support that submission. Any reader of the substantive decision is informed at paragraph 3 that we were not satisfied on the balance of probabilities that either particular of the charge was established and that the charge was dismissed.

62. We acknowledge that where an allegation has been made, "mud can stick", but in our view, cases of alleged sexual misconduct carry a risk of much graver reputational harm, and we accept the CAC submission that the present case is in a different category for Dr H.[29]

63. When the case is published on the Tribunal Decision's webpage, the Council

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[27] Above, note 18
[28] CAC v Teacher 2016-27, 25 October 2016, at para [65].
[29] Above, note 26

sometimes provides summaries of the decision as a preface. The Council may like to ensure that paragraph 129 of our substantive decision is encapsulated in any case note. We said:

We formed an opinion of the applicant as a competent, compassionate early childhood teacher. Her descriptions of her practices and reflected favourably on her ability and attitude. Although she had undergone some stressful times in her time at the Centre, there was nothing this day that was out of the ordinary. There was no particular circumstance that might have led her to behave in a way that was out of character.

64. In summary, we are not satisfied that it is proper to order non-publication of the applicant's name.

Theo Baker
Chair

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

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

2. An appeal must be made within 28 days after receipt of written notice of the decision, or any longer period that the court allows.

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